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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Schwann Tholl Kalmakoff, 2022-10-05 (CA22108)

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The appellant appealed a chambers decision regarding division of family property. The appellant and respondent had cohabitated 23 years, during which time they owned and operated a farming corporation and acquired several residential properties. Pursuant to an

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interim order, an auction company paid the respondent approximately $550,550 from the sale of the farming corporation's machinery and equipment. At the time the decision appealed from was made, the equipment sale proceeds payment was not accounted for in the corporation's financial records and no tax form had been issued from the corporation. At pre-trial, the parties reached a settlement of property division issues. The minutes of settlement stated the appellant would retain the home quarter, all farmland and the house in Unity and the respondent transfer her interest in these properties to the respondent. The respondent would keep the condo and sell her corporate shares to the appellant for $325,552 and be released from outstanding debts of the corporation, if any. The minutes stated the transfer of corporate shares should result in no tax implications for the respondent. The appellant was to pay to the respondent an equalization payment of $390,000. After the minutes of settlement were signed, an issue arose concerning responsibility for income tax for $224,998 that was taken out of the farming corporation to settle the family property dispute. The appellant took the position that because the equipment sale proceeds had been paid directly to the respondent, she should be deemed to have received the money from the corporation as a dividend. The respondent took the position that the appellant should pay the tax because he took the money out of the corporation to cover his personal debt to her. The parties were not able to resolve the issue. The respondent filed an application seeking to enforce the minutes of settlement and decide the tax issue. The chambers judge decided the minutes of settlement were enforceable as a judgment and the appellant bore the tax liability. The Court of Appeal considered: 1) did the chambers judge lack the jurisdiction to make the decision regarding tax liability; 2) did the chambers judge fail to provide sufficient reasons; and 3) did the chambers judge err in her interpretation of the minutes of settlement? HELD: The appeal was allowed, and the matter remitted to the Court of King's Bench for continuation of the pre-trial conference. Division of family property decisions are only set aside on appeal where there has been an error of law, a palpable and overriding error of fact, or an abuse of discretion. Interpretation of minutes of settlement involves issues of mixed fact and law unless there is an extricable question of law. 1) The appellant argued the chambers judge did not have the jurisdiction to decide who bore the personal income tax liability from the removal of equipment sale proceeds from the corporation. The court rejected this argument. The essential character of the issue before the judge was interpreting the minutes of settlement, and this issue was in the jurisdiction of the Court of King's Bench. 2) The judge's reasons were sufficient, made clear why the conclusion was reached, and permitted meaningful appellate review. 3) Minutes of settlement of a legal proceeding are interpreted as contracts. For a contract to exist, there must be an objective meeting of the minds regarding all essential terms. In court, both parties argued the minutes of settlement were enforceable based on erroneous characterizations of the agreement. The issue of tax consequences of the removal of funds from the corporation was an essential term of the contract. Viewed objectively, there was no agreement on that essential term. Therefore, there was no enforceable contract. Courts should

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avoid voiding contracts for uncertainty. Courts also avoid interpreting uncertainties to create an agreement the parties did not intend. The chambers judge made a factual finding that no agreement had been reached between the parties regarding the specific tax issue. The agreement itself demonstrated tax consequences were important to the parties. Neither party thought they would bear the tax of removing the equipment sale proceeds from the corporation and each deposed they would not have signed the agreement if they thought they would be responsible for that tax. The tax liability was not unforeseeable or inconsequential to the settlement for each party. Nothing in the settlement agreement allowed the court to refine the agreement and it was not the role of the court to remake the agreement.

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***R v Courtoreille*, 2022 SKCA 110**

Schwann Kalmakoff McCreary, 2022-10-05 (CA22110)

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Criminal Law - Sentencing - Aboriginal Offender

The Crown appealed from an 18-month sentence of incarceration imposed on the offender for possessing a prohibited firearm with ammunition, contrary to s. 95(1) of the *Criminal Code*. The respondent had posted online photos of herself with a sawed-off rifle. She was found by police in a taxi in Saskatoon with a sawed-off rifle. The respondent had pled guilty. On appeal, the Crown argued the sentencing judge imposed an overly lenient sentence, incorrectly determined certain factors were mitigating, conducted a flawed *Gladue* analysis, misapprehended evidence about prospects for rehabilitation, imposed a sentence disproportionate to the gravity of the offence and offended the principle of parity. The Court of Appeal considered: (1) did the sentencing judge make a material error in principle; and (2) was the sentence demonstrably unfit?
HELD: Leave to appeal the sentence was granted, and the appeal was dismissed. The sentencing judge did not make errors that impacted on the sentence and the sentence was not demonstrably unfit. (1) The sentencing judge made some irrelevant comments, but overall

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demonstrated an understanding of the principles of deterrence, denunciation, and protection of the public. It was an error for the sentencing judge to question to functionality of the ammunition, but these comments had no impact on the sentence imposed. Gang member association and possession of drug paraphernalia did not prove possession of the firearm was linked to other criminal activity. The sentencing judge did not impose a reduced sentence solely because of the existence of an Aboriginal heritage. The pre-sentence report contained specific commentary on *Gladue* factors. An offender is not required to establish a direct causal link between background or systemic factors and the commission of the offence. The offender had experienced family breakdown, instability, dislocation, death of a parent, grandparent residential school survivors, child poverty, periods of foster care, substance abuse by caregivers, racism and marginalization in school and employment. The judge's reasons explaining the analysis of the *Gladue* factors could have been better articulated, but there was no error in principle. The Crown argued three prior breaches of release conditions demonstrated the offender was not remorseful and not committed to rehabilitation. The sentencing judge acknowledged the breaches. The appellate court does not reweigh an offender's credibility, and there was no error in the sentencing judge's assessment of the offender's sincerity. The principle of parity states similar offenders who commit similar offences in similar circumstances should receive similar sentences. The sentencing judge declined to follow a line of cases from Ontario and preferred cases from Saskatchewan. The Crown sought to introduce fresh evidence in the form of firearm-related statistics in its factum without an application to adduce fresh evidence. The offender did not receive notice of the Crown's intention to introduce statistical information at the appeal hearing, apart from the factum. The respondent was not prepared to argue the issue, and the Court of Appeal declined to consider the statistical information, which would not have been determinative on the parity argument. The sentence respected the parity principle, and the cases the sentencing judge followed had a similarly situated Indigenous offender. (2) The sentence imposed was not demonstrably unfit.

