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

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***T.S. v J.L.W.*, 2022 SKCA 35**

Caldwell Ryan-Froslie Leurer, 2022-03-16 (CA22035)

Family Law - Paternity Testing

The parties appealed a chambers decision requiring that blood or genetic testing be ordered pursuant to s. 48(1) of *The Children's Law Act, 1997* (CLA) (since repealed and replaced by *The Children's Law Act, 2020*) to determine paternity with respect to the respondent. The appellant, who is the child's mother, argued that the chambers judge erred by failing to give reasons why the respondent's action was properly constituted, by misapprehending evidence that she asserted establishes the respondent's improper motive for bringing the application, and by making an order

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contrary to the child's best interest. The appellant asserted that the respondent was abusive to her and that his motive for bringing the application was to control and harass her. The appellant asserted that the order is contrary to the child's best interest because regardless of paternity, the respondent should not have a relationship with the child given his abusive behaviour. The respondent cross-appealed, arguing that the chambers judge erred in not finding a presumption of paternity absent a genetic test. The respondent asserted that he and the appellant cohabited at the material time in accordance with section 45(1)(a) of the CLA.
HELD: The appeal and cross-appeal were dismissed without cost. The court concluded that the chambers judge acted within his discretion in ordering blood and genetic testing. The court rejected the appellant's argument that the respondent's proceeding was not properly constituted and that the chambers judge erred by failing to give reasons for finding that it was. The court found that the chambers judge had provided reasons, including that the respondent's proceeding complied with the relevant CLA provisions, the respondent had requested a declaration of paternity, and no other person was named as the potential father. The court rejected the appellant's argument that the chambers judge had misapprehended evidence. The court found that the chambers judge had properly considered the evidence regarding the respondent's treatment of the appellant and possibility of alternative motives for bringing the application. The court concluded that the chambers judge was within their discretion in determining that, despite these factors, there were legitimate questions regarding paternity. The court rejected the appellant's argument that the chambers judge erred in finding that the order for blood or genetic testing was in the child's best interest. In weighing these interests, the court referred to the *United Nations Convention on the Rights of the Child* and considered the implications of determining paternity, including the importance of information regarding familial background and medical history, and legal rights and obligations that the father and child may have if paternity were determined. In adopting the approach from *R.J.P. v N.L.W.*, 2013 BCCA 242, the court concluded that determining the appropriate parenting arrangement for the child is distinct from, and generally not relevant to, the question of whether genetic testing should be ordered. Regarding the respondent's cross-appeal, the court determined that there was conflicting evidence as to whether the parties were cohabiting at the time of conception, and it was therefore appropriate for the chambers judge to conclude that a presumption of paternity under section 45(1)(a) of the CLA could not be established.

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***R v Clark*, 2022 SKCA 36**

Ottenbreit Leurer Tholl, 2022-03-17 (CA22036)

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Family Law - Division of Family Property - Value of Family Home - Appeal

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Practice - Application to Strike - Frivolous and Vexatious/Abuse of Process

Practice - Pleadings - Striking Out - Abuse of Process

The accused, R.C., appealed his conviction of second-degree murder. The victim had died from blunt force trauma to the head. Two witnesses had been with R.C. and the victim the day of the victim's death. One witness observed R.C. striking the victim; the other witness identified R.C. from the victim's Facebook page after being interviewed by the RCMP. The issues for the court to determine were whether the trial judge erred by failing to address the frailties of eyewitness evidence in instructions to the jury, whether the trial judge erred by permitting bad character and post-conduct evidence without a voir dire, and whether the verdict was unreasonable.
HELD: R.C.'s appeal was dismissed by the majority of the court. R.C. argued the trial judge had failed to adequately caution the jury. The witnesses, on the night of the incident, had not previously met R.C. and were consuming drugs. R.C. argued that the witnesses would have been mistaken in identifying him. The court dismissed this argument as there is not a standard of perfection in charges made to a jury and the trial judge had adequately discharged the obligation to caution the jury on the frailties of eyewitness evidence. Similarly, the court found that the trial judge was not obligated to caution the jury about in-court identification as all eyewitness testimony was assessed by the jury for credibility and reliability. R.C.'s argument that the trial judge permitted bad character and post-conduct evidence without a voir dire was rejected, as the court found such evidence did not presumptively require a voir dire. Further, the bad character evidence in this case provided probative value towards R.C.'s motive for the attack on the victim. The verdict was not unreasonable. In assessing the totality of the evidence, the jury acted judicially as was expected of them. In dissent, the minority of the court would have allowed the appeal and ordered a new trial. Leurer J.A. found that the jury had not been sufficiently cautioned through a special warning, as contemplated by *R v Hibbert*, 2002 SCC 39, [2002] 2 SCR 445, on the frailties of eyewitness evidence and consequently, there was concern with the in-court identification of R.C.

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***Tysseland v Tysseland*, 2022 SKCA 39**

Richards Caldwell Kalmakoff, 2022-03-25 (CA22039)

Family Law - Division of Family Property - Appeal - Unequal Division
Family Law - Division of Family Property - Value of Family Home - Appeal
Family Law - Quantum of Spousal Support - Appeal
Civil Procedure - Costs - Appeal

L.D.T., the spouse of G.A.T., appealed the decision of a judge of the Court of Queen's Bench following a trial (trial judge) to the Court of Appeal (court) on a number of grounds, two of which the

Cases by Name

Administrative and Supervisory Personnel Association v University of Saskatchewan

D.D.C. v B.J.C.

Dolynchuk v McGowan

Fletcher-Tung v Tung

Gayk v Epic Alliance Inc.

Peressini v Hawes

R v Caissie

R v Clark

R v Johnson

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R v Purcell

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Sobeys Capital Incorporated (Safeway Operations) v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Locals 454, 480, 496 and 950

T.S. v J.L.W.

Tomcala v Input Capital Corp.

