KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 127**

Date: **2025 08 15**
File No.: QBG-RG-02705-2019
Judicial Centre: Regina

BETWEEN:

ALICIA YASHCHESHEN

PLAINTIFF

- and -

SASKATCHEWAN GOVERNMENT INSURANCE

DEFENDANT

Appearing:

Alicia Yashcheshen	self-represented plaintiff
Reginald A. Watson, K.C. and Craig Savoie	for the defendant

JUDGMENT
August 15, 2025

ROBERTSON J.

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INTRODUCTION

[1] This decision addresses applications by both the plaintiff and the defendant following judgment dated June 19, 2025: *Yashcheshen v Saskatchewan Government Insurance*, 2025 SKKB 85 [*Judgment*].

[2] The plaintiff, Alicia Yashcheshen, applies under Rule 9-13(3) of *The King's Bench Rules* to set aside the *Judgment*. The defendant, Saskatchewan Government Insurance [SGI], applies for an award of costs following that *Judgment*.

[3] For the following reasons, the plaintiff's application is dismissed, and SGI's application is granted in part.

BACKGROUND

History of Litigation in the Court of King's Bench

[4] The history of this litigation is summarized in my fiat of April 24, 2025: (*Yashcheshen v Saskatchewan Government Insurance*, 2025 SKKB 58 at para 5 [*April 24 Fiat*]); my unreported fiat of June 11, 2025 (*Yashcheshen v Saskatchewan Government Insurance* (11 June 2025) Regina, QBG-RG-02705-2019 (Sask KB) at paras 2-10 [*June 11 Fiat*]); and my *Judgment* at paras 9-25. Subsequent events are summarized below.

[5] On June 23, 2025, the plaintiff filed a Notice of Application to set aside the *Judgment* and direct a new trial, supported by the plaintiff's Affidavit sworn June 23, 2025 [June 23 Affidavit]. On July 2, 2025, the plaintiff filed two more Affidavits sworn June 30, 2025 [June 30 Affidavit] and July 1, 2025 [July 1 Affidavit].

[6] On June 30, 2025, SGI filed a Notice of Application to strike all or portions of the June 23 Affidavit. On July 2, 2025, SGI filed application to strike portions of the June 30 Affidavit and July 1 Affidavit.

[7] On July 3, 2025, Tochor A.C.J. heard both the plaintiff's application to set aside the *Judgment* and SGI's application to strike the plaintiff's three affidavits. In a fiat dated July 3, 2025, Tochor A.C.J. adjourned the plaintiff's set aside application to July 22, 2025 to be heard by the trial judge and dismissed SGI's applications to strike the affidavits: *Yashcheshen v Saskatchewan Government Insurance* (3 July 2025) Regina, QBG-RG-02705-2019 (Sask KB) [*Tochor Fiat*].

[8] On July 17, 2025, SGI filed a draft Bill of Costs. On July 18, 2025, SGI filed an Affidavit of Disbursements of Joan Kozack sworn July 18, 2025, in support of SGI's application for an award of costs.

[9] Also on July 18, 2025, the plaintiff filed a fourth Affidavit sworn July 17, 2025.

[10] On July 21, 2025, the plaintiff filed a fifth Affidavit sworn July 18, 2025.

[11] Both parties filed briefs of law for each application.

[12] On July 24, 2025, Robertson J. heard the plaintiff's application to set aside the *Judgment* and SGI's application for an award of costs arising from that *Judgment*. The plaintiff appeared by telephone and SGI's lawyers appeared in person. The decision was reserved.

History of Litigation in the Court of Appeal

[13] The plaintiff appealed each of my three decisions. The plaintiff filed Notice of Appeal against the *April 24 Fiat* on May 16, 2025: CACV 4551. The plaintiff filed Notice of Appeal against the *June 11 Fiat* on June 12, 2025, along with Notice of Application to Impose Stay Pending Appeal: CACV 4566. The plaintiff filed Notice of Appeal against the *Judgment* on June 20, 2025: CACV 4571.

[14] On June 13, 2025, SGI filed an application to quash the plaintiff's appeal of the *June 11 Fiat* on the basis that leave was required.

[15] On June 25, 2025, Kilback J.A. heard both applications involving the *June 11 Fiat*. In his fiat of June 26, 2025, Kilback J.A. dismissed the plaintiff's stay application and application for leave to appeal the *June 11 Fiat*, which he called the "Adjournment Decision". Kilback J.A. also concluded that SGI's application should be decided by a full panel. He left it open to the plaintiff to request leave to appeal *nunc pro tunc* before the panel hearing SGI's application to quash her appeal. SGI was awarded costs fixed at $800. See: *Yashcheshen v Saskatchewan Government Insurance* (26 June 2025) Saskatchewan, CACV4566 (CA).

ISSUES

[16] The application raises the following issues:

(1) Should the *Judgment* be set aside?

(2) What award of costs, if any, should be made on the application?

(3) If the *Judgment* is not set aside, what award of costs, if any, should be made on the action?

POSITION OF PARTIES

The Plaintiff

[17] The plaintiff asks that the *Judgment* be set aside. Her non-appearance for trial was not the result of negligence or bad faith. She was medically unfit to attend. Her medical condition was supported by a doctor's note. She had also appealed the adjournment decision to the Court of Appeal. Therefore, her absence was excusable. She made every good faith effort to explain and adjourn the trial. SGI would suffer no

prejudice from the adjournment and should have consented. SGI also refused to consider her remote appearance.

[18] The Court had a duty to accommodate the plaintiff due to disability but refused to do so. The Court should also have told her how to apply for remote appearance. This was all procedurally unfair. The trial judge was biased against her. It is troubling that the judge and SGI counsel met over three days in the absence of the plaintiff before *Judgment* was granted. The *Judgment* should therefore be set aside and a new trial entered.

[19] The plaintiff acknowledged errors in her Brief of Law but denied SGI's suggestion that they resulted from use of "ChatGPT", a generative artificial intelligence platform. The plaintiff said they were her interpretation of case law.

[20] With respect to SGI's application for costs, no costs should be awarded to SGI. In *Yashcheshen v Merck Frosst Canada Ltd.* (3 February 2020) Saskatoon, QBG-SA-00949-2018 (Sask QB) [*Chow Fiat*], Chow J. exempted the plaintiff from a costs award because of her inability to pay. The request for Column 3 is egregious. Second counsel costs should not be awarded. SGI should have settled her claim and avoided trial.

The Defendant

[21] The plaintiff's application to set aside the *Judgment* should be dismissed with costs awarded to SGI at Column 3 and including second counsel costs.

[22] An application under Rule 9-13(3) of *The King's Bench Rules* to set aside a judgment obtained at trial does not invite a reconsideration of the decision to grant judgment nor is it an appeal of that judgment. The Court should only exercise its discretion to set aside where there is new evidence to justify setting aside a judgment. The evidence must be something which was not known to the Court and which the

applicant could not have made known to the Court at the time it made its decision. In this case, there is "not a scintilla of evidence" to support setting aside the *Judgment*.

[23] Although the plaintiff filed five affidavits, contrary to *The King's Bench Rules*, the only new "evidence" is a prescription from Dr. Noor Adams dated June 18, 2025, stating "Spem meal replacement shake five per day x one year" and a note from Dr. Noor Adams stating "Due to medical conditions the patient needs to be close to a washroom at all times. Distance 2 washroom should not exceed 10 steps." (June 23 Affidavit, Exhibits "A" and "B") This medical evidence suffers from the same defects as discussed in the *Judgment* at paras 36-40.

[24] The plaintiff sabotaged the trial. She never provided a witness list, although directed to do so by the Court. On the date of trial, there were no witnesses for the plaintiff. After SGI subpoenaed the plaintiff's experts, the plaintiff told them not to attend. Although the Court adjourned the trial over three days and gave notice to the plaintiff, she took no steps to appear, either in person or remotely. The Court was left with no choice but to award *Judgment*.

