Case Mail

The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
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R v M.G.S., 2021 SKCA 1

Jackson Leurer Tholl, January 4, 2021 (CA21001)

Criminal Law - Assault - Sexual Assault - Victim under 16 - Conviction - Appeal

The appellant appealed his conviction after trial in Queen's Bench by judge alone of committing sexual offences against two complainants who were sisters, aged 10 and 14 respectively at the time. He was convicted of committing: a sexual assault on the younger sister contrary to s. 271 of the Criminal Code; touching her for a sexual purpose contrary to s. 151; sexual assaults on the older sister between November 2012 and August 2015 contrary to s. 271, touching her for a sexual purpose contrary to s. 151; and during the same period, obtaining for consideration the sexual services of a person under 18 years of age contrary s. 286.1(2). The appellant was living in a common-law relationship with the mother of the two complainants. Both the complainants gave video-recorded statements to the police that were admitted into evidence at trial as part of their testimonies. The younger sister provided a description of the appellant cuddling with her in his bed while

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they were alone together at home and then touching her inappropriately and showing her a vibrator, at which point she ran out of the house. When the older sister heard what had happened, she began crying and asked if "it" had happened to her sister. She told the police that she was the victim of repeated sexual assaults by the appellant which began when she was 10 and ended when she was 13 that included penile penetration, the use of a vibrator and masturbating him. He threatened to withhold access to the home wireless if she did not cooperate. She had not disclosed the assaults because the appellant told her not to and because she thought that she would get into trouble and that no one would believe her. When the appellant testified, his version of the events involving the youngest sister differed from hers, saying that she sat on him while he was in bed having a nap but her demeanor changed when a vibrator used by him and his spouse rolled out from under a pillow. He denied that he touched the child for any sexual purpose and denied that he ever touched the older sister for a sexual purpose or had intercourse with her or bartered for sexual favours. The trial judge reviewed the principles set out in R v D.W. and found the children's evidence to be truthful and reliable. He rejected the appellant's denial of criminal misconduct and found that the presumption of innocence had been displaced. On appeal, the appellant's grounds, based primarily on the brevity of the trial judge's decision were that he erred in law: 1) by incorrectly applying the criminal standard of proof. Although the judge correctly instructed himself on the principles, he misapplied them. The judge obviously preferred the evidence of the Crown and that was the only reason he rejected his evidence. The judge reversed the burden when he assessed the appellant's evidence in light of the Crown's; 2) by unevenly scrutinizing the evidence. He submitted that the judge failed to critically assess inconsistencies in the children's evidence that warranted scrutiny which would have undermined the Crown's evidence; 3) by failing to provide adequate reasons to explain his guilty verdict such that the deficiency foreclosed meaningful appellate review; and 4) by failing to address prejudice suffered by him as a result of late disclosure. He argued that the timing of disclosure to him of communications between the complainants' mother and the police violated his s. 7 Charter rights. The appellant's counsel had not made a Charter application during the trial.

HELD The appeal was dismissed. The court found with respect to each ground that it was satisfied that the trial judge had not erred in law: 1) because he correctly applied the criminal burden of proof. He found the appellant guilty only after consideration of all of the evidence, including the appellant's testimony; 2) in his scrutiny of the evidence. There was no merit to the argument. This ground related to trial fairness and Mehari had established that uneven scrutiny cannot constitute an independent ground of appeal. If such an allegation is made, the appellant is required to identify something sufficiently significant in the reasons or record to establish that the trial judge employed a faulty methodology in deciding credibility, and in this case, the appellant had failed to make it out on the reasons or the record; 3) in providing adequate reasons. The judge's conclusion that the weight of the appellant's denial was overwhelmed by the truth of the children's evidence clearly indicated that he rejected the appellant's evidence. Read in the context of the evidence at trial and the submissions of counsel, his reasons were adequate; and 4) with respect to the late disclosure, because the

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defence did not ask for a decision nor did he make one. This ground raised a new issue on appeal. It would not allow the appellant to make a Charter argument because the evidence did not show a Charter breach, and there would be no miscarriage of justice if this ground were not considered, as he had not shown a reasonable possibility the non-disclosure affected the trial's outcome or the overall fairness of the trial.

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R v Morin, 2021 SKCA 3

Jackson Barrington-Foote Tholl, January 12, 2021 (CA21003)

Criminal Law - Firearms Offences - Acquittal - Appeal

The Crown appealed the Queen's Bench trial judge's decision to acquit the respondent of eight Criminal Code firearms charges and find him guilty of only one charge of possession of a shotgun shell while prohibited under s. 117.01 of the Code and for transporting it in a careless manner, contrary to s. 86(1) of the Code. A police officer stopped a vehicle in which the respondent was one of three passengers. The officer asked the respondent to leave the back seat of the vehicle while he was investigating because he had provided a false name. During the following five minutes, the other occupants remained in the vehicle unobserved by the officer. The respondent was arrested when the officer found that he was unlawfully at large and, incidentally to the arrest, searched the back seat of the vehicle and found a sawed-off shotgun loaded with a shell concealed under a jacket where the respondent had been seated. At the police station, a shotgun shell fell out of the respondent's clothes. The shell matched the one found in the shotgun. No fingerprints were found on the gun but the respondent's DNA was detected on the shell. At trial, the respondent applied for exclusion of the evidence, alleging that his ss. 8 and 9 Charter rights had been violated. The application was dismissed and the evidence applied to the trial proper. In his oral decision, the judge set out the nine charges and recapitulated the admissions made by the defence that the respondent was subject to a firearms prohibition and not able to hold a valid firearms licence. He summarized the facts and his Charter ruling and then found that the respondent was not in possession of the firearm because it could have been in the possession of one of the other occupants of the vehicle and been moved by them during the five-minute period and therefore the Crown had not proven six counts of the indictment. The respondent was found guilty of possession of the shell but because there was no evidence led to show that his possession of ammunition was obtained by the commission of an offence, he was acquitted of that charge. The Crown argued that trial judge erred: 1) by restricting his analysis to determining whether the respondent was in personal possession of the shotgun. He did not consider whether