Tysseland v Tysseland

Yashcheshen v Teva Canada Ltd.

court considered at length. These were: first, whether the trial judge erred by dividing the value of the farmland and other property inherited by G.A.T. from his father O.T. unequally in his favour; and second, whether he erred in restricting the family home to the house and building and not including the full home quarter as divisible family property. The court reviewed the pertinent factual findings from the trial. L.D.T. and G.A.T. lived together since 1993 at the farm with O.T. They married in 1997 and intended to live in a town house in Eastend purchased by the parties before the marriage. In 1998, the parties separated, though they lived together intermittently thereafter. Upon separation, G.A.T. moved back to the farm to live with O.T. O.T. died in 2001. In accordance with his will, his farmland and improvements were bequeathed to G.A.T. The farmland included the home quarter on which the farmhouse was located. O.T.'s will expressly stated that "any benefit conferred [here]under was not [to] be considered matrimonial property." The parties separated for the last time in 2015. L.D.T. had petitioned for divorce and ancillary relief including a division of family property and spousal support in 2002 but did not advance the proceedings. In the interval, G.A.T. continued to farm, without any involvement from L.D.T., who made a small income from self-employment and automobile accident income replacement benefits. G.A.T. petitioned for divorce and ancillary relief in 2015. The court then reviewed the reasons of the trial judge, noting that he divided the farmland and improvements inherited by G.A.T. from O.T. 75% to G.A.T. and 25% to L.D.T., and that in doing so relied on the evidence at trial that G.A.T. and L.D.T. were separated at the time of O.T.'s death; O.T. had expressly stated in his will that nothing in it was intended to be interpreted as creating matrimonial property rights; G.A.T. and L.D.T. did not "co-mingle their respective finances", including by way of joint bank accounts or joint debts. With respect to the matter of the delineation of the family home to include only the yard site and not the full home quarter, the court observed that in coming to this conclusion, the trial judge did not turn his mind to the relevant provisions of *The Family Property Act* (FPA), being s. 2(1), "family home" and s. 22, but simply fixated on the evidence of the expert that the house and yard site had a value of $275,000.00.
HELD: The court dismissed the first ground of appeal but allowed the second. The court first reiterated the standard of appeal it was to apply in cases such as this where a judge is required to make numerous discretionary rulings, citing *Ackerman v Ackerman*, 2014 SKCA 137, for the proposition that the court will not interfere with the discretion of a trial judge except when he or she "abused his or her discretion by erring in principle, disregarding a material matter of fact, or failing to act judicially, or if the result is so plainly wrong as to amount to an injustice". Turning to the first ground of appeal, the unequal division of the inherited farmland, the court referred to ss. 21(2) and (3) of the FPA which permit a court to depart from an equal division of family property if it would be unfair and inequitable to do so having regard to a number of matters, including those referred to in the trial judge's reasons, and as he did turn his mind to these factors, given the "governing standard of review" it was open to him to do so without interference. Conversely, as to his determination of what constituted the family home, the court found that the trial judge omitted altogether to apply the definition of "family home" and s. 22 of the FPA in his reasoning and, as such, his decision was reviewable on this ground. The court therefore adjusted the equalization payment the trial judge had ordered.

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***Dolynchuk v McGowan*, 2022 SKCA 42**

Richards Whitmore Barrington-Foote, 2022-03-30 (CA22042)

Civil Procedure - Appeal
Civil Procedure - Evidence - Admissibility of Documents

The appellants appealed a decision of a trial judge that found in favour of the respondent against them. The appellants had sold a home with a deck that had not received a building permit. After taking possession, the respondent was advised by the municipality that the deck was not compliant with *The Uniform Building and Accessibility Standards Act*. The trial judge found in favour of the respondent and ordered $20,000.00 plus costs payable by the appellants for the defective deck. The issue for the court to determine was whether the trial judge erred in relying upon rules of evidence from Provincial Court and thereby improperly admitting expert evidence.
HELD: The appeal was allowed, and the respondent's claim dismissed. The trial judge erred in applying a relaxed and inappropriate standard for the admissibility of evidence. Further, the trial judge erred in admitting expert evidence in favour of the respondent. The expert evidence at trial had come by way of so-called expert letters that had been tendered by the respondent as full exhibits, without calling the authors of the letters to testify. The trial judge erred in relying on Rule 1-6 to admit evidence that was otherwise inadmissible.

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***Administrative and Supervisory Personnel Association v University of Saskatchewan*, 2022 SKCA 43**

Ottenbreit Whitmore Tholl, 2022-03-30 (CA22043)

Labour Relations - Employee Discipline - Arbitration - Appeal
Administrative Law - Appeal - Standard of Review

The Administrative and Supervisory Personnel Association (ASPA), the union grieving the termination of B.G., the coach of the University of Saskatchewan (U of S) men's volleyball team, appealed to the Court of Appeal (court) the decision of a judge of the Court of Queen's Bench (chambers judge) allowing the appeal of U of S from the decision of the arbitrator appointed pursuant to the collective bargaining agreement (CBA) reinstating B.G. to his position following his dismissal by U of S. The main ground of appeal

was that the chambers judge erred in principle by exceeding his review powers as pronounced in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 441 DLR (4th) 1 (*Vavilov*). The court canvassed the facts and background of the matter, the arbitrator's decision, and the decision of the chambers judge. B.G. was a successful volleyball coach for the U of S men's volleyball team since 1992. In 2016, he invited a player, M.M., to "redshirt" with the team (i.e., to practice with the team but not to participate in games). M.M. had been charged with sexual assault while playing with a team at another college (MHC) and had transferred to U of S. thereafter. B.G. had discussed the charge in a general way with M.M., who claimed he was innocent of the offence, and intended to plead not guilty. M.M. proved to be a model player and was given a position on the team. Contrary to his representation to B.G. that he intended to defend himself from the charge, he pled guilty and was sentenced to incarceration. The print media became aware of the situation. B.G. spoke to a media outlet about it, and the story was widely disseminated to the public at large and came to the attention of U of S personnel, who had a meeting with B.G., and soon thereafter terminated his employment. The dismissal letter stated the reasons for his termination. These related to alleged mistakes in judgment for recruiting M.M. knowing of the charge; by not informing the appropriate personnel about his recruitment of M.M.; by failing to consider "potential safety and reputational risks to student-athletes, Huskie Athletics, and the U of S as a whole;" and failing to consult with U of S personnel before speaking to the media. At the time of M.M.'s transfer, the MHC sent a form called an AEV to the U of S, which stated that M.M. would not be eligible to compete in any sports there but gave no reasons. B.G. was not aware of the AEV form. The U of S had no policy for recruitment of athletes. ASPA grieved the termination to an arbitrator pursuant to the CBA. The arbitrator disagreed with the U of S that B.G.'s lapses of judgment should have resulted in his termination, or any discipline beyond a warning. (See: *Administrative and Supervisory Personnel Association v University of Saskatchewan*, 2020 CanLII 49268 (Sask LA) (Arbitrator: William F.J. Hood, Q.C.) (arbitration decision). In his reasons, he found that B.G. had made lapses of judgment by not apprising the U of S of his recruitment of M.M. given his knowledge of the serious charge he was facing, but that he was not required to dig into the charge and "play detective." He also ruled that it was an error in judgment to not disclose the circumstances of M.M.'s recruitment to U of S in advance of speaking to the media since U of S was then unable to respond and diffuse the public backlash, which caused damage to the reputation of the university. Nonetheless, he went on to point out that the dismissal letter did not include as a reason for B.G.'s termination that he breached any rule or policy of U of S, and in fact there was no recruitment policy in place. He went on to impose a penalty of a warning. The chambers judge overturned the decision of the arbitrator and reinstated the dismissal. (See: *University of Saskatchewan v The Administrative and Supervisory Personnel Association,* 2021 SKQB 154 (chambers decision). The chambers judge stated that the arbitrator's reasoning was illogical as it related to his finding that B.G. was guilty of lapses of judgment but that these were not serious enough to warrant dismissal, and as such, his decision did not meet the *Vavilov* test of reasonableness.