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***SBLP Southland Mall Inc. v Regina (City)*, 2022 SKCA 115**

Caldwell Whitmore Leurer, 2022-10-06 (CA22115)

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The appellant mall appealed against a decision of the Saskatchewan Municipal Board Assessment Appeals Committee (committee). The city had assessed the mall's value for tax purposes under an enclosed shopping centre model, guided by an income approach to valuation that used rents received by owners of similar properties to determine value. The assessor had grouped the appellant mall with a downtown mall in the same city. The appellant argued the two malls were not similar in terms of typical rental rates. The appellant had sought disclosure from the city board of revision. Data was produced under subpoena during the hearing. A request for a several-week adjournment to review the newly disclosed data was rejected, and the hearing continued the following day. The appellant indicated the lack of time to consider the new data undermined its right to be heard. The hearing proceeded but the appellant did not cross-examine the assessor and made no arguments. The appellant appealed the board of revision decision to the municipal board assessment appeals committee. The committee found no error in rejecting the adjournment request. The Court of Appeal considered: 1) do assessment appraisers owe a duty of fairness; 2) what is the nature and extent of an assessor's duty of disclosure; 3) what is the committee's jurisdiction to address issues of procedural fairness and what standard of review applies; and 4) did the committee misconstrue or exceed its jurisdiction in the circumstances of this assessment appeal?
HELD: The appeal was allowed. The committee decision was declared void ab initio and the matter was remitted to the committee for disposition. 1) Assessors, boards of revision and the committee are each obliged to follow the principles of procedural fairness. *The Cities Act*, s. 203(4) allows boards of revision to make rules to govern their proceedings provided that those rules "are consistent with this Act and with the duty of fairness", and thus the Act does not supplant the common law duty of fairness. 2) The court considered the *Baker* ([1999] 2 SCR 817) factors to identify the content and scope of the duty of fairness. The property assessment scheme is based on mass appraisal with little front-end interaction between assessed persons and assessors. When appealed, assessments are presumptively correct. Boards of revision review assessment decisions for error on the record. An appellant must identify specific grounds and facts for each alleged error. An appellant needs access to information to identify errors. The legislation provides the authority for boards, the committee, or the court to make tailored orders to protect the confidentiality of information and authorizes cities to charge a fee for disclosure of information about an assessment to an assessed person. Assessors have an obligation to disclose as a requirement of the statutory appeal regime, rather than pursuant to the common law duty of fairness. The board of revision employs an adversarial formal hearing process. The property assessment appeal involves economic interests, rather than

Charter-protected rights and freedoms of individuals. The statutory powers and the specific procedural choices by the city's board of revision gave rise to a legitimate expectation the assessed person would receive full disclosure of the information relevant to their assessments before the hearing and that the board of revision would consider and address allegations of disclosure deficiencies. The *Baker* factors confirm that assessors did not have a general obligation to disclose assessment information to assessed persons as part of the assessors' duty of fairness. However, assessors were statutorily obliged to disclose to assessed persons all the information relevant to their assessments when those assessments are appealed. While disclosure may occur outside an assessment appeal, the obligation of assessors to disclose arose only under, and must be fulfilled in accordance with, s. 200 of *The Cities Act*. In their adjudicative role, boards of revision have a duty to ensure that assessors, cities and assessed persons have complied with s. 200 and they may exercise their powers to ensure that this occurs in advance of a hearing in the interests of procedural fairness. Assessed persons, whether appellants or respondents to an appeal, have a right to be fully and promptly informed of the factual and legal basis of the assessments under appeal so that they may state their case for establishing or dispelling error in those assessments. 3) The committee has jurisdiction to address allegations of a lack of procedural fairness at board of revision proceedings. The committee should apply a correctness standard of review to such questions. Where the committee concludes there was a breach of procedural fairness at the board, the committee must conduct a *de novo* review of the assessment on the record taken before the board, as supplemented in accordance with s. 223 of *The Cities Act*. 4) The committee erred by failing to address the allegation that late disclosure of relevant data with an overnight adjournment was procedurally unfair. The issue was remitted to the committee for disposition in accordance with the appellate court's judgment.

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***Yashcheshen v Teva Canada Ltd.*, 2022 SKCA 121**

Caldwell Leurer, 2022-10-20 (CA22121)

Civil Procedure - Appeal - Re-hearing - *Court of Appeal Rules*, Section 47(1)
Civil Procedure – Appeal

The applicant applied for a re-hearing of her appeal, pursuant to Rule 47(1) of *The Court of Appeal Rules*. Since the first appeal decision was rendered, one judge of the panel had retired. The application was heard by the remaining members of the panel, who considered whether the court should exercise its discretion to rehear the appeal.

HELD: The application was dismissed, with fixed costs of $800 to each of the two respondents. The court has discretion to rehear an appeal provided no formal judgment has issued, but the court only exercises this power in special or unusual circumstances. The bar for a rehearing is high because of the need for finality to litigation. Some of the reasons the applicant asked for a rehearing were based on a misunderstanding of the appeal decision. The applicant said she was denied procedural fairness in the hearing of her appeal, but she filed a written factum, was heard in oral argument, and was successful on several issues. The appeal was not procedurally unfair. The applicant asked for a rehearing so she could explain why the appeal decision was wrongly decided. That did not justify a rehearing. A "litigation mulligan or 'do-over'" (see: *Double Diamond Distribution Ltd. v Garman Turner Gordon LLP*, 2021 SKCA 152, at para 16) is not a proper basis for an appeal to be heard.