[25] SGI would suffer prejudice if the *Judgment* were set aside. It was prepared for trial, with witnesses subpoenaed and scheduled. SGI paid non-refundable fees for expert witnesses (Affidavit of Joan Kozack sworn June 6, 2025, para. 5). The trial judge saw SGI's cart full of documents in the courtroom.

[26] All participants, including self-represented parties, have a duty of candour to the Court. The plaintiff's Brief of Law contains misleading case references. The supposed quote at para. 33 of the plaintiff's Brief of Law from a Supreme Court of Canada decision does not appear in that decision. It is probably a creation of artificial intelligence.

[27] With respect to the request for costs on Column 3 and second counsel, this was a long and demanding case for SGI and its counsel, made more difficult by the "wilfully frustrating behaviour" of the plaintiff. The plaintiff chose the forum. She had the option of appeal to the Automobile Injury Appeal Commission. A ten-day trial was scheduled because each party estimated it would require five days to present their side of the case. The pre-trial judge agreed that ten days were required and directed scheduling of the trial accordingly.

LAW

[28] In this part, I will review law relevant to the issue of whether the *Judgment* should be set aside. As will be discussed below, there is little judicial consideration of Rule 9-13(3) of *The King's Bench Rules*. However, I conclude that the decisions invoking the Court's exercise of inherent jurisdiction to set aside orders and judgments made at hearings provide guidance on factors to consider in applying Rule 9-13(3).

Rule 9-13(3) of *The King's Bench Rules*

[29] *The King's Bench Rules* in Rule 9-13(3) allows the party who did not appear for trial to apply to set aside the resulting judgment:

> **Party not appearing**
>
> **9-13**(3) Any verdict or judgment obtained if one party does not appear at the trial may be set aside by the Court on those terms that the Court considers just, on an application made within 15 days after the trial.

[30] Rule 9-13(3) has limited and specific application to a judgment granted at trial where the opposing party fails to attend. Neither defendant counsel nor I were able to locate any reported decisions in which Rule 9-13(3) was applied. Four decisions were found applying former rules.

[31] The following three decisions concerned the former Rule 271 of *The Queen's Bench Rules* (since rep). The Rule does not apply where the party appeared for trial and then left, since there was an appearance: *Gutenberg v Hunter*, 2005 SKCA 127 at para 7, 275 Sask R 81. An application must be brought within 15 days after the trial: *Shell Canada Products Ltd. v L & D Truck Ltd*., 2005 SKQB 336 at para 8, 276 Sask R 315 [*L & D Truck*]. It does not apply to summary judgment, which is heard in chambers and therefore is not a trial: *Young v McLaren*, 2009 SKQB 307 at para 15, 340 Sask R 220.

[32] I located one other reported decision applying a former rule. In *Prairie Drug Co. Ltd. v Rabinovitch*, [1929] 3 DLR 606 (CanLII) (Sask CA) [*Prairie Drug*], the Saskatchewan Supreme Court sitting as Court of Appeal considered an application to set aside judgment obtained by the plaintiff where the defendants failed to appear at trial. The Court applied then Rule 331 of *The King's Bench Rules* (since rep) in setting aside the judgment. In doing so, the Court reviewed the history of this Rule:

> [6] With the utmost deference, I would say that I have come to the conclusion that the learned Chamber Judge erred in his opinion so expressed, since the application is not, as the material discloses, one to adjourn, but an application to set aside the judgment obtained on default of appearance at the trial, and for that purpose is based upon King's Bench Rule 331, which is as follows:
>
> > 331. Any verdict or judgment obtained where one party does not appear at the trial may be set aside by a court or a judge upon such terms as may seem fit upon an application made within fifteen days after the trial.
>
> [7] This Rule is the same, with the single variation as to time, as English Marginal Rule 457 (Order XXXVI, Rule 33), under which there have been a number of decisions defining the proper mode of its application. See *The Annual Practice*, 1929, p. 619. The Rule appears to be founded upon the former Chancery practice. Thus in *Hale v. Lewis* (1838) 2 Keen 318, 48 E.R. 651, it was held by Lord Langdale, MR., that, a bill having been dismissed with costs on the nonappearance of the

plaintiff's solicitor, the cause should, upon a petition supported by affidavit, be ordered under the circumstances to be set down again to be heard, upon payment of costs by the plaintiff. See also *Cockle v. Joyce* (1877) 7 Ch. D. 56, 47 L.J. Ch. 543

[8] After the Rule had come into existence, Fry, J., in *Wright* v. *Clifford* (1878) 47 L.J. Ch. 543, 26 W.R. 369, upon the application of the plaintiff, set aside thereunder a judgment obtained against him in default of appearance at the trial, his solicitor having deposed that he had deferred instructing counsel to appear thereat owing to his not unreasonable but erroneous belief that the action had been settled.

[9] In *Burgoine* v. *Taylor* (1878) 9 Ch. D. 1, 47 L.J. Ch. 542: which appears to be the leading case on the subject, it was held in effect by the Court of Appeal, upon the application of the defendant, that, where his non-appearance at the trial was occasioned by the slip of his solicitor who was watching the list but missed the case, judgment taken on his default should be set aside upon payment of all the costs thrown away by reason of the trial becoming abortive. Upon such an application, proof of the merits by the applicant is not essential. In this respect the practice differs from that respecting applications to set aside judgments in default of pleadings. *Bracken v. Gilpin* [1921] W.N. 274, where Scrutton, L.J. thus expresses himself:

> If judgment is given in Chambers against a defendant who is in default, and the judgment is not irregular, it is the common practice to require an affidavit of merits before the judgment is set aside. But it is otherwise where the plaintiff's case has been heard in Court and the defendant is not there, for then the Judge knows something of the merits. If the defendant afterwards comes and shows that he was absent through a mistake on his part or on the part of his solicitor, and asks to have the case re-heard, the judge may require an affidavit of merits if he thinks it necessary; but more commonly an order is made to reinstate the case without an affidavit.

[10] In the present case, it appears from the material that the defendants' solicitors failed to notify the defendants of the date of the trial in sufficient time to enable them to launch an application, supported by the proper material, for the adjournment of the trial on the ground that the defendants could not attend and submit their case owing to the illness of the female defendant. On the application now appealed from, such

> illness, and its result in preventing their attendance, are deposed to in the affidavits, not only of the defendants themselves, but in that of her physician as well, and no attempt has been made by the plaintiff to contradict their statements.
>
> [11] I think, therefore, that this is a case where the defendants are entitled to invoke the above Rule.
>
> [12] I would therefore allow the appeal, and set aside the judgment in question and restore the action to the list of cases standing for trial, upon payment by the defendants of the costs of the day, which include all costs thrown away by reason of the trial becoming abortive, and also the costs of the application to the Chamber Judge below. Such costs to be paid within 30 days from the taxation thereof.
>
> [13] There should be no costs of this appeal.

Inherent Jurisdiction to Set Aside Orders and Judgments Made at a Hearing

[33] There are several Saskatchewan decisions in which the Court has recognized its inherent jurisdiction to set aside a decision obtained at a hearing.

[34] In *T.D. Bank v Prairie Gold Oilfield Servicing Ltd.*, [1990] 6 WWR 16 (CanLII) (Sask QB) [*Prairie Gold*], Wright J. dismissed an application to set aside a foreign judgment registered against the applicant in Saskatchewan. In doing so, he commented on the inherent power of the Court to set aside judgments and the special circumstances which might justify such an order:

> [7] … The Queen's Bench has an inherant power to set aside judgments: *Royal Trust Co. v. Jones et al.* (1962), 37 W.W.R. (N.S.) 1 (S.C.C.). It will do so in special circumstances. For example, where a judgment has been obtained by fraud the court will set aside *ex debito justitiae*. Other categories include: lack of jurisdiction, irregularity, perjury and new evidence. …
>
> [8] … Litigants are entitled to certainty with respect to proceedings in our courts. They should also expect that there will be finality to these proceedings. Judges should be extremely reluctant to set aside any decision of the court unless the circumstances compel that action.

