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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John Howard Society of Saskatchewan v Saskatchewan (Attorney General), 2022 SKCA 144

Schwann Tholl McCreary, 2022-12-15 (CA22144)

Constitutional Law - *Charter of Rights*, Section 7
Criminal Law - Prison and Prisoners - Regulation of Prisons - Prisoner Rights

The John Howard Society of Saskatchewan (Society) brought an appeal before the court after having their originating application dismissed by a judge sitting in chambers at the Court of Queen's Bench (chambers judge). The chambers judge did give the Society standing to bring their application and further appeal on a public interest basis but saw no merit to their argument that disciplinary measures within provincial correctional facilities violate section 7 of the *Charter*. The government of Saskatchewan operates five prisons. *The Correctional Services Act, 2012*, c C-39.2 (Act) and *The Correctional Services Regulations, 2013*, RRS c C-39.2 Reg 1 (Regulations) apply to inmates subject to discipline within provincial institutions.

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The burden of proof applied in disciplinary hearings is set out in section 68 of the Regulations: A discipline panel shall not find an inmate responsible for a disciplinary offence unless it is satisfied on a balance of probabilities that the inmate committed that offence. Section 77(1) of the Act sets out the discipline that inmates may be subject to if they have been found to have committed a disciplinary offence. Included as possible sanctions is the potential for an offender to be segregated to their cell, or the potential forfeiture of a period, not exceeding 15 days, of remission earned. Prisoners can generally earn 15 days of remission for every month of their sentence served if they comply with institutional rules and demonstrate good behaviour. The Society argued before the chambers judge that these two sanctions infringe on an individual's liberty, and that applying a standard of proof of a balance of probabilities results in a violation of section 7 of the *Charter* as the adjudication ought to be occurring on standard of proof requiring guilt beyond a reasonable doubt. The chambers judge equated the sanctions opposed in disciplinary proceeding as akin to losing a privilege and not the imposition of more carceral time, and accordingly found that *Charter* rights were not violated by the Act or Regulations. The issues the court determined were: 1) whether section 7 of the *Charter* required proof beyond a reasonable doubt for inmate disciplinary proceedings conducted under Part VIII of the Act and Part XIII of the Regulations; and 2) if section 68 of the Regulations violated s. 7 of the *Charter*, was it saved by s. 1 of the *Charter*?
HELD: The Society's appeal was dismissed. The court concluded that the presumption of innocence cannot be extended to require proof beyond a reasonable doubt for charges under the inmate discipline regime and section 68 of the Regulations does not violate section 7 of the *Charter*. The court outlined that as there were no underlying facts in dispute, the standard of review applicable was one of correctness as the Society's appeal engaged questions of law. The Society grounded their argument in the belief that offenders subject to discipline are entitled to a presumption of innocence; however, the court rejected this argument. The inmate disciplinary process was held to be an administrative process with its purposes aimed at ensuring institutional efficiencies and not protecting the public. The chambers judge was held to have been correct in his ruling that the sanctions imposed by the Act do not increase carceral time and the effect of segregation is not as severe as the deprivation of liberty that can occur with an innate facing solitary confinement. As administrative proceedings are civil in nature, there is no presumption of innocence. The court provided an example of how administrative proceedings can attract criminal consequences, such as the instance of a lawyer who engages in trust defalcation, but this does not necessitate that a standard of proof requiring guilt to be proven beyond a reasonable doubt is engaged during regulatory proceedings. The court further cited the case of *R v Whitty* (1999), 135 CCC (3d) 77 (NCLA) that determined that the requirement for a breach of a conditional sentence order needs to only be proven "on a balance of probabilities," which demonstrates that even in the criminal process, proof beyond a reasonable doubt is not always required. As section 7 (of the *Charter*) was not found to be violated by s. 68 of the Regulations, the court did not engage in a section 1 analysis in dismissing the Society's appeal.

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***Danychuk v University of Regina*, 2022 SKCA 146**

Leurer Tholl Kalmakoff, 2022-12-21 (CA22146)

Administrative Law - Judicial Review - Appeal
Administrative Law - University Student Accommodation Plans - Judicial Review
Human Rights - Appeal

C.D. appealed the decision of a Court of Queen's Bench judge sitting in chambers (chambers judge) that dismissed his application for judicial review. The University of Regina (university) was named as the respondent on appeal. In *Danychuk v University of Regina*, 2022 SKQB 35, the chambers judge upheld the decision the University Senate Appeals Committee (SAC) rendered on C.D. as being reasonable. C.D. was enrolled in the Social Work program at the university when he received correspondence from an Associate Dean of his faculty that warned him that the university might have to take action against him to address his unsatisfactory performance of professional responsibilities. The letter C.D. received from the Associate Dean suggested that a medical withdrawal from current courses, pending appropriate corroboration from a medical practitioner, may be appropriate. C.D. did not seek a medical or any form of withdrawal from his studies and he became the subject of a review panel. C.D. attended before the review panel, did not present any medical evidence, and took the position that his behaviours were not problematic. The review panel recommended to the Dean that C.D. be removed from the program. The Dean followed the panel's recommendation and C.D. was withdrawn from his studies for a minimum of two years. C.D. appealed the Dean's decision first to the university's Council Committee on Student Appeals (committee), where he was permitted to introduce evidence he may not have previously submitted to the review panel. C.D. chose again to not tender any medical evidence. The committee upheld the Dean's decision. C.D. then appealed the committee's decision to the SAC, which is only permitted to complete appeals based on the record. As C.D. had not raised any medical concerns in prior hearings, the SAC had no evidence of medical impairments contributing to C.D.'s behaviour, and the committee's decision was affirmed. Before the chambers judge, C.D. argued that he suffered from medical issues that the university was required to accommodate to the point of hardship and that the decision of the SAC had been unreasonable. The chambers judge noted that there was no evidence received of medical impairments before the hearings completed at the university – the crux of C.D.'s arguments before the hearings was that his behaviour was not problematic and that it was the

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Unconscionable Transactions

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university that was at fault for what was happening with him – and he found no reason to set aside the decision of the SAC. The court identified that the sole issue it was required to determine was whether the SAC decision was reasonable.
HELD: C.D.'s appeal was dismissed, and he was ordered to pay $2,000.00 in costs to the university. The court outlined in its analysis that C.D. had sought judicial review of the SAC decision only, and not the prior determinations that had resulted in his withdrawal as a student. The court held that the standard of review applied was one of reasonableness, allowing it to step into the shoes of the chambers judge to evaluate whether the SAC's decision was correct. C.D. had not specified nor argued to the SAC or to the committee that he was afflicted with medical disabilities requiring accommodation. The court determined that the SAC's decision, which was based strictly on the record before it and the submissions made by C.D. and the university, was reasonable: the reasoning within the decision was justified, it identified and answered the grounds of appeals that were raised by C.D., and no error could be identified. Accordingly, the court confirmed the chambers judge's decision and dismissed C.D.'s appeal and ordered costs payable to the university.