HELD: The court allowed the appeal, set aside the decision of the chambers judge and reinstated the arbitration decision, finding that the chambers judge's review of the arbitrator's decision amounted to an impermissible trial *de novo* consisting in large measure of rulings about what he believed the arbitrator should have looked at and not whether he properly conducted his inquiry in accordance with the legal framework dictated by B.G.'s terms of employment and the dismissal letter itself. Among other areas of concern, the court pointed to the chambers judge's view that the arbitrator should have taken more stock in whether B.G. had delved sufficiently into the details of the sexual assault with M.M. The court agreed with the arbitrator on this point, that no policy or rule or the dismissal letter itself required B.G. to be a private investigator and that it would in fact have been inappropriate for him to cross-examine M.M. about the charge. What is more, the court ruled that as the arbitrator had concluded B.G. failed to exercise reasonable judgment by not reporting the particulars of M.M.'s recruitment to U of S, it was superfluous for him to look into what else B.G. should have done to determine that he needed to report to appropriate personnel.

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***R v Johnson*, 2022 SKCA 45**

Richards Schwann Kalmakoff, 2022-04-08 (CA22045)

Criminal Law - Aggravated Assault
Criminal Law - Aggravated Assault - Sentencing - Dangerous Offender
Criminal Law - Appeal - Sentencing - Dangerous Offender

G.J. sought an appeal of two aggravated assault charges (assault charges). He further sought to have the court set aside his designation as a long-term offender or, alternatively, for the court to shorten the ten-year long-term supervision order (LTSO) that he is subject to. G.J. was previously convicted of the assault charges, and had pled guilty to other criminal charges, which resulted in him being sentenced to seven years of incarceration followed by the LTSO. G.J. successfully appealed one of the assault charges (see: 2018 SKCA 28). When that matter was remitted to the Court of Queen's Bench (lower court), G.J. pled guilty and was sentenced to time served. The lower court refused G.J.'s request to reduce the term of the LTSO as it found it had no authority to do so. The issues for the court to determine were whether G.J.'s convictions for the assault charges ought to be overturned and whether the LTSO ought to be set aside or reduced in duration.
HELD: G.J.'s appeal was dismissed. G.J. had been convicted of the assault charges in 2017 and had concurrently pled guilty to other charges. He was successful in appealing one of the assault charges in 2018, when the court overturned his conviction and ordered a new trial. Critically, G.J. took no issue with his designation as a long-term offender in arguments at the 2018 appeal. In 2019, after one of the assault charges had been successfully appealed and remitted back to the lower court, G.J. entered a guilty plea. A joint submission was made. It involved a request that G.J. receive no additional punishment for the count of assault and that he be sentenced for time served. The lower court accepted this submission but did not accept the submission of G.J. to reduce the time of his LTSO pursuant to s. 753.4 of the *Criminal Code*. The lower court concluded that s. 753.4 was not applicable in G.J.'s circumstances as he was not subject to additional time in custody. G.J. appealed beyond the lower court's decision and sought to have both assault charges overturned. The court concluded that G.J.'s appeal of the assault conviction, which had been upheld in 2018, could not be re-opened. The court is *functus officio* with respect to this conviction. The court considered the assault that G.J. pled guilty to in 2019 and noted that G.J. had filed his notice of appeal late. The court analyzed five factors to consider in allowing a late filing of a notice of appeal and dismissed G.J.'s appeal of the assault charge. The court further dismissed G.J.'s request to set aside the LTSO. The court identified the challenges to G.J.'s position: G.J. was in effect seeking to re-open his 2018 appeal, where the court is *functus officio*, or receive leave from the court to extend the time for filing against the long-term offender designation that had emanated from his original proceedings. G.J.'s submissions to shorten the LTSO were also dismissed. The court determined that for s. 753.4 of the *Criminal Code* to be engaged, an offender must face new and additional time in custody. In the present case, G.J. was not subject to any further time as his guilty plea before the trial court for the 2019 assault proceedings was for time served.

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***R v Caissie*, 2022 SKCA 48**

Ottenbreit Whitmore Tholl, 2022-04-13 (CA22048)

Criminal Law - Appeal - Conviction
Criminal Law - Murder

J.D.C. appealed his convictions after trial before a Court of Queen's Bench judge (trial judge) sitting alone for the first-degree murder of his girlfriend, C.K., pursuant to s. 235(1) of the *Criminal Code* and offering an indignity to human remains pursuant to s. 182(b) of the *Criminal Code* (see: 2018 SKQB 279 and 2019 SKQB 3). The court determined that integral to the conviction of J.D.C. was a voir dire conducted for the admissibility of evidence before the trial judge. C.K.'s car had been found abandoned in a slough. There was a windshield washer fluid container, termed as a "jug", that had been jammed between the brake pedal and the accelerator pedal, pushing the accelerator pedal down. C.K.'s body was found in a portion of an abandoned farmyard. The RCMP installed a tracking device on J.D.C.'s vehicle. The tracking device recorded J.D.C.'s movements from August 21, 2011 to December 15, 2011. There was not enough information to arrest J.D.C. from movements recorded by the tracking device. Subsequently, J.D.C. was subject to a "Mr. Big" undercover operation commenced in 2015 as he was believed to have played a part in C.K.'s death. The police set up an elaborate operation in which they posed as a criminal organization that sought to engage J.D.C. in apparent illegal dealings. Central to the organization's representations to J.D.C. was they expected honesty from him. During the undercover investigation, dozens of police officers had 49 separate interactions with J.D.C. During those interactions, J.D.C. confessed on six separate occasions to killing C.K. Further, with J.D.C.'s confessions compared with his movements on the tracking device, it was determined that J.D.C. had been in the vicinity of where C.K.'s body was discovered on multiple occasions in 2011 and his movements corroborated other statements he had made to the undercover officers regarding C.K.'s death. J.D.C. was convicted by the trial judge. J.D.C. appealed the voir dire and trial decisions based on evidence, namely his confessions, being presumably inadmissible. The issues for the court to determine were (a) did the trial judge err by admitting the confessions? and/or (b) did the trial judge err by misapprehending evidence related to the location of C.K.'s body and the jug found in the vehicle? HELD: J.D.C.'s appeal was dismissed. On the issue of whether the trial judge erred by admitting the confessions, J.D.C. advanced several arguments. He submitted that the judge erred in finding his confessions were reliable and therefore admissible because the trial judge failed to take into the account the significant financial and other inducements that had been offered to him as part of the undercover investigation. He submitted that the trial judge failed to properly deal with the evidence regarding the presence of the jug and the placement of C.K.'s body. Further, he submitted that the trial judge found evidence to be confirmatory of the confessions when it was not so. He also argued if the trial judge had applied the test from *R v Hart*, 2014 SCC 52, [2014] 2 SCR 544 (*Hart*), it would be apparent that his confessions ought not be admitted into evidence. The court confirmed that the law governing the admissibility of confessions made in Mr. Big operations is set forth in *Hart*. The court elaborated that the first prong of the test involves four steps of analysis. The second prong of the *Hart* test involves the potential abuse of process by the police. J.D.C. did not advance arguments that the police had been abusive in their processes. On the argument of financial inducements, the court confirmed the trial judge's finding that J.D.C. was neither desperate nor destitute and had other means to support himself; the financial inducements did not make his confessions unreliable. J.D.C. proffered that the jug found in C.K.'s vehicle was exculpatory evidence. The court rejected this argument. The placement of the jug, as found by the trial judge, did not contradict the confessions J.D.C. had made, although the placement of the jug was an anomaly. J.D.C.'s confession regarding the placement of C.K.'s body