the respondent was in joint or constructive possession within the meaning of s. 4(3) of the Code. The defence said that the Crown had not raised this at trial and sought a conviction on the basis of personal possession; 2) by failing to consider the evidence in its totality; and 3) by requiring proof that the respondent was in possession of the firearm in relation to the charge of being an occupant in a vehicle knowing there was a firearm in the vehicle.
HELD: The appeal was dismissed. The Crown's appeal of the acquittal pursuant to s. 676(1)(a) of the Code on a question of law was subject to the correctness standard of review. The court found with respect to each ground that the trial judge had not erred in law: 1) because his determination that it was possible for the gun to be in the possession of the other occupants and that it could have been moved when they were not under observation precluded a finding of possession under any of the three definitions of possession provided in s. 4(3), regardless of whether the Crown had not argued the respondent was in joint or constructive possession; 2) because his analysis was sufficient to demonstrate that he considered the effect of the totality of the evidence in that he reviewed the findings made in the voir dire and summarized them in the trial decision; and 3) because he had found he had a reasonable doubt that the respondent had knowledge that the firearm was in the vehicle, and under s. 94(1) of the Code, that was sufficient for an acquittal.

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Parsons v Burkart, 2021 SKCA 2

Jackson Ottenbreit Caldwell, January 12, 2021 (CA21002)

Family Law - Division of Family Property - Interim - Exclusive Possession of Family Home - Appeal

The appellant appealed the interim order of a Queen's Bench chambers judge made in July 2020 that granted the respondent exclusive possession of the parties' family home for the purpose of listing it for sale. This order amended one made in March 2020 in response to the same application by the respondent wherein a chambers judge had given the appellant exclusive possession of the home subject to the condition that he pay all mortgage and insurance payments, failing which the respondent was given leave to renew her application. When the appellant failed to fulfil the condition, the respondent renewed her application. The appellant filed an affidavit explaining that he had not made the payments because his business had been severely affected by COVID-19, but prior to the application he had brought all payments up to date. The chambers judge delivered his oral decision in favour of the respondent because the appellant had breached the condition of the previous order, although he took notice of the appellant's explanation. The judge ordered the appellant to vacate the

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home but gave him some time to make alternate living arrangements. The appellant argued that the chambers judge erred by: 1) failing to consider the impact of the pandemic on his business and his ability to make the payments; 2) failing to consider that the payments were current as at the date of the application; and 3) by making an interim disposition of the home in the circumstances where it was the only asset of value in the family property.
HELD: The appeal was allowed and the order set aside. The court found with respect to the first two grounds that they had no merit. The chambers judge took judicial notice of the effect of the pandemic on the appellant's business and he stated that he had read the appellant's affidavit so was aware of the evidence that the payments were up-to-date. Regarding the third ground, the judge's decision was discretionary and thus reviewed on the deferential standard. As well, his order was an interim one because it was part of the larger property family property proceedings and it was not the practice of the court to entertain appeals of same. In the circumstances, however, it made an exception and found that the judge exercised his discretion improperly. He failed to consider any of the numerous criteria required to make an order granting interim distribution of family property and his decision had the effect of a final order in that the respondent could sell the home. The disposition of such a major asset was usually left to trial. The parties were encouraged to proceed to pre-trial conference. It chastised the appellant for making a practice of bringing payments up-to-date immediately prior to court applications and warned him not to repeat such conduct. The respondent was also admonished for bringing a chambers application to the Court of Appeal to deal with and give direction concerning some of the same issues before the court in this appeal. The application was improper and an abuse of the court's process.

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R v Perry, 2020 SKQB 297

Mitchell, November 10, 2020 (QB20272)

Statutes - Interpretation - Summary Offences Procedures Act, 1990, Section 23

The appellant was convicted of driving without due care and attention contrary to s. 213(1) of The Traffic Safety Act. At his first appearance in Traffic Safety Court, he pled not guilty and a trial date was set for March 2, 2020. The appellant failed to appear and the Justice of the Peace (JP) entered a default conviction against him and fined him $280. The conviction was permitted under The Summary Offences Procedures Act, 1990 (SOPA). When he learned of the default conviction, the appellant filed a request for reconsideration and it was scheduled to proceed on March 20, 2020. As a result of COVID-19, the courthouses were closed by that date

and the appellant could not appear in person before the JP hearing his request. The JP denied the appellant's request and declined to direct a new trial on the basis of written materials filed by him. He appealed the decision pursuant to s. 813 of the Criminal Code and submitted as his grounds that he had missed the trial date because he entered its date incorrectly in his cell phone and that he was denied an in-person hearing of his reconsideration request due to COVID-19.
HELD: The appeal was dismissed. The court found that it could only interfere with a default conviction entered under SOPA on a very narrow basis, and that the failure of an accused to appear at trial through inadvertence, negligence or carelessness was not sufficient reason to set aside a default conviction. Under s. 23 of SOPA, there is no requirement for an oral hearing for a reconsideration request. The JP considered the same written materials regarding the facts and found them to be insufficient. It was appropriate for the JP to adjudicate the request as she did under SOPA on the basis of those materials and because of COVID-19.

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R v C.J., 2020 SKQB 318

Elson, December 4, 2020 (QB20313)

Criminal Law - Sexual Assault
Criminal Law - Reasonable Doubt - Credibility
Criminal Law - Elements of the Offence

The trial judge, as directed by the Supreme Court in R v Ewanchuk, 1999 CanLII 711 (SCC), was required to determine whether the element of actus reus in a sexual assault allegation had been proven beyond a reasonable doubt, or stated differently, whether the crown had proven to the required criminal standard that the complainant subjectively believed she had not consented to the sexual act she described in her evidence. The complainant testified that she was under the influence of alcohol to the extent that she was blacking out on and off during what she described in her evidence as sexual intercourse and cunnilingus with the accused. The accused testified that the complainant had indicated she desired sexual intercourse by her advances to him, and by saying "I want you to fuck me." The complainant admitted that she had no memory of the essential events leading to the sexual activity and testified that it was possible she may have consented to it, but she did not remember if she did. The only evidence about what happened was supplied by the complaint and the accused, they being the only persons present. The trial judge conducted a D.W. analysis of the evidence and considered the Criminal Code provisions relevant to the question of consent in sexual assault trials, including s. 273.