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***Hertz v Kille*, 2023 SKCA 3**

Caldwell Schwann Barrington-Foote, 2023-01-05 (CA23003)

Civil Procedure - *Queen's Bench Rules*, Rule 7-9(2)(b) and (e), Rule 7-9(2)(a)
Practice - Judgments and Orders - *Res Judicata* - Issue Estoppel

The appellant appealed a chambers decision striking the appellant's claims in contract and unjust enrichment as *res judicata* and his punitive damages claim as not disclosing a reasonable cause of action. The appellant had claimed an interest in the net profits and sale proceeds of a bus corporation. The respondent had been the sole shareholder of the bus corporation until it was sold in 2019. The appellant, respondent and corporation had made agreements in 2013 and 2016 regarding corporate governance, management and division of corporate profits. The appellant had started an action against the respondent in 2018 claiming breach of contract, breach of fiduciary duty, unjust enrichment and oppression, and relief including a 50 percent beneficial interest in the corporation and general and punitive damages. While an application related to the 2018 action was under reserve, the parties reached a settlement agreement that permitted the sale of the corporation free from claims under the action and permitting payments of 20 percent of the proceeds to each upon the closing of the sale. The agreement provided that if a final court decision granted the appellant

an interest less or more than 20 percent, the amount he received under the settlement agreement would be adjusted accordingly. The agreement also required the appellant to amend his pleadings to replace any claim to an ownership interest with a claim to consideration paid to the respondent by the purchaser of the corporation. The agreement was provided to the judge who heard the application that was under reserve at that time. When the reserved decision was released, it did not decide whether the appellant had a legal or beneficial interest in the corporation. The respondent sent 20 percent of the proceeds to the appellant on the trust condition that the appellant discontinue his action. The appellant refused to discontinue the action and the respondent applied to set aside the settlement agreement on the basis that there was no meeting of the minds. After the application was heard but before a decision was made, the appellant filed another statement of claim pleading breach of contract and unjust enrichment and seeking punitive damages. A chambers judge then released the "settlement decision" ordering the respondent to pay the appellant 20 percent of the sale proceeds, and the appellant to discontinue his initial action after receiving the money. The respondent applied to have the second statement of claim struck as an abuse of process and disclosing no reasonable cause of action. A chambers judge struck the second action. The appellant appealed. The Court of Appeal considered: did the chambers judge misinterpret a prior chambers decision as disposing the appellant's claims made in the second action?
HELD: The appeal was allowed. Whether a judge has properly interpreted a court decision is a question of law. The subjective views of the parties do not govern the interpretation. When deciding what question of law or fact was decided, the court examines the pleadings, the language of the order, and the circumstances. The settlement decision did not decide the basis for the first action was superseded by the settlement agreement. The settlement decision decided the prior agreements were irrelevant to the issues in that application. The settlement agreement did not confirm it terminated prior agreements, constituted the entire agreement, or released claims from breaches of prior agreements. The settlement decision only decided whether the respondent had to pay the appellant 20 percent of proceeds and whether the appellant had to discontinue his action upon receipt of payment. The interpretation of other parts of the settlement agreement and any prior agreements was left to another day. Questions about whether the settlement agreement precluded claims from alleged breaches of prior agreements were not *res judicata*. The decision striking the second action was set aside and the remaining issues remitted to the court below.

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***Brandt Properties Ltd. v Sherwood (Rural Municipality)*, 2023 SKCA 4**

Richards Whitmore Tholl, 2023-01-06 (CA23004)

Administrative Law - *Municipal Board Act* - Assessment Appeals
Administrative Law - Standard of Review - Reasonableness - Appeal
Municipal Law - Property Assessment

The appellant property owners appealed the Assessment Appeals Committee (committee) of the Saskatchewan Municipal Board (board) decision, dismissing their appeals in relation to the property tax assessments for commercial properties in 2019. The assessment model determined land value by using arm's length sales data from similar properties in defined areas. The value of improvements was determined using replacement cost new less depreciation with a market adjustment factor. The property owners argued that sales data from one area ought to be removed and not applied to determining land values outside that area. Also, the property owners argued that an excluded sale was arm's length and ought to be included. The board and the committee dismissed the property owners' appeals. The Court of Appeal considered: 1) did the committee correctly find the board had selected and applied the correct standards of review of an assessment; 2) did the committee correctly apply the law regarding the relevance of statistical evidence as a factor in determining comparability; 3) did the committee deprive the property owners of their right of appeal by failing to remedy errors of law and failing to address a ground of appeal.
HELD: The court allowed the appeal and remitted the matter to the committee for reconsideration. 1) The board erred in its framing of the standard of review and the committee erred when it decided the board had properly applied the reasonableness standard. The reasonableness standard of review does not relate to the perspective of a "reasonable person." The Court of Appeal had recently explained the applicable standard of review in *Affinity Holdings Ltd. v Shaunavon (Town)*, 2022 SKCA 83. 2) An assessment expert provided statistical expert evidence in support of applying a time adjustment to land valuation. By disaggregating data from different areas, his analysis showed a dramatically falling market in one area and a rising market in the remaining areas. Statistical testing can have a role in testing the appropriateness of property groupings. It was a misreading of prior cases to rule it could not. The committee erred by ignoring the statistical evidence because it related to the issue of similarity between one area and another area. The consideration of this evidence was remitted to the committee. 3) The property owners' notice of appeal filed with the committee put the issue of another expert witness's opinion properly before the committee. The committee's decision was internally inconsistent in noting the board had missed the core of the expert witness's evidence and also found no error in the decision regarding whether a certain sale was arm's length. The court expressed some concern with the board's undue reliance on the prior year's assessment decision as creating a presumption to overcome. However, the committee did not entirely fail to engage with the property owner's argument on this point. Thus, the court could not give effect to the issue appealed.

