

Case Mail

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

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The applicant in this case sought a review of an order dismissing an application for a stay of execution made by him and his spouse under Rule 15 of *The Court of Appeal Rules*.
HELD: The application was dismissed. The applicant did not disclose any error warranting interference with the dismissal of the stay application. A panel of the Court of Appeal may discharge or vary an order made by one of its judges in chambers only if the judge made an error in principle, disregarded or misapprehended a material matter of fact, failed to act judicially or rendered a decision so plainly wrong as to amount to an injustice. In this case, the appellant identified nothing in the judge's reasons that would justify the court interfering with the judge's decision. The applicant did not allege that the judge's reasons disclosed an error that fell within one of the traditional grounds for making an order under s. 20(3) of *The Court of Appeal Rules* and his affidavit did not establish that there had been a material change in circumstances, assuming that proof of a material change in circumstances was an alternate pathway to intervention.

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Criminal Law - Appeal

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During the COVID-19 pandemic, the appellant attended a public gathering of more than 10 people in Saskatoon, Saskatchewan, that was billed as a “Children’s Freedom Rally”. She was charged with failing to comply with an April 20, 2021, public health order (PHO) contrary to s. 61 of *The Public Health Act, 1994* (Act). The appellant was issued an offence notice ticket and entered a not guilty plea. At trial, the appellant argued that the PHO violated her rights under s. 4 (freedom of conscience), s. 5 (freedom of expression), and s. 6 (peaceable assembly) of *The Saskatchewan Human Rights Code, 2018* (SHRC), and that these violations operated as a complete defence to the charge. The trial judge disagreed and found the appellant guilty of the ticket offence as charged. The appellant appealed the conviction and sentence to the Court of King’s Bench, but the appeal was dismissed.

HELD: Leave to appeal was granted but the appeal was dismissed. The appellant raised a question of law. An applicant for leave to appeal must establish that the appeal raises a question of law that is either: (a) significant to the administration of justice generally or (b) compellingly meritorious in the particulars of the case in question. In this case, the appeal raised a question of law and requested that the court resolve the conflict between individual rights enshrined in the SHRC and incursion of those rights by public health orders. The appeal judge did not err in upholding the trial judge’s conclusion that the rights outlined in the SHRC were not absolute or in concluding that the appellant’s rights under the SHRC had to yield to the provisions of the PHO. The trial judge did not fail to address the appellant’s arguments. The appeal decision was replete with references to the appellant’s primary ground of appeal and the provisions of the SHRC. This was demonstrated by the judge’s identification of the appellant’s position at the start of his analysis, commentary on the case law that the appellant relied upon to make her point, overview of the pre-*Charter* jurisprudence respecting reasonable limits attaching to common law rights and reference to a similar argument that had been addressed by the Alberta Court of Queen’s Bench. There was no error in how the appeal judge resolved the appellant’s core submission. The appeal judge did not err by relying on *Charter* jurisprudence. The appeal judge assessed the appellant’s argument by applying various

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Alliance Crane Inc. v Sapergia

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principles of statutory interpretation and with reference to analogous case law. The decisions relied upon by the appellant in positing that the appeal judge failed to appreciate previous Saskatchewan jurisprudence that had decided the SHRC rights issues differently were not binding on the appeal court.

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***R v Berg*, [2025 SKCA 85](#)**

Tholl Kalmakoff Drennan, 2025-09-04 (CA25085)

Criminal Law - Appeal

Criminal Law - Appeal - Conviction - Sexual Assault

Criminal Law - Appeal - Offences Against Persons - Sexual Assault

Criminal Law - Evidence - Credibility

Criminal Law - Evidence - Reliability

This appeal centred around the trial judge's credibility assessments and the evidence. The appellant was convicted of sexual assault after a judge-alone trial. The complainant (18 years old at the time) and the appellant (19 years old) met at a hotel where the complainant worked. Two days later, the complainant went alone to the appellant's hotel room. Sexual activity occurred, but their accounts of the incident were different. The complainant testified that the sexual encounter was not consensual, but the appellant claimed it was consensual. The judge found the complainant credible and reliable, rejected the appellant's account when the evidence was considered as a whole, and entered a conviction. The Court of Appeal (court) had to decide whether the trial judge failed to consider or misapprehended material inconsistencies in the complainant's evidence (especially about alcohol and marijuana use), and whether the trial judge misapplied the legal framework for credibility.