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***Livingston v Saskatchewan Human Rights Commission*, 2022 SKCA 127**

Caldwell Kalmakoff McCreary, 2022-11-02 (CA22127)

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Civil Procedure - Dismissal for Lack of Jurisdiction
Civil Procedure - Jurisdiction of the Court
Civil Procedure - Pleadings - Application to Strike Statement of Claim - Abuse of Process
Labour Arbitration - Exclusive Jurisdiction
Labour Law - Arbitration - Jurisdiction
Practice - Pleadings - Striking Out - Abuse of Process
Statutes - Interpretation - *Saskatchewan Employment Act*, Section 6-45

The appellant was employed by the respondent, Saskatchewan Human Rights Commission. He was represented by a union in relation to his employment. The appellant filed a statement of claim alleging his employer and its executive director had committed the tort of breach of privacy and breached a duty of procedural fairness while dealing with issues arising from a human rights complaint he had filed against his employer. A chambers judge struck the appellant's action because it was in the exclusive jurisdiction of a labour arbitrator and because it was duplicative of a grievance proceeding under a collective agreement and an abuse of process. The appellant appealed. The Court of Appeal considered whether the chambers judge erred by: 1) finding the claim fell claim fall exclusively in the jurisdiction of a labour arbitrator; and 2) finding the claim was an abuse of process because it created a multiplicity of proceedings.
HELD: The appeal was dismissed with costs to the respondents. 1) The chambers judge correctly decided that an arbitrator appointed under the collective agreement has exclusive jurisdiction to decide all disputes arising under the collective agreement, pursuant to s. 6-45 of *The Saskatchewan Employment Act*, except only for the court's residual discretionary jurisdiction to grant relief not available under the statutory arbitration scheme. Labour arbitrators have jurisdiction over human rights legislation and employment standards, tort claims and privacy claims arising out of a unionized employment relationship. The appellant argued that

his court action did not arise from the employment relationship, but instead, arose from a human rights complaint he filed with the commission. The chambers judge had decided that the executive director spoke to the appellant's coworkers in the capacity of an employer and that the remedies sought related to the appellant's employment. The chambers judge did not err by finding the essential nature of the dispute arose from employment. Even if the commission was acting as a statutory body rather than employer, the action likely would be barred by s. 43 of *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2. 2) Multiplicity of proceedings is a basis for finding a proceeding to be an abuse of process. A grievance arbitrator was capable of addressing the issue. An arbitration hearing had been scheduled. The appellate court agreed with the chambers judge's reasoning. It was not an error to strike the claim as an abuse of process.

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***Boardwalk REIT Properties Holdings Ltd. v Regina (City)*, 2022 SKCA 128**

Caldwell Whitmore Leurer, 2022-11-04 (CA22128)

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Municipal Law - Assessment Appeals
Statutes - Interpretation - *Cities Act*, Section 203.1
Taxation - Property Taxes - *Municipal Board Act*

The appellant real estate investment trust appealed against a decision of the Saskatchewan Municipal Board Assessment Appeals Committee (committee), which upheld a decision of the respondent city's board of revision (board). The assessor for the city had estimated the value of several commercial properties owned by the appellant under a multi-family residential model. The appellant had appealed the assessment to the board of revision, alleging errors in the assessment methodology and seeking an order that the assessor disclose information used by the assessor in the assessment. The board decided it did not have authority to compel the assessor to disclose information and prohibited the appellant from advancing certain arguments. The committee upheld the board's decision. The appellant sought and was granted leave to appeal to the Court of Appeal on three questions: 1) did the committee apply the wrong standard of review to the review of the board's decision; 2) did the committee err by finding the board had no authority to order disclosure under s. 203.1 of *The Cities Act*; and 3) did the committee err by failing to allow the appellant to pursue its appeal in relation to four-unit suite apartments?
HELD: The appeal was allowed, and the matter remitted to the committee for reconsideration, with no order of costs. 1) The committee must review on the correctness standard questions about whether the board hearing was procedurally fair. The committee erred when it applied a reasonableness standard. 2) Section 203.1 of *The Cities Act* provides boards of revision the authority to compel parties to produce evidence at appeal hearings in accordance with s. 200 of the Act. The committee erred when it concluded the board had no authority to order disclosure. 3) Because of the errors regarding the first two issues, relevant evidence may have been improperly omitted from the record. The omission of evidence may have affected the scope of permissible

arguments at the appeal hearing. In light of the conclusion on the first two issues, the court could not address the third question, and the committee must conduct a *de novo* review of the assessment at issue.

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***R v Bird*, 2022 SKQB 202**

MacMillan-Brown, 2022-09-08 (QB22196)

Criminal Law - Admissibility of Statements - Voluntariness of Statements
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Criminal Law - Manslaughter
Criminal Law - Murder - First Degree
Criminal Law - *Voir Dire* - Evidence - Admissibility
Statutes - Interpretation - *Criminal Code*, Section 222, Section 229, Section 231, Section 235(1)

The accused was charged with one count of first-degree murder for causing the deceased's death, contrary to s. 235(1) of the *Criminal Code*. In August 2017, the deceased went to a house where several gang-involved people were drinking. At the house, the accused shot the deceased in the head, causing his death. The Crown alleged the accused killed the deceased while in pursuit of an unlawful object, knowing her actions were likely to cause his death. The trial judge considered: was the accused guilty of first-degree murder or a lesser included offence.
HELD: The court found the accused guilty of the lesser included offence of manslaughter. The presumption of innocence remains unless and until the Crown proves each essential element of an offence beyond a reasonable doubt. A reasonable doubt must arise out of the evidence or a lack thereof. The trial judge made findings of fact from the evidence presented through witnesses and documents at trial. The deceased was involved in a physical attack that ended some time before he was shot. An autopsy report stated the deceased died of a single gunshot wound to the head. The accused admitting to killing the deceased in an admissible warned statement. The Crown proved the voluntariness of the video statements beyond a reasonable doubt by establishing the will of the accused was not overborne by threats or promises, oppression, lack of an operating mind or police trickery. The interviews lasted six and seven hours, lengths that warrant scrutiny regarding voluntariness. All officers testified the accused was not impaired, did not appear to have mental health concerns and had no difficulty communicating. There were no threats, and the police were polite and calm while questioning. The police used persuasion but not undue pressure. She was provided with bathroom breaks and cigarettes. She expressed an understanding that what she said to officers could be used against her. She had the right to remain silent, but not a right not to be spoken to by police. There was no point when the accused's medical condition caused concern such that the interview ought to have ended. There was no change in jeopardy that created a renewed right to legal counsel. Nothing about the interview suggested race or colonial oppression removed the accused voluntariness. The videoed statements were admissible. In the statement, the accused stated that she and two other people playing around and were turning the gun's safety on and off. She said she had been drinking. She was handed the gun and thought the safety was on when she pulled the trigger. The trial judge considered the credibility, reliability and weight of the video statements. The Crown proved beyond a reasonable doubt the alleged offence occurred on August 11, 2017, in Prince Albert and the accused was the individual who committed the offence, thus