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***Brandt Properties Ltd. v Sherwood (Rural Municipality)*, 2023 SKCA 5**

Richards Whitmore Tholl, 2023-01-06 (CA23005)

Administrative Law - Standard of Review - Reasonableness - Appeal
Municipal Law - Appeal - Property Taxes - Assessments
Municipal Law - Assessment Appeal
Municipal Law - Property Tax Assessment

The appellant property owners appealed the Assessment Appeals Committee (committee) of the Saskatchewan Municipal Board (board) decision dismissing their appeals in relation to the property tax assessments for commercial properties in 2020. This case parallels a similar appeal dealing with 2019 assessments (*Brandt Properties Ltd. v Sherwood (Rural Municipality)*, 2023 SKCA 4). The assessment model determined land value by using arm's length sales data from similar properties in defined areas. The value of improvements was determined using replacement cost new less depreciation with a market adjustment factor. The property owners argued that sales date from one area ought to be removed and not applied to determining land values outside that area. Also, the property owners argued that an excluded sale was arm's length and ought to be included. The board and the committee dismissed the property owners' appeals. The committee decided the property owners had not put forward new evidence warranting a reversal of assessment decisions in previous years. The Court of Appeal considered: 1) did the committee correctly find the board had selected and applied the correct standards of review of an assessment; 2) did the committee err by putting the onus on the appellant to put forward new evidence or reasons to reverse decisions from previous years; 3) did the committee err by requiring the property owner to prove the correct assessments for the entire population as a pre-condition to success on appeal? HELD: The court allowed the appeal and remitted the matter to the committee for reconsideration. 1) The board erred in its framing of the standard of review in many respects. The committee erred when it endorsed the board's use of an incorrect standard of review. This was a material error of law. The Court of Appeal has recently explained the applicable standard of review in *Affinity Holdings Ltd. v Shaunavon (Town)*, 2022 SKCA 83. A reasonable decision is based on an internally coherent rational chain of analysis and is justified in relation to the facts, circumstances and conditions affecting the property. This is not a *de novo* analysis, but the reviewing committee deferring to the board on the basis the board was alive to the issues is too superficial and incomplete. 2) Every annual assessment is a distinct decision giving rise to a freestanding right of appeal. Decisions from one year do not determine the result in a subsequent year. It was an error of law to approach an appeal as if the property owner had a burden of overcoming the board or committee's decision from a previous year. The committee ought to consider whether the evidence established an error in the assessment each time an appeal is brought. 3) A property owner has no obligation to prove what the correct assessment should have been for its property or other properties in order be successful on appeal. The appellant only needed to show an error in the assessment.

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***R v Wurtz*, 2022 SKKB 229**

Elson, 2022-10-19 (KB22221)

Regulatory Offence - Appeal - *Traffic Safety Act*

The Crown appealed the judgment granted by a justice of peace who acquitted S.W. of two offences that were ticketed pursuant to *The Traffic Safety Act*, SS 2004, c T-18.1 (Act). The Crown appealed S.W.'s acquittal for driving a vehicle at a speed greater than the maximum speed indicated by a properly erected sign, contrary to s. 199(1)(b) of the Act. S.W. was observed speeding 17km/h greater than directed on a posted sign by a police officer who issued the tickets. The police officer did not recall S.W. at trial but testified to checking S.W.'s license at the time of the incident. The justice of peace found at trial that the Crown had failed to prove that the posted speed limit sign was an "official sign" as required by the Act and that the police officer had failed to properly identify S.W. The issues for determination before the court were (1) whether the speed sign posted was an "official sign" as contemplated by the Act, and (2) whether the police officer was required to complete identification beyond his observation of S.W.'s driver's license when he was pulled over.
HELD: The Crown's appeal was granted, S.W.'s acquittal for speeding was set aside and he was found guilty; the matter was remitted back to the justice of peace for final disposition. The court held that the presumption of regularity supported the Crown's appeal on the first issue of whether the speed sign posted was an official sign. The court explained that the presumption of regularity is derived from the maxim *omnia praesumuntur rite esse acta*, which presumes the regularity of a public officer's actions until the contrary is shown. The court cited the case of *R v Scott* (1980), 1980 ABCA 299 (CanLII), 56 CCC (2d) 111 to support to use of the maxim in prior jurisprudence to presume compliance with statutory formalities where evidence of such compliance cannot be easily procured. The court further concluded that the justice of peace erred when he asked the police officer to identify S.W. during trial. While such identification is preferred, it is not necessary to establish guilt. The court held that circumstantial evidence is often used to identify an accused person at trial, particularly in traffic safety cases.

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***Sellers v Boardwalk REIT Properties Holdings Ltd.*, 2022 SKKB 234**

Labach, 2022-10-24 (KB22225)

Landlord and Tenant - Appeal - Residential Tenancies Act
Landlord and Tenant - Writ of Possession

L.R., the tenant and applicant, brought an appeal pursuant to section 72(1) of *The Residential Tenancies Act, 2006* (Act), seeking to set aside a writ of possession and order to pay rental arrears that had been rendered in favour of the respondent landlord, Boardwalk REIT Properties Holdings Ltd. (Boardwalk) in a decision from a hearing officer reported at 2022 SKORT 2415. The Director of the Office of Residential Tenancies (director) had received notice of L.R.'s appeal but did not participate in the hearing. The director provided the court with its entire file for review. L.R. argued that she received notice of the residential tenancy hearing the day before the hearing at 5:30 pm when she returned to the residence after being away for several days. Boardwalk submitted that the hearing officer was correct in finding that service had been achieved by L.R. receiving a mailed notice seven days in advance of the hearing and by having the notice posted to her door. The issues for the court to determine were: 1) whether the court had jurisdiction to consider L.R.'s appeal, and if the first issue were answered in the affirmative, 2) whether L.R. had been served with notice of the hearing as required by the Act.
HELD: The court found that it did have jurisdiction to consider L.R.'s appeal and granted the relief she sought by setting aside the

writ of possession and returning the matter back to the Office of Residential Tenancies (ORT). In considering the first issue, the court reviewed section 72(1) of Act and found that it had jurisdiction to consider L.R.'s appeal as it raised issues going to errors in law or jurisdiction. The court's analysis on the central issue of whether L.R. had been served as required by the Act focused on a review of the file received from the director and the submissions of parties. The court found that the hearing officer erred when he concluded that service had been achieved by mail delivery one week in advance and posting a notice to the rental unit as required by the ORT, as sufficient evidence had not been received that both steps had been taken. The court found no certificates of service in the file received from the director confirming that L.R. had been served as required. While the Act permits a hearing officer to deem effective irregular service, that was not a provision relied upon in this instance. L.R.'s appeal was granted, and the matter remitted to the OTR for rehearing.

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***Leier v Probe*, 2022 SKKB 247**

Dovell, 2022-11-10 (KB22236)

Civil Procedure - Discovery - Documents - Privilege
Civil Procedure - Costs - Expert Witness Fees
Wills and Estates - Procedure