HELD: The appeal was dismissed. The court applied the deferential standard of review for credibility and reliability findings, which requires a finding of palpable and overriding error for appellate intervention (see *R v Kruk*, 2024 SCC 7). The court considered the entire context of the trial decision and found that the trial judge knew and correctly applied the law, properly considered all the evidence, and was aware of the inconsistencies raised during cross-examination. Any discrepancies about substance use did not undermine the complainant's core account or the consent analysis. The appellant alleged that the trial judge misapplied the credibility framework from *R v W.(D.)*, [1991] 1 SCR 742 (WL) [*W.(D.)*], and

other related jurisprudence. That principle establishes that evidence needs to be assessed as a whole, not as a choice between conflicting testimonies. On the *W.(D.)* analysis, the court held that the judge properly applied the steps involved in credibility assessment and assessed the appellant's claims against all of the evidence, including the inconsistencies in the complainant's testimony. The conviction was upheld and the appellant was directed to surrender into custody by a specified date.

DISSENT: Justice Drennan would have allowed the appellant's appeal because she agreed with him that the trial judge committed errors in (1) not considering material inconsistencies in the complainant's testimony about her alcohol and marijuana use and (2) relying on the complainant's evidence to reject that of the appellant. After outlining the parts of the trial testimony and the judge's reasons that led her to that conclusion, Justice Drennan concluded that she would have quashed his conviction and remitted the matter for a new trial.

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***R v J.L.S.*, [2025 SKKB 79](#)**

Elson, 2025-06-12 (KB25075)

Criminal Law - Possession of Child Pornography

Criminal Law - Making Sexually Explicit Material Available to Child

Statutes - Interpretation - *Criminal Code*, Section 163.1(4), Section 171.1

The accused was charged with possessing child pornography and making sexually explicit material available to a child. The accused testified in his defence. The complainant was 13 years old at the time of the alleged offence, and 16 years old when she testified. The father of the complainant and the accused were friends. The complainant testified that she found one of her stepmother's old cellphones and decided to use it to set up a secret Instagram account and an email account to communicate with the accused. She sent nude photographs and videos of herself to the accused. She could not explain why she sent the photographs and could not remember what started it. She was pretty sure the accused sent her Instagram texts that gave her the idea for the video. He later sent her a video of himself masturbating, but his face was not visible. The complainant testified that she went to the accused's home to "hang out" with the accused. They talked for a while, but it turned into physical touching initiated by the accused. She left and then reported a sexual assault to the RCMP. There was no dispute that the complainant fabricated some particularly heinous parts of her complaint. At trial, the complainant admitted there were aspects of her complaint that were not true. She told the RCMP about her sending photos and a video to the accused as well as her receiving a video and photos from him. The complainant's sexual assault complaint did not result in charges against the accused, but the RCMP continued investigating the accused. Officers took a warned and recorded statement from the accused the day after he was arrested, and his phone was seized and remained in the detachment's possession. One of the officers set up a meeting with the complainant and her father.

They discussed the complainant's iPhone and her Instagram and email accounts. The officer reviewed the contents of the accounts and saw the nude photos and video she sent to the accused. Officers sought and obtained a search warrant to search the accused's phone. The images on the accused's phone included more than a dozen depictions that met the definition of child pornography, including most of the photos of the complainant and a video of the complainant. Officers decided to lay charges against the accused and to obtain a warrant to search his residence. Officers seized a computer tower and USB drives. The court determined whether the Crown proved beyond a reasonable doubt that the accused was guilty of: 1) possessing child pornography; and/or 2) of making sexually explicit material available to a child.