was not vague but rather relatively specific given the layout of the farmyard. J.D.C.'s arguments respecting evidence being non-confirmatory were rejected by the court. J.D.C. alleged that seven of 17 separate pieces of confirmatory evidence referred to the in the trial judge's voir dire decision were inconsistent with his confessions. The court assessed the individual items that were alleged to be non-confirmatory, and while noting exceptions, acceded to the findings of fact made by the trial judge. The trial judge did not misapprehend evidence with respect to the jug or the placement of C.K.'s body: these arguments were dismissed as was the totality of J.D.C.'s appeal.

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***Yashcheshen v Teva Canada Ltd.*, 2022 SKCA 49**

Caldwell Ryan-Froslie Leurer, 2022-04-18 (CA22049)

Practice - Application to Strike - Frivolous and Vexatious/Abuse of Process
Practice - Pleadings - Striking Out - Abuse of Process

A.Y. appealed an order issued by the Court of Queen's Bench (lower court) in which her request for an adjournment was denied; her statement of claim against Teva Canada Inc. (Teva) was struck; affidavits filed by her were struck, and she was declared to be a vexatious litigant pursuant to Rule 11-28 of *The Queen's Bench Rules*. Further, the lower court dismissed her request to find that Rule 11-28 violated her equality rights as protected by the *Charter* and cancelled all her fee waiver certificates which had been granted pursuant to *The Fee Waiver Act*, SS 2015, c. F-13.1001. A.Y. was also ordered to pay costs. A.Y. commenced an action against Teva, a pharmaceutical manufacturing company, with respect to drugs she received for "off label" use for the treatment of Crohn's disease. Teva brought an application to strike the statement of claim filed by A.Y. and to declare her a vexatious litigant. The Government of Saskatchewan commenced an action against A.Y. seeking an order pursuant to s. 6 of *The Fee Waiver Act* to cancel all fee waiver certificates to be heard concurrently with Teva's application. A.Y., in response to the applications, filed a notice of constitutional question challenging the validity of Rule 11-28 and s. 6 of *The Fee Waiver Act* on the basis that her equality rights were infringed by Rule 11-28 and her liberty was impugned by s. 6. On the date of hearing, A.Y. sought an adjournment that was refused. A.Y. then asked the Justice of the lower court (chambers judge) to recuse herself, as she had previously been a lawyer employed by the government. The chambers judge refused this application. A.Y. then left the courtroom as the applications proceeded. Before the Court of Appeal, A.Y. sought to have fresh evidence admitted. In addition to the question of fresh evidence, the court considered whether the chambers judge erred: (a) by refusing to grant A.Y.'s request for an adjournment; (b) by striking the statement of claim as disclosing no reasonable cause of action; (c) by dismissing the constitutional questions raised by A.Y.; (d) by striking affidavits filed as expert evidence by A.Y.; (e) by declaring A.Y. to be a vexatious litigant; (f) by cancelling all of A.Y.'s fee waiver certificates; and (g) by ordering costs against A.Y.
HELD: A.Y.'s appeal was allowed in part. The lower court overlooked an amended statement of claim that had been filed by A.Y. in response to Teva's application to strike. The pleading ought to have been considered. The lower court also erred in striking affidavits completed by individuals proffered as experts by A.Y. The expert affidavits may fall within the "participating expert" exception to the inadmissibility of opinion evidence. The lower court further failed to consider whether s. 6 of *The Fee Waiver Act* offends s. 7 of the *Charter*. The court further felt that the vexatious litigant order is overly broad. It was also inappropriate for the lower court to cancel

A.Y.'s fee waiver certificates. On the issue of admitting fresh evidence, the court rejected A.Y.'s arguments to permit documents that showed the chambers judge had previously been employed by the government. The documents were available to A.Y. prior to the hearing, so they were not "fresh evidence," and the court rejected the premise that a lawyer employed by the government later appointed to the bench would be biased. The chambers judge exercised her discretion fairly in rejecting A.Y.'s adjournment request. A.Y. before the chambers judge argued that she required an adjournment to accommodate a disability. No such request for accommodation was properly before the chambers judge. The chambers judge erred, however, in striking A.Y.'s statement of claim. A.Y. had filed an amended statement of claim that the chambers judge did not consider in her decision as she believed it was unfiled. The court reasoned that a plaintiff should be given an opportunity to amend their pleadings to correct deficiencies before those pleadings are struck. The chambers judge overlooked whether s. 6 of *The Fee Waiver Act* offends s. 7 of the *Charter*; accordingly, this issue was remitted back to the lower court. The court found that the chambers judge erred in striking affidavits filed by A.Y.'s physician as they fit in the "participating expert rule:" an example of this is a treating physician who has formed opinions based on their participation in the events underlying an action, as in A.Y.'s case. The court found that the lower court was overly broad in ordering that A.Y. required leave to file "other applications," as that would have the effect of preventing future interlocutory motions; no evidence had been received that A.Y. had been bringing frivolous interlocutory applications. The court removed this reference from the vexatious litigant order issued against A.Y. The court carefully interpreted s. 6 of The *Fee Waiver Act* and s. 12 of the corresponding regulations to find that the lower court did not have jurisdiction to cancel all the fee waivers issued to A.Y.: cancellations must be done on a case-by-case basis. A.Y.'s appeal of costs was dismissed; her argument that indigent litigants are not subject to costs was rejected by the court.