J.L., the administrator *de bonis non* of the Estate of M.L.L. and D.L., the plaintiffs, filed an application for the defendant, B.P., to produce documents. The application before the court was filed pursuant to Rules 5-12(1)(e) and 5-12(2)(a) of *The Queen's Bench Rules* and focused on the production of a material document titled "March 8, 2022 Berger Cavan Group Report" (report) and associated materials provided to the accountant who authored the report. B.P. objected to the production of the report as he asserted that the report had been prepared in response to the claim filed and was protected by litigation privilege. B.P. did however, seek that the costs of the report in the amount of $58,830.00 be paid by the estate. The defendant had previously acted as a power of attorney for the deceased for several years and was named as the executor of her estate. The parties had previously been involved in two originating applications: in the first originating application, B.P. was ordered to provide an accounting of all affairs and decisions he had made while he acted under a power of attorney for the deceased; the second originating application resulted in the removal of B.P. as the executor of the estate in reasons found at *Leier v Probe*, 2021 SKQB 41. After the originating applications, B.P. received the claim from the plaintiffs which seeks over $1 million in general damages for breach of duty to account, breach of fiduciary duty, breach of trust and unjust enrichment. The court was provided with the report under seal with consent of the parties to review the documents, if necessary, with this authority arising from an interim fiat being granted by the court. The parties also filed competing affidavits and briefs, including an affidavit filed by the accountant who had authored the report. The issues for the court to determine were: 1) Is the report a consultant/expert report of the defendant, B.P., prepared for the dominant purpose of litigation and did litigation privilege attach to it? 2) If so, had the litigation privilege been waived expressly, by implication or where fairness and consistency so required? 3) Who was responsible for the payment of the invoice for the report?
HELD: The court found the following on the issues before it: 1) The report was prepared for the dominant purpose of litigation and litigation privilege attached: accordingly, it was not to be disclosed to the plaintiffs. 2) Litigation privilege had not been waived; and 3)

the defendant was responsible at first instance for payment for the report. As there was mixed success, the court ordered that no costs would be awarded to either party. In determining the first issue, the court reviewed the evidence filed and examined the report itself. It concluded that “words matter” and the accountant had been hired by the defendant after being served with the claim to provide an opinion. The court noted that the accountant’s affidavit confirmed he had been hired by the defendant’s counsel after the claim was received to provide an opinion for use in defending B.P. Notations within the report, the invoice for the report, and the affidavit of the accountant included phrases such as the report being prepared as a “Response to statement of claim with detailed support and analysis to assist counsel.” The report was prepared in direct response to the litigation and litigation privilege attached; the court further concluded on the second issue that privilege had not been waived. The plaintiffs argued the existence of the order from the first originating application required B.P. to provide an accounting of the affairs of the estate, however, the court found that B.P. had not had the report authored to satisfy that court order. B.P. asserted that costs are ordinarily borne by the estate for expert reports; the court rejected this argument in concluding under the third issue that, until otherwise ordered, it was not the estate’s responsibility to pay for expert reports. With the plaintiffs’ application dismissed, the court ordered that the report it had received under seal be returned to B.P. once the requisite appeal period had lapsed.

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***Egger v Waisman*, 2022 SKKB 249**

Scherman, 2022-11-18 (KB22237)

Business Corporations - Just and Equitable Remedies
Statutes - Interpretation - *Business Corporations Act*, Section 207, Section 234(3)

The applicants, Egger and Ng (Egger/Ng), one set of shareholders, and a second set of shareholders, the respondents, Waisman and Hector (Waisman/Hector), together owned and operated six corporations that owned and operated six hotels and a restaurant/bar in Saskatchewan. The Egger/Ng shareholders applied to a judge of the Court of King’s Bench (chambers judge) pursuant to the “just and equitable” criteria in s. 207(b)(ii) of *The Business Corporations Act* (BCA) for an order dividing “the operating corporations between the parties pursuant to the s. 234 power [of the BCA] given to the Court to make any final order it sees fit.” The chambers judge appreciated that the applicants were “not seeking an oppression remedy under s. 207(1)(a) of the BCA.” The respondents opposed the application to deal out the operating companies between the two groups, being of the view that they were not at an unresolvable impasse and that a previous chambers order (see: 2021 SKQB 215) provided a road map towards resolution of their differences that should be given a chance to come to fruition. They also submitted that ss. 207(1), (2) and 234 of the BCA were intended to govern applications for dissolution and liquidation of a corporation when oppressive conduct was alleged, which was not the case here.
HELD: The chambers judge decided that the correct interpretation of ss. 207(1)(a), 207(1)(b)(ii), 207(2) and 234(3) was that put forward by the applicants, being that s. 207(1)(b)(ii) “standing alone, created a distinct test or criteria for the Court to exercise its power to make any order it sees fit” and then went on to state that it was just and equitable to order liquidation of the operating corporations “to bring an end to the conflict.” Having so found, he chose to exercise his discretion to end the conflict not through

liquidation of the operating corporations, but by way of an order dividing the operating corporations between the shareholder groups on terms he thought fit under ss. 207 and 234, which he went on to set out in his judgment. He did not agree with the respondents that they would be able to work together to sell the corporations or the corporate assets, given the history of animosity between the shareholder groups since 2010 that had resulted in 11 court proceedings, including oppressive conduct applications. The chambers judge relied on the judicially endorsed rule of statutory construction that "no legislative provision should be interpreted so as to render it mere surplusage" as stated in *R v Proulx*, 2000 SCC 5, which he reasoned would be the result if s. 207(1)(b)(ii) were not given independent meaning separate from s. 207(1)(a).

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***R v C.C.D.*, 2022 SKKB 253**

Mitchell, 2022-11-21 (KB22241)

Criminal Law - Sexual Assault - Sexual Offences - Person under 14
Criminal Law - Assault - Sexual Assault - Sentencing

C.C.D. was found guilty of committing sexual assault, contravening section 271 of the *Criminal Code*, against a 12-year-old victim. He appeared before the court to be sentenced. C.C.D. had been romantically involved with the victim's mother and had grown close to the victim and her twin brother. In July 2019, the victim entered her mother's bedroom where she wanted to discuss attendance at an upcoming event with C.C.D, who she viewed as a father figure. The victim was thrown onto the bed in the room and C.C.D. penetrated her. The victim's brother came to the bedroom door and witnessed the assault. C.C.D. maintained his innocence through trial. Victim impact statements were entered into the record that disclosed that the victim and her brother had both attempted suicide since the time of the assault. C.C.D. was 52 years old at the time of sentencing, had been employed with the same employer for 27 years and was involved in a common-law relationship with a partner other than the victim's mother. He had a dated criminal record. The issue for the court to determine was the sentence to impose on C.C.D.
HELD: The court imposed a custodial sentence of five years in addition to auxiliary orders. The Crown had sought a sentence of six years, while C.C.D. argued for a sentence between three and four years. The court cited section 718.1 of the *Criminal Code* to hold that the fundamental purpose of sentencing is proportionality. The court referenced the decisions of *R v L.V.*, 2016 SKCA 74 and *R v Friesen,* 2020 SCC 9 (Friesen) as being pertinent to the sentencing of offenders convicted of sexual offences against children. The court applied the facts of C.C.D., the victim, and the assault against the factors contemplated in Friesen and concluded that a fit sentence would be five years. Aggravating factors included C.C.D. being in a position of trust; the age of the victim; and the egregiousness of the assault. The court was not presented with many mitigating factors in favour of C.C.D. but did note he continued to enjoy the support of his employer and spouse, which may aid him in rehabilitation and reintegration after serving his sentence.

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***R v Quewezance*, 2022 SKKB 260 (not yet published on CanLII)**

Layh, 2022-11-29 (KB22247)

Criminal Law - Publication Ban
Criminal - Publication Ban - Access to information - Right of Access - Openness of the Court
Criminal Law - Wrongful Conviction

The Crown requested a publication ban and sealing order on court proceedings related to two women's application for interim release from custody pending the Justice Minister's (minister) review of their application alleging wrongful conviction for second degree murder in 1993. The minister's review would take several months or longer. If the minister was satisfied that there was a reasonable basis to conclude a miscarriage of justice likely occurred, the minister could direct a new trial, or refer the matter to the Court of Appeal in the manner of a conviction appeal. If the minister is not satisfied a miscarriage of justice likely occurred, he could dismiss the application. The Criminal Code does not set out how a person awaiting a ministerial review under s. 696.1 might seek release. The Crown and defence accepted that the women had a Charter right to apply for release where the application to the minister is pending and an evidentiary threshold has been met. The court considered: did the Crown establish the publication ban was necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures would not prevent the risk, and the salutary effects of the ban outweigh the deleterious effects on the rights and interests of the parties and the public?
HELD: The Crown's application for a publication ban and sealing order on interim release proceedings was denied. The judge outlined the historical development of the law relating to publication bans. The relevant context included who sought the ban, who opposed it, the stage of proceedings, the subject matter of the ban, the rights and privacy of third parties, the scope of the ban sought, and the length of time of the ban. The principle of open court was of overarching importance. Section 517(1) of the Criminal Code, relating to publication bans granted pending a trial determination, was not relevant to the publication ban sought by the Crown in this case. The Crown argued that trial fairness could be compromised by the publication of information, including personal and private information from several sources and reference to a confession. The alleged risk must be grounded in evidence. The Crown linked no evidence to a real risk of a threat to the proper administration of justice. Publication bans are the exception. None of the affiants presenting personal information sought a publication ban. Records from the earlier trial proceedings have been available to the public for nearly 29 years. A publication ban on the interim release proceedings would not prevent public access to the entire trial transcript. The circumstances are already widely known. The risk that an untainted jury would be unavailable without a publication ban was not a substantial risk. It will be several years before any possible trial. Jurors do not need to be entirely ignorant of the facts for a fair trial. A new trial need not proceed by jury trial. Because there was no substantial risk, it was not necessary to weigh the salutary and deleterious effects of a ban. However, a ban would have deleterious effects. The women argued that media coverage and community concern over their convictions drives wrongful conviction cases forward. The administration of justice thrives on exposure to light. Another wrongful conviction case in which a temporary publication ban was granted was markedly different from this case. The Crown did not establish the ban was necessary.

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***Fiddler v Provost*, 2022 SKKB 263**

Meschishnick, 2022-12-02 (KB22255)

Landlord and Tenant - Residential Tenancies - Hearing - Appeal
Statutes - Interpretation - *Residential Tenancies Act, 2006*, Section 72, Section 73(5)

The landlord applied to the Office of Residential Tenancies (ORT) for a hearing before a hearing officer requesting an order of possession of premises he was renting to the appellant, which was granted in the absence of the tenant, who appealed the order. The appeal was taken pursuant to s. 72 of The Residential Tenancies Act, 2006 (RTA) to a judge of the King's Bench (appeal judge). The facts were uncontested, and the affidavits of the appellant were accepted by the appeal judge. The hearing had been scheduled to be conducted by telephone at 11:30 am. The appellant was provided with notice that he would be telephoned by the hearing officer at that time. Unbeknownst to the appellant, his cellphone was set to not accept calls from private numbers, and though the hearing officer called a few times, the appellant did not receive the calls and as a result did not take part in the hearing, which proceeded in his absence. The hearing officer ordered that the landlord take possession of the premises and directed that a writ of possession issue. The appellant had waited to be connected from 11:00 am to 12:30 pm and intended to participate in the hearing. He discovered by 1:43 pm that his phone had blocked the hearing officer's calls. At that time, the hearing officer had not rendered his decision. The appellant requested a rehearing pursuant to s. 73(5) of the RTA within two hours of learning the hearing had concluded, which was denied by the hearing officer who ruled that "the tenant should have ensured that the calls were going through to his phone or contacted the ORT shortly after to enquire."
HELD: The appeal judge quashed the decision of the hearing officer and ordered a new hearing. He recognized that the appellant had raised issues of procedural fairness, in particular that he was arbitrarily denied the right to be heard before a decision against his interests was rendered, and such a breach of natural justice was a question of law which gave him the jurisdiction to hear the appeal. He went on to find that the hearing officer erred in law by "failing to identify, much less consider" the legal basis for the exercise of his discretion to deny a rehearing; his decision to refuse to grant the rehearing was therefore not capable of meaningful appellate review; and he went on to say the hearing officer "failed to conduct a fair hearing" by not considering evidence from the dispute resolution office of the ORT and giving the appellant a chance to explain the reason why the hearing officer could not reach him by phone.

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***Mountain Investment Corp. v Quewezance*, 2022 SKKB 266**

Robertson, 2022-12-05 (KB22252)

Civil Procedure - *Queen's Bench Rules*, Rule 7-1, Determination of a Question
Contracts - Unconscionability
Debtor and Creditor - Mortgage - Foreclosure

Mortgages - Foreclosure
Unconscionable Transactions

The defendant borrower applied under Rule 7-1 of *The Queen's Bench Rules* to determine whether a mortgage agreement was unconscionable pursuant to The Unconscionable Transactions Relief Act (Act) or the common law. The borrower owned and lived in a house in Regina. A first mortgage was registered against the property for $190,000 in 2016 by a non-party mortgage lender. The plaintiff lender and the borrower signed a mortgage agreement for a second mortgage to secure a $28,000 loan. The agreement had a one-year maturity date and a 20-year amortization period. Interest accrued at a rate of 14.99% per annum. Additional broker, placement and administration fees of $7,649 were charged. The borrower had received legal advice regarding the second mortgage. The borrower had missed payments on the second mortgage. The borrower had paid a total of $28,355.62 on the second mortgage and still owed $23,760.52 at the time the application was heard. The chambers judge considered: 1) did the application satisfy the requirements for a hearing under Rule 7-1; 2) should relief be granted under the Act or the common law for unconscionability; and 3) if yes, what was the appropriate remedy?
HELD: The cost of the loan was excessive, and relief was granted under the Act. 1) Rule 7-1(1) allows an issue to be heard before trial where its determination will dispose of all or part of the claim, substantially shorten a trial or save expense. The parties agreed on facts for the purpose of the application. Deciding the unconscionability issue would dispose of part of the defence, shorten any trial and save expense. The criteria for a Rule 7-1 determination were met. 2) Saskatchewan precedents regarding unconscionability pre-dating Supreme Court of Canada decisions from 2020 were questionable, given the SCC's 2020 clarification of the test for unconscionability. For a contract to be unconscionable at common law, there must be an inequality of bargaining power between the parties and it must be an improvident bargain. Relief under *The Unconscionable Transactions Relief Act* requires proof that the cost of the loan was excessive, or the transaction was harsh, or the transaction was unconscionable. The borrower and lender had no prior relationship, which weighed against granting relief under the Act. The borrower was led to the lender by a third party who received a $3,950 broker fee, which favoured granting relief. The one-year loan term was a neutral factor. Although the urgency of the borrower's circumstances was not objectively real, the borrower was anxious and financially vulnerable, which favoured granting relief. The lender did not have to borrow funds to finance the loan, which was a neutral factor. The borrower was behind in credit card payments but did not have a history of prior defaults. The judge assessed this as a neutral factor. There were two mortgages, but ample equity to secure the second mortgage. This circumstance was neutral. The borrower would have difficulty reading and understanding the loan agreement, which favoured granting relief. The borrower obtained legal advice, which weighed against granting relief. The application related to a mortgage agreement. Legislative policy and court supervision of foreclosure proceedings favoured granting relief. As a whole, the circumstances were mixed. The cost of the loan was 48.34 percent. In light of prevailing interest rates at that time, the cost of the loan was excessive. The agreement was harsh in effect on a financially vulnerable person. There was inequality in the positions of the parties. The bargain was improvident. A fully informed and competent credit counsellor would not have recommended the borrower enter into the agreement at the time it was made. The borrower was entitled to relief under the Act because the cost of the loan was excessive, the transaction was harsh and unconscionable. 3) The cost of the loan was reduced retroactively to the original interest rate of 14.99 percent plus a one-time administration fee of $1,000 with no other fees. Costs of the application were fixed at $1,000.

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***Singer Enterprises Inc. v Parrish & Heimbecker, Limited*, 2022 SKKB 268**

Currie, 2022-12-12 (KB22263)

Contracts - Interpretation - Jurisdiction
Civil Procedure - Jurisdiction of the Court
Statutes - Interpretation - *Arbitration Act, 1992*
Statutes - Interpretation - *International Commercial Arbitration Act*

The plaintiff was a grain producer who had a contracted with the defendant to deliver grain to the defendant in 2021. The plaintiff was unable to deliver the grain and informed the defendant. The defendant claimed the plaintiff owed it $765,037.59 in lieu of delivering the shortfall amounts of grain and initiated arbitration proceedings under the contracts. The plaintiff took the position the contract was unconscionable and unenforceable, and started a court action seeking a declaration the contracts were unenforceable and a declaration the arbitration clause did not empower an arbitration tribunal to decide the issue, and an interlocutory injunction restraining the defendant from pursuing arbitration. The defendant applied for a stay of the court action so the matter could proceed to arbitration. The plaintiff applied for an injunction of the arbitration on the grounds the arbitration clause was unconscionable. The court considered: 1) would the arbitral tribunal or the court rule on whether the arbitration clause was unconscionable; and 2) what orders were appropriate as a result?
HELD: The plaintiff's action was stayed to allow the arbitration to proceed. 1) The contract stated any claim related to the contract shall be settled by arbitration. Regardless of whether *The International Commercial Arbitration Act* or *The Arbitration Act, 1992* applied, the Act empowered an arbitral tribunal to rule on its own jurisdiction, including the existence or validity of the arbitration agreement. The tribunal can address issues of unconscionability. The lack of an express reference to the tribunal's authority over unconscionability does not create an ambiguity. An arbitral tribunal is empowered to rule on its own jurisdiction even when that issue touches on a matter of equity. *The International Commercial Arbitration Act* prohibits the application of equity in making the award on the merits of the matter in the absence of the parties' agreement otherwise. That Act does, however, bestow broad power to rule on any jurisdictional issue, including matters of equity. *The Arbitration Act, 1992* empowers a tribunal to apply equity. The interpretation of commercial arbitration contracts generally is now considered a question of mixed fact and law, not a question of law alone. A standard form contract where there is no factual matrix specific to the parties is generally but not always a question of law alone. The question of unconscionability involved a consideration of whether the arbitration clause arose in the context of inequality of bargaining power, and whether the arbitration clause amounted to an improvident bargain for the plaintiff. Whether there was an inequality of bargaining power involved facts beyond the language of the contract and was specific to the parties. Whether the arbitration clause, which required an up-front arbitration fee and located arbitration in the United States, was improvident for the plaintiff was a question involving facts specific to the parties and beyond the language of the standard form contract. The question of whether the arbitration clause is unconscionable is a question of mixed fact and law to be determined by the arbitration tribunal. 2) The plaintiff's action was stayed pending the tribunal's ruling on the plaintiff's allegation that the arbitration clause is unconscionable; or if the plaintiff does not participate in the arbitration process, the tribunal's determination of the arbitration process. All other matters raised were premature. The respondent was entitled to costs of both applications.

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***United Food and Commercial Workers, Local 1400 v Prairie Pride Natural Foods Ltd.*, 2022 SKKB 274**

Elson, 2022-12-19 (KB22264)

Administrative Law - Arbitration - Judicial Review
Administrative Law - Boards and Tribunals - Authority - Duty of Fairness - Judicial Review
Administrative Law - Judicial Review - Arbitration - Interpretation of Collective Agreement
Labour Law - Arbitration Board - Judicial Review

The union and the employer both sought judicial review of an arbitration board's award deciding that the employer wrongfully terminated an employee after an off-site confrontation with other employees, and ordering the employer pay the employee damages instead of reinstating him. The union argued reinstatement was the proper remedy. The employer argued the hearing had been unfair because an unqualified interpreter translated witness testimony, and the board's decision itself was unreasonable. The court considered: 1) did the board breach procedural fairness by conducting the hearing with an interpreter without formal qualifications or who lacked impartiality; 2) did the board fail to act reasonably in disregarding contradictory testimony; 3) did the board fail to act reasonably in deciding the grievor had not committed a disciplinable act; 4) did the board fail to act reasonably in interpreting the collective agreement to require the employer to conduct a more complete investigation; and 5) did the board fail to act reasonably by ordering damages instead of reinstatement?
HELD: Both applications for judicial review were dismissed, with the employer entitled to costs of the union's application under column 2 and the union entitled to costs of the employer's application under column 3. 1) The employer was not denied procedural fairness by not having a formally qualified translator. The award did not address translation services provided at the hearing. Affidavit evidence regarding translation at the hearing was permitted because it related to a question of procedural fairness not otherwise found in the record. Improper lines of cross-examination on an affidavit were disregarded. The translator was known to the grievor and was not a member of a translator association, nor did she have formal training as a translator. The employer objected to the translator at the hearing. The union was not able to locate an alternate translator on short notice. The duty of procedural fairness applied to arbitration proceedings. The nature of the decision and the process used to make it, the legislative scheme, and the legitimate expectations all suggest procedural protections similar to those in a civil trial. The importance of the decision to those affected may not always be the same for all parties to an arbitration proceeding. The arbitration board could observe the potential impacts on the parties and provide the necessary procedural protections. The court found no court authority that s. 14 of the *Charter* necessarily applies to grievance arbitration proceedings. The employer and union both knew about the grievor's language challenges before the hearing. Steps could have been taken to address the need for a translator before the first day of hearing. The employer argued it was denied a proper understanding of the testimony of the witnesses who testified in Thai. The employer further argued it was denied a meaningful opportunity to cross-examine these witnesses. The court confirmed the grievor had difficulties with English and had a right to an interpreter for which all parties ought to have planned. The employer has a right to understand the testimony given by witnesses and cross-examine meaningfully. Procedural protections for the grievor are qualitatively different from the protections for the employer. The employer had the onus to prove justification for dismissal, and the grievor had to respond. The employer's own failure to interview the grievor before dismissal put the employer at a disadvantage. The employer's professed ignorance about the case was a mystery of the employer's own making. The extrinsic evidence did not establish the translator was not competent, despite no formal training. 2) The arbitration board's treatment of conflicting testimony did not make the decision

unreasonable. The employer's argument relied on affidavit evidence that was not part of the record. The affidavits conflicted regarding the actual testimony. The court did not consider this evidence. The arbitration board identified a conflict in testimony and explained the reasons for rejecting one testimony over the other. An unexplained rejection of a witness's testimony does not alone render a decision unreasonable. 3) The board's decision was not unreasonable for finding there was no cause for discipline. The employer argued that the grievor, having followed his coworker from work, stopped in a parking lot and engaged in a verbal confrontation was enough to justify dismissal. The employer did not articulate how the conclusions the arbitrator did draw were unreasonable. The employer also had not relied upon these events as the reason at the time of dismissal. 4) The labour-management section of the collective agreement used open-ended language that may well justify multiple interpretations. The board's interpretation that the language applied to discipline was transparent, justified and intelligible in the context and purpose of the collective agreement. Furthermore, the interpretation was not necessary to the outcome of the arbitration decision overall. 5) The judge probably would have ordered reinstatement given the circumstances, but the decision to award damages without reinstatement was transparent, justified, intelligible and the outcome was defensible.

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***Haas v Saskatchewan Veterinary Medical Association*, 2022 SKKB 275**

Morrall, 2022-12-19 (KB22265)

Administrative Law - Duty of Fairness - Breach
Administrative Law - Judicial Review
Administrative Law - Judicial Review - Adequate Alternative Remedy
Administrative Law - Judicial Review - Natural Justice/Procedural Fairness
Civil Procedure - *Queen's Bench Rules*, Rule 3-56(3)
Statutes - Interpretation - *Electronic Information and Documents Act, 2000*, Section 10

The applicant applied for judicial review seeking to quash all decisions and resolutions passed at an annual general meeting of the Saskatchewan Veterinary Medical Association. The applicant is a member of the association. After the AGM, the applicant learned that the association had made declawing cats an offence under the association's bylaws. The applicant said he did not know the declawing issue was on the agenda, and he argued he ought to have been informed of the agenda by regular mail so he could make submissions before the issue was decided. The association said they had emailed all members five times before the AGM informing them how they could access the AGM materials. The declawing bylaw was passed with 51 votes in favour, seven against and one abstention. Declawing has been banned in seven other Canadian provinces. The court considered: 1) was there an undue delay in filing the originating application for judicial review; 2) was an adequate alternative remedy available to the applicant; 3) what was the appropriate standard of review; 4) was the notice given reasonable or correct; 5) what would be the appropriate remedy; and 6) costs.
HELD: Application dismissed. 1) The delay in bringing the application was not undue. The application was filed seven to eight months after the applicant found out about the declawing amendment. There is no strict timeline for judicial review in Saskatchewan

and latitude must be given to litigants who have not previously engaged a lawyer and where there is no obvious avenue of appeal. Even if the delay was undue, there is no substantial hardship or prejudice in the matter proceeding. 2) The judicial review was dismissed because the applicant had adequate alternative remedies. Judicial review is discretionary. The public interest does not always require judicial intervention. Absent exceptional circumstances, parties cannot proceed to the court system until the administrative process is completed. The applicant here had democratic options. He could convene a special meeting of council to consider the matter, with the support of 25 voting association members, or propose an amendment to reverse the change at the next annual general meeting. The judge did not see the point of forcing the association to reconsider a democratic decision that passed with an overwhelming majority of votes because the applicant did not read his email. 3) In the event the judge was incorrect in determining an adequate alternate remedy, a correctness review of procedural fairness questions would be required, with reference to the nature of the decision and process followed, the statutory scheme, the importance of the decision to individuals affected, the legitimate expectations, and the agency's choice of procedures. 4) Email notices did not breach procedural fairness. *The Electronic Information and Documents Act, 2000* (EIDA) at s. 10 specifies that a requirement to provide information in a specific non-electric form is satisfied if the information is provided in an electric form that is substantially the same, accessible and capable of being retained for subsequent reference. The term "mail" as used in *The Veterinarians Act, 1987* and bylaws does not include email. However, the EIDA provisions mean email satisfied the mail notice requirements. The applicant's consent to receive documents by email was inferred from how he signed up for registration and his receipt of 126 emails.

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***S.L.L. v D.B.L.*, 2022 SKKB 277**

Brown, 2022-12-20 (KB22267)

Family Law - Child Support - *In Loco Parentis*
Family Law - Exemption from Mandatory Mediation - Interpersonal Violence

The parties were the grandparents of two children. The children had been apprehended from their biological parents, who had not been involved in parenting for the past ten years. The applicant applied for an interim order the respondent provide pension and income information, child support and spousal support. The court considered: 1) could child support be ordered against the respondent, when he was not the biological parent; and 2) could orders be made before mandatory mediation occurred? HELD: The respondent was ordered to provide income and pension disclosure and child support, and the parties were exempted from mandatory mediation. 1) Someone who stands *in loco parentis* can and should be ordered to provide child support to another person who is caring for the children. The respondent argued that he was a foster parent, and thus not responsible for child support. *The Family Maintenance Act, 1997* includes in the definition of "parent" anyone who demonstrates a settled intention to treat a child as part of the family, except when the person is providing foster care services. The *Divorce Act* defines "child of the marriage" to include a child for whom the spouses or former spouses stood in the place of parents. The application did not specify any provision of either Act. The court used the standard that most readily provided for child support. It is not in the best interests of the child to permit a parent to decide if there is or is not a parental relationship. On the *prima facie* standard of an interim application, the

respondent was a parent to the children while cohabitating with the applicant. The respondent had raised the children for ten years and there was no evidence of him telling the children he was only a foster parent. He was seeking shared parenting time. He has an obligation to support the children financially. There was no evidence the biological parents were able to support the children financially, but the respondent could make an application against the biological parents. The court considered the respondent's responsibility for significant debts arising out of the marriage and ordered him to pay 85 percent of the Guidelines amount. Given the parties' relative incomes, no spousal support was ordered. 2) Section 44.01(6) of *The Queen's Bench Act, 1998* permits the court to exempt the parties from mandatory situation in certain circumstances, including a history of interpersonal violence. Evidence established the respondent's expressed anger against the applicant, and his criminal charges for assault and threats against his current partner and others. The threat violence was more than mere suspicion. The court exempted the applicant from the obligation of mandatory mediation at this time.

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***R v D.M.R.*, 2022 SKPC 42**

Hinds, 2022-10-28 (PC22039)

Criminal Law - *Youth Criminal Justice Act*
Criminal Law - Aggravated Assault - Elements of Offence
Criminal Law - Defences - Self-Defence

D.M.R., a 17-year-old youth, came before a Provincial Court judge for trial on two counts: that he wounded his 26-year-old cousin, T.I., with a small hunting knife contrary to section 268 of the *Criminal Code* (aggravated assault), and that he contravened a previous youth sentence to abstain from the possession and consumption of alcohol. D.M.R. conceded that he consumed alcohol during the evening the crimes are alleged to have occurred. In response to the aggravated assault charge, he testified that he used his knife against T.I. in self-defence. T.I. and D.M.R. are of similar height, but T.I. outweighed his younger cousin by over 100 pounds during the evening of the stabbing. The cousins were attending a house party that eventually moved to nearby Pow Wow grounds.Both cousins admitted to consuming alcohol during the evening of the incident: T.I. testified that he consumed enough alcohol that he "blacked out" for certain portions of the evening; D.M.R. testified that he consumed five beers during the evening. D.M.R. testified that his cousin antagonized him throughout the evening. He stated that he was cautioned by T.I. to not speak to someone at the party; that his vehicle was minimally damaged by his cousin crashing into it; that he was punched by T.I. at the residence; that his buttocks were pinched by T.I. at the Pow Wow grounds, where he testified that he was later tackled by his cousin and repeatedly struck in the back of the head. He testified it was while he was being pummeled and struck, with his pleas to T.I. to stop going unheeded, that he took out his knife and stabbed his cousin three times in his back. Another witness testified that she observed events at the residence and Pow Wow grounds as described by D.M.R. T.I. testified that he did not have a memory of being stabbed and that it was possible that events had happened as described by D.M.R. and the other witness. The court considered three issues for trial: 1) the elements of the offence of aggravated assault; 2) credibility of the witnesses and findings of fact; and 3) whether the Crown had negatived self-defence.
HELD: D.M.R. established that he acted in self-defence in stabbing T.I. and the court acquitted him of aggravated assault. The court

sequentially considered the three issues outlined for trial to find D.M.R. not guilty of aggravated assault. The court first established the elements necessary for the Crown to establish aggravated assault. For a conviction for aggravated assault, in addition to the elements necessary for an assault, it is also necessary for the Crown to establish that an accused wounded, maimed, disfigured or otherwise endangered the life of the complainant. In establishing credibility and facts, the court cited *R v W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742 for the common principle that if an accused's evidence is believed, a court must acquit. The court concluded that D.M.R. was a credible and reliable witness. It also found the other witness who corroborated the events D.M.R. testified to as being a reliable and credible witness. T.I.'s evidence was viewed as credible, but unreliable, as his memory of the incident was affected by his heavy consumption of alcohol that evening. The court briefly considered whether an aggravated assault had occurred and concluded that while the wounds T.I. suffered were minor, they did establish the elements of an aggravated assault as they fit into the definition of "wound" as considered in jurisprudence from other cases and a reasonable person would have realized D.M.R.'s conduct would have subjected T.I. to the risk of bodily harm. The central focus of the court's analysis was whether the Crown negatived self-defence. The court reviewed section 34 of the *Criminal Code*, which governs self-defence, and other cases which have considered self-defence including the recent case of *R v Khill*, 2021 SCC 37, 409 CCC (3d) 141. In applying the facts against the factors found in section 34, the court found that on an objective and subjective basis, D.M.R. had acted in self-defence in stabbing his cousin when he was being pummeled on the ground and he was found not guilty of committing aggravated assault.

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***R v A.H.*, 2022 SKPC 46**

Schiefner, 2022-11-24 (PC22043)

Criminal Law - Sexual Assault - Sexual Offences - Person under 14

A.H. was tried before a Provincial Court judge for an allegation that he had committed a historical sexual assault against his half-brother when he was 16 and the complainant was nine or ten years old. A.H. was 36 years old at the time of trial. The complainant alleged that during a visit over Christmas in 2002 or 2003, after family members had finished opening presents, A.H. asked him to go with him to the lower level of their father's residence. While in the lower level of the residence, the complainant alleged that A.H. had him touch his penis and briefly inserted it into his mouth. The complainant did not have a memory of what happened after the incident, but testified that it affected him in subsequent years, and that he abused alcohol and drugs to suppress his recollection of the incident. The complainant had maintained sobriety into 2016 or 2017 when he said A.H., in an inebriated state during a visit at their father's home, sought forgiveness from him. A.H. testified in his own defence and stated that the incident had never happened when he was a youth and that he did not recall the 2016-2017 conversation that the complainant testified to. The complainant went to the police to describe what A.H. had done to him when they were younger after he lost a younger brother (who was also A.H.'s half-brother) to suicide in 2020; the complainant felt that A.H. had harmed his deceased brother too. The issue for the court to determine was whether A.H. had committed a sexual assault against his half-brother in 2002 or 2003.
HELD: The court acquitted A.H. The court focused its inquiry of whether A.H. had committed the sexual assault by assessing the credibility and reliability of the evidence received from the complainant and A.H. The court concluded that it was left with a

compelling and persistent doubt that A.H. had committed the crime alleged. The court cited *R v W. (D.)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742 to confirm that it is the Crown's burden to prove its case beyond a reasonable doubt. The court found that the complainant and A.H. were credible witnesses, but the court had concerns with the reliability of the complainant's testimony about the incident. The court cited *R v G.D.D.*, 1995 CanLII 7500 (NS SC) to highlight the scrutiny to be applied to the evidence received in sexual assault cases where childhood memories may be false or distorted. While the complainant may be credible and hold a sincere belief that the incident occurred, the court identified reliability issues with the evidence received: the complainant testified that his initial impressions of the incident were that it was a "bad dream" and only later did he grasp that it was a real event; the complainant admitted to consuming hard drugs in addition to alcohol for years (which the court found could have an influence on memory); and, the complainants' negative feelings toward A.H. may have been affected by the loss of his brother. The court did not receive a clear narration of the 2016-2017 conversation and attached little weight to this evidence. Given the doubt in the reliability of the complainant's testimony, A.H. was found not guilty.

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