HELD: The accused was found guilty of both counts. 1) The Crown had to prove two essential elements for the possession of child pornography charge: i) that the materials met the definition of child pornography in the *Criminal Code* (*Code*); and ii) that the accused possessed the material. Here, there was no dispute that the images and videos constituted child pornography. The main issue was whether the accused possessed the material. The court referred to the definition of possession in s. 4(3)(a) as incorporating both personal and constructive possession. The court was satisfied beyond a reasonable doubt that the accused had sufficient knowledge and control of the desktop and thumb drive such that he must also have know of their contents and their character. The court was satisfied beyond a reasonable doubt that the accused was in possession of the items of child pornography found on the phone, the desktop and thumb drive. There was no evidence of any other individuals accessing the device or of password sharing. 2) The court was satisfied beyond a reasonable doubt that the Crown proved all essential elements of the offence under s. 171.1(1)(a) of the *Code*. For the second count, the Crown had to prove: i) that the accused made available sexually explicit material to another person; ii) that the accused believed that person was under 18; and iii) that the accused's purpose was to facilitate the commission of an offence under s. 163.1 of the *Code*. The issue here was whether the accused made the material available to the complainant, and if so, what his was purpose in doing so. There was no dispute as to his knowledge or belief about the complainant's age. The court considered the meaning of the phrase "for the purpose of facilitating the commission of an offence". The court considered the text messages between the accused and the complainant and found that the accused encouraged the complainant to send more photos. The decision to send the video of himself was interpreted by the court as ongoing encouragement to send more images and videos to add to his collection.

***Alliance Crane Inc. v Sapergia*, [2025 SKKB 94](#)**

Robertson, 2025-06-27 (KB25087)

Civil Procedure - *King's Bench Rules*, Rule 5-12, Rule 5-20

Civil Procedure - Questioning a Non-Party

Civil Procedure - Production of Documents

The defendant was a former employee of the plaintiff, and the dispute arose when he went into business for himself. The plaintiffs sought damages for breach of fiduciary duty, conversion, conspiracy, unjust enrichment, and interference with economic relations. Here, the court determined applications for production of documents and an application to question a non-party. The

litigation was at the discovery stage, with affidavits of documents having been exchanged. The parties had been requesting and producing records, but there had not yet been any questioning of the parties. The court determined: 1) whether the parties' applications for production of documents be granted; 2) whether the defendant's application for questioning of a non-party be granted; and 3) whether costs should be awarded.

HELD: The court allowed the applications for production of documents in part and dismissed the defendant's application to question a non-party. 1) Most of the requests for production of documents were dismissed because the requested documents did not exist, were not in the possession or under the control of the defendants, or had already been produced. The court noted that applications under Rule 5-12 for production of documents should be uncommon because the discovery process is designed to avoid the need for judicial intervention. If a record is "relevant to any matter in issue in the action" as set out in Rule 5-6(1)(b) and not subject to privilege, then it must be disclosed. A failure to disclose relevant documents will adversely affect the standing and credibility of that party, and adverse inference of fact may be drawn, in addition to cost awards. For an application under Rule 5-12(1)(b), the applicant must show the party from whom production is sought served an affidavit of documents, that the affidavit of documents is unsatisfactory, and that the documents sought are relevant to a matter in issue in the action. 2) The court dismissed the application to question non-parties because it was premature. The court stated that applications to question non-parties before discovery is complete "will invariably be dismissed as premature" (para 131). The court referred to Rule 5-20 for when non-parties may be questioned, and *Custom Cycle (1996) Ltd. v Honda Canada Inc.*, 2013 SKQB 335 for the test for when the court may exercise its discretion to grant leave to question a non-party. 3) The court made no award of costs between the plaintiff and defendant, given the limited and mixed success on the applications. However, the court awarded costs of \$1,000 to be paid by the defendants to the non-party.