[35] In *Kroma Kolor Photo Labs v Snyder* (1991), 98 Sask R 257 (CanLII) (QB), Halvorson J. set aside a judgment for failure to reply to a garnishee summons. In doing so, he rejected at para. 5 the applicant's reliance on then Rule 271 of *The Queen's Bench Rules*, which applied to setting aside judgment against a party not appearing at trial, and to then Rule 346 of *The Queen's Bench Rules*, which applied to default judgment. Instead, at para. 9 he relied upon the Court's inherent jurisdiction to supervise its process. He held at para. 10 that "the applicant must explain any delay, disclose a meritorious defence and account for the circumstances under which the default occurred." He concluded at para. 12 that justice would be served by allowing the applicant the opportunity to present its statement disputing liability.

[36] In *Shell Canada Products Ltd. v Materi* (1999), 178 Sask R 294 (QB), Scheibel J. set aside an appointment for examination for discovery where the defendant did not have notice of the application. In doing so, Scheibel J. described the test at paras. 4-5:

> [4] I am satisfied that the court has an inherent power to set aside a judgment of this court in special circumstances. Equity and fairness dictates that a judgment obtained without actual notice to the defendant may be set aside where the court concludes that the order for judgment may not have been granted had the defendant been given notice of the proceedings.
>
> [5] In addition I am satisfied the proposed statement of defence raises valid triable issues which, if accepted would constitute a defence on the merits.

[37] *Prairie Drug* was cited by Currie J. in *L & D Truck* at para 9, as supporting the Court's inherent jurisdiction to set aside a summary judgment granted after the defendant failed to appear on the date set for hearing of the summary judgment application. Currie J. at para. 10 of *L & D Truck* stated the test to apply on such an application as follows:

> [10] The court has inherent jurisdiction to set aside a judgment. The court will do so in exceptional circumstances, when equity and fairness so dictate. Exceptional circumstances recognized to date include fraud, lack of jurisdiction, irregularity, perjury, new evidence, and lack of notice.

[38] Currie J. granted the set aside application with costs awarded against the applicant.

[39] In *Egware v Egware*, 2016 SKQB 116, 77 RFL (7th) 270, Brown J. struck a petition as an abuse of process where judgment for divorce had previously issued. In doing so, he commented at para. 27 on the Court's jurisdiction to declare void a judgment obtained by fraud, citing *Prairie Gold* and *L & D Truck*:

> **FRAUD**
>
> [27] If a judgment has been obtained by fraud, or the court lacked the jurisdiction to grant the judgment, the court has the authority to determine that the judgment is void and declare it so as a result. …

[40] In *Montgomery v Jahnke*, 2017 SKQB 374 [*Montgomery*], Tholl J. (as he then was) dismissed an application to set aside an order for accounting by the respondent under a power of attorney. In doing so, Tholl J. held at para. 19 that Rule 10-13 and the test applicable to setting aside a default judgment are not applicable to setting aside an order granted on the merits in chambers. He went on to recognize the inherent jurisdiction of the Court to set aside judgments, cautioning that the power "must be used sparingly and only in exceptional circumstances":

> [29] The inherent jurisdiction of the court with regard to setting aside judgment, declarations or orders obtained on the merits must be used sparingly and only in exceptional circumstances. The court must be cautious to ensure it avoids overstepping its jurisdiction resulting in effectively sitting in appeal of its own determinations. In *Toronto Dominion Bank v Prairie Gold Oilfield Servicing Ltd.* (1990), 85 Sask R 192 (QB), the court described the court's inherent power to set aside a judgment which was obtained based on evidence as follows:

> 7 … Rather the domestic judgments now impugned must be viewed as judgments entered after a hearing at which evidence was introduced by both parties. The Queen's Bench has an inherent power to set aside judgments: *Royal Trust Co. v. Jones*, [1962] S.C.R. 132, 37 W.W.R. 1, 31 D.L.R. (2d) 292. It will do so in special circumstances. For example, where a judgment has been obtained by fraud the court will set aside *ex debito justitiae*. Other categories include: lack of jurisdiction, irregularity, perjury and new evidence. …

[41] In *Pillar Capital Corp. v Swift River Farms Ltd.*, 2021 SKQB 119 [*Swift River QB*], varied on other grounds in *Swift River Farms Ltd. v Pillar Capital Corp.*, 2022 SKCA 89 [*Swift River CA*], Scherman J. dismissed an application to open up a noting for default of defence, granting leave to file a statement of defence and set aside order *nisi*. The defendant's application was heard at the same time as the plaintiff's application for an order confirming sale. Scherman J. at paras. 21-22 of *Swift River QB* dismissed the defendant's application, finding exceptional circumstances did not exist to justify setting aside the order *nisi*.

[42] The Court of Appeal in *Swift River CA* at para 88 recognized that "a judgment or order may be set aside where equity and fairness so require":

> [88] However, I am not persuaded that this was a material error, regardless of whether the Chambers judge was correct in concluding that there had been a breach of clause 5.2(b) – which I need not decide. A judgment or order may be set aside where equity and fairness so require, as a result of circumstances such as fraud, lack of jurisdiction, irregularity, perjury, new evidence and lack of notice: *Shell Canada* at para 9; *Toronto Dominion Bank v Tymchak* (1990), 85 Sask R 192 (QB) at para 7; *Royal Trust Company v E.M. Jones*, [1962] SCR 132 (WL) at 143–146; and *Desbiens v Warken*, 2020 SKQB 145 at paras 13–17, 61 CPC (8th) 187. While an error of law may be relevant in determining if there are special circumstances of this kind, the fact there was an error of law in the course of the analysis does not, in and of itself, justify setting aside a judgment or order. As Tholl J. (as he then was) affirmed in *Montgomery v Jahnke*, 2017 SKQB 374:

> [29] The inherent jurisdiction of the court with regard to setting aside judgment, declarations or orders obtained on the merits must be used sparingly and only in exceptional circumstances. The court must be cautious to ensure it avoids overstepping its jurisdiction resulting in effectively sitting in appeal of its own determinations.
> …

[43] The Court of Appeal in *Swift River CA* concluded at para. 90 that "the Chambers Judge did not err in deciding there were no exceptional circumstances that would justify setting aside the Order *Nisi*."

[44] In *Rennebohm v Rennebohm*, 2020 SKQB 350 at para 17, Megaw J. invoked inherent jurisdiction in his decision to set aside an order to produce documents. In doing so, he applied the test from *McAdam v Grimard*, 2017 SKQB 39 at paras 9-11, 7 CPC (8th) 123, for setting aside default judgment under Rule 10-13 of *The King's Bench Rules*.

[45] In *Affinity Credit Union 2013 v Monastyrski*, 2024 SKKB 128, Currie J. dismissed an application to set aside order *nisi* for sale of land. In that case, the owner at the time of application for an order confirming judicial sale, applied to set aside the order *nisi* on the basis that the land was homestead and therefore exempt from an order for foreclosure and sale under s. 44 of *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1. Currie J. at para. 17 found that the test to be applied on a set aside application was that from *L & D Truck* at para 10, quoted above. He went on at para. 18 to conclude that he had jurisdiction to set aside an order made by another judge of the Court.

[46] In *Above Food Ingredients Inc. v Anmoho LLC*, 2025 SKKB 110 [*Above Food*], Klatt J. set aside orders for judgment granted in chambers. The defendants had failed to appear despite being properly served. In doing so, Klatt J. held at para. 28 that Rule 10-13 of *The King's Bench Rules* did not apply where judgment has been entered after a hearing on the merits. In her analysis at paras. 34-61, she considered first the test

for opening a default judgment and then whether there were exceptional circumstances. Klatt J. found at para. 65 that it was just and equitable to set aside the order and ensuing judgment.