HELD: The trial judge ruled that he had a reasonable doubt with respect to the essential question of the complainant's lack of consent and found the accused not guilty. First, he turned his mind to the presumption of innocence, the reasonable doubt standard of proof, and its application to questions of credibility, which led him to review several case authorities in which the analysis in R v D.W., 1991 CanLII 93 (SCC) was applied, these being R v Ryon, 2019 ABCA 36, R v Levac, 2020 SKQB 171, and R v Panasiuk, 2019 SKQB 258. In instructing himself, the trial judge cautioned himself that credibility is not a contest between the accused and the complaint as to whose evidence is more believable, as such an approach ignores the fundamental principle of the presumption of innocence. A trier of fact must examine all the evidence at the trial to be satisfied with the guilt of the accused beyond a reasonable doubt. If he believes the accused's evidence, he must acquit him; if he is in doubt as to whom to believe, he must acquit; if he does not have a reasonable doubt based on the accused's evidence, he must then consider all the evidence to be satisfied with his guilt beyond a reasonable doubt. In this case, the trial judge needed to apply this analysis to the element of lack of capacity to consent. No evidence, including expert evidence, was called concerning the level of consciousness of a person in a blackout. The Crown failed to show the complainant was unconscious at the relevant time. The trial judge concluded based on the evidence presented as a whole that he had a reasonable doubt the complainant was in a state of unconsciousness or did not have an operating mind and so might have consented to the sexual activity described by the accused, there being no other evidence to raise a reasonable doubt that she did not consent.

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R v F.G.D, 2020 SKQB 321

Mitchell, December 7, 2020 (QB20314)

Criminal Law - Sexual Touching - Victim under 16
Criminal Law - Credibility and Reliability
Criminal Law - Reasonable Doubt

In a trial of offences under ss 151 and 271 of the Criminal Code, in which the Crown alleged that the accused was the person who had sexual intercourse with the complainant, a female person under the age of 16 years, the judge was required to rule as to whether the Crown had proven the element of identity: i.e., that the accused was the person who had sexual intercourse with the complainant. The other essential elements of the offence, including whether the touching was of a sexual nature, were not in issue. The question of consent was not in issue as consent is not a defence to the charge. Primarily, the judge was required to determine whether

the complainant's evidence was sufficiently credible and reliable to prove the essential element of identity beyond a reasonable doubt. At the time of the activity which led to the charge, the accused, J.D., was 21 years of age and the complainant 14. On the day of the unlawful act, the complainant visited at the home of her friend, T.D., J.D.'s sister. She did so regularly, and when she did, she brought large amounts of alcohol with her, which she and T.D. would consume while listening to music. She generally slept the night in T.D.'s bedroom when she visited and did not linger in any other part of the house. T.D. shared the house with her father, T.G.D., her mother, P.S., and J.D. At the time of the offence, T.D. and J.D.'s brother, B.J.D., was also staying in the house. T.G.D. and P.S. slept in a bedroom across the hall from T.D.'s bedroom. J.D. slept in a bedroom a floor below. The complainant testified that she had drunk at least the full contents of a 26-oz. bottle of whiskey, which caused her to be sick and throw up. She testified she blacked out on the floor of the bedroom with a bucket next to her. When she awoke, her leggings were pulled down to below her waist and someone was having sexual intercourse with her. This male assailant said "arch your back." She was lying on the single bed. T.D. was not there. She heard a noise across the hall and the male withdrew and left the bedroom. She saw him briefly. She stated the person she saw was J.D. The complainant did not go to the police until 18 months after the incident. At trial, J.D. testified on his own behalf, saying he had not been in the bedroom, but he did not say where he had been at the time. T.D. testified she had been in the bedroom and would have witnessed the incident, had it occurred, though there was evidence of vomit on her rug and the complainant being asleep on her stomach on the single bed. T.D. said J.D. was not home that night and neither were her parents, who both testified they were at home sleeping at the time. P.S. said she did not know anything about what happened until the preliminary hearing, though in her statement taken at the time of J.D.'s arrest, she referred to details of the incident she could not have known except from J.D. All D. family witnesses vehemently expressed on the stand that J.D. did not do anything to the complainant.

HELD: The trial judge found the accused not guilty, as he could not be certain that J.D. was the person who sexually assaulted the complainant, though he believed it was likely he had done so. He strongly emphasized the distinction between credibility and reliability as he was directed to do by the Court of Appeal in R v Wolff, 2019 SKCA 103, putting little weight on the evidence of the D. family, having concerns with the credibility or truthfulness of their evidence, given its internal and external inconsistencies. Though he found the complainant's evidence to be credible, he was not satisfied beyond a reasonable doubt that it was reliable and accurate. The complainant had little to do with J.D., only heard the offender speak briefly, and did not notice anything out of the ordinary about his manner of speaking. She had also waited 18 months to give a statement to the police, and her memory would have faded. She only saw the perpetrator's face very briefly, and the evidence about lighting in the room was vague. So, on an analysis under R v D.W., 1991 CanLII 93 (SCC), the trial judge ruled that: 1) he did not believe J.D.'s evidence; 2) he had no reasonable doubt arising from that evidence, and 3) on the evidence as a whole, including that of the complainant, and the possibility that B.J.D. was the offender, he could not find beyond a reasonable doubt that J.D. had committed the sexual assault.