***Bank of Nova Scotia v Piecowye*, [2025 SKKB 116](#)**

Currie, 2025-07-29 (KB25126)

Civil Procedure - *King's Bench Rules* - Summary Judgment

Civil Procedure - Summary Judgment - Setting Aside

The plaintiff sued the defendant for a debt and interest owing on a Visa credit card. The defendant in her pleadings denied being the defendant named in the action, denied dealing with the plaintiffs and denied owing any amount to the plaintiffs. The defendant also failed to attend a mandatory mediation session despite being provided notice. The plaintiff thereafter applied for summary judgment. The defendant failed to appear in court on the date that was set for the summary judgment application despite receiving personal notice. The presiding judge dealt with the application and granted the summary judgment. The defendant applied for an order setting aside the summary judgment and the associated writ of execution.

HELD: The application was dismissed. The defendant did not prove exceptional circumstances that warranted setting aside the summary judgment. In granting an order to set aside a summary judgment granted on the merits, the following principles apply: (a) the application is to be made as soon as possible after the judgment sought to be set aside comes to the attention of the applicant

in the event of any delay, and the applicant must justify and satisfactorily explain the reasons for the delay; (b) the applicant must provide a satisfactory explanation for her failure in responding to the claim; (c) the applicant must disclose a defence that raises arguable issues; and (d) the applicant must satisfy the court that an order setting aside the judgment will not seriously prejudice the party who has obtained the judgment. The applicant must also show exceptional circumstances creating an unjust result that should be set aside based on the principles of fairness and equity. In this case, the defendant failed to provide a satisfactory explanation for her failure to respond to the notice of application for summary judgment. The circumstances of the plaintiff obtaining summary judgment against the defendant did not also constitute exceptional circumstances creating an unjust result that should be set aside based on the principles of fairness and equity, neither was it unjust, unfair or inequitable that the court proceeded with the application and granted judgment in the circumstance of the defendant not responding to the notice of application.

***Ward, Re (Bankrupt)*, [2025 SKKB 135](#)**

Shalashniy, 2025-08-27 (KB25131)

Bankruptcy - Application for Discharge - Conditional Order

Statutes - Interpretation - *Bankruptcy and Insolvency Act*, Section 172, Section 173

The bankrupt spouses applied for discharge from bankruptcy. Both were second-time bankrupts. The trustee and superintendent opposed the discharge. The bankrupts participated in a tax shelter scheme and had their contributions rejected by the Canada Revenue Agency. The court was concerned about the dishonest conduct of the bankrupts, including failing to disclose their incomes and employers upon assignment, providing inaccurate monthly income and expense information to the trustee, and incurring significant consumer credit leading up to their second bankruptcies. The court was also concerned about the bankrupts transferring property to their daughter in the time leading up to the hearing. The court determined whether to grant the discharge. HELD: The court did not grant the discharge. The court found that a conditional order was more appropriate than a refusal of discharge but noted that a refusal could be justified here. The court imposed the minimum monthly payment conditions for the first two years. After the first two years, the minimum payments would be reduced, with the bankrupts still expected to pay the full amount of the conditional order. The court found that the bankrupts were not honest but unfortunate debtors. The principles applying to discharge include the equitable distribution of assets to creditors and the financial rehabilitation of the debtor. A discharge grants an honest but unfortunate debtor relief from the burden of their debts, and the chance for a fresh start. Courts strike a balance between the interests of the creditors, the bankrupt, and the integrity of the bankruptcy system. Under s. 172(1) of the *Bankruptcy and Insolvency Act* (BIA), the court has wide discretion to grant or refuse a discharge. Where facts under s. 173(1) are established on a balance of probabilities, the court's statutory discretion becomes more limited as it is unable to grant an absolute discharge. The discharge is not a matter of right. The discharge provisions in the BIA and the case law stress that a bankrupt seeking a discharge must be both honest and unfortunate. Courts expect bankrupts to be forthright in providing a transparent picture of the bankrupt's affairs. Even if the bankrupts here suffered some misfortune by participating in the tax shelter scheme, it did not explain their subsequent conduct. There was no dispute that they were second-time bankrupts, and therefore that a fact under s. 173(1)(j)