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***R v Purcell*, 2022 SKQB 66** (not yet on CanLII)

MacMillan-Brown, 2022-03-11 (QB22080)

Criminal Law - Assault - Sexual Assault - Sentencing
Constitutional Law - Challenge to *Criminal Code* Provision

K.P. was convicted of sexual assault following his trial before a judge of the Court of Queen's Bench (trial judge). The trial judge turned to sentencing K.P., who then applied for a declaration that s. 742.1(f) of the *Criminal Code* (Code) breached his s. 7 *Charter* "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice," and so was of no force and effect. His argument was that s. 742.1(f) of the Code foreclosed a conditional sentence as a sentencing option, even if the trial judge had found she would have imposed such a sentence if available to her. In approaching the question of the constitutionality of s. 742.1(f) of the Code, the trial judge proceeded to first sentence K.P. as though s. 742.1(f) had not been the law. In that way, she reasoned, it was open to her to examine whether she was satisfied that K.P. had jumped the required statutory hurdles which would permit her to impose a conditional sentence and, if she so found, she would then hear the *Charter* challenge. In sentencing K.P., she referred to the factual findings she made at trial, the materials filed, and counsel submissions. K.P. and the victim, K.M., were intimate partners at the time of the offence. The two of them went to three isolated locations where K.P., who was 32 years of age, attempted to engage K.M., who was 19, in sexual activity, through

persistent grabbing of her buttocks inside her pants, and touching her groin, legs and stomach outside her clothes, lifting, pushing and grabbing her, forcing her to kiss him, and attempting to pull down her pants. She did not consent to this activity and repeatedly said so and showed as much by pushing him away and walking away from him. He controlled her movements as he had driven her in his car to the last location. In her victim impact statement, K.M. expressed that her mental health had been seriously affected by the offence. K.P. had one minor, dated offence on his record.
HELD: In her determination of a fair and fit sentence for this offence and this offender, the trial judge first directed herself to the purpose and principles of sentencing as contained in ss. 718 to 718.2 of the Code, and in particular, the principles of proportionality, parity, aggravating and mitigating circumstances, and the objectives of denunciation and deterrence. As to the statutory conditions mandated by the Code with respect to sentencing an offender to a conditional sentence, she looked at the relevant provisions of s.742.1 of the Code which she observed required her to consider whether she was satisfied that in this case: a fit and fair sentence was less than two years; whether a conditional sentence "would not endanger the safety of the community;" and whether a conditional sentence "would be consistent with the fundamental purpose and principles of sentencing set out in sections 781 and 718.2." She was satisfied, upon a review of the cases filed by the Crown and defence, that in order to stay within the bounds of parity, she was to find that the offence in this case was not "fleeting," was serious because of K.P.'s persistence in violating K.M.'s bodily integrity, but was not so grave as to warrant a two-year term of imprisonment since such a sentence would be too close to one for penetration of a victim, which had not occurred in this case. She went on to find that judging from his low recidivism risk as shown in filed risk assessments, she was satisfied that K.P. would not endanger the safety of the public if in the community. As to whether she was satisfied a conditional sentence was consistent with the fundamental principles of sentencing, she said she was not so satisfied, since: a conditional sentence could not impose punitive sanctions sufficient to denounce K.P.'s conduct or deter other like-minded persons from committing this type of offence; the facts of the offence were not minor; the offence involved an "intimate partner" and was therefore statutorily aggravating; the age difference between K.P. and K.M.; and the significant impact of the offence on K.M. She imposed a sentence of 10 months' incarceration and 18 months probation. As she decided a conditional sentence was not available to K.P., she stated the constitutional challenge was moot and needed not be argued.

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***Gayk v Epic Alliance Inc.*, 2022 SKQB 68** (not yet on CanLII)

Rothery, 2022-03-14 (QB22072)

Business Corporations Act - Remedies

The applicants sought an order to appoint an inspector to investigate the respondents in accordance with s. 222 of *The Business Corporations Act*, RSS 1978 (SBCA) and s.229 of the *Canada Business Corporations Act*, RSC 1985, c C44 (CBCA). The applicants were two of over 120 investors in the various respondent companies. Collectively, the applicants invested over $10 million in the respondent corporations. The applicants all constituted security holders under the SBCA and the CBCA. On October 21, 2021, the Saskatchewan Financial and Consumer Affairs Authority (FCAA) issued a cease trade order against all but one of the respondent corporations. The grounds for the order included that the respondents were found not to be registered as "dealers" or "advisors" under *The Securities Act, 1988*. On September 22, 2021, the respondents executed an undertaking agreeing to not

conduct any further trading in securities. The respondents continued to advertise and engage in trading securities after executing the undertaking and after the cease trade order was in place. The respondents continued to reassure security holders that their shares were unaffected by financial difficulties that occurred after the cease trade order was issued. On January 19, 2022, the investors were informed that the respondents were bankrupt. On February 2, 2022, the respondents filed documents dissolving several of its corporations. The applicants were unable to obtain information from the respondents regarding the security holders' financial positions or their investments.
HELD: Relying on the factors set out in s. 222(2) of the SBCA (s .229 of the CBCA) and additional factors outlined in *Millership v HyperBlock Inc.*, 2019 ONSC 2903, the court determined that an investigation into the respondents was appropriate. The court found that the respondents met the test for oppressive and unfairly prejudicial conduct including outlined in s. 222(2)(b) of the SBCA (s.299(2)(b) of the CBCA) in that they had traded and advised in securities without registration and failed to file requisite preliminary prospectus. Adding to the appearance of oppressive and unfairly prejudicial conduct was evidence supporting that the respondents liquidated inventory and assets for cash, dissolved respondent corporations under statutory declaration that those respondents had no assets or liabilities, and engaged in dishonest methods to manipulate the real estate market the security holders had invested in. The court found that the respondent directors met the test of persons connected with the respondent corporations who have acted dishonestly under s. 222(d) of the SBCA (s.229(d) of the CBCA) by engaging in conduct contrary to *The Securities Act, 1998*, and by making false representations to security holders that the respondents were in compliance with the FCAA and that their security was not in jeopardy. Relying on s. 224(1.1) of the SBCA (s. 231(2) of the CBCA), the court determined that the FCAA's ongoing investigation into the respondents did not bar the court from appointing an inspector.