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R v Wolfe, 2020 SKQB 324

Danyliuk, December 8, 2020 (QB20300)

Criminal Law - Criminal Negligence in the Operation of a Motor Vehicle
Criminal Law - Elements of the Offence

The trial judge was required to decide whether the Crown had proven the elements of the offence of criminal negligence causing death or injury in the operation of a motor vehicle. Evidence was led by the Crown establishing that the accused, an experienced professional driver of semi-trailer trucks, drove a Chevrolet truck westbound in the northeast lane of a divided four-lane highway, doing so for at least 200 yards; ignored signage indicating he was driving westerly in the eastbound lanes; ignored road line markings indicating he should not cross onto these lanes; and failed to react when the operator of a motor vehicle driving towards him easterly in the southeast lane flashed his high/low beams to alert him that he was driving in the opposite direction to that in which he should have been travelling. The evidence also proved he had alcohol in his blood and was alone in his truck. The accused, while operating his vehicle in this manner, collided head-on with a Toyota motor vehicle traveling eastbound in the same northeast lane of traffic in which the accused was travelling west. The collision was devastating since both vehicles were travelling at about the speed limit of 110 km per hour. Upon impact, the operator of the Toyota and the front seat passenger were killed, and the rear passenger was seriously injured. The accused was also seriously injured. The trial judge was required to decide whether the evidence proved beyond a reasonable doubt the actus reus and the mens rea of the offences. HELD: After reviewing the elements of the offence of dangerous driving, which is lower on the scale of what constitutes criminal departure from normal driving, the trial judge considered the actus reus and mens rea elements of the offence of criminal negligence in the operation of a motor vehicle, and in doing so was persuaded by the reasoning of the trial judge in R v Dunford that the actus reus of criminal negligence in the operation of a motor vehicle is proven by evidence which establishes beyond a reasonable doubt that an accused, having a legal duty to use reasonable care to avoid damage to others, operates a motor vehicle with a wanton and reckless disregard for the life or safety of other persons. The mens rea is proven by evidence which establishes beyond a reasonable doubt that the accused did so with a demonstrated marked and substantial departure from the conduct of a reasonable prudent driver. The trial judge in R v Dunford defined "wanton" to mean "heedless," "ungoverned," or "an unrestrained disregard for consequences;" and reckless as "heedless of the consequences, headlong, irresponsible." Whether there is an actus reus (criminal act), is to be

determined objectively, through the lens of a reasonable person, whereas the mens rea (intention) of an accused requires a subjective inquiry as to what an accused meant to do. The consequences of the actions of an accused are not to be considered as they cannot assist the trial judge in the analysis of culpability. The trial judge ruled that as a driver on the highway, the accused had a legal duty to other persons, and on the basis of the accused's pattern of driving as revealed by the evidence, both the actus reus and the mens rea of the offences of criminal negligence causing death and causing injury were proven beyond a reasonable doubt.

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De Lage Landen Financial Services Ltd. v Shewchuk, 2020 SKQB 332

Layh, December 14, 2020 (QB20304)

Contract - Conditional Sale - Farm Equipment
Contract - The Saskatchewan Farm Security Act

HELD: The chambers judge was required to apply s. 53 of the SFSA, which broadly allowed him to do what was just as between DLL and the Shewchuks, including ordering that DLL take possession of the equipment, but suspending the effect of the possession order pending payment of an amount by the Shewchuks. The Shewchuks were required to pay $10,000.00 to DLL before the expiry of two months, failing which the possession order would be executable without further process. If the payment were made, the matter was to be brought back before the chambers judge, and the Shewchuks would be required to convince him that they had a concrete plan to make the contracted payments and so stave off the loss of the equipment. The chambers judge was guided by the authority of Naber v John Deere Financial Inc., 2020 SKCA 94, which adopted the reasoning in Bartko v Odnokon Holdings Ltd., 2012 SKQB 262.

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R v R.C., 2020 SKQB 333

Popescul, December 16, 2020 (QB20317)

Criminal Law - Appeal - Conviction - Sexual Touching

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Medernach v Nutrien Ltd., 2020 SKQB 337

Currie, December 18, 2020 (QB20318)

Civil Procedure - Application for Summary Judgment - Cross-Examination

The plaintiff sued the defendants for wrongful dismissal and later commenced an application for summary judgment. In response, the defendants applied for an order permitting them to conduct cross-examination on the affidavits of the plaintiff and another person who had filed an affidavit in support of the plaintiff's application. The application for summary judgment was adjourned and the defendant's application was granted, and the court ordered the plaintiff and the other affiant to attend for cross-examination. The plaintiff then sought disclosure from the defendants and, finding their response unsatisfactory, he served a notice of application requiring disclosure and in the interim, took the position that it would be unfair, pursuant to Queen's Bench rule 5-5, to have to submit to being questioned before proper disclosure occurred.
HELD: The court ordered that cross-examination proceed. The plaintiff's argument was applicable only to examination for discovery of a party. Cross-examination on affidavits does not take the place of questioning. The defendants' right to cross-examine the plaintiff and the other affiant was not related to the question of the defendants' obligation to make full and proper production in the broader action overall, and the court's consideration of the plaintiff's application for production would not be affected by the outstanding summary judgment proceedings. The defendants' right to cross-examination as per the order was not affected by any outstanding issues of document production in the broader action.

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A.R.C. v K.M.M., 2020 SKQB 340

Goebel, December 21, 2020 (QB20320)

Family Law - Custody and Access - Surviving Parent
Family Law - Custody and Access - Persons of Sufficient Interest

The respondent mother lived in Alberta with her three-year-old daughter following the death of the child's father in July 2020. Two years prior to his death, he commenced a proceeding naming the respondent, alleging that she had relocated to Alberta with their daughter without his consent and applying for the return of the child. The court granted

an interim order specifying parenting time for each parent. The respondent returned with the child to Saskatchewan. No further steps were taken and the parties reconciled in 2019 and became engaged. The family lived together in Saskatchewan, where the respondent resumed primary care of the child while the father continued to work as a farmer. In September 2020, the petitioners, the niece of the deceased and her husband, commenced a second proceeding in which they sought sole custody of the child. They also applied without notice for an order seeking that the child be returned to Saskatchewan to reside in their care, which was granted pending the hearing of the previous application. In this application, they sought to be named as "persons of sufficient interest" (PSI) under s. 6 of the Act. In support of their application, they deposed that the child called them aunt and uncle. They had not had a close relationship with the child until she was 18 months old, when they arranged for her to spend regular time with them and their children for a period, but they severed the relationship because of allegations against her parents. The respondent applied for an order consolidating the two proceedings and a further application seeking an order terminating the 2018 interim order and a declaration pursuant to s. 4 of The Children's Law Act that she had sole custody of the child.
HELD: The court granted an order for consolidation of the proceedings under Queen's Bench rule 3-81. It granted the respondent's application to vacate the 2018 interim order and declared that she was the child's sole legal custodian. The petitioners' application to be named PSIs was dismissed. There was no evidence that the child viewed them as parental figures, nor did anyone else in the community see them as parental figures to the child. They did not support the child financially and were not named as guardians in her father's will. As a result of dismissing the petitioner's PSI application, it was unnecessary to consider the remaining issues. The petitioners were ordered to return the child to the respondent within 72 hours.