[47] In finding exceptional circumstances, Klatt J. commented at para. 62 that "while service requirements were technically complied with, Above Food's counsel was not notified of the applications sought …", adding that "I would have expected, as a courtesy, that Cap Minds and ANMOHO would have done so." In making that comment, Klatt J. may have had in mind para. 56 of The Advocates' Society, *Principles of Civility and Professionalism for Advocates* (20 February 2020) online: <www.advocates.ca> (12 August 2025):

> 56. Subject to the applicable rules of practice, advocates should not cause any default or dismissal to be entered without first notifying opposing counsel, if the identity of opposing counsel is known.

Setting Aside Default Judgment Under Rule 10-13 of *The King's Bench Rules*

[48] Rule 10-13 of *The King's Bench Rules* allows the Court to set aside noting for default or default judgment:

> **Setting aside default judgment**
>
> **10-13** Subject to rule 9-13, in case of any judgment by default, whether by reason of non-delivery of defence or non-compliance with any of these rules or with any order of the Court, the Court may set aside or vary the judgment on those terms as to costs or otherwise that the Court considers fit.

[49] The test for setting aside default judgment was stated in *Klein v Schile*, [1921] 2 WWR 78 (CanLII) (Sask CA) at paras 2-5. The Court of Appeal has reaffirmed this test in: *Hamel v Chelle* (1964), 48 WWR (NS) 115 (Sask CA); *Warner Construction Co. Ltd. v Municipality of Wood River* (1979), 1 Sask R 118 (CA); *Bank of Montreal v Pauls* (1984), 35 Sask R 204 (CA); and *2 Hearts Personal Care Ltd. v*

Klepsch, 2012 SKCA 26, 385 Sask R 261 [*2 Hearts*].

[50] In *2 Hearts* at paras 3-4, Caldwell J.A. writing for the Court of Appeal summarized the test to set aside default judgment:

> [3] In his reasons for dismissing the appellants' application, the chambers judge correctly noted that a defendant who seeks to set aside a noting in default must:
>
> (a) bring the application expeditiously upon becoming aware of the claim;
>
> (b) provide a satisfactory explanation for the failure to respond to the claim;
>
> (c) disclose a defence which raises arguable issues; and
>
> (d) satisfy the court that an order setting aside the noting in default will not seriously prejudice the plaintiff.
>
> [4] A fundamental principle relevant to the exercise of judicial discretion in applications of this nature is that the application of the court's rules and principles must not violate the principles of fundamental justice and equity (see: *Willrun Payroll Services Inc. v. Prairie Land & Investment Services Ltd.*, 2010 SKCA 42, [2010] 5 W.W.R. 195). As Cameron J.A. pointed out in *Rimmer v. Adshead*, 2002 SKCA 12, [2002] 4 W.W.R. 119, the applicable principle requires consideration of all the circumstances and a strong reason to deny a defendant his or her day in court when he or she can demonstrate an arguable defence to the claim and the delay has not caused the plaintiff irreparable harm. See also *Ballentyne and Broussie v. Benard*, 2012 SKCA 23.

Conclusions on the Law

[51] In *Montgomery* at para 19, Tholl J. stated that the test for setting aside default judgment is not the test to be applied in setting aside an order or judgment obtained at a hearing. The test for setting aside default judgment under Rule 10-13 of *The King's Bench Rules* is different from the test for setting aside judgment at trial under Rule 9-13. While the Court may consider the four-part test for setting aside

default judgment, the threshold to set aside a judgment obtained at trial is much higher.

[52] The threshold test for setting aside an order or judgment becomes more onerous as the action progresses from default judgment to judgment at trial. The test is much more lenient for default judgment than judgment at trial. The reasons are obvious, including that default judgment occurs near the start of the commencement of litigation and without any hearing, whereas judgment at trial occurs at the end of the litigation process in open Court on the date scheduled for trial.

[53] The Courts in some of the cases summarized above used or included the test to set aside default judgment in their reasons on an application to set aside an order or judgment made at a hearing. There is nothing wrong in doing so when the order was made at a hearing because the applicant failed to attend. If the test for setting aside default judgment is not met, then the higher test to set aside an order or judgment made at a hearing cannot not be met. Further, some or all of those factors may be relevant to the issue of equity and fairness. But the Court must go on to address the full test of "exceptional circumstances, when equity and fairness so dictate." A recent example of this is found in *Above Food*, as summarized above.

[54] From the cases reviewed, the following principles emerge.

[55] The applicant has the onus of satisfying the Court that an order or judgment should be set aside. The Court's exercise of its inherent jurisdiction to set aside an order or judgment made at a hearing is discretionary. The exercise of this discretion should be used sparingly and only in exceptional circumstances dictated by equity and fairness.

[56] There is a two-step analysis or test for setting aside an order or judgment obtained at a hearing:

(1) Has the applicant established an exceptional circumstance?

(2) If so, does the exceptional circumstance, having regard to equity, fairness, and all other relevant circumstances, dictate that the order or judgment be set aside?

[57] The exceptional circumstance must relate to the hearing or the evidence supporting the decision. The non-exhaustive list of possible exceptional circumstances includes:

(a) No notice of hearing through no fault of the applicant, depriving them of an opportunity to appear and present their case or respond;

(b) Inability to attend, which could not have been anticipated, or to appear by agent or remote appearance or to seek adjournment, through no fault of the applicant;

(c) Irregularity in proceedings which was not apparent at the time of the hearing or trial and was so serious as to fundamentally negate the integrity of the decision;

(d) Order or judgment obtained by fraud or perjury not discoverable at the time of the hearing or trial;

(e) New evidence not discoverable at the time of the hearing or trial which would change the outcome;

(f) Lack of jurisdiction by the Court making the order or judgment.

[58] Even if such an exceptional circumstance is proved, the Court must still go on to consider the balance between the competing interests of the parties, including prejudice to the other party, and the public interest in certainty of decisions and finality

in litigation. Equity and fairness apply to both parties.

[59] These principles are consistent with *Prairie Drug*, which I accept as the controlling authority for an application under Rule 9-13(3).

[60] As stated in the *Judgment* at para 57, Rule 9-13(3) is intended as a safety valve, providing a speedy avenue of relief against injustice resulting from award of judgment under Rule 9-13(1) or (2). It avoids the necessity and delay of appeal to remedy an obvious injustice.

[61] Rule 9-13(3) also recognizes that the trial judge may be in the best position to decide whether the new evidence constitutes "exceptional circumstances" and, if so, whether equity and fairness dictate that the judgment be set aside. The trial judge can ask himself or herself; if I had known that, would I still have granted judgment?

[62] A set aside application under Rule 9-13(3) is not a reconsideration or appeal of the decision to grant judgment. Judges do not sit in appeal of their own decisions. In the event of an appeal, the appellate Court will consider the record. While new evidence may be admitted on appeal, that is a rare occurrence.

[63] The set aside application, in contrast, focuses on new evidence not known to the trial judge at the time the decision was made and not known or reasonably discoverable by the applicant. The new evidence must be so critical and compelling that it would result in a different decision and be manifestly unjust to allow the judgment to stand.

[64] Where, as here, there is an appeal of a judgment, the trial judge in deciding a set aside application must take care in their reasons not to appear to be trying to re-justify or bolster reasons for the subject decision, which must speak for itself.

[65] With this in mind, I turn to analysis of the issues.

ANALYSIS

[66] The issues to be addressed are: (1) Whether the *Judgment* should be set aside; (2) If so, what award of costs, if any, should be made on the action; and (3) What award of costs, if any, should be made on the application?

[67] Before turning to the three issues, I will address SGI's position that its application to strike the June 23 Affidavit remains to be determined and the fact that there is a pending appeal of the *Judgment* to the Court of Appeal.