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***R v Kay*, 2022 SKQB 72** (not yet on CanLII)

Danyliuk, 2022-03-17 (QB22081)

Criminal Law - Dangerous Driving - Impaired
Constitutional Law - *Charter of Rights*, Section 11(b) - Delay - Trial within a Reasonable Time
Constitutional Law - *Charter of Rights*, Section 24(1) - Stay of Proceedings
Criminal Law - Evidence - Judicial Notice

The accused, T.K., was initially charged with driving while impaired by alcohol or a drug and driving above the legal limit for blood alcohol. The Crown proceeded by summary conviction on the two charges, but later added a charge of dangerous driving which was "out of time" to proceed summarily and as a result the Crown proceeded by indictment on all three charges. The "face of the record" showed that the charges arose from an event which occurred on October 26, 2018, and the initial information was sworn January 2, 2019; that the prosecution involved many court appearances and cancelled trial dates; and that the trial in the Court of Queen's Bench was ultimately scheduled to commence March 24, 2022. Prior to the start of the trial, T.K. brought a *Charter* application before the trial judge for a stay of proceedings pursuant to s. 11(b), alleging that his right to be tried within a reasonable time was infringed.
HELD: The trial judge allowed the *Charter* motion, ruling that T.K.'s right to be tried within a reasonable time was infringed and that

the charges be stayed pursuant to s. 24(1) of the *Charter*. The trial judge reviewed the record of the proceedings and the affidavit material filed by the defence, noting that the Crown filed no evidence capable of countering the application. He then applied the available evidence, the materials on record and submissions of counsel to the applicable law, which he recognized to be *R v Jordan*, 2016 SCC 27 (*Jordan*) and cases which followed and developed its principles, including *R v Coulter*, 2016 ONCA 704, which he stated provided a useful framework upon which to base his analysis. He summarized the steps he was to take in his analysis as follows: 1) calculate the total delay; 2) subtract the defence delay to arrive at the "net delay;" 3) compare the net delay to the *Jordan* "presumptive ceiling," which in this case was 30 months; 4) if the net delay exceeds the presumptive ceiling, look at whether any exceptional circumstances occurred as defined by *Jordan* which would rebut the presumption, these being of two types, discrete events and particularly complex cases; 5) subtract the delay from discrete events from net delay to see if "the presumptive ceiling has been reached"; 6) if so, ask whether the case was particularly complex such that the time the case has taken is justified and the delay is reasonable; and 7) if the remaining delay falls below the presumptive ceiling, has the defence shown the delay is unreasonable? In going through these steps, the trial judge first calculated the total delay. He found that the correct time for the clock to start was the date the original information was sworn, being January 2, 2019, and that the clock should stop on the day of the Queen's Bench trial start date of March 24, 2022. The total delay he found was 38 months and 23 days. He then determined that there had been no defence delay, for a number of reasons. Contrary to the Crown's contention that the defence caused delay by not waiving T.K.'s right to require the Crown to proceed by indictment instead of summarily, he found that the Crown's position was untenable since T.K. was perfectly in his right to have the Crown proceed in the manner it had chosen. He found the net delay was identical to the total delay; and that therefore the net delay exceeded the presumptive ceiling by 8 months and 20 days. Turning to the matter of whether any discrete events as defined by *Jordan* were to be subtracted from the net delay, the trial judge dismissed all of the Crown's arguments concerning what it posited were discrete events, in particular, that COVID-19 was such a one. The trial judge commented that the Crown had not led any evidence in support of its position that COVID-19 caused trial delay in this case, and that he declined its invitation to take judicial notice that such was the case, citing *R v Kedoin*, 2020 SKQB 12. He said it was not self-evident that COVID-19 had resulted in trial delay in this case and evidentiary proof was required, and what is more, making such a finding without evidence would be an unreasonable extension of the concept of judicial notice. Lastly, he dismissed any consideration that this case was particularly complex, as defined by *Jordan*. The Crown had failed to show any "hallmarks" of complexity including the nature of the evidence and issues which required inordinate trial or preparation time. He then concluded that given his findings, *Jordan* required him to enter a stay of proceedings.

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***Fletcher-Tung v Tung*, 2022 SKQB 78**

Turcotte, 2022-03-23 (QB22090)

Family Law - Child Support - Variation

The petitioner, D.N.F., sought to vary the terms of a consent child support order that was a final order pursuant to a divorce, which became effective on October 30, 2018. The petitioner, the former wife, sought a variation effective August 1, 2020, based on the respondent's increase in income. The respondent, T.K.C.T., the former husband, did not oppose the application but he sought a

variation of the order to August 1, 2019. The parties separated on February 26, 2017. On August 22, 2018, the parties entered an interspousal contract that resolved all outstanding issues. The order for child support reflects the terms of the interspousal contract. A term of the child support order permits a review of child support on an annual basis. The issues for the court to determine were whether: (a) the respondent's income should be considered from August 1, 2019, or August 1, 2020; and (b) the matter ought to be determined on affidavit evidence.
HELD: The court was not able to determine retroactive child support to be payable from T.K.C.T. to D.N.F. as there was conflicting evidence in the filed affidavits. The court directed the parties to move the matter on to pre-trial and trial in accordance with The Queen's Bench Rules when they were ready to do so. The court outlined the procedural history of the matter, which had resulted in various appearances in chambers and several affidavits being filed. The court observed a procedural irregularity in the petitioner's claim: the application should have been brought under Rule 15-26 and not Rule 15-49 as filed. The court established that it had jurisdiction to consider child support retroactively. The child support order included a review clause requiring the parties to adjust child support annually. This negated the need for a material change of circumstances. Further, the *Divorce Act* at s. 17(1)(a) permits the court to make an order varying, rescinding or suspending, retroactively or prospectively, a support order or any provision of one. The court then considered whether the parties had complied with Rule 15-26 to 15-29 to follow procedural directions and observed that the parties did not comply with these directions, which contemplate the exchange of financial information. The court was not able to adjust child support as there was incomplete and contradictory information provided by the parties. The respondent had provided some medical information that was categorized as a bald assertion. Further, the respondent had not provided information from a private company controlled by him. The court was concerned that the parties had failed to provide any meaning information on the circumstances of the children. Accordingly, the matter was directed to pre-trial and trial.