satisfying the necessary elements of the date, jurisdiction and identity. To establish the accused was guilty of manslaughter required the Crown to prove the reasonable person in the accused's circumstances would foresee that the unlawful act in question involved a non-trivial risk of causing bodily harm to the deceased. The risk of bodily harm must be objectively foreseeable. Handling the firearm in the way that she did – pulling the trigger without ensuring that the safety was in fact engaged – carried a significant and very real risk of causing serious bodily harm to the deceased. Murder under s. 229(c) of the Code required the Crown to prove the accused was pursuing a distinct unlawful purpose or goal when she shot the deceased. The Crown did not prove an unlawful object separate from the inherently dangerous act of pointing a gun and threatening the deceased.

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***R v T.V.*, 2022 SKKB 213**

Bardai, 2022-09-23 (KB22207)

Criminal Law - Sentencing - Sexual Touching - Victim Under 16 Years
Criminal Law - Sentencing - Joint Submission

The offender, T.V., was convicted of sexual interference contrary to s. 151 of the Criminal Code (Code) following a trial before a judge of the Court of King's Bench (trial judge). The trial judge turned his attention to the matter of T.V.'s sentencing. The Crown and defence put forward a joint submission of 24 months' custody followed by probation for 30 months on numerous conditions including the performance of community service work. The only matters at issue concerned the number of hours of community service work, their completion date, and the terms of the prohibition order under ss.161(a), (a.1), and (b) of the Code. The trial judge referenced his findings of fact made at trial for sentencing purposes, including that T.V. was 65 years of age, and the victim's grandfather; the victim was 13 years old at the time of the offences; T.V. sexually assaulted her on two occasions, once when she was visiting at T.V.'s home, and again in her bedroom in the city where she lived; on the first occasion, T.V. pressed the victim against a wall in the bathroom while she was wearing only a towel and T.V. was wearing only underwear on the bottom; she saw his exposed erect penis, but he did not touch her with it, though his "round stomach" was touching her "skin to skin"; she pushed him off and escaped; the second incident involved T.V. entering her bedroom while she was doing homework, where he tickled her neck with his beard, kissed her neck, then fondled her breasts under her bra, until he left the bedroom when people came home. At sentencing, the trial judge found that T.V, as indicated in a pre-sentence report (PSR) filed at court, showed no remorse for the offences, and maintained that the victim fabricated the allegations; in addition, the author of the PSR wrote that T.V.'s risk to reoffend was medium, but that he "lack[ed] insight into his behaviour"; in the same PSR, the victim described ongoing anxiety, especially when she "sees older men"; the trial judge went on to find that "the level of physical intrusion… [was] violent and has left clear and deep emotional and psychological trauma on the young victim; that T.V. was in a position of trust towards her; and she was "particularly" vulnerable by being at T.V.'s home far from her own residence.
HELD: The trial judge accepted the joint submission of 24 months' custody and 30 months' probation to follow and ruled on the minor differences in dispute. He found the joint submission was not to be "departed from" since the proposed sentence "would not bring the administration of justice into disrepute and was not contrary to the public interest" (see: *R v Anthony-Cook*, 2016 SCC 43). In so ruling, he assessed the facts in light of the principles of sentencing developed with respect to child sexual touching victims

since *R v Friesen*, 2020 SCC 9 (*Friesen*), which he stated called on the courts to increase the sentences for this type of offending because any form of sexual touching of child victims has very serious adverse effects on the victim and society at large, and that Parliament signalled as much by increasing the maximum sentence for the sexual touching of children from ten to 14 years. He went further, expressing that *Friesen* established the paramount purpose of sentencing in these cases was to deter and denounce such conduct, and that in assessing the gravity of the offence and the degree of responsibility of the offender, sentencing judges should not overemphasize the level of physical interference while "ignoring and underemphasizing the serious emotional and psychological harm to the victim that can occur when there may be no penetration, genital contact or physical scarring but when the sexual violence leaves lasting trauma emotionally and psychologically, nonetheless."

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***S.B. v D.H.*, 2022 SKKB 216**

Zerr, 2022-09-26 (KB22220)

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Torts - Recognition of New Nominate Tort

The plaintiff applied for summary judgment of her claim against the defendant, her former husband, in tort for the non-consensual distribution of intimate images pursuant to s. 7.3 of *The Privacy Act*, intentional infliction of mental distress, and the as-yet unrecognized tort of public disclosure of private facts. The defendant had pled guilty to the criminal charge of distribution of intimate images. The court considered: 1) was summary judgment appropriate; 2) was the defendant liable to the plaintiff for the statutory tort of non-consensual distribution of intimate images; 3) should the common law tort of public disclosure of private facts be recognized in Saskatchewan, and if so, was the defendant liable to the plaintiff pursuant to this common law tort; 4) was the defendant liable to the plaintiff for the intentional infliction of mental distress; 5) do either contributory negligence or voluntary assumption of risk factor into this decision; and 6) what damage award was appropriate?
HELD: The plaintiff's claim was almost entirely successful. 1) Summary judgment was appropriate. The defendant argued a trial was required to determine disputed factual matters of whether the plaintiff consented to publication, whether the defendant knew the plaintiff did not consent or was reckless whether she consented, and the extent of the plaintiff's injuries. The judge decided that summary judgment would allow a fair and just determination of facts in dispute. Differences in the affidavit evidence regarding consent were resolved. The defendant had agreed in cross-examination that all publication done after the parties separated was without the plaintiff's consent and that the plaintiff warned the defendant not to do it. Furthermore, the defendant had pled guilty to criminal charges related to distributing intimate images. A trial was not required to sort out the facts. 2) To establish the statutory tort