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Royal Bank v Strelioff, 2020 SKQB 339

Rothery, December 22, 2020 (QB20319)

Mortgages - Foreclosure - Judicial Sale - Costs - Real Estate Commission
Statutes - Interpretation - Limitation of Civil Rights Act, Section 8

This fiat was issued pursuant to an earlier fiat and is to be read in conjunction with it (see: 2020 SKQB 23). The plaintiff, Royal Bank of Canada (RBC) applied for and was granted an order nisi for sale by real estate listing in 2018. Its terms included that the real estate commission should not exceed five percent. In its application for the order confirming sale, the plaintiff's officer explained that the real estate agent agreed to pay one percent of the five percent to counsel for RBC. At the hearing, RBC's counsel attached a document entitled Commission Reduction Agreement and argued that the one percent of real estate commission that the realtor had agreed to pay to RBC out of the 5.0 percent commission he was entitled to charge pursuant to the order nisi for sale was a matter of contract between the real estate agent and RBC. Because the court had permitted a real estate commission of five percent, the proceeds of sale available for payment of the outstanding mortgage were exactly what the court allowed. The mortgagors were not prejudiced by this agreement between RBC and the realtor to compensate the solicitors for RBC for administrative services performed.
HELD: The court found that RBC was not entitled to one percent of the real estate commission, regardless of whether the realtor had agreed to it. The agreement was nothing more than a mechanism for RBC to recoup administrative costs for the collection of monies due under the mortgage. Judicial sale is an equitable remedy and subject to supervision by the court. The one percent fee that the real estate agent agreed to pay RBC transformed a percentage of the real estate commission from an allowable cost of

sale into compensation to RBC's for administrative services performed. That was not the type of cost referred to in the order nisi for sale by real estate listing. It was an amount collected by RBC in contravention of s. 8 of The Limitation of Civil Rights Act.

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Thorne v Thorne, 2020 SKQB 341

Currie, December 22, 2020 (QB20315)

Wills and Estates - Wills - Proof in Solemn Form

The applicant applied for a declaration under s. 37 of The Wills Act, 1996, that a document signed by her father, R.B. Thorne, was fully effective as though it had been properly executed as his will. The document was signed in 2014 in Honduras in the presence of two witnesses, but only one signed the document to indicate that he witnessed the signing. The respondents, Thorne's other children, opposed the application. They submitted that there were suspicious circumstances regarding Thorne's testamentary capacity at the time he signed the document and a trial should be held to prove the will in solemn form. The applicant and the respondents presented evidence that supported their contentions.
HELD: The application was dismissed. The court directed a trial of the issue of whether the document was Thorne's will. There were too many outstanding questions surrounding its signing for the court to be satisfied with respect to s. 27(1) of the Act.

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R v Raheem-Cummings, 2020 SKQB 342

Mitchell, December 23, 2020 (QB20316)

Criminal Law - Judicial Interim Release Pending Trial - Review
Statutes - Interpretation - Criminal Code, Section 492.3

The accused applied pursuant to s. 520 of the Criminal Code for a review of the decision of a Provincial Court judge that dismissed his application for bail and ordered him to remain in custody pending trial. The accused was caught during a surveillance operation of another person alleged to be trafficking in drugs. The accused was observed meeting with the person under investigation, obtaining drugs from him and placing them in his vehicle's trunk. The police arrested the accused and searched the vehicle, where they found a secret compartment containing drugs, cash, a pistol and ammunition. He was charged with possession of cocaine and fentanyl for the purpose of trafficking contrary to the Controlled Drugs and Substances Act; possession of currency exceeding $5,000 obtained from trafficking contrary to ss. 354 and 355 of the Criminal Code;

possession of a firearm contrary to s. 117.01 of the Code and failing to comply with a probation order contrary to s. 733.3 of the Code. The applicant, a 28-year-old African-Canadian man, was gainfully employed and resided in Toronto. He had struggled with drug addiction since he was 16. His criminal record as a youth contained three convictions that were more serious than the three he had as an adult. He argued at the hearing that because he suffered from asthma, COVID-19 posed a significant risk to his health if he continued to be detained in custody. The bail judge determined that the applicant had failed to demonstrate why his continued detention was not justified based upon the secondary and tertiary grounds set out in s. 515(10)(b) and (c) of the Code. Detention was justified under the secondary ground because of the applicant's criminal record and the epidemic of drug abuse in Saskatchewan and under the tertiary, because of the firearms charges against the applicant. The defence argued that the judge was required to consider the applicant as a member of a vulnerable population overrepresented in the criminal justice system pursuant to the recently enacted s. 493.2 of the Code. The judge acknowledged counsel's argument at the hearing, although he noted that there was not a large black population in Saskatchewan, but did not consider the provision in his decision. Further, the judge did not find the applicant's medical condition would tip the balance in favour of release. At the hearing of the review of the bail judge's decision, the applicant's girlfriend advised that she would act as his surety, he would live at her home in Ontario upon release and his family would post a bond of $10,000. As well, the applicant advised that he had an agreement with an Ontario company for the purposes of providing electronic monitoring of him.
HELD: The application was allowed. The applicant was released subject to 20 conditions of release, including electronic monitoring. The court found that it was entitled to review the applicant's request de novo because there had been a material and relevant change in circumstances since the bail hearing, as he now had a surety and a bond. As well the bail judge had erred in law in his interpretation of s. 493.2 of the Code when he failed to consider the relevance of the applicant's circumstances. The provision is mandatory and the judge appeared to believe that it had only localized operation to jurisdictions where there is a large African-Canadian population. Further, the judge appeared to suggest that the applicant's previous convictions for serious criminal offences obviated the need to consider s. 493.2. With respect to the court's de novo review pursuant to s. 520(10), it found that the applicant's detention was not warranted under either the secondary or tertiary grounds. Under the tertiary ground, it held that the public's confidence in the administration of justice would not be lessened by the release of the applicant in light of his chronic medical condition and the risk of exposure to COVID-19 while in custody, especially during the second wave, as well as his membership in a racialized group that fell within s. 493.2 of the Code.