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***D.D.C. v B.J.C.*, 2022 SKQB 79**

Turcotte, 2022-03-23 (QB22091)

Family Law - Custody - Jurisdiction
Family Law - Custody and Access - Shared Parenting

The petitioner father, D.D.C., applied pursuant to the *Divorce Act*, RSC 1985, c 3 (2d Supp), and s. 8 of *The Children's Law Act, 2020*, SS 2020, c 2, for an interim parenting order for the two children of the marriage. D.D.C. married the respondent, B.J.C., in August 2012. Aside from one year, the parties continuously resided in Lloydminster, Saskatchewan from 2013 – November 2020. D.D.C. is a power engineer who works in Blue Ridge, Alberta on a shift schedule. B.J.C. is a licensed practical nurse who works three days at the Lloydminster Hospital. After the parties separated, B.J.C. moved to Marwayne, Alberta, to reside with her boyfriend on an acreage. Marwayne is approximately 43 kilometres from Lloydminster. Commencing in December 2020, the parties began a shared parenting regime. The parties shared parenting rotation started to match D.D.C.'s work schedule in February 2021. The parties' eldest child attended kindergarten in Lloydminster. B.J.C. unilaterally registered the child for grade 1 in Marwayne. B.J.C. further registered the youngest child in preschool in Kitscoty, Alberta which is situated between Lloydminster and Marwayne. The

parties agreed to continue shared parenting following D.D.C.'s work schedule. The main issue for the court to determine is whether the respondent should be able to change the children's residence from Lloydminster to Marwayne. If the children's residence is changed to Marwayne, a secondary issue of the location of the pickup of the children arises.
HELD: The court determined that the parties shall have interim joint decision-making responsibility and interim shared parenting time, continuing to follow D.D.C.'s work schedule. The children's residence for interim school registration purposes only shall be with the respondent in Marwayne; in all other respects, the children will be residents of Saskatchewan. On the issue of where pickup of the children should be, the court ordered that D.D.C. will drop off and pickup the children from B.J.C.'s care on his way to and back from work in Blue Ridge. The court applied the principles of the *Divorce Act*, despite D.D.C. applying under two Acts. As a preliminary matter, the court considered whether B.J.C.'s move can be considered a "relocation" as contemplated by the *Divorce Act*. The court found as there was no parenting order in place, the strict provisions of relocation in the *Divorce Act* did not apply. B.J.C. taking up residence in Marwayne was not technically either a relocation or a change of place of residence within the meaning of the *Divorce Act*. For further guidance, the court examined additional jurisprudence to evaluate contextual and child-centric factors affecting the parties' two children. The court determined, based on the best interests of the children, that the parties shall have interim joint decision-making and shared parenting. The court did not frame the request of B.J.C. to have the children reside in Marwayne as a "mobility" issue. The examination centered on residency. As the parties had maintained shared parenting between both communities, the court did not disrupt this regime. The court also ruled that D.D.C. will be responsible for picking up and dropping off the kids to match his work schedule. The court did not want to see disruption to the eldest child continuing her studies in Marwayne: accordingly, it was ordered that the child would continue her schooling in that community. The court strongly advised the parties to cooperate in making the interim order that will now be in place for both children. As there was mixed success, no costs were ordered.

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***Peressini v Hawes*, 2022 SKQB 80**

Labach, 2022-03-24 (QB22092)

Family Law - Jurisdiction
Family Law - Division of Matrimonial Property

The petitioner wife, J.S.P., filed a petition seeking the remedy of an unequal division of the parties' family property. The property is 28.73 acres of vacant land, purchased with the respondent's father, on the southeast shore of St. Brieux Lake in the RM of Lake Lenore, Saskatchewan. The respondent, J.A.H., was served with the petition but did not respond. Subsequently, J.A.H. filed this application before the court's consideration. J.A.H. sought an order to strike J.S.P.'s petition in favour of Alberta having jurisdiction. The parties reside in Alberta. They filed for a joint divorce in Calgary in October 2019. A divorce judgment was granted in November 2019. Following the divorce, J.S.P. brought actions in Alberta for division of matrimonial property, changing a child's name, and an action for parenting time with the children. The parties' divorce judgment was set aside by an Alberta judge who further amalgamated the three actions. The parties continued to participate in proceedings in Alberta. The issues for the court's determination were: (a)

does the Saskatchewan Court of Queen's Bench have territorial competence over the proceeding brought by J.S.P.; and (b) should the Saskatchewan Court of Queen's Bench decline to exercise its territorial competence in favour of the Alberta Court of Queen's Bench?

HELD: The court declined to exercise territorial competence in the proceeding brought by J.S.P. in Saskatchewan on the ground that Alberta is the more important forum in which to try the proceeding. The court commenced its analysis by first noting that J.A.H. had filed his application incorrectly: he was seeking a final order but filed pleadings as though he sought an interim order, and further, he did not bring his application to strike in compliance with Rule 7-9 of *The Queen's Bench Rules*. The court determined there was no prejudice and proceeded with its analysis. The court considered *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 (CJPTA), and with the family property situated in Saskatchewan, determined that Saskatchewan does have territorial competence with J.S.P.'s petition as the family property is in Saskatchewan. On the second issue of whether the court should decline to exercise its territorial competence in favour of Alberta's Court of Queen Bench, the court examined factors listed in s. 10 of the CJPTA, namely: (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses in litigating in the court or in any alternative forum; (b) the law to be applied to issues in the proceeding; (c) the desirability of avoiding multiplicity of legal proceedings; (d) the desirability of avoiding conflicting decisions in different courts; (e) the enforcement of an eventual judgment; and (f) the fair and efficient working of the Canadian legal system as a whole. The court applied the facts in this case, accepted J.A.H.'s arguments and declined to exercise its jurisdiction over J.S.P.'s petition. The arguments in favour of J.A.H. included: the parties live in Alberta; their children live in Alberta; most of the family property is in Alberta, and the parties have attorned to Alberta for the amalgamated proceedings. J.A.H. was awarded costs of $750.00.