of non-consensual distribution of intimate images, the plaintiff must prove the images depicted the plaintiff; the images were intimate images as defined by the Act; and the images were distributed as defined by the Act. The plaintiff is presumed to not consent to the distribution unless the defendant establishes otherwise. The plaintiff must establish the defendant knew the plaintiff did not consent or was reckless as to whether the plaintiff consented. The statutory tort was created by an amendment proclaimed into force on September 15, 2018. There was nothing to suggest the amendment was intended to have retroactive application. The evidence did not establish on a balance of probabilities that any videos were uploaded after the amendment was declared into force. The videos remained available after the amendment was in force, and thus the application of the legislation was application to a continuing situation and not retroactive application. The defendant distributed the images without the plaintiff's consent and knowing she did not consent, and thus, the statutory tort was established. 3) The common law tort of public disclosure of private facts, as recognized in Ontario and Alberta, requires that the plaintiff establish the defendant publicized an aspect of the plaintiff's private life; the plaintiff did not consent to the publication; the matter publicized or its publication would be highly offensive to a reasonable person in the plaintiff's position; and the publication was not of legitimate concern to the public. For the court to recognize a new tort, that tort must reflect a wrong, it must be necessary to address that wrong, and it must be an appropriate subject of judicial consideration. Following the reasoning in *E.S. v Shillington*, 2021 ABQB 739, the court recognized the tort of public disclosure of private facts in Saskatchewan. The defendant publicized an aspect of the plaintiff's private life without the plaintiff's consent. The publication would be highly offensive to a reasonable person in the position of the plaintiff. The publication was not of legitimate concern to the public. 4) The tort of the intentional infliction of mental distress requires the plaintiff to prove the defendant's conduct was flagrant and outrageous, intended to cause harm and resulted in a visible and provable mental injury. The defendant had admitted that he knew after their separation, the plaintiff did not consent to him uploading her image to pornography websites. The defendant's encouragement to others to use the plaintiff's images and offers to provide her name and Facebook page showed an intention to cause her harm. A visible and mental injury was established in light of the number of times her private images were accessed and the amount of contact from strangers she received as a result; the premature delivery of her son shortly after she became aware of the internet content; her report of severe anxiety, distress, fear, unease, dread; and her attendance at counselling sessions. The court accepted this level of injury was more than ordinary annoyance, anxiety or fear. 5) Contributory negligence and voluntary assumption of risk did not apply. Consent to taking intimate photos is not a wrong. The wrong was sharing the photos without consent. 6) The plaintiff sought general, aggravated and punitive damages. The court reviewed similar cases, taking note of principles for damages in sexual battery cases. General damages recognize the deep affront to dignity and personal autonomy were set at $85,000. Aggravated damages in the amount of $75,000 were appropriate because the defendant acted out of malice. Punitive damages are awarded when the misconduct is a marked departure from ordinary decent behaviour to express outrage and achieve objectives of punishment, deterrence and denunciation. The total award must be proportionate. Noting that in some jurisdictions, serving a criminal sentence is a bar to punitive damages and in light of the total award of $160,000, punitive damages were not awarded. Costs were awarded on column 3.

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***Dahl v Dahl*, 2022 SKKB 217**

Elson, 2022-09-27 (KB22208)

Family Law - Access and Custody
Family Law - Custody and Access - Interim
Family Law - Custody and Access - Interim - Mobility Rights
Family Law - Custody and Access - Mobility Rights - Interim Application - Best Interests of the Child
Family Law - Custody and Access - Mobility Rights - Primary Residence
Statutes - Interpretation - *Education Act, 1995*, Section 142

The petitioner and respondent had joint custody and a shared parenting arrangement for a five-year-old child. The parents lived more than 460 kilometres apart. In minutes of settlement from a pre-trial conference in 2020, the parties agreed to a two-week alternating parenting arrangement following the mother's relocation from Saskatoon to Estevan. Both parents had registered the child for kindergarten in their respective locations. The Saskatoon school had cancelled the registration on the basis that a child could not be registered in two locations. The court considered: 1) should the court order a change in the parenting arrangements on the basis of affidavit evidence filed; and 2) what should the interim parenting arrangements be pending pre-trial conference and trial? HELD: 1) The court could not order a change in the parenting arrangements based on the virtually irreconcilable affidavit evidence filed. 2) The court had no meaningful jurisdiction or basis in law to direct two separate school divisions to accept the child's registration. *The Education Act, 1995*, SS 1995, c E-0.2, s. 142 provides a child, not the child's parent, a right to attend school. The right is in a singular school division. The school division's board of education, not the court, has the authority to determine the school a child shall attend. On an interim basis, the court determined the child would reside primarily with the petitioner while attending school in Estevan. The court directed an expedited pre-trial conference and interim access times for the respondent.