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Dubois Estate, Re, 2020 SKQB 343

Robertson, December 24, 2020 (QB20326)

Estate Administration

This application on behalf of a prospective estate administrator concerned the interplay of s. 20(1)(4) of The Administration of Estates Act (AEA), s. 12(5) of The Queen's Bench Act (QBA), s. 3(4) of The Public Guardian and Trustee Act (PGTA), and Rule 16-12(2)(b) of The Queen's Bench Rules (QBR), with respect to the necessity and timing of serving proper notice on the Public Trustee where minors might be beneficially interested in the estate. In this case, the deceased died without a will, leaving two minor children surviving her. Her sister applied to be appointed administrator of the estate, valued at less than $ 25,000.00. By s. 20(1)(4) of the AEA, giving a bond was not necessary as the estate was valued at less than $25,000.00. There is no requirement that the Public Trustee be notified in such a case. The question to be resolved was whether the notice of the application for appointment as administrator was required to be served on the Public Trustee and whether the Public Trustee should be served prior to the

grant of letters of administration in the absence of specific legislation to that effect.
HELD: The chambers judge ruled that pursuant to s. 12(5) of the QBA, which imbued the court with overriding jurisdiction over all matters relating to estates, including the granting of letters of administration, and because s. 3(4) of the PGTA imposed a duty on the Public Trustee to act as official guardian of the interests of minors in estates, he was required to ensure that the Public Trustee was able to exercise its duty. The Public Trustee must be notified of the interests of the children. As such, notice in the prescribed Form 16-12, Rule 16-12(2)(b) QBR needed to be provided to the Public Trustee before letters of administration issued, and not after.

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Turpie Farms Ltd. v 613168 Saskatchewan Ltd., 2020 SKQB 345

Robertson, December 30, 2020 (QB20321)

Administrative Law - Appeal - Arbitration
Contract Law - Arbitration - Appeal - Leave to Appeal

The appellant applied for leave to appeal the decision of an arbitrator. The respondent opposed granting of leave as there was no jurisdiction for an appeal. The original principals of the corporate parties were brothers who decided to form a partnership in 1997 regarding their grain and cattle farming operation. The partners then dissolved the partnership in 2012 and entered into a partnership dissolution agreement. The appellant continued the grain farm operation while the respondent continued the cattle ranching operation. When they were unable to reach agreement over the distribution and valuation of the land, they agreed to resolve their dispute by arbitration. They signed an arbitration agreement that contained a limitation on appeal to questions of law and/or jurisdiction with the leave of the court in accordance with s. 45(2) of The Arbitration Act. They then signed a "terms of reference for arbitrator" (TORA) which described the issue for him to determine was whether the value of the farmland ought to be valued as at November 2012 or at current values, and his decision was to be binding. Included in the terms of reference was that the arbitrator's decision was not subject to appeal other than on a question of law pursuant to s. 45 of the Act. The arbitrator found the land in question had not become partnership property in 1997 and was not subject to division; the farm land had remained with the appellant and the ranch land stayed with the respondent, and the land should be valued at its current value. The appellant applied for leave to appeal the decision out of an abundance of caution, submitting that if the arbitration agreement and TORA were read together, then they might be reconciled by construing the intent to be an appeal on a question of law with leave.
HELD: The court found that leave was not required. It determined that the parties chose to change the ability to appeal in the TORA. Having been signed after the arbitration agreement, the TORA superseded the arbitration agreement with respect to any appeal. It expressly provided for an appeal on a question of law. The ability to appeal falls under s. 45(1) of the Act, which does not require leave of the court. The parties were left to schedule the hearing of the appeal.

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Shephard v 101093126 Saskatchewan Ltd., 2020 SKQB 346

Bardai, December 30, 2020 (QB20322)

Civil Procedure - Summary Judgment - Application to Strike Statement of Claim
Torts - Occupier's Liability - Lease

The plaintiff brought a claim on her own behalf and on behalf of the beneficiaries of the estate of her deceased common law spouse against multiple defendants: 1010093126 Saskatchewan Ltd., operating as the Whitewood Hotel (hotel); Hwa Sil Yeom and P.Y. Kitchens Ltd., owners and operators of a restaurant and bar located in the hotel; and two servers employed in the bar. The claim alleged that the deceased was served excessive amounts of alcohol before he drove his vehicle. He died in a collision shortly after leaving the bar. Regarding the hotel, the plaintiff asserted that the hotel was the operator and/or occupier of the bar and failed to train and/or supervise staff such that the deceased was over-served on the night in question. The hotel applied for summary judgment. It and the plaintiffs agreed for the purposes of the application that the deceased was in a spousal relationship with the plaintiff, had been over-served and his accident was caused or contributed to by the alcohol he was served at the bar. The hotel entered into a lease with the bar as tenant on September 15, 2015. An affiant on behalf of the hotel attested that the hotel wanted a restaurant and bar available to its guests but that it did not provide instruction as to how the bar would operate. It did not hire, pay, supervise or train the staff. The lease was terminated in January 2017 and the restaurant permit transferred by the Saskatchewan Liquor and Gaming Authority from the bar to the hotel the next month. The issues were: 1) whether this was an appropriate case for summary judgment and 2) whether the hotel was a joint occupier with the tenant of the bar. The plaintiffs contended that the hotel was the occupier or joint occupier of the bar, thereby attracting occupiers' liability for two reasons: by virtue of the control it exercised over the bar under the lease or otherwise and by virtue of being the holder of the permit; 3) whether the hotel was liable to the plaintiffs under The Alcohol and Gaming Regulations Act, 1997 (AGRA) or The Automobile Accident Insurance Act (AAIA). The plaintiffs argued that the hotel was a third party within the meaning of the AAIA and should be viewed as a "holder of a restaurant permit" pursuant to AGRA, and accordingly, they were entitled to maintain an action by virtue of The Fatal Accidents Act; and 4) was the hotel liable by virtue of having been assigned the permit for the bar in 2017 although the permit stated that the effective date was December 1, 2015?
HELD: The application for summary judgment was granted. The plaintiffs' claim against the hotel was dismissed. The court found with respect to each issue that: 1) this was an appropriate case for summary judgment because there was little dispute between the parties about the facts; 2) the hotel was not the occupier of the bar in the sense alleged in the claim because it had not hired, trained and supervised staff, nor obtained a liquor licence, nor ensured patrons were not over-served; 3) the hotel was neither a permit holder nor the occupier of the bar at the time of the accident and had committed no act or omission that might attract liability as an occupier or give rise to a claim under the AAIA; and 4) the hotel was not responsible for conduct that occurred a year before they became the permit holder in accordance with s. 69.1 of AGRA.