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***Sobeys Capital Incorporated (Safeway Operations) v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Locals 454, 480, 496 and 950*, 2022 SKQB 85**

Gerecke, 2022-03-28 (QB22093)

Labour Law - Arbitration - Judicial Review

The applicant, Sobeys Capital Incorporated (Safeway Operations) (employer), sought a judicial review of an arbitration decision granted in favour of the respondent, Saskatchewan Joint Board, Retail, Wholesale and Department Store union, Locals 454, 480, 496 and 950 (union). The arbitrator found that the employer had violated the collective bargaining agreement (CBA) between them. The union filed a grievance when the employer required or permitted a bakery supplier to "re-line" shelves. The parties entered the CBA that spans the period June 2014 to June 2022. The term "re-line" was not defined in the CBA. The term in dispute that led to the grievance filed was Article 7.15 which read "Except prior to new store openings and one (1) week thereafter or during store remodeling to a maximum of one (1) week, suppliers' representatives, other than rack jobbers or employees of soft drink, salted snacks, bread or bakery, will not price products in stores, stock or replenish merchandise other than to rotate or check code dating on shelf stock." For further interpretation of the parties' dispute, the arbitrator also relied on Article 4, which established rights for the employer's management to make discretionary decisions. The parties offered different interpretations of "re-lining"

shelves. The union witness described it as an elaborate process that is ordinarily done by its members. The employer's witness described the process as something that takes 60-90 minutes and represents small changes to shelves such as removing seasonal products. While the arbitrator listed evidence received, he did not make any definite findings of fact. He concluded that the bakery attending the employer's location contravened Article 7.15: re-lining was more than a simple process as described by the employer. The arbitrator determined that the bakery's actions were not permitted by the CBA. The issues for the court to determine were: 1) What principles govern interpretation of the CBA? 2) Did the arbitrator misdirect himself as to what was in issue? 3) Does the decision depart sufficiently from the standards set out by Jackson J.A. in *Amalgamated Transit union, Local 615 v Saskatoon (City)*, 2021 SKCA 93 (*Amalgamated*) to make it unreasonable? 4) Should effect be given to the employer's *de minimis* argument? 5) Does Article 4 of the CBA affect the analysis? 6) What remedy should be granted?
HELD: The arbitrator made numerous errors, resulting in his decision being quashed. The court rejected the reasoning process followed by the arbitrator. A new hearing with a different arbitrator was ordered. The court considered the issues it outlined sequentially. It first determined that the principles that govern the interpretation of the CBA are a literal, reasonable view of what the contract states. On the second issue, the arbitrator focused on the wrong issue. By focusing on re-lining, the arbitrator missed that the analysis to be undertaken is whether the bakery's actions were permitted under Article 7.15. In applying the Amalgamated standard, the court concluded that the arbitrator's misguided questions rendered his decision as unjustifiable. While the employer expressed that re-lining was a simple process, or *de minimis*, the court rejected this argument as no authority was provided by the employer. The court did not view Article 4 as determinative of the matter before the arbitrator, and lastly, the court concluded that the only remedy that was appropriate was quashing the arbitrator's decision and remitting the matter back to another arbitrator.

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***R v Wolfe*, 2022 SKQB 86**

Gerecke, 2022-03-30 (QB22075)

Criminal Law - Identification - Circumstantial Evidence
Criminal Law - Threats to Cause Bodily Harm - Elements of Offence
Criminal Law - Exceptions to Hearsay Rule - Admissions

The trial judge in the Court of Queen's Bench rendered his decision following the trial of the accused Nathan Wolfe (N.W.) on three charges, all of which required the Crown to prove beyond a reasonable doubt that N.W. had threatened to cause death and bodily harm to either D.S. or C.S. D.S. was the complainant against N.W. with respect to charges including aggravated assault. The Crown alleged that N.W. threatened D.S., a "justice participant," and that he attempted to interfere with the course of justice by threatening death or bodily harm to her if she testified against him. The Crown's evidence offered as proof of the elements of these offences consisted of the testimony of the investigating officer, Sgt. M.I., who was qualified to provide expert opinion evidence concerning the slang parlance of street gangs, a series of six screen captures from a Facebook account in the name of Nate G. Wolfe (FB posts), a series of nine recorded telephone calls from N.W.'s account made by a "common male voice" from the Saskatoon Correctional Centre where N.W. was a remand prisoner during the relevant time (calls), and an agreed statement of facts admitting the authenticity of the telephone recordings and that the caller in them was the same person in all the calls. N.W. did not

admit he was the person who made the calls. No direct evidence was presented by the Crown tending to prove that N.W. was the caller.
HELD: The trial judge convicted the accused of all three offences with which he was charged. Though the trial judge thoroughly reviewed the proof requirements of the elements of all three offences, and the admissibility of the FB posts and calls as admissions against interest, he was cognizant that his main task was to determine whether the Crown had proven beyond a reasonable doubt that the common male voice in the calls was the accused N.W. and to do so solely on the basis of circumstantial evidence of identity. After “recounting” the FB posts and the calls, he oriented himself as to the law by which he was to guide himself in his determination concerning the application of the standard of proof beyond a reasonable doubt to circumstantial evidence, in particular R v Villaroman, 2016 SCC 33, as considered in R v Power, 2022 SKCA 24. He recognized that it was his role as trial judge to decide on the evidence whether the only reasonable inference to be drawn from that evidence was that N.W. was the caller and the author of the FB posts, and that he need not give effect to an alternative inference “simply because it is impossible to exclude it entirely.” With this in mind, the trial judge concluded that by comparing the details of the calls and the FB posts with an understanding of the slang parlance used by the caller and the author of the FB posts, the numerous indications by the caller that he was Nathan Wolfe, that the numerous dictations by him of the wording he wanted to appear on his Facebook page which appeared there almost verbatim, and the general theme of the calls and the Facebook entries concerning D.S. being a “snitch,” a “rat,” and that she should be “rolled up,” caused him to find beyond a reasonable doubt that N.W. was the caller making the threats of death or bodily harm to her.

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***Tomcala v Input Capital Corp.*, 2022 SKQB 89**

Tochor, 2022-03-30 (QB22076)

Civil Procedure - Redaction of Documents

The defendants in this matter applied to a judge of the Court of Queen’s Bench (chambers judge) to allow them to redact certain portions of 90 documents previously filed in court as part of a Book of Documents. The applicants believed the documents contained irrelevant and potentially harmful information concerning non-parties to the action.
HELD: The chambers judge allowed the application and approved most of the proposed redactions, which he stated met the test set out in McGee v London Life Insurance Company Limited, 2010 ONSC 1408 (McGee), which was that portions of documents sought to be redacted be both irrelevant to the fact- finding analysis, and excising them was necessary because “there was a real likelihood of serious harm to an important interest if the information [was] disclosed.” The chambers judge first dealt with the meaning of relevancy, agreeing with the reasoning in S.B.R. v L.L.R., 2018 SKQB 177 that relevancy involves considerations of “proportionality, common sense, fairness and some degree of genuine relevance.” The chambers judge agreed with the plaintiffs about the general rule: that where relevant, the full document must be disclosed, and that Rule 5-4 of The Queen’s Bench Rules did speak to some extent to privacy interests. He went on to find, however, that there were exceptions to the general rule, as explained in McGee, and in this case as the redacted portions concerned irrelevant material which would potentially harm non-parties to the litigation, that material should be redacted. The excised portions of the documents consisted of the names of other customers of the

defendants and their business dealings with the defendants. The chambers judge determined that these dealings were in no way factually relevant to the proceedings.

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