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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***Phillips v Vo*, 2023 SKCA 20**

Richards Schwann Kalmakoff, 2023-02-02 (CA23020)

Civil Procedure - Request for Recording of a Proceeding
Civil Procedure - *Queen's Bench Rules*, Rule 9-34

The appellant sought a copy of an audio recording of an assessment hearing for use in his defense against Law Society allegations of professional misconduct. The appellant based his application on Rule 9-34 of *The Queen's Bench Rules*, which governs access to recordings of proceedings in the Court of King's Bench. The Queen's Bench judge dismissed the application because the appellant had not shown why the recording was necessary for his defence (*Vo v Phillips Legal Professional Corporation*, 2022 SKQB 41). The appellant argued that the chambers judge applied the wrong test for deciding whether a copy of the recording should be released.
HELD: The appeal was allowed. The Court of Appeal held that the Queen's Bench judge took

Civil Procedure - *Queen's Bench Rules*, Rule 6-13, Rule 12-1(1)

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an improperly restrictive approach to the application of Rule 9-34. There is no requirement for an applicant to indicate how important or necessary a copy of the recording will be to the applicant. A copy of a recording "should be released if it is sought for an acceptable purpose, if the proposed manner of its use will not be problematic and if its use will be limited to the purpose in question."

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***P&H Milling Group a Division of Parrish & Heimbecker, Limited Saskatoon v United Food and Commercial Workers, Local 1400*, 2023 SKCA 14**

Caldwell Kalmakoff McCreary, 2023-01-26 (CA23014)

Administrative Law - Labour Arbitration Award - Appeal
Administrative Law - Judicial Review - Collective Agreement - Standard of Review - Reasonableness

This was an appeal from the judicial review of a labour arbitration award. The arbitrator considered whether a group of employees was entitled to sick pay when they were required to self-isolate due to potential exposure to COVID and were not permitted to work as scheduled. The grievances were filed in March and April of 2020. The employees testified that they had no symptoms and were otherwise "ready, willing, and able to work as scheduled" but could not because of the requirement to self-isolate. The appellant employer and the union respondent were under a collective bargaining agreement. The arbitrator held that the sick leave provisions in the collective agreement did not entitle the grievors to sick pay because they were not actually sick. On judicial review, a Court of Queen's Bench chambers judge found that this was too narrow an interpretation and was unreasonable. The chambers judge set aside the arbitrator's decision and held that the grievors were entitled to sick pay. The appellants appealed this decision. The parties to the appeal agreed that the chambers judge correctly identified that the labour award should be reviewed on a reasonableness standard. Therefore, there was only one issue on appeal: 1) whether the reviewing judge correctly applied the reasonableness standard of review.
HELD: The appeal was dismissed. The Court of Appeal (court) agreed with the chambers judge's conclusion that the only reasonable interpretation of the sick leave provisions was that the parties intended for the employees to be entitled to paid sick leave when they were required to be absent from work for legitimate health-related reasons. 1) Reasonableness review requires the appeal court to "step into the shoes" of the chambers judge and conduct its own

Family Law - Child Custody - Person of Sufficient Interest

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reasonableness review (*Teamsters Canada Rail Conference v Canadian National Railway Company*, 2021 SKCA 62). The court identified two types of fundamental flaws that can render a decision unreasonable: a) a failure of rationality internal to the decision-maker's reasoning process; and b) when the decision is untenable in some respect, given the relevant factual and legal constraints that bear on it. Here, the court found that the arbitration award was flawed in both ways. The arbitrator did not perform any analysis on the contractual language relating to benefit entitlement in the sick leave provisions of the collective agreement. Her failure to follow the accepted approach to collective bargaining agreement interpretation constituted a departure from established arbitral authority and was unreasonable. Determining the scope of the grievors' entitlement to benefits under the sick leave provisions was the first place the arbitrator should have considered, but this went unanswered. The arbitrator's chain of analysis was not internally rational. The failure to interpret the language of the sick leave provisions (which included five words used interchangeably: illness, disability, sickness, accident, and injury) was fatal to the rationality of the reasoning process.

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***Klaptchuk v Johnson*, 2023 SKCA 25**

Jackson Barrington-Foote Kalmakoff, 2023-02-22 (CA23025)

Civil Procedure - Summary Judgment
Wills and Estates - Common Law Doctrine - *Devastavit*

The chambers judge granted a summary judgment in favour of the respondents, finding the executrix appellant personally liable to the respondents for an unsatisfied judgment against the estate. The respondents had originally obtained a judgment, but eight days later, the appellant unexpectedly passed away. The chambers judge held that the executrix appellant breached her obligations as executrix and trustee of the estate because she distributed the estate's assets for her own use instead of settling the respondent's claim against the estate. Further, the chambers judge held that this conduct amounted to waste or mismanagement characterized under the common law doctrine of *devastavit*, concerning breaches of the duties of personal representatives. He determined that the only defence she could raise to avoid personal liability, *plene administravit*, was not available to her. The appellant appealed, arguing that the chambers judge erred by: 1) improperly applying the common law doctrine of *devastavit*; 2) deciding the case on a summary judgment basis; and 3) by failing to consider and apply relevant provisions of *The Enforcement of Money Judgments Act* (EMJA). 4) The appellant also applied to introduce fresh evidence.