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JKT Holdings Ltd. v Aviva Canada Inc., 2020 SKQB 347

Robertson, December 31, 2020 (QB20323)

Civil Procedure - Class Actions - Application to Strike
Statutes - Interpretation - Class Actions Act, Section 4

The plaintiff filed a statement of claim brought under The Class Actions Act in April 2020. It claimed that the 24 defendant insurers breached insurance contracts with class members by failing to honour business interruption insurance coverage engaged by the COVID-19 pandemic. In August, one defendant applied for an order appointing a designated judge under s. 4 of the Act. In September another defendant's counsel sought directions from the Chief Justice of the Court of Queen's Bench on the applications and was advised that in the view of the Chief Justice, it was not necessary for the defendant to apply to him to designate a judge to hear an application to strike, nor did the plaintiff need to apply to have a judge designated to consider the certification application. Over the next two months a number of the other defendants filed notices of application seeking an order striking the claim without leave to amend or, alternatively, that it be stayed. The plaintiff filed an application without notice in November 2020 that sought leave for the appointment of a designated judge. The issues were: 1) should the applications be adjourned sine die, pending a decision on the applications for designation of a judge; 2) if not, does a judge sitting in regular chambers have jurisdiction to hear and decide applications to strike the claim brought under The Class Actions Act; and 3) if so, should the judge determine such applications to strike?
HELD: The plaintiff's application to adjourn sine die was granted pending a decision on the plaintiff's application to have a judge designated under the Act. The court reviewed the jurisprudence regarding designation of a judge for a class action certification hearing and noted that the Chief Justice held in Pambrun, following Duzan, that a party other than the plaintiff can apply for designation of a judge to consider a certification application. Regarding whether courts should hear preliminary applications involving class actions, the practice adopted in Knuth and Piett had been to leave those applications for the judge designated to hear the certification application. It found with respect to each issue that: 1) it would be appropriate in most cases to adjourn the applications to strike pending a decision on the application to have a judge designated, but here, it could be inferred that the Chief Justice chose not to exercise his authority to reassign these applications from regular chambers; 2) there is no bar against a judge in civil chambers hearing an application to strike a class action; and 3) it would adjourn the applications pending a decision on the application to designate a judge based on two of the multiple factors set out in Piett: it is the court's general practice to defer preliminary applications to a designated judge and the legislative policy of the Act as in s. 6(1)(a) expressly requires the designated judge to be satisfied that the pleadings disclose a cause of action.

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Parrish & Heimbecker Ltd. v TSM Winny Ag Ltd., 2020 SKQB 348

Elson, December 31, 2020 (QB20324)

Contract Law - Recognition and Enforcement of International Arbitration Awards

Parrish & Heimbecker Ltd. (P&H), a company purchasing grain, brought an application pursuant to The Enforcement of Foreign Arbitral Awards Act (EFAA) and The International Commercial Arbitration Act (ICA) to have an arbitration award made in the USA recognized and enforced as against TSM Winny Ag Ltd. (TSM), a grain producer located there. The EFAA and the ICA incorporate the provisions of the New York Convention, a treaty dealing with international recognition and enforcement of arbitration awards, and the Model Law, a best practices code "[reflecting] a worldwide consensus on the principles and important issues of international arbitration practice" (UNICITRAL), which were both ratified by Canada and adopted by Saskatchewan by way of the EFAA and ICA. The chambers judge referenced Yugraneft Corp. v Rexx Management Corp., 2010 SCC 19, in his review of the New York Convention and Model Law, as well as BWV Investments Ltd. v Saskferco Products Inc. 1994 CanLII 4557 (SK CA), Parrish & Heimbecker Ltd. v Bukurak, 2017 SKQB 322, 18 CPC (8th) 194 (Bukurak).and other Saskatchewan cases in his explication of the framework for the

recognition and enforcement of international commercial arbitration awards in Saskatchewan. P&H, pursuant to an arbitration clause in an alleged agreement for the purchase and sale of grain from TSM, sought arbitration from the National Grain and Feed Association (NGFA) pursuant to its Grain Trade Rules. TSM submitted to its jurisdiction for the purpose of contesting the existence of the agreement. P&H sought finding that a binding contract existed, including a valid arbitration clause, and sought damages resulting from its breach. The NGFA panel found, according to its rule concerning the confirmation of contracts, that a contract existed between P&H and TSM. By the rule, a contract was deemed to exist because TSM failed to immediately inform P&H that it disagreed that it existed. The panel, however, declined to make a damages award, ruling that pursuant to another grain trade rule, on the facts as found by the panel, TSM had not given P&H notice of its inability to comply with the contract, and so P&H was required to give TSM sufficient time to try to comply. As it had not done so, it cancelled the contract prematurely since there was still time and opportunity for TSM to comply with its obligations under the contract. P&H appealed to the NGFA appeal committee against the ruling that no monetary damages were to be paid to it. The appeal panel reversed the ruling of the arbitration panel on the question of the damages award on the basis that the term of the binding contract dealing with the rights of the buyer superseded the applicable grain trade rule. P&H, with the arbitration award of the NGFA in hand, applied to the court for its recognition and enforcement. TSM resisted the application again, claiming there was no agreement in writing as required by the EFAA, and claiming in addition that the application should be dismissed as no certified copy of the agreement to submit to arbitration had been filed with the court; and thirdly on the basis that the appeal committee of the NFGA had made its decision on submissions "not falling within the terms of the submission to arbitration" (Model Law Article 36(1)(a)(iii)).
HELD: The application was allowed subject to a short adjournment to allow P&H to file a certified copy of the agreement in writing for arbitration. The chambers judge found that: 1) The contract was formed through an exchange of texts between P&H and TSM, which texts, being electronic communications, could be interpreted as telegrams, the term used in 1958 in the New York Convention, which allowed contracts to be made by telegram. 2) The contract did not need to be signed by the parties to be binding, though the written pro forma terms, which included the arbitration clause, were included in it. Further, although no certified copy of the agreement in writing had been filed at court, he ruled that he would not dismiss the application for this procedural irregularity. 3) Though the parties to the appeal had not specifically addressed the issue upon which the appeal committee had overturned the NGFA arbitration panel - whether the contract, which specifically addressed the conditions of its cancellation, superseded the grain trade rule by which the buyer was prohibited from cancelling in the absence of notice by the seller of its inability to complete the contract - the chambers judge was not prepared to interpret Article 36(1)(a)(iii) against the applicant, given that the Model Law was to be interpreted liberally, and the overall intention of the Model Law was the efficient enforcement of international commercial arbitration awards.

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J.C. v S.O., 2020 SKQB 349

McCreary, December 31, 2020 (QB20325)

Family Law - Children's Law Act
Family Law - Access and Custody
Family Law - Interim Mobility

This interim application by S.O., the mother of M.C., a four-year-old child, was brought on the eve of S.O.'s relocation to British Columbia (BC) with M.C., so they could live with D.H. and his young son M.H. D.H. had arranged for a house and had obtained work there. He also had an extended family in BC prepared to welcome the new family. M.C.'s father J.O. had withheld him, not returning him after exercising a period of access. The chambers judge was required to decide whether the circumstances of the case met the high threshold against an interim order allowing M.C.'s move with his mother, the presumption being that such a drastic change in the interim was generally not in a child's best interests. S.O. and J.C. had lived together with M.C. for approximately two years after he was born. They separated when M.C. was 18 months old, and S.O. became his primary caregiver. No agreement or order was in place concerning M.C.'s parenting, but J.C. exercised parenting rights to M.C., though on an irregular basis. He had been convicted for assaulting S.O., which resulted in his being placed on a probation order with a no-contact order with S.O. and M.C., and a move on his own initiative to BC for three months. S.O. was left behind in Saskatchewan when D.H. and M.H. moved to British Columbia because of the last-minute withholding of M.C. by J.C. and the necessity of S.O.'s court application to allow their move to BC. As a result, she and M.C. had no place to live, and when S.O. lost her job, they were living on welfare. J.C. was not paying regular child support, claiming he was not working, though that was not proven.
HELD: Based on the authority of The Children's Law Act, which provides that the sole consideration in parenting cases is the best interests of the child, and after considering case authority interpreting the meaning of this concept, the chambers judge ruled that S.O. had met the high threshold of proof that the move to BC was in the best interests of M.C. He found he had no doubt that M.C.'s needs were being met almost exclusively by S.O., and that the uncontroverted evidence was that S.O.'s relationship with D.H. had the indicia of being a lasting one and would bring S.O. and M.H. out of the poverty in which they presently found themselves, which poverty was in large measure due to the actions of J.C., who was unwilling or unable to alleviate it. As to M.C.'s rights to access to J.C., the chambers judge found that, though the expense and inconvenience of travel was to be regretted, J.C.'s right to parent M.C. was not thereby curtailed.

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R v Roy, 2021 SKPC 4

Agnew, January 7, 2021 (PC21001)

Criminal Law - Long-term Offender - Sentencing
Criminal Law - Sentencing - Joint Submission

As itemized by the sentencing judge, the offender had a substantial criminal history of offending sexually against children by "hands-on" sexual assaults and by possessing child pornography. He also breached numerous s. 810 Criminal Code recognizances intended to prevent him from offending further in this manner by requiring him to participate in treatment and counselling and restricting his access to children and child porn. Between May 1, 2008 and February 22, 2018, among other offences, he committed a sexual assault against a three-year-old, two offences of possessing child pornography, and six counts of breaching s. 810 recognizances. On August 13, 2014, he was sentenced to a penitentiary term of 42 months, which he served to warrant expiry. He was released on a s. 810 recognizance, breaching it very soon after his release. Other than the May 1, 2008, sexual assault, he committed no further "hands-on" sexual offences. The predicate offences to which the offender pled guilty were again possession of child pornography and breaching a s.810 recognizance. The Crown-initiated proceedings to have the offender designated a long- term offender under Part XXIV of the Criminal Code, which, among other requirements, obligated the Crown to prove there was a reasonable possibility of eventually controlling his risk of re-offending in the

community. Crown and defence counsel came before the court with a joint submission by which it was agreed that the offender met all the criteria for designation as a long-term offender.
HELD: The sentencing judge was of the view that he did not have the jurisdiction to allow himself to be bound by a joint submission on the ultimate issue, that the offender met the criteria for designation as a long-term offender, and so ruled that he was required by law to make this finding himself, free from any agreement between Crown and defence. As such, he embarked on a detailed analysis of all the criteria, ultimately finding he was not satisfied there was a reasonable possibility of eventual control in the community of the risk of the offender re-offending sexually against children by possessing child pornography or by sexually touching them. Upon reviewing the sentencing materials, considering the submissions of counsel, and the law, and weighing a number of factors, including the offender's own statements that he preferred to remain in jail so did not see jail as a deterrent; his failure in the past while prohibited from possessing child pornography to resist his urge to possess it; the opinion of the court appointed assessor and that expressed in the Correctional Services of Canada records that extensive and intensive sexual offender treatment while in custody failed to be absorbed by the offender and did not prevent him from accessing child pornography; the failure of libido-reducing drugs to have any effect on his offending; the offender's contorted view of children as sexual objects; and the uncertainty of programming in the community sufficient to address his deep-set criminality, the sentencing judge came to the conclusion that he was not satisfied of the reasonable possibility that the risk of the offender doing serious harm to children could ever be controlled in the community, and so would need to sentence the offender for the offences for which he was convicted without recourse to Part XXIV of the Criminal Code.

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