The Plaintiff's Affidavits

[68] SGI argued that the *Tochor Fiat* did not address its application to strike portions of the June 23 Affidavit. In para. 5 of the *Tochor Fiat*, Tochor A.C.J. expressly mentions the other two affidavits:

> [5] She also filed additional affidavits dated June 30, 2025 and July 1, 2025, for which counsel for SGI filed a Notice of Objection. SGI submits the entirety of both these affidavits should be struck for the failure to comply with Rules 13-30 to 13-33 of the *King's Bench Rules*.

[69] The *Tochor Fiat* was written and issued the same day that the application was heard in chambers, along with many other applications. While the June 23 Affidavit is not expressly mentioned, I note the use of the words "additional affidavits". I am confident that Tochor A.C.J. was aware that SGI's application to strike applied to all three affidavits.

[70] If any doubt remains, I adopt his reasons in dismissing the application to strike the June 23 Affidavit. In doing so, I note and agree with the observation at para. 10 of the *Tochor Fiat* that SGI's "objections [to the affidavits] are well founded." Even so, Tochor A.C.J. thought it best to leave the affidavits intact, trusting that I could sort

the wheat from the chaff: "I am confident the judge hearing the plaintiff's application can give whatever weight is appropriate to the disputed affidavit evidence" (*Tochor Fiat* at para 13).

[71] I also acknowledge that SGI's well-founded objections to the plaintiff's five affidavits extend beyond their content to the number (see Rules 6-6; 6-9(1)(a), (6), (7), and (8); and 13-38(4)). Even so, I have considered all of the affidavits on this application.

The Effect of Pending Appeals in the Court of Appeal

[72] In the *Judgment* at para 29, I acknowledged that I would normally decline to proceed on a file where the Court of Appeal was engaged. In this case, it again seems best to deal with these applications for two reasons.

[73] With respect to the plaintiff's application, the Court of Appeal in *Sinclair v Webb*, 2011 SKCA 90, adjourned an application for leave to appeal and directed the applicant to first apply under then Rule 271 of *The Queen's Bench Rules* to have the judgment set aside. The determination of the plaintiff's application appears necessary therefore for her appeal to proceed. A decision now may avoid future delay in already protracted litigation.

[74] With respect to SGI's application, it seems best that the Court of Appeal have all matters in this Court determined when it hears the plaintiff's appeal, including any award of costs. Again, this may avoid delay and allow the Court of Appeal to make a final adjudication of all possible appeals.

[75] I turn now to whether the *Judgment* should be set aside.

(1) Should the *Judgment* be set aside?

[76] As discussed above, the test under Rule 9-13(3) of *The King's Bench*

Rules to set aside a judgment obtained when one party failed to appear at the trial is whether the applicant has established exceptional circumstances which dictate setting aside the judgment to respect equity and fairness. What then are the possible exceptional circumstances raised by the plaintiff on this application?

[77] The plaintiff in her Notice of Application states grounds in paras. 7-17. Most of the paragraphs do not state grounds and are more in the form of argument. The plaintiff's Brief of Law and oral argument in large part sought to re-argue her application for accommodation, which was dismissed in the *April 24 Fiat*, and her application to adjourn the trial, which was dismissed in the *June 11 Fiat*.

[78] Nonetheless, from the Notice of Application, Brief of Law, and oral argument, I have tried to identify possible exceptional circumstances which I will address below.

(i) Excusable Reason for Failing to Attend Trial

[79] As discussed above, there is a paucity of case law applying Rule 9-13(3). This is not surprising, given the manner in which trials occur.

[80] The plaintiff had notice of the trial, so lack of notice is not at issue. This action was her appeal of an administrative decision to deny the plaintiff's claims. So, there was a prior adverse decision on the merits which would help to inform the parties. There were pleadings and extensive pre-trial discovery to further inform the parties of the issues and evidence.

[81] Civil trials in the Court of King's Bench are a big deal, involving many participants. The tension increases in the days approaching trial. Counsel and parties are usually fully absorbed in preparation as the date of trial approaches, and therefore not likely to forget to show up for the trial.

[82] On the day of trial, there are often many people attending, including the parties, their lawyers, and witnesses. It will be a rare occurrence when there is no one there for one side or the other. When a key participant does fail to appear, there is usually someone present for that side who will provide an explanation and track the participant down or seek an adjournment.

[83] Lawyers rarely fail to show for trial. J. Kenneth McEwan, *Sopinka on the Trial of an Action*, 4th ed (Toronto: LexisNexis, 2020) at para. 5.189 states "Failure to attend at trial or attending late can constitute contempt of court."

[84] Here, no one appeared for the plaintiff; neither the plaintiff nor any witnesses. I accept SGI's position that the plaintiff deliberately sabotaged the trial. The plaintiff did not provide a witness list, despite being told to do so in the *April 24 Fiat* at para 70. Rule 9-6 of *The King's Bench Rules* provides that "a party shall not, at trial, lead evidence from a witness unless that witness is listed in a witness list." The plaintiff did not appear at trial. She had called off her witnesses, including those subpoenaed by SGI, which was an interference with Court orders. She made no effort to inform SGI or the Court that she did not intend to appear.

[85] The trial was adjourned over three days and the plaintiff was notified of the adjournments. Despite this additional opportunity to appear, she made no effort to do so. I found in the *Judgment* at paras 34, 36, and 75, that the plaintiff's aim was to manipulate an adjournment which had previously been denied. I remain of that view.

[86] In any event and to use SGI's words: that is "old news" known at the time the *Judgment* was made. There is nothing new that constitutes exceptional circumstances which would dictate setting aside the *Judgment*.

[87] What is the "new news" relevant to the set aside application?

(ii) New Evidence of Medical Condition

[88] There is new evidence in the form of the prescription and note from Dr. Adams attached as exhibits to the plaintiff's June 23 Affidavit.

[89] I agree with SGI that this "new evidence" is of questionable value. It suffers from the same defects as the doctor's note reviewed in the *Judgment* at paras 36-40. Even if fully admissible, Dr. Adam's prescription and note seem more relevant to the earlier application for accommodation, which was dismissed, or an application to appear remotely, which was never made.

[90] One may ask whether this is actually new evidence. Dr. Adams presumably wrote the prescription and note based on what the plaintiff told him. The prescription is dated June 18, 2025, and the note is dated June 19, 2025. The *Judgment* is dated and was issued June 18, 2025. The content of this evidence was therefore likely within the knowledge of the plaintiff before *Judgment*.

[91] According to the plaintiff she was at the time unable to leave her home in Yorkton, Saskatchewan, both because of her medical condition and her inability to drive because of daily cannabis use (June 23 Affidavit at para. 12; Brief of Law at para. 52: "This makes travel from Yorkton to Regina for court physically impossible without risking license suspension or criminal liability"). So, her contact with Dr. Adams, whose office is in Regina, Saskatchewan, must have been by telecommunication on or before June 18, 2025. On the other hand, if the plaintiff did see Dr. Adams in Regina on June 16, 17, or 18, 2025, then she could have also attended the trial, which was adjourned from June 16, 2025, to June 17, 2025, to June 18, 2025.

[92] Finally, the medical condition to which the exhibits relate was known long before trial. The plaintiff in her June 23 Affidavit at para. 2 confirms that her medical condition and treatment by Dr. Adams date back 20 years:

> [2] I have been under the medical care of Dr. Adams, since 2005, who is aware of my diagnosis of Crohn's Disease, a serious chronic condition that causes unpredictable and urgent bowel movements, among other symptoms.

(iii) Irregularity in Proceedings that Destroys the Integrity of the Judgment

[93] The plaintiff in her Brief of Law at para. 39 claims that SGI "acted in bad faith by demanding a 10-day trial for matters that, by any reasonable estimation, could have been resolved within two to four days." The claim that SGI demanded the ten-day trial is false. The pre-trial report shows, and SGI counsel confirmed, that each side estimated they required five days each to present their case. The pre-trial judge estimated the trial would require ten days. The actual scheduling was done by the case management judge in her fiat of December 7, 2024, after consultation with the parties (*Judgment* at para 5).

[94] The plaintiff claims that the Court failed to inform her of the ability to appear remotely.

[95] First, the Court does not generally advise parties on how to appear. Personal appearance is the norm and usually necessary to effectively present at trial. Remote appearances must be approved by the Court. Rule 6-19(2) of *The King's Bench Rules* allows electronic hearings in whole or part but only "if the parties agree and the court permits or the court orders". The Court's Administrative Notices, Dealings with Registry Offices (7 February 2024) online: SaskLawCourts <https://sasklawcourts.ca/kings-bench/administrative-notices/> (13 August 2025) at paras. 2, 3, and 6, address advice from the registry office, notice of adjournments, and requests to appear remotely:

> 2. While court staff are committed to ensuring clients have the most up-to-date information regarding court process, they are unable to provide legal advice. Providing guidance on the specific process that should be utilized to achieve a

> desired outcome constitutes legal advice. This applies to all participants in the court system, including self-represented litigants and lawyers.
>
> 3. The court should be advised, as early as possible, of adjournments and settlements. Adjournments and settlements frequently occur with very little notice, which contributes to delays in scheduling other matters.
>
> …
>
> 6. Requests to appear remotely for any scheduled appearance should be made as early as possible to ensure that the registry offices have sufficient time to make appropriate arrangements.

[96] Second, the plaintiff's premise that she was unaware of the ability to request remote appearance is not credible. She has previously appeared remotely both in this Court and in the Court of Appeal. She appeared by telephone during the case management phase of this litigation. The plaintiff in her Brief of Law at para. 29 refers to "a five-year practice during which she had consistently appeared by phone." This statement is made in relation to her complaint about not being called for the hearing of her adjournment application on June 10, 2025. This should have alerted her that she had to take steps if she wanted to appear remotely.

[97] Third, contrary to the plaintiff's claim, the Court did inform the plaintiff of the ability for remote appearances, including the requirements for a prior request and Court approval. This was done twice in writing. First, in the *April 24 Fiat* at page 2 of the appended Memorandum (Provided to Plaintiff at Pre-trial):

> In special circumstances, a judge may allow a witness to testify by telephone. If you have a witness who cannot appear in person, you can apply to the trial judge, prior to trial, to request that the witness testify by telephone. To arrange for this motion, you can contact the registrar of the Court where the trial is scheduled to be heard. The trial judge will make the decision after hearing your argument as well as the defendant's argument on this issue.
>
> [Emphasis in original]

And second, as stated in the *Judgment* at para 13, the Local Registrar emailed the plaintiff on June 13, 2025, explaining the procedure for requesting remote appearance:

> Good morning,
>
> All court appearances before the Court of King's Bench for Saskatchewan are presumptively in person. If parties wish to appear remotely, the request must be made in writing to the registry office and considered by the presiding judge in advance.
>
> The Administrative Notice entitled "Dealings with the Registry Office" provides at paragraph 6 that "requests to appear remotely for any scheduled appearance must be made as early as possible to ensure that the registry offices have sufficient time to make appropriate arrangements." This was issued on February 7th, 2024, though the presumptive mode of appearance as being in person has always been the Court's standard practice.
>
> The Court of Appeal and Court of King's Bench are separate courts, governing by separate court processes. I cannot speak to the modes of appearance before the Court of Appeal.
>
> …

[98] The plaintiff did not make any request for remote appearance at trial. She made requests to appear by telephone for the hearing of this application, which were granted.

[99] There is also the plaintiff's claim that the trial judge was biased (Notice of Application, para. 13: "Justice Robertson's obvious bias"). If the plaintiff had reason to believe the trial judge was biased, she could have applied at trial for disqualification. No such application was made. This could still be a ground of appeal in the Court of Appeal.

[100] The plaintiff in her July 1 Affidavit at para. 4 states that she has or will be filing a complaint against the Court's staff, against SGI, and against the trial judge with the Saskatchewan Human Rights Commission. The ability of the public to complain about judicial misconduct is important for judicial accountability. Such

complaints against the trial judge are not relevant to the set aside application. The Saskatchewan Human Rights Commission and the Canadian Judicial Council will make their own determination on any complaint.

(iv) Appeal of the Judgment

[101] The appeal of the *Judgment* is new in that it was filed after the *Judgment* was issued. The fact of an appeal is not a reason for this Court to either set aside or not set aside a judgment. The appeal provides assurance that if there is error in the *Judgment*, the Court of Appeal will identify and may remedy that error.

(v) Conclusion

[102] I am not persuaded that the plaintiff has met her burden of establishing exceptional circumstances, nor that the circumstances reviewed, either individually or cumulatively, would dictate setting aside the *Judgment*.

[103] I dismiss the application to set aside the *Judgment*. The *Judgment* therefore stands.

(1.1) Other Relief Sought in Plaintiff's Application

[104] The plaintiff sought other relief in her application at paras. 3-5 of the Notice of Application: order directing new trial through Webex; order permitting the plaintiff to proceed with appeal; and costs of the application. To avoid leaving the impression it was overlooked, I expressly dismiss the application for a new trial.

[105] With respect to the order permitting the plaintiff to proceed with her appeal, that is a matter for the Court of Appeal, not this Court.

(2) What award of costs, if any, should be made on the application?

[106] With respect to costs of the application, I award costs of the application

to SGI on Column 2 of the Tariff of Costs with second counsel costs.

(3) If the *Judgment* is not set aside, what award of costs, if any, should be made on the action?

[107] SGI filed a draft Bill of Costs on July 17, 2025, seeking an award of costs following judgment on Column 3 of Schedule I-B of the Tariff of Costs and second counsel costs. SGI's application for costs is supported by the Affidavit of Disbursements of Joan Kozack filed on July 18, 2025.

(i) The King's Bench Rules

[108] *The King's Bench Rules* in Part 11: Recoverable Costs of Litigation, Assessment of Costs and Sanctions provides guidance on the assessment of costs. Generally, the successful party is entitled to an award of costs. Having regard to the factors in Rule 11-1, I exercise my discretion to award costs to SGI as the defendant.

(ii) The Appropriate Column

[109] The Tariff of Costs [Tariff] provides tables for calculation of costs. Schedule I "B" provides for fees payable to lawyers for proceedings in the Court of King's Bench. It lists steps in the litigation process with amounts recoverable under three columns. The informational note in the Tariff states that, "the appropriate column is based upon the complexity of the matter. Column 1 represents the least complex matter and Column 3 represents the most complex matter."

[110] In *1348623 Alberta Ltd. v Choubal*, 2016 SKQB 200 at paras 24-26, 94 CPC (7th) 210 [*Choubal*], Danyliuk J. held that the party seeking costs has the onus of justifying an award of costs on either of the higher columns:

> *2. What is the appropriate column on the tariff of costs on which to have the costs of this action assessed?*
>
> [24] Defendants' counsel suggests this was a lengthy and complex proceeding, such that column 3 of the tariff was appropriate. Under the current tariff (which is relatively new) column 1 is the default position. A party may justify an award and assessment on one of the higher columns. The onus is on the party seeking costs on the higher column to justify same.
>
> [25] In the "preamble" to Schedule I, "B", the general Queen's Bench tariff, it is indicated that "The appropriate column is based upon the complexity of the matter. Column 1 represents the least complex matter and Column 3 represents the most complex matter. The parties may agree upon the column to be applied failing which this must be decided by the Court."
>
> [26] These revised tariff provisions have received relatively little judicial interpretation as yet. The new tariff represents a fundamental change in the approach to costs, in that the amount in issue is not determinative of the column to be used to assess those costs. Complexity is the key.

[111] In *Thomas v Saskatchewan Indian Gaming Authority Inc.*, 2021 SKCA 164, 76 CCEL (4th) 37, the Court of Appeal addressed a ground of appeal that the trial judge had erred in awarding costs on Column 2 of the Tariff. Kalmakoff J.A., writing for the Court at para. 46, reviewed relevant law, quoting from *Choubal*:

> [46] Rule 11-1 of *The Queen's Bench Rules* speaks to a judge's discretion to award costs. The general rule is that the successful party in an action is entitled to costs. Rule 11-1(3)(a) provides that the court may "fix all or part of the costs with or without reference to the Tariff". Rule 11-1(4) lists a number of factors that the court may consider in exercising its discretion as to costs. Among others, they include the result of the proceedings, the amounts claimed and recovered, the importance of the issues, the complexity of the proceedings, and the conduct of the parties within the proceedings. As with the decision of whether to award costs, the decision as to which column of the Tariff should be used involves an exercise of discretion. In *1348623 Alberta Ltd. v Choubal*, 2016 SKQB 200, 94 CPC (7th) 210, Danyliuk J. succinctly described the factors to be considered in that respect:

[28] There is no "magic" rule to apply to determine costs. As stated in *Northland Material Handling Inc. v Parkland (County)*, 2012 ABQB 586 at para 26, 77 Alta LR (5th) 150: "Rather than one principle, the weight of the case law establishes that the facts and circumstances of each particular case must be assessed to determine whether a higher column or a multiple of a column is appropriate in that case". I agree.

…

[30] Our *Queen's Bench Rules* list some factors to consider in deciding what cost award to make. There is no corresponding list to determine which column of the tariff to use once that cost order is made. The tariff itself clearly imports complexity as the dominant consideration in selection of a column.

[31] Distilling the cases and considering the nature of our Rules and tariff, it strikes me that in determining on which column party-and-party costs ought to be awarded, the following factors should be considered:

(a) **Complexity of the case.** …

(b) **Importance of the case.** …

(c) **The duration and conduct of the proceedings.** …

(d) **The urgency of the matter.** …

(e) **The amount at issue.** …

(f) **Whether experts were involved.** …

(g) **Parity and expectations.** …

(h) **Access to justice.** …

(i) **Discretion and reasonableness.** …

(j) **Any other relevant matter.** …

(Emphasis in original)

[Emphasis in original]

[112] Here, SGI calculated costs under Column 3 on the basis that the action and trial were highly complex. The plaintiff asked that no costs be awarded. If costs were awarded, then she argued for Column 1 or 2 as appropriate (Plaintiff's Brief of Law at paras. 5 and 6).

[113] To decide on the appropriate column, I will review the factors from *Choubal* at para 31, which are quoted below, in relation to the facts of this case.

> ***(a) Complexity***
>
> [31] …
>
> (a) **Complexity of the case.** This would include several sub-considerations, such as the complexity and number of any issues of fact, law and evidence; the nature and number of witnesses and exhibits; whether novel or intricate points of law were raised; whether the case was markedly out of the ordinary; and the cooperation (or lack thereof) of counsel and/or the parties in streamlining the case. All of these bear on overall complexity, which the tariff itself highlights as the overarching consideration in determining the appropriate column.
>
> [Emphasis in original]

[114] As Danyliuk J. stated in *Choubal* at para. 26: "Complexity is the key."

[115] This action was an appeal under s. 191 of *The Automobile Accident Insurance Act*, RSS 1978, c A-35, against denial of benefits for injuries resulting from automobile accidents. The Amended Statement of Claim at para. 34 complicated the appeal by introducing claims for bad faith and breach of contract. The Amended Statement of Claim at para. 35 sought punitive damages.

[116] This was a complex case. The complexity includes the facts involving a dispute over causation of alleged injuries with medical evidence, the law, and procedure. The history of the litigation supports SGI's assertion that the litigation was

made more complex by the conduct of the plaintiff.

[117] This factor favours an award under Column 3.

(b) Importance

> [31] …
>
> (b) **Importance of the case**. Litigation is virtually always important to the parties involved. Consideration of that aspect of this criterion will seldom be overly helpful, much less determinative. However, consideration of the impact of the case to the community at large as well as the legal community will be of some importance. For example, a case may have important repercussions to policy and procedure within government or regulatory organizations. It may deal with how ordinary citizens may comport themselves within our society. As well, there may be importance to the matter in advancing the state of the law in a given area. The more such factors pertain, the more complex the case is.
>
> [Emphasis in original]

[118] This case was important to the parties. It likely has limited significance beyond the parties, apart from illustrating the challenges posed by some self-represented parties.

[119] This factor is neutral.

(c) Duration and Conduct

> [31] …
>
> (c) **The duration and conduct of the proceedings**. A trial may be long because it is complicated with many issues of fact and law, or it just may be long because there is substantial history to cover. Length alone cannot determine complexity, but in an age where judicial economy is assiduously pursued a

> long case may be indicative of complexity. As well, the manner in which the proceedings were conducted by counsel and/or the parties can complicate or simplify matters. Steps taken which shorten or lengthen (or simplify or complicate) the proceedings may affect complexity for the purpose of the application of the tariff.
>
> [Emphasis in original]

[120] This action was commenced in 2019. The Amended Statement of Claim refers to several motor vehicle collisions going back to September 9, 1997. It took several years to bring the action to trial, with extraordinary involvement of the Court in case management, as summarized in the history of the litigation in my decisions.

[121] The trial was scheduled for ten days. This is a long trial. While the plaintiff now says the trial should have been shorter, the length reflected the plaintiff's estimate of time to present her case and her failure to cooperate with SGI. As a result, SGI had to be prepared for the unexpected.

[122] This factor favours an award under Column 3.

(d) Urgency

> [31] …
>
> (d) **The urgency of the matter.** This may not apply to trials but there are numerous complex applications which are also urgent. Injunctions, receiverships and bankruptcies, *Anton Piller* and *Mareva* orders – these are but a few of the types of cases where counsel must "drop everything" and devote an intense effort to putting together comprehensive material in what is usually an extremely tight time frame. In the appropriate case this could push a matter toward more complexity and even into Column 3.
>
> [Emphasis in original]

[123] This factor is more applicable to applications where counsel must drop

everything to argue on an urgent basis, rather than trials. There was no particular urgency to this trial.

[124] This factor is neutral.

(e) Amount

> [31] …
>
> (e) **The amount at issue**. This court has moved away from an assessment of the amount of the claim or award as determining which tariff column is used. Rather, complexity is now the measure. Nevertheless the amount involved may play a role in determining the overall complexity of a particular matter. There can be an interplay between the amount involved and the concept of proportionality, which is set out in the Foundational Rules.
>
> [Emphasis in original]

[125] Here, the Amended Statement of Claim at para. 37 gives amounts for some of the claims. Those amounts total $1,921,324.12. This is a significant claim.

[126] This factor favours an award under Column 2 or 3.

(f) Experts

> [31] …
>
> (f) **Whether experts were involved.** Expert witnesses almost inevitably increase the preparation time of counsel, whether one is calling or responding to an expert witness. Again, merely because an expert witness testifies does not mean a case is complex but it is at least an indicator of some degree of complexity.
>
> [Emphasis in original]

[127] Both parties in this action had planned to call expert witnesses, in

particular to provide medical evidence. A *voir dire* would be required to qualify witnesses.

[128] This factor favours an award under Column 2 or 3.

(g) Parity and Expectations

> [31] …
>
> (g) **Parity and expectations**. While each case is different, the court should consider comparable awards and make the appropriate adjustments. This should have the effect of avoiding inconsistency amongst cost awards. Reasonable consistency will lead to litigants and their counsel being able to form reasonable expectations as to the potential cost consequences of litigation in a given range of circumstances.
>
> [Emphasis in original]

[129] The parties here did not point to awards of costs in comparable cases. From my experience as a trial judge, Column 2 or 3 might be expected.

[130] This factor favours an award under Column 2 or 3.

(h) Access

> [31] …
>
> (h) **Access to justice.** There is an inherent tension between a cost award which operates (in whole or in part) as an indemnity, and the objective of promoting access to justice. There is a balance to be struck, and achieving same will sometimes be difficult. If the effect of an established range of cost awards in a province is to discourage frivolous and baseless litigation, so be it. But if the effect is to prevent or deter reasonable and meritorious claims from being

> brought, that is something to be considered at a policy level.
>
> [Emphasis in original]

[131] This factor is concerned with awards of costs that deter valid claims and thereby impede access to justice. The plaintiff in this action says an award under Column 3 against her – as a self-represented party with disabilities – would be punitive.

[132] The plaintiff said she was exempted from costs by Chow J. in his unreported *Chow Fiat*. At paras. 4 and 63, Chow J. struck the plaintiff's Statement of Claim in its entirety as an abuse of process under Rule 7-9(2)(e) of *The King's Bench Rules*. Chow J., at para. 64, made no award of costs because the plaintiff was financially incapable of satisfying an award for costs:

> [64] Although the Applicant, Merck has been successful in these proceedings, I accept that the Plaintiff, Ms. Yashcheshen is financially incapable of satisfying an order for costs, and I decline to make any such order in the circumstances.

[133] In *Yascheshen v Teva Canada Ltd*., 2022 SKCA 49 at para 127, [2022] 8 WWR 60, varying *Saskatchewan v Yashcheshen*, 2020 SKQB 160, 3 CCLI (6th) 56, Ms. Yashcheshen's appeal against a $200 costs award on a vexatious litigant application was dismissed, stating that the financial circumstances of a litigant is a factor to be considered in awarding costs, but it is not a determinative factor:

> [127] Costs are a discretionary decision that fall within the purview of a judge hearing a matter. The financial circumstances of a litigant are a factor to be considered in awarding costs, but it is not a determinative factor (see Rule 11–1(4)).

[134] The Court of Appeal at para. 136 also made its own award of costs of $200 against Ms. Yashcheshen for her unsuccessful application to adduce fresh evidence for her appeal.

[135] Although no evidence was submitted on Ms. Yashcheshen's financial

capacity, I accept that the plaintiff is a person with limited means.

[136] This factor favours either no award of costs or an award reduced from Column 3 to Column 1 or 2.

(i) Discretion and Reasonabless

> [31] …
>
> (i) **Discretion and reasonableness.** While an examination of the tariff award on the three available columns should be performed, overall it does not strike me as reviewable error that the judge awarding costs take a wide perspective of the proceedings and determine if the overall award is fair and reasonable in the circumstances.
>
> [Emphasis in original]

[137] In awarding costs, the trial judge is required to exercise discretion in a fair and reasonable manner. An award of costs under Column 2 or 3 is, in my view, fair and reasonable, having regard to all of the circumstances.

[138] This factor favours an award of costs under Column 2 or 3.

(j) Other Relevant Matters

> [31] …
>
> (j) **Any other relevant matter**. This list is not exhaustive. Factors can arise which cannot presently be anticipated. This last criterion recognizes the wide discretion this court enjoys as to costs.
>
> [Emphasis in original]

[139] Based on my review of all of the factors, I am satisfied that Column 2 is the appropriate column for the award of costs. But for the limited financial means of the plaintiff, I would otherwise have awarded costs under Column 3.

(iii) Second Counsel Costs

[140] SGI was represented at trial by three lawyers. SGI asks for second counsel costs.

[141] Item 36 of Schedule I-B of the Tariff provides for "Counsel Fee at Trial to Second Counsel – in discretion of the Trial Judge, not to exceed ½ of the counsel fee to First Counsel, if considered necessary".

[142] Danyliuk J. considered granting second counsel fees in *Choubal* at paras 43-46. In doing so, he cited *Electronic Superstore Ltd. v Geransky Brothers Construction Ltd.* (1991), 90 Sask R 150 (QB) at para 32 [*Geransky Brothers*], where Baynton J. wrote "the determining factor is whether the presence at the trial of second counsel is reasonably required":

> [32] Both the plaintiff and the defendant Boychuk were represented by second counsel. Only the defendant Geransky was not so represented. In view of the fact that the defence was conducted primarily by the defendant Boychuk, this dissimilarly in the manner in which the defendants were represented in understandable. Schedule I of the Tariff of Costs makes provision for second counsel in important cases. Although all cases are presumably important to each litigant and counsel, the determining factor is whether the presence at the trial of second counsel is reasonably required. This involves a consideration of the importance of the issues at stake, the amount at risk, the complexity of the evidence, the length of the trial, and like factors. …

[143] The plaintiff disputes SGI's claim for second counsel costs. The plaintiff cited *Hill v Arcola School Division No. 72*, 2002 SKQB 156, 218 Sask R 82 [*Hill*] and *Geransky Brothers*.

[144] In *Geransky Brothers* at para 32, Baynton J. awarded second counsel costs, finding second counsel was reasonably required given the length of trial (three weeks scheduled), the large number of documents, and several witnesses.

[145] In *Hill*, Barclay J. cited *Geransky Brothers* at para 32 in awarding second

counsel fees, stating at para. 12 “I have no hesitation in finding that the presence of second counsel was reasonably required”:

> **3. Is the Board entitled to costs for second counsel?**
>
> [12] In *Electronic Superstore Ltd. v. Geransky Brothers Construction Ltd. et al, supra,* Baynton J. prescribed the guidelines to be used in awarding second counsel fees. At p. 159 he states:
>
> > ... Schedule I of the Tariff of Costs makes provision for second counsel in important cases. Although all cases are presumably important to each litigant and counsel, the determining factor is whether the presence at the trial of second counsel is reasonably required. This involves a consideration of the importance of the issues at stake, the amount of risk, the complexity of the evidence, the length of trial, and like factors.
>
> Here both the plaintiffs and the Board were represented by second counsel and both second counsel were actively involved in the trial. I have no hesitation in finding that the presence of second counsel was reasonably required. The issues at stake were of importance, there was a large sum of money involved, the trial lasted 27 half court days, before a jury, and the evidence adduced, which included numerous experts, was extremely complex. Furthermore, both liability and the quantum of damages were in issue.
>
> [13] The presence of second counsel did facilitate and expedite the trial for all parties involved. I accordingly award second counsel fees to the Board.

[146] The trial did not proceed in this case, so I cannot evaluate the performance of SGI’s counsel in examining witnesses. However, each of the three lawyers appearing for SGI made argument at trial or on this application. In *Tremblay v Anderson*, 2023 SKKB 164 at para 43, I awarded second counsel costs where two of the same three lawyers represented the defendant. From that and other experience with these lawyers, I am satisfied that they would have worked effectively as a team in representing SGI at trial, as they did in pre-trial proceedings and on these applications. The junior counsel

was not there to carry the bags for senior counsel.

[147] I am satisfied that second counsel costs are appropriate because the presence of second counsel was reasonably required, given the length of trial, number of records, and issues in play.

[148] I therefore exercise my discretion to rule that second counsel costs are properly included as part of the award of costs.

(iv) Conclusion

[149] SGI's application for an award of costs is granted, but the draft Bill of Costs filed on July 17, 2025, must be revised from costs at Column 3 to costs at Column 2. The claim for second counsel costs is granted. The draft Bill of Costs is otherwise approved, subject to any request for taxation.

DECISION

[150] The plaintiff's application to set aside the *Judgment* is dismissed.

[151] SGI is awarded costs of the application on Column 2, including second counsel costs.

[152] SGI's application for an award of costs of the action is granted on Column 2 of the Tariff, including second counsel costs.

[153] The Local Registrar is directed to return the Court's file to the Registrar of the Court of Appeal for Saskatchewan.

J.
D.N. ROBERTSON