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***J.W.C. v K.D.H.*, 2022 SKKB 237**

Goebel, 2022-10-31 (KB22231)

Family Law - *Divorce Act* - Shared Parenting
Family Law - Application to Vary Final Consent Judgment
Family Law - Custody and Access - Voices of the Children Report

The petitioner father, J.W.C., applied to a judge of the Court of Queen's Bench (chambers judge) in July 2022, to vary a final consent judgment (judgment) made on April 24, 2019 pursuant to s. 17(5) of the *Divorce Act* as it pertained to the joint parenting provisions of the judgment concerning P.C., the 13-year-old daughter of the parties. His sole ground for requesting this relief was that P.C. had expressed to him the desire to reside full time with him because of conflict with her mother, the respondent, K.D.H., arising from her claim of overly harsh discipline of P.C. and her younger brother, K.C. The chambers judge surveyed the court proceedings and noted that after an intimate relationship of approximately eight years during which P.C. and K.C. were born, the parties married, only to separate a few months after the marriage in 2016; they were unable to agree on parenting arrangements, and trial dates were selected, but at the pre-trial conference in 2018, they agreed that a "comprehensive parenting assessment"

should be ordered; such was prepared and the pre-trial conference was reconvened; the detailed report recommended a "shared parenting schedule for both children, supported by therapy and education" as well as continued visits with a child psychologist; J.W.C., and K.D.H., whose separation had not been amicable, were directed to attend "New Ways For Families with Aspire Too"; the report addressed such matters as P.C.'s strained relationship with her mother in 2019 and feeling caught between her parents"; and the judgment incorporated the recommendations of the report. The chambers judge pointed out that Rule 15-1 of *The Queen's Bench Rules* deemed the variation application to be a commencement document requiring the parties to proceed to mandatory mediation pursuant to s. 44.01 of *The Queen's Bench Act, 1998*. J.W.C. sought an order from the chambers judge that a Voice of the Child (report) be completed. He stated that such a report is intended to give a voice to the wishes of a child during parenting conflicts.

HELD: The chambers judge declined to order the report, and dismissed the variation application, reasoning that the only basis upon which J.W.C. brought it was his expectation that in the report P.C. would voice her wish to live exclusively with him, and that this wish amounted to a material change in circumstances; and since the report was not ordered, the application was moot. She commented that it was always open to J.W.C. to bring a fresh application. The chambers judge organized her reasons by asking herself two questions; first, as a matter of law, was she required to order a Voice of the Child Report before "making a finding that there had been a material change in circumstances since the original judgment was granted"; and second, if not, was it appropriate in this case to do so? Following a survey of the case law including *Gordon v Goertz*, [1996] 2 SCR 27 (*Gordon*), she concluded that to get through the door permitting the variation application to proceed, J.W.C. was required to adduce evidence sufficient to satisfy her that between the judgment and the application, a "material change" had occurred. She went on to state that the case law set the bar high; so that a material change was one that "altered the child's needs or the ability of the parents to meet those needs in a fundamental way" and needed to be a "distinct departure from what the court could reasonably have anticipated when the previous parenting order was granted" (see: *Gordon*). She then set out the policy reasons for setting the bar high, including finality of litigation. Having set her footing on this point, she then considered the concept of material change as it related to her decision concerning the report, leading her to review the case law, and to the conclusion that no firm rule governed whether, if a report was to be ordered, it should be available to her before the materiality inquiry or following it. She appreciated that the decision in this regard was discretionary, to be made after weighing an open-ended list of case-specific factors, which in this case, she found, included that J.W.C. was attempting to limit her discretion by suggesting she should make an order in conformity with P.C.'s wish as voiced in the report, which J.W.C. anticipated would be that she wanted to live with him. The chambers judge was not prepared to delegate her duty to decide the threshold issue and the paramount issue of what was in the best interests of P.C. to P.C. herself, without more. The chambers judge also expressed that she was of the view the report was unnecessary, being that P.C.'s wishes were "not controverted" and would be unreliable, since the evidence led her to believe P.C.'s "voice" would not be hers solely, but that of J.W.C. In sum, the chambers judge thought that to order a limited scope report of questionable worth created "a risk that proceeding in this fashion may cause further harm to the strained family dynamic that the 2019 judgment sought to address."

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***Griffiths v 101186119 Saskatchewan Ltd.*, 2022 SKKB 238**

Elson, 2022-11-01 (KB22232)

Civil Procedure - Costs Award - Costs Thrown Away
Civil Procedure - *Queen's Bench Rules*, Rule 11-1

The judge assigned to conduct a civil trial in the Court of Queen's Bench (trial judge) granted the plaintiff's request for an adjournment of the trial. He reviewed the court proceedings. The plaintiff failed to serve expert witness reports and statements of expertise within the 90-day time limit set by the pre-trial conference judge. The trial was scheduled for 10 days commencing October 17, 2022. The plaintiff served the documents on the defendants during the period from October 4 to 6, 2022, necessitating an adjournment of the trial, which was opposed by the defendants. In allowing the adjournment, the trial judge invited submissions from the parties with respect to the amount and timing of costs to be paid by the plaintiff. The plaintiff relied on Pearson v Pearson, 2000 SKQB 161 (Pearson) as authority that the cost award "should not exceed taxable costs for the adjournment request, in any event of the cause, but not payable forthwith." The defendants, on the other hand, argued for costs "thrown away" due to the adjournment, inviting the trial judge to follow the "Ontario approach of awarding costs thrown away on a full recovery, or near full recovery, basis."
HELD: The trial judge reviewed Rule 11-1 of *The Queen's Bench Rules*, which "specifically described" his broad discretion to award costs, and considered *Siemens v Bawolin*, 2002 SKCA 84 which established the principles governing the award of solicitor and client costs; that such awards are rare and exceptional; generally awarded for "scandalous, outrageous or reprehensible" behaviour of a litigant during the course of the litigation; and may in exceptional cases "provide the other party complete indemnification for costs reasonably incurred." He also reviewed the Ontario cases relied on by the defendants, and found that it was not uncommon for Ontario courts to award costs on a substantial indemnity or full indemnity basis, but that was not the case in Saskatchewan, where the solicitor and client regime governed and was intended to censure the conduct of litigants in exceptional cases, but not provide indemnity in situations where a party is blameworthy, as was the plaintiff in the case before him, but whose conduct does not amount to scandalous, outrageous or reprehensible behaviour justifying solicitor and client costs. He then awarded costs to the two sets of defendants on an enhanced basis in the amount of $4,000.00, payable $2,000.00 to each within 60 days in any event of the cause, and without prejudice to the trial judge to revisit the amount of the award after trial.

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***SNC Lavalin Inc. v Saskatchewan Power Corporation*, 2022 SKKB 242**

Klatt, 2022-11-07 (KB22233)

Contract Law - Complex Arbitration - Costs
Statutes - Interpretation - *Arbitration Act*, Section 44, Section 46(1)(f), Section 54

SNC-Lavalin Inc. (SLI) applied to a judge of the Court of Queen's Bench (chambers judge) under s. 46(1) of *The Arbitration Act* (Act) claiming that the tribunal formed pursuant to the Act to determine disputes between SLI and SaskPower arising from three contracts between them related to "the construction and cold commissioning of three carbon capture plants critical to SaskPower's Integrated Carbon Capture and Sequestration Demonstration Project" acted in a "procedurally unfair manner" by refusing to allow it

to file further submissions concerning the award of costs. There was no issue on the facts. The construction contracts contained mandatory arbitration clauses empowering the tribunal with exclusive and final jurisdiction to decide the issues between the parties. The contracts also provided that in awarding costs the tribunal "shall consider whether a party was substantially successful in its claims or defences in the arbitration." Procedural Order #9 (PO #9) set down in writing the agreement of the parties about the procedure for making submissions concerning costs; no oral submissions would be made. In PO #9, SLI and SaskPower were specifically required to make submissions "on the issue of liability for costs on the premise that they are a prevailing party." PO #9 also set out that no submissions would be received after October 18, 2019, unless either party "specifically requests an opportunity to further address costs before the final award is issued". SLI allowed this period to elapse, and the final award issued including the award for costs. The tribunal awarded costs not because of substantial success but on divided success. Net costs were then awarded in favour of SaskPower after setting off SLI's costs. In its submissions, SLI had not addressed why it believed it was the prevailing party, and had been substantially successful, entitling it to full costs. Though the final award had been made, SLI requested it be allowed to file another submission dealing with why it was the prevailing party. The tribunal declined to do so claiming it was *functus officio*.
HELD: The chambers judge ruled that the tribunal did not act with procedural unfairness. She first canvassed the case law pertaining to the standard of judicial review of tribunal decisions for procedural unfairness, which she said established a standard of correctness "without deference to the choices made by an administrative tribunal." She also appreciated that the Act "contemplate[d] that a certain degree of procedural fairness will be afforded to the parties during the arbitration process," which in this case involved the duty of fairness of the tribunal to the "participatory rights" of SLI in the submission process. The chambers judge dismissed SLI 's arguments as to why it did not ask for an opportunity to counter SaskPower's submissions which dealt "head-on" with the meaning of "prevailing party" and "substantial success," and which the tribunal specifically said the parties were to address. She concluded that the process put in place by the tribunal with the involvement of the parties was clear and transparent; could not have led STI to be confused about what it was required to do; and the tribunal could not be faulted for SLI's failure to take up the opportunity to make further submissions which addressed the question of "prevailing success."

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***R v Ahenakew*, 2022 SKKB 243**

Currie, 2022-11-09 (KB22234)

Municipal Law - Dangerous Animals Bylaw - Appeal

A.A. appealed the decision of a Justice of the Peace (justice) who ordered, pursuant to s. 9.1(5) of The Dangerous Animals Bylaw, 2003 (bylaw) the destruction of Gracie, her 45-pound pit bull female cross dog, to a summary conviction appeal judge of the Court of Queen's Bench (appeal judge). A.A. pled guilty to the bylaw offence that Gracie, an animal, who "without provocation kill[ed]… a domestic animal," another dog, committed an offence contrary to s. 9(4) of the bylaw. A.A. took no issue as to the factual findings of the justice of the peace. A.A. took Gracie from her home on the Ahtahkakoop First Nation to Saskatoon for a visit. She was placed in a yard at a residence whence she escaped and "without provocation" immediately ran at a dog, Annie, who was

walking on a leash with her owner. “Gracie crossed the street directly and seized Annie by the throat, shaking her.” She died of her injuries. The appeal judge observed that the justice made findings of fact from the evidence, then referred to *R v Barber*, 2015 SKPC 178 (*Barber*), a dangerous animal case in which the Provincial Court judge set out “a number of factors that somebody in my position has to take into account”. He noted further that the justice took these factors into account in arriving at his decision that “he had little choice” but to order Gracie’s “destruction,” and in doing so emphasized the unpredictability of the attack since this type of behaviour had never been displayed by Gracie. A.A. argued that the justice had jumped immediately to the ultimate option of Gracie’s destruction without carefully considering lesser, alternate remedies, and so erred in law, and also that he had erred in his weighing of the relevant factors he was to consider in arriving at a fit sentence.
HELD: The appeal judge relied on *R v Lacasse*, 2015 SCC 64 and *R v Regnier*, 2016 SKQB 290 to confirm the standard of review governing the appeal: “this appeal court should intervene only if the justice of the peace made an error in principle, or he failed to consider a relevant factor, or he overemphasized the appropriate factors”. Following his detailed survey of the justice’s reasons, he rejected A.A.’s argument that the justice failed to consider the sentencing options contained in ss. 8(4) and (5) of the bylaw, which included muzzling and enclosure, before ordering the ultimate remedy and that he did so without considering the options in an order from lesser to greater severity. The appeal judge found that the bylaw did not support A.A.’s argument that by not showing in his reasons that he had specifically examined each option in ascending order of severity, and not stating why he had rejected each option in turn, he erred in law. The appeal judge noted that the justice did show he considered and dismissed other options when he stated, “I have little choice” and referring to the “nature and extent” of Gracie’s risk to the public, as was done in *Barber*. He concluded as well that the justice acted within the scope of his discretion in finding aggravating and not mitigating that Gracie’s pattern of behaviour, which had not included previous dangerous attacks, made her behaviour unpredictable. As such, it would be impossible to know whether lesser options other than destruction might eliminate the dog’s risk of inflicting injury or death to other dogs, or children for that matter.

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***T.G. v Government of Saskatchewan*, 2022 SKKB 244**

Popescul, 2022-11-09 (KB22235)

Class Actions - Certification - Criteria
Statutes - Interpretation - *Class Actions Act*, Section 6(1)(a), Section 6(1)(b), Section 6(1)(c), Section 6(1)(d), Section 6(1)(e)

The plaintiffs, T.G., R.M. and D.S., sought to certify a class action involving students attending the R.J.D. Williams Provincial School for the Deaf (also known as the Saskatchewan School for the Deaf) (school) that they alleged the defendant, the Government of Saskatchewan, operated, maintained and administered between 1955 and 1991, during which time, as they further alleged, they were “physically, sexually and emotionally abused by their teachers, the staff and other students” for which the defendant was liable in negligence and breach of fiduciary duty. The judge of the Court of Queen’s Bench before whom the certification application was brought (judge) appreciated that if he was satisfied the five criteria listed in ss. 6(1)(a), (b), (c), (d), and (e) of *The Class Actions Act* (CAA) were met by the plaintiffs, he had no discretion but to certify the action as a class action. The judge noted the plaintiffs and defendant had worked out between them, either fully or conditionally, wording with respect to criteria

(a), (c), and (e)(i) and (iii) of the CAA, which they proposed the judge endorse. They had not been able to agree on all the terms of (e)(ii), the class action plan: in particular, which party was to pay the cost of providing notice to the members of the class, or (d), whether "a class action would be the preferable procedure for the resolution of the common issues." The judge was required to make rulings on these issues.
HELD: The judge first ruled on the "areas of agreement" between the parties, which he said were appropriate and he endorsed. These were that, first, the pleadings disclosed a cause of action in negligence and breach of fiduciary duty (s. 6(1)(a)); second, that the issues proposed by the parties were common and suitable (s. 6(1)(c)); third, that the plaintiff, T.G., who attended the school from 1971 to 1987, was an appropriate representative for the class, but since he lived in Manitoba, the judge agreed that another former member of the school from Saskatchewan should be added as a representative plaintiff. Until a candidate had been chosen and the required affidavit had been filed with the court, this criterion would be a conditional one. Third, as to the "litigation plan" other than the matter of the notice costs, the judge was aware that the parties were in the process of drafting a suitable litigation plan, but "certain deficiencies" remained, and as put forward by the parties, he was prepared to issue a "workaround order" which would allow a conditional certification, subject to the other criteria being met. The judge then turned to the issues in dispute, which involved the costs of notifying the members of the class of the class action (s. 6(1)(e)(ii)), definition of the class (ss. 6(1)(b)), and, of primary importance, the question of whether a class action was the "preferable procedure" to satisfy the claims of the plaintiffs in this case (s. 6(1)(d)). The judge was able to deal with the first two contentious matters without lengthy analysis. He found the plaintiffs' definition of the class, all being "students who attended the [school] between 1955 and 1991," was too broad and agreed with the defendant that the class should be limited to those students who attended the school during that time who claimed "to have suffered physical, sexual and/or psychological abuse." As to the question of notice costs, following his survey of the case law on point, he ruled that both parties should share the cost equally because "this should have the effect of ensuring that both parties work together to form a reasonable, fair and cost-efficient notification plan." Lastly, the judge dealt further with the main contentious issue, that of whether a class action was the preferable procedure by which to resolve the claims. After canvassing the cases filed by the plaintiffs and defendant, he noted that most "institutional abuse cases" were proceeded with by way of a class action. He understood the defendant to acknowledge as much, but countered that though the actions were certified, they did not prove to be efficient and fair "to both the defendants and the class members." After reviewing *Kequahtooway v Saskatchewan (Government)*, 2018 SKCA 68, which referred to *AIC Limited v Fischer*, 2013 SCC 69 as the "controlling authority" with respect to the preferability criterion, he reasoned that the on a comparability analysis as between a class action and other types of proceedings, a class action would best meet the goals of "judicial economy, access to justice, and behaviour modification". In particular, he expressed that a class action would resolve this complex and document-heavy action, involving extensive common issues once as opposed to numerous times were there to be separate actions. He also expressed that the individual plaintiffs were from a vulnerable class with little means to pursue their claims individually, and that, as expressed in *Seed v Ontario*, 2012 ONSC 2681, the focus of a claim of "institutional abuse is on systemic wrongs, not on the individual circumstances of class members" best considered in a class action designed to redress a wrong which concerns society at large.

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***R v Kitchener*, 2022 SKPC 43**

Stang, 2022-10-17 (PC22038)

Criminal Law - Resisting Officers in Lawful Execution of Duty

Following the calling of the evidence and the close of the case, the judge of the Provincial Court trying the case (trial judge) was required to decide the central issue in the case, whether the peace officers who attended a cell at a police detachment of the RCMP on a complaint from the cell guard that the accused was attempting to self-harm were acting within their common law duty as peace officers when they applied force to stop him from self-harming and applied further force to prevent him from taking any further action to self -harm. The trial judge found on the evidence that he accepted that two peace officers were called by the jail guard to deal with a prisoner who was self-harming. The trial judge found as fact that the peace officers were confronted with the accused with his head in a toilet, and with his pants tied around his neck; they pulled his head out of the toilet, and removed his pants from around his neck, which they seized, and then attempted to remove his shirt and socks, but not his underwear. The accused resisted the removal of his clothing, and in doing so grabbed at one of the officers' belts near his pistol holder and would not let it go without more and greater force being used on him. He was charged with assaulting a peace officer in the execution of his duty. The accused defended the charge by advancing the argument that because the officers did not know if the accused had been lawfully arrested and placed in the cell, they were not acting in the lawful execution of their duty, and that they had exceeded that duty by the level of force they applied to the accused.
HELD: The trial judge found that the Crown had proved all elements of the offence. He reviewed the case law on police powers in light of the facts in the case, ruling that the common law duty of peace officers included the duty to protect life, and in this case the officers clearly applied reasonable force to first prevent the accused from drowning himself in the toilet and by applying force only to remove other items of the accused's clothing to prevent any further attempts at self-harm. By resisting and holding onto the officer's service belt near his gun, the accused applied non-consensual force to the officer. That the officers did not know whether the accused had been lawfully arrested and placed in the cell was of no consequence because the application of force in this case did not involve arrest but protection of life.

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