had been established. As a result, the court was unable to grant an absolute discharge even if it were inclined to do so. The court found that the bankrupts were responsible for their own situation, and their use of credit indicated an “unjustifiable extravagance in living” consistent with s. 173(1)(e). They took actions to rack up credit, maximize exempt assets, and dissipate non-exempt assets before bankruptcy.

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***Lindsay v Birch Hills (Town)*, [2025 SKKB 142](#)**

Meschishnick, 2025-09-04 (KB25136)

Municipalities Act - Jurisdiction of Court - Council Members - Disqualification

Municipalities - Local Government Elections - Nomination Requirements

Statutes - Interpretation - *Local Government Election Act, 2015*

The applications in this case contested the results of the municipal elections in the Town of Birch Hills. The first application contested the election of mayor, and the issue was whether the nomination of the candidate who was successful in the election should have been accepted by the returning officer because he had failed to file a criminal record check with the appropriate form. The second application contested the election of members to council of the Town of Birch Hills, asserting that those who were elected to council failed to file required forms with their nomination papers and the returning officer should not have accepted their nomination papers.

HELD: The applications were dismissed. The non-compliance in failing to file the criminal record check attached to the appropriate form and the failure of the returning officer to reject the respondents' nomination papers were saved by s. 8 of *The Local Government Election Act, 2015* (the LGEA). Under s. 8 of the LGEA, no election is to be deemed or declared invalid by reason of: “(a) non-compliance with the provisions of [the] Act with respect to the holding of the poll or the counting of the votes; (b) mistakes in the use of forms; or (c) any inadvertent errors or irregularities.” This applies if it appears to the court that an election was conducted in accordance with the intent of the LGEA and that the non-compliance, error or irregularity did not affect the result of the election. In this case, the applicants acknowledged that the non-compliance did not affect the outcome of the election. The failure to file the criminal record check resulted from the candidates not knowing of the requirement, and the returning officer who was also unaware of the requirement accepting the nomination papers of these candidates without that form. There was no evidence to suggest that the failure to file the criminal record check was deliberate or that one of the candidates knew of the requirement and knowingly refused to do so. The election of mayor and council was also conducted in a fair manner, the candidates who ran for office met the qualifications required of candidates and the electorate was provided with the information that the LGEA requires before the voters cast their ballots. The failure of the returning officer to reject the nomination papers for not having the criminal records check attached to the appropriate form was saved by substantial compliance with the LGEA. The evidence established that each candidate provided a criminal record check and there was no evidence that these criminal record checks were not posted for public inspection as required by the LGEA. The evidence also established that it was the candidates who requested the criminal record checks and provided them to the returning officer with the nomination papers. There was no evidence that the criminal record check

did not search for all the records set out in Form B.1. All that was missing was the written consent of the candidates to the disclosure of the criminal records. There was no evidence from any of the candidates that they were unaware that the criminal record checks they provided would not be published and would remain confidential. In the circumstances, the essential requirements for the filing of nomination papers by the respondents and the acceptance of those nomination papers by the returning officer were met. The respondent, M.R., was not an employee of the Town of Birch Hills. Under s. 44 of the LGEA, a member of council is disqualified from council if the member, when nominated, was not eligible for nomination or election. Under s. 43(3) of the LGEA, an employee of a municipality may seek nomination to the council if the person has first obtained a leave of absence. In this case, it was clear that the respondent and Birch Hills had a mutual understanding and the subjective intention to enter into an independent contractor relationship. While there were factors supporting an employee-employer relationship, the objective reality in support of the parties' subjective intention outweighed those factors.