L.E.S. v L.L.S.

McCormack v Piller

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Welter v Kequahtooway

HELD: The Court of Appeal allowed the appeal but dismissed the application to adduce fresh evidence. The chambers decision was set aside in its entirety, and the matter was remitted to the Court of King's Bench. 1) The chambers judge applied the common law doctrine of *devastavit* in a manner inconsistent with provisions of *The Trustee Act, 2009* and thus made a legal error. He was required to first determine whether the appellant's actions breached the duty of care owed by a trustee, and if so, he then had to consider whether she should be relieved from personal liability under s. 45 of *The Trustee Act, 2009*. Executors and administrators are "trustees" as defined in *The Trustee Act, 2009*. They are subject to the provisions of that Act, including the general duty of care and good faith. Executors have a legal obligation to preserve assets of the estate, and neglect of this duty can constitute a *devastavit* at common law, giving rise to personal liability. The standard is not perfection, but that of "honesty, and reasonable skill and prudence." However, legislative provisions like s. 45 of *The Trustee Act, 2009* provide courts with discretion to relieve a trustee from personal liability where it would be fair to do so if the trustee acted honestly and reasonably, notwithstanding the breach. Here, the chambers judge erred because once he found that the appellant breached her duties as a trustee in a way that constituted a *devastavit*, he only considered the availability and applicability of the common law defence, rather than turning his mind to whether it would be fair to relieve the appellant from personal liability under s. 45 of *The Trustee Act, 2009*. There was material in the record before the chambers judge that obligated him to turn his mind to that section, and his failure to do so constituted an error of law. 2) This was not an appropriate case for summary judgment. The failure to consider whether the appellant should be relieved of personal liability under s. 45 of *The Trustee Act, 2009* was also sufficient to find that the chambers judge made an error in determining the case on a summary judgment basis. If the chambers judge had applied the correct legal framework, there would have been no proper basis for concluding that there was no genuine issue requiring a trial. There were conflicts in the evidence relevant to the legal issues to be decided, and the issues could not properly be resolved on the affidavits filed. 3) Having determined the above two issues, the court found it unnecessary to turn to the arguments under the EMJA. 4) The evidence that the appellant sought to introduce on appeal occurred prior to the hearing before the chambers judge and could therefore have been tendered in the original hearing with the exercise of due diligence. The fresh evidence failed to meet the applicable tests under *R v Palmer*, [1980] 1 SCR 759 and affirmed in *Barendregt v Grebliunas*, 2022 SCC 22.

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***Mryglod v Tarling*, 2023 SKCA 26**

Schwann Leurer McCreary, 2023-02-22 (CA23026)

Appeal - Family Law - Custody and Access
Family Law - Appeal - Variation - Parenting Order

A 2011 consent judgment provided for shared parenting of a four-year-old child on a rotating weekly basis. In 2021, the father (appellant) brought an application to vary the 2011 parenting order so that the now 14-year-old's primary residence would be with him, and parenting time with the mother would be every second weekend. The appellant argued that material changes had taken place which justified a variation: the child was now ten years older and expressed her preference through a Voices of the Child assessment to live primarily with him. A Queen's Bench judge sitting in chambers made an interim order wherein he determined there was no material change in circumstances that justified the variation of a final parenting order. The appellant appealed on the grounds that: 1) the chambers judge erred in concluding that there was no material change to the child's circumstances; and 2) the chambers judge exceeded his authority by ordering that the mother's partner attend counselling.
HELD: The Court of Appeal (court) allowed the appeal and referred the matter of determining the child's best interests to the Court of King's Bench. The standard of review for appeals from interim parenting orders is deference. 1) The chambers judge overlooked material evidence and erred in principle by too narrowly defining which factors can establish a material change. There is a two-stage test for whether a material change affecting the child's circumstances has occurred. First, the judge must determine whether there has been a change in the circumstances of the child. If a material change is established, the reviewing judge must consider whether the material change is such that the best interests of the child require a variation of the order, and what kind of variation. For a change to be established, the child's current circumstances must be a distinct departure from what the court could reasonably have anticipated when the existing parenting order was granted. For materiality of the change, the child's circumstances must have altered in a fundamental way since the granting of the parenting order. The father argued that a material change in circumstances occurred because ten years had passed since the 2011 parenting order, the parties now resided in different places, both had re-partnered, and the child was now old enough to express that she wished to live with her father. The chambers judge was not satisfied that a material change had been established, concluding that the passage of time and the child's wishes were not determinative. He indicated that the court should be more concerned with fostering stability, and expressed concern that if the teen's wishes were granted, it would lead to a "slippery slope" of teenage children asking for variations, which could overwhelm the system. Here, the court determined that the chambers judge was obliged to assess the changes that occurred over time and to determine whether they fundamentally affected the child's circumstances. The court referred to case law from Saskatchewan and other provinces where courts concluded that a child's increased maturity, together with their expression of a preference, can constitute a material change in the child's circumstances sufficient to vary a parenting order. 2) The chambers judge exceeded his authority when he ordered a non-party (the mother's partner) to attend counselling.

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***R v Jimmy*, 2023 SKCA 28**

Jackson Tholl Kalmakoff, 2023-03-01 (CA23028)

Criminal Law - Appeal - Sentencing - Aggravated Assault
Criminal Law - Appeal - Sentencing - *Criminal Code*, Section 268, Section 718(e)

The Crown appealed a sentence of two years less a day (minus credit for pre-sentence custody) followed by two years of probation for aggravated assault. The offender was found guilty after a trial in Provincial Court. The victim sustained permanent, life-altering injuries after the offender stomped and kicked the victim's head and body while he was unconscious. Family members assumed the victim was unconscious from drinking, so they put him in his bed; the victim did not receive medical attention until the following day. The victim suffered a brain bleed, spent six weeks in hospital recovering, had his memory permanently impaired, and required extensive physical therapy to relearn how to walk and talk. At the time of the attack, the offender was out on bail for another assault charge and was in breach of conditions to obey a curfew and to abstain from the consumption of alcohol. The victim started the altercation by throwing one punch. The offender's argument for an acquittal based on self-defence was rejected in Provincial Court, with the judge finding that the offender's actions were "overwhelmingly inappropriate to the situation." The Court of Appeal (court) considered several errors that impacted the sentence imposed: 1) the treatment of age and relative propensity for violence as sentencing considerations; 2) the application of the step or jump principle; and 3) the application of s. 718(e) of the *Criminal Code* (Code). As a result of these errors, the court intervened to impose a fit sentence.
HELD: The majority of the court granted leave to appeal the sentence and allowed the Crown's appeal. The court intervened to impose a sentence of three years minus credit for pre-sentence custody. The probation order was deleted, but ancillary orders were left undisturbed. The court indicated that the general sentencing range for aggravated assault is a term of imprisonment between two and four years, assuming the offender was of previous good character, with no prior record. Even with an established sentencing range, sentencing judges must individualize the process according to the parity principle, assessing the moral culpability of the offender and the consequences to the victim. 1) The trial judge committed errors in principle when he reasoned that a penitentiary term would be inappropriate because of the offender's age, and because the penitentiary is a place for "very, very violent offenders, who are usually much older than [the offender]." The court noted that the offender was 29 at the time of the offence and had convictions for violent offences. 2) The trial judge misapplied the "step" principle. While the offender had not received long sentences on his record before, his previous convictions did not appear to involve the same level of violence as the case at bar. 3) The trial judge erred by failing to conduct an appropriate analysis under s. 718(e) of the Code. Here, the trial judge referred to *Gladue* principles as a reason for concluding that a penitentiary sentence would be inappropriate, but failed to explain how these principles led him to that conclusion.
DISSENT: Justice Jackson would have dismissed the appeal. She did not agree that the sentencing judge erred in a way that warranted the court's intervention, citing *R v Friesen*, 2020 SCC 9 for the proposition that appellate courts "must generally defer to sentencing judges' decisions" unless there is "good reason" to intervene. The sentencing judge's reasons should have been read more favourably, as he heard the witnesses, including the victim, testify. He provided oral reasons where he gave weight to the context of the aggravated assault, the offender's personal situation, and the offender's progress during the long interval between the

offence and sentencing. The Crown on appeal did not address the fact that the original sentence imposed almost four years of state supervision on the offender when one also considered the probation period.

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***R v Mosquito*, 2023 SKCA 29**

Caldwell Barrington-Foote Kalmakoff, 2023-03-02 (CA23029)

Criminal Law - Manslaughter - Appeal
Criminal Law - Appeal - Sentencing - COVID-19

The 21-year-old offender forcibly entered a dwelling house with four others for the purpose of committing an assault. The offender was armed with a loaded, sawed-off shotgun. The gun accidentally discharged, resulting in the death of one of the people with whom the offender entered the house. The offender pled guilty to both breaking and entering under s. 348(1)(b) of the Criminal Code and manslaughter by unlawfully causing death under s. 236 of the Code. The same afternoon the guilty pleas were entered, the sentencing judge heard counsel's sentencing submissions and rendered a decision immediately after, sentencing the offender to seven years in custody for the manslaughter and five years concurrent for the breaking and entering. The Crown appealed on the basis that the sentencing judge committed errors affecting the sentence, and that the sentence was demonstrably unfit. In particular, the Court of Appeal (court) considered whether the sentencing judge erred by failing to consider or to give sufficient weight to aggravating factors while overemphasizing mitigating factors?
HELD: The court granted leave to appeal, but the appeal was dismissed. The court determined that the sentencing judge did not commit errors in principle that affected the sentence, and that the sentence was not demonstrably unfit. The sentencing judge considered the submissions of Crown and defence together with the pre-sentencing report. The failure by the sentencing judge to expressly outline all aggravating factors here did not mean that he failed to consider them. An appellate court may only intervene to vary a sentence if the sentence is demonstrably unfit, or the sentencing judge made an error in principle that had an impact on the sentence (*R v Lacasse*, 2015 SCC 64 and affirmed in *R v Friesen*, 2020 SCC 9). In order to intervene, an appellate court must be convinced not only that the sentencing judge erred but that the reasons demonstrate that the error had an impact on sentence. An appellate court must also "read the reasons of a trial or sentencing judge in a functional and contextual manner." The court rejected the Crown's arguments that aggravating and mitigating factors had not been properly considered. Here, the sentencing decision was pronounced by a judge who had very recently conducted a "careful" s. 606 inquiry, reviewed the well-crafted written submissions of defence counsel, a comprehensive pre-sentencing report, and had just heard thorough submissions from both counsel. He was also familiar with these offences as a result of having sentenced a different offender who was present at the same residence. The sentencing Crown tendered the offender's criminal record, bringing to the court's attention three convictions for crimes of violence, and two convictions for breaking and entering. The sentencing Crown argued that generally a 12-year sentence would be appropriate given the offender's high moral culpability and aggravating factors, but that in these particular circumstances, nine years would be appropriate given the guilty pleas, *Gladue* factors and the negative effect of COVID restrictions on the offender during 18 months spent on remand. Defence counsel argued that a sentence from five to seven years would be more appropriate, given the

offender's youth, *Gladue* factors, the fact that he contracted COVID twice on remand, and had been subject to unusual restrictions and lockdowns because of the virus. The sentencing judge imposed a sentence of seven years for the manslaughter, less remand credit at a rate of 1.5 to 1. The Crown on appeal submitted that the sentencing judge erred by treating COVID as a mitigating factor. The court reviewed recent jurisprudence to determine whether the sentencing judge was entitled to take COVID into account as a factor that directly impacted the sentence, rather than as remand credit. Where an offender argues that the impact of COVID should be taken into account when determining a fit sentence, evidence is required to determine the effect of the pandemic on that offender. The court has not yet addressed a legal framework to apply in this situation, but after reviewing the case law, the court found that the effects of the COVID pandemic are properly dealt with as collateral consequences unique to each offender, rather than as enhanced credit. Here, it was for the sentencing judge to determine the weight to be given to how COVID impacted the offender. The court was unable to say that the sentencing judge erred in taking this into consideration. The court expressed concerns that the Crown on appeal took a different position from the Crown at sentencing.

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***R v Croswell*, 2023 SKKB 20**

Gerecke, 2023-01-27 (KB23020)

Criminal Law - Sentencing - Aggravated Assault

The court determined an appropriate sentence for aggravated assault and possession of a knife for the purpose of committing an offence, contrary to ss. 268 and 88 of the *Criminal Code*, RSC 1985, c C-46 (Code), respectively. The Crown sought a six-year sentence while defence asked for a range of 3 to 3 ¼ years. The offender had committed a brutal, prolonged assault on the victim. HELD: The court held that a sentence of 5.5 years was appropriate for the aggravated assault conviction. The court set out the sentencing principles in ss. 718, 718.1, and 718.2 of the Code. The principles in *R v Gladue*, [1999] 1 SCR 688 were not applicable. The Crown argued that there were no mitigating factors, while defence pointed to the fact that the offender was remorseful and had family support. The court noted that the defence did not attempt to identify aggravating factors or to specifically outline mitigating factors. The court referred to a pre-sentencing report. The offender was 23 years old at the time of the offences, had a criminal record with numerous and escalating violent offences, had been apprehended by the Ministry of Social Services as a child, and then raised by his father. The offender was assessed at an extremely high risk of reoffending. The court referred to the Court of Appeal's sentencing range of two to four years for aggravated assault. Sentences exceed the four-year "ceiling" when the offender has a lengthy record for violent offences. The court stayed the s. 88 change, finding that there was a sufficient factual and legal nexus that violated the rule against multiple convictions (*R v Kienapple*, [1975] 1 SCR 729).

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***R v Larose*, 2023 SKKB 24**

Popescul, 2023-02-02 (KB23029)

Criminal Law - Manslaughter - Sentencing

This was a sentencing decision for manslaughter. The offender was charged with second degree murder but was found guilty of the lesser included offence of manslaughter after a trial by judge and jury. After the manslaughter conviction, the offender pled guilty to three other offences arising out of the same incident: two counts of assault with a weapon, and a breach of probation. While the offender was in jail for a different conviction, he was angry about an incident that occurred between him and an acquaintance and planned revenge. When the offender was released from jail, he was subject to a probation order with a condition to keep the peace and be of good behaviour. Hours after his release, the offender went to the acquaintance's house armed with bear spray and a knife, intending to harm the acquaintance. The offender arrived at the house to find five other people in the living room. The offender sprayed the occupants with bear spray, resulting in an altercation with one of the occupants. The offender stabbed the occupant in the torso during an altercation and the occupant died shortly after. The Crown argued that 16 years was a proper sentence, while defence counsel advocated for 8 years. The sentencing judge also resolved the issue of whether the offender brought a knife to the victim's house, or whether the offender found the knife at the victim's house and then used it. The sentencing judge concluded that the offender brought the knife from his house and that it belonged to the offender's wife. The offender's wife testified under oath at trial that the knife was not hers, but in a recorded video statement to police she said the distinctive green-handled army knife was hers and that she saw her husband exit the house with it after the stabbing. The Crown's application to have the statement admitted under the principled exception to the hearsay rule was granted.
HELD: The court imposed a sentence of 15 years' incarceration for manslaughter, less pre-sentence custody credit, and one year to be served concurrently for each of the three offences to which the offender pled guilty following the trial. The court set out the purpose, objectives, and principles to guide sentencing in ss. 718 to 718.2 of the *Criminal Code* (Code). The Code directed that the maximum penalty for manslaughter was life imprisonment with no set minimum. For manslaughter, there are different degrees of moral culpability ranging from near accident to near murder. In Saskatchewan, the general sentencing range for manslaughter is four to 12 years. The court undertook an extensive review of case law for a parity framework. There were few mitigating circumstances: the offender completed grade 12, worked for several years, had a supportive wife and children, had been incarcerated before but not in the penitentiary, and the evidence fell short of establishing murder. While the offender went to the house intending to cause harm to the acquaintance, he did not plan to murder anyone. The decision to cause harm immediately upon release from jail while under a probation order indicated high moral culpability and was an aggravating factor. This was essentially a home invasion. The court did refer to a pre-sentencing report to note that his moral culpability was "undoubtedly affected" by *Gladue* factors. The court concluded that in the circumstances, a sentence of incarceration above the general range for manslaughter was required. The offender's personal circumstances and historical and systemic factors placed him in a somewhat different position from a non-Indigenous offender, resulting in a fit sentence of 15 years.

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***Bryan Construction Ltd. v Chokani*, 2023 SKKB 26**

Morrall, 2023-02-03 (KB23023)

Civil Procedure - Cross-Examination
Civil Procedure - *Queen's Bench Rules*, Rule 6-13, Rule 12-1(1)

This decision arises out of a statement of claim issued by the plaintiff against the defendants in 2016 wherein the plaintiff sought damages. In this decision, a third-party defendant applied for an order under Queen's Bench Rule 6-13 and the court's inherent jurisdiction to mandate the attendance of certain parties for the purposes of cross-examination on a summary judgment application. The third-party defendants served their application 56 minutes late, making the date of service one day late. The defendants in this matter made oral submissions that if the third-party defendant's motion was granted, they should also be allowed to cross-examine. Both parties were bound by strict deadlines set by an earlier fiat of the court. The court determined: 1) whether the third-party defendant's application for cross-examination should be allowed despite the late service; and 2) if the third-party defendant's application is granted, should the defendants also be allowed to cross-examine?
HELD: 1) The court granted express leave for the third-party defendant to proceed with the application to cross-examine, and validated service under Rule 12-1(1) to deem the service as effective on the date set out in the prior fiat. The court set out two questions that must guide the courts in exercising their discretion in this situation: a) Did the litigant try to comply? b) Was there any incurable prejudice as a result of the noncompliance? For attempts at compliance, courts will be less likely to grant a discretionary remedy if the inaction is due to strategic or tactical factors. Courts will be more likely to grant a discretionary remedy when there are imperfect attempts at compliance due to human frailties. Courts can cure prejudice through adjournments or costs, but this factor operates in combination with the attempts made to comply. Here, the court noted it was unlikely that prejudice resulted from a 56-minute delay in service. There was an intention to comply with the timing of service, given that the strict application of the rules rendered actual service at 4:56 effective service as of the following day. The court found that the circumstances here militated in favour of the exercise of discretion. 2) After reviewing the authorities, the court found that while cross ordering cross-examination is a discretionary decision that can be made based on the circumstances in the matter before the court, there were no circumstances present here that would warrant changes to the procedure outlined in the fiat. The court noted that the fiat was "eminently reasonable" and specifically addressed concerns with the defendants' "dilatory conduct." They did not advise they wished to pursue any cross-examination until approximately 26 days after the deadline imposed by the court. The court found that the circumstances were "entirely different" for the defendants and denied any further cross-examination by them in this application.

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***R v Douglas*, 2023 SKKB 23**

Scherman, 2023-02-06 (KB23028)

Criminal Law - Dangerous Offender
Statutes - Interpretation - *Criminal Code*, Section 753

The trial judge previously found the offender guilty of dangerous operation of a motor vehicle under s. 249(1)(a) of the *Criminal Code*, RSC 1985, c C-46 (Code), failing to stop at an accident with the intent to escape liability under s. 252(1) of the Code, and failing to stop for police and causing bodily harm to an officer under s. 249.1(3) of the Code. The dangerous driving conviction constituted a "serious personal injury offence" for the purpose of dangerous offender or long-term offender proceedings. The Crown filed an application pursuant to s. 752.1 of the Code for a dangerous offender assessment which was filed with the court, and the Crown then applied under s. 753 for a dangerous offender designation. The focus of the evidence of the hearing was whether the offender's pattern of impulsive and dangerous behaviour, particularly while under the influence of drugs and/or alcohol, created a serious ongoing risk of him reoffending that put the safety of the public at risk. The main issue the court determined was whether the offender should be designated as a dangerous offender or a long-term offender. The requirements for being designated a dangerous offender or alternately, a long-term offender, are found in s. 753. The court referred to *R v Boutilier*, 2017 SCC 64 for an interpretation of what must be proven by the Crown to secure a dangerous offender designation: (a) the offender has committed, and has to be sentenced for, a serious personal injury offence; (b) the serious personal injury offence is part of a broader pattern of violence as described in s. 753(1); (c) there is a high likelihood of violent recidivism; and (d) the violent conduct of the offender is intractable. The court had to be satisfied that it was "likely" that the past pattern of behaviour would continue into the future. The offender had received extensive programming while imprisoned, but the issue was whether he would apply that knowledge in the future. Expert opinion testimony from the psychiatrist assessor was that the offender's history of violence was mostly impulsive behaviour as opposed to deliberate behaviour, that impulsivity tends to decrease over time with age, and that the offender's greatest risk going forward was substance abuse. The offender was diagnosed with antisocial personality disorder and substance use disorder.
HELD: The sentencing judge was satisfied that it had been proven beyond a reasonable doubt that the offender should be designated a dangerous offender. The s. 249.1(3) conviction, combined with the offender's prior convictions for similar driving behaviour, proved beyond a reasonable doubt that there had been both a pattern of repetitive behaviour showing a failure to restrain his behaviour and a likelihood of causing death, injury or severe psychological injury to others, and a pattern of persistent aggressive behaviour showing a substantial degree of indifference respecting the reasonably foreseeable consequences of his behaviour to other people. In determining whether to designate the offender as a dangerous offender, the judge considered whether the offender was a threat to life, safety or well-being of other persons, now or in the future, as well as whether such risks could be managed in the community. He found that the potential reduction in the offender's risks from ageing and Suboxone therapy were "simply possibilities" at this time. There remained a high likelihood of recidivism. The judge determined whether a sentence for a determinate period, paired with a long-term supervision period, would adequately protect the public. He concluded that the maximum penalty of a ten-year sentence of imprisonment was appropriate for the s. 249.1 offence given the offender's cumulative record and the number of similar offences.

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***Muller v Jensen*, 2023 SKKB 28**

Richmond, 2023-02-08 (KB23024)

Family Law - Bifurcation of Issues - *Queen's Bench Rules*, Rule 7-1

The petitioner claimed that she cohabited with the respondent from 2014 until 2019 when their relationship ended. The respondent passed away in 2020. The petitioner sought an equal division of the family home and property. The representative for the respondent's estate (respondent) filed an answer arguing that the claim should be dismissed because the two were never spouses. In the alternative, the respondent relied on an exemption claim and sought an unequal property division. The main issue to be determined was whether there was authority to bifurcate the matter at this early stage, in advance of the pretrial, to determine the preliminary issue of whether the parties were spouses as defined by *The Family Property Act*.
HELD: The court analyzed the case law and referred to Rule 7-1 to conclude that determining the status of the parties' relationship would be appropriate at this early stage. Here, the judge could not determine based on affidavit evidence alone whether the parties were spouses. The rules and the facts of this case justified scheduling a viva voce hearing to determine the issue of whether there was a relationship. Such a determination could dispose of the claim or significantly increase the likelihood of settlement. There were also advantages in proceeding by way of bifurcation to potentially avoid the cost of having valuations done to the property should the respondent be successful.

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***Fiddler v Janssen Inc.*, 2023 SKKB 29**

Mitchell, 2023-02-08 (KB23025)

Class Action - Settlement Agreement
Statutes - Interpretation - *Class Actions Act*, Section 38, Section 41(2)

This fiat arises from a statement of claim filed in 2015 that alleged that the defendants distributed type 2 diabetes medications without a reasonable warning about certain side effects and injuries. The plaintiff's application was heard at the same time a national settlement agreement was approved in Ontario and in Quebec. The representative plaintiff applied for an order under s. 38 of *The Class Actions Act* (CAA) to certify the class for settlement purposes against the defendants. The plaintiff also sought an order approving the settlement hearing notice and notice plan, class counsel fees, and an honorarium for serving as the Saskatchewan representative plaintiff. The defendants consented to the approval of the national settlement agreement but took no position on

counsel fees, disbursements, or honorarium. The national settlement agreement required approval of all three courts before it would take effect.
HELD: The court approved the national settlement agreement pursuant to s. 38 of the CAA because it was fair and reasonable, and in the best interests of the class members. The court also approved the contingency fee retainer agreement under s. 41(2) of the CAA, and was satisfied that the proposed retainer was appropriate. The court referred to *Perdikaris v Purdue Pharma Inc.*, 2018 SKQB 86 for the law relating to the approval of a proposed class action settlement. Under the test, the court "must be satisfied that the settlement is fair, reasonable, and in the best interests of the class as a whole." To satisfy this standard, the proposed settlement does not need to be perfect, but it must fall within a "zone of reasonableness."

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***R v Martell*, 2023 SKKB 31**

Robertson, 2023-02-10 (KB23026)

Criminal Law - Evidence - Witness - Expert
Statutes - Interpretation - *Criminal Code*, Section 657.3, Section 714

The accused was charged with first degree murder. The Crown's theory was that the accused used a cellphone on the day of the alleged murder. This fiat considers two applications by the Crown: 1) under s. 657.3 of the Criminal Code (Code) to qualify a witness to give expert opinion evidence; and 2) under s. 714 of the Code to allow two witnesses to provide testimony remotely by videoconference. The Crown sought to have the witness qualified to give expert opinion evidence about the interpretation and analysis of cellular phone records, cellular tower information, and tracking and locating cellular telephones.
HELD: The court granted both applications. 1) In deciding the s. 657.3 application for expert opinion evidence, the court set out the two-stage test under *R v Mohan*, [1994] 2 SCR 9 (*Mohan*) and *White Burgess Langille Inman v Abbot and Haliburton Co.*, 2015 SCC 23 (*White Burgess*). The evidence must first meet the four *Mohan* factors: a) relevance; b) necessity; c) absence of an exclusionary rule; and d) special expertise. Second, the trial judge must weigh the potential risks against the benefits of admitting the evidence (*White Burgess*). The factor of relevance was met because the evidence was intended to explain the use and location of the cellphone on the day of the homicide. The evidence was necessary because "ordinary people" would not be able to interpret the data without the assistance of an expert. There was no exclusionary rule that would apply to exclude the expert's evidence, and the court was satisfied that the witness had acquired special expertise through his experience and training. The court found that the witness was impartial and unbiased, and was satisfied that the benefit, based on relevance and necessity, of the opinion evidence outweighed any potential prejudice to the accused. 2) In determining whether to allow the witnesses (the witness referred to above and a forensic pathologist) to appear by videoconference, the court reviewed the statutory criteria in s. 714 against the Crown's application. These include the location and personal circumstances of the witness, the costs to have the witness appear personally, the nature of the anticipated evidence, the suitability of the location from where the witness will give evidence, and the accused's right to a fair and public hearing. Both witnesses resided in British Columbia. One was 74 years of age, and the other was a single father. Air travel, travel time, and hotel accommodations would be costly. The court noted that technical evidence and expert

evidence will be more readily received by video than evidence of an eyewitness to a crime. The court concluded that trial fairness was “not compromised by remote testimony, provided it [was] done properly” and that “having regard to all of the factors” it was appropriate to allow both witnesses to testify by videoconferencing technology. The court added that in the event of technical difficulties or other issues, the decision could be revisited.

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***Welter v Kequahtooway*, 2023 SKKB 33**

Goebel, 2023-02-13 (KB23031)

Family Law - Child Custody - Person of Sufficient Interest
Family Law - Party Status - First Nation
Family Law - Transfer of Proceedings

This fiat involved the care and best interests of a child. The child’s mother was a member of the Zagime Anishinabek First Nations (ZAFN). The child’s father immigrated to Canada from Sudan with his extended family. The mother and father separated shortly after the child’s birth. The mother had three older children from a different relationship. She experienced personal difficulties and decided to have her three older children cared for by their maternal grandparents on ZAFN. She asked the paternal aunt and uncle of the child relevant to these proceedings if they would care for her, and they agreed. A written agreement was signed by the mother and the aunt and uncle. Child protective services was never involved. The mother maintained regular contact with the child. In 2021, the aunt and uncle separated, and the aunt continued to care for the child. In 2022, the mother moved back to ZAFN to live with her parents and three older children. She told the aunt that she wanted the child to move back there as well. The aunt initiated these proceedings under *The Children’s Law Act, 2020*, SS 2020, c 2 (CLA) seeking an order designating her as a person of sufficient interest to the child, an order providing her with sole guardianship and decision-making authority, and an application for interim relief to ensure that the child would not be unilaterally removed from her care. These were granted as an interim measure. The mother filed an answer and counter-petition seeking primary care, that the father and ZAFN be added as parties to the proceeding, and a transfer of venue. The court resolved the following issues: 1) should ZAFN be added as a party to the proceeding? 2) Should the proceeding be transferred to a different judicial centre? 3) What, if any, changes should be made to the interim care arrangement to ensure the best interests of the child pending an agreement or court order?
HELD: 1) The court did not add ZAFN as a party to the proceedings. The court has broad discretion to add a party to a family law proceeding. The court noted that party status confers wide-ranging entitlements and obligations that can significantly impact the rights of all parties and the outcome of a proceeding. Here, the mother failed to satisfy the court that granting party status to ZAFN in this matter was necessary, appropriate or in the best interests of the child. The court referred to *L.(M.S.D.) (Re)*, 2008 SKCA 48 for the proposition that party status was not required for relevant information and evidence to be available to the trier of fact. The court found this to be a purely private family law proceeding between the parents and a person of sufficient interest under the CLA. This dispute was distinguishable from family law proceedings involving state action or under child and family services legislation. Here,

the mother was “free and able to call witnesses and lead evidence relevant to cultural factors in the determination of the child’s best interests.” ZAFN did not need to be a party to the proceeding to ensure that this type of relevant and important evidence was brought to the court’s attention. The court was concerned that adding ZAFN as a party could make the proceeding more complicated and prolonged, with the possibility of forcing the matter to trial even where the other parties had reached a consensus. 2) The court determined that the balance of convenience favoured proceeding in Saskatoon rather than in Battleford. This location would be the least disruptive to the child’s routine. Family law proceedings may be commenced at any judicial center in the province (*Queen’s Bench Rules*, Rule 15-11). Once commenced, a family law proceeding cannot be transferred without the consent of the parties or an order of the court. Any party can apply for a change of venue. Absent consent, the applicant must satisfy the court that “the balance of convenience” favours proceeding in another judicial centre. 3) The court set out changes to the interim agreement where the parties were unable to agree, including who should be responsible for the travel for visits and who should bear the costs of transportation. The court set out specific provisions in the amended interim order.

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***Harlingten v Shaw*, 2023 SKKB 34**

Rothery, 2023-02-14 (KB23032)

Civil Procedure - *Queen’s Bench Rules*, Rule 16-43
Statutes - Interpretation - *Wills Act, 1996*, Section 37
Wills and Estates - Formal Requirements

The applicant executrix applied under Rule 16-43 of *The Queen’s Bench Rules* for direction from the court to resolve a caveat filed by the respondent. The caveat involved an interest in a specific bequest made by a subsequent document attached to the deceased’s original will. Emails between the deceased and his former lawyer referencing and attaching the subsequent document were attached to affidavits by the applicant. The will was stored at a law office. The respondent developed a close relationship with the deceased, was named as his power of attorney and appointed as his healthcare proxy. While the deceased was dying in hospital, he asked the respondent to retrieve and keep a binder of important documents from his house, including his will and the attachment providing the $20,000 specific bequest to her, and copies of emails between him and his lawyer. After he died, the respondent gave the binder to the applicant, who took issue with the specific bequest. The subsequent attachment to the will was subject to s. 37 of *The Wills Act, 1996* (Act). The court referred to *Bunn Estate (Re)*, [1992] 4 WWR 240 for the proposition that where a party alleges that a document represents the testamentary intentions of the deceased despite defects in execution, that party must prove testamentary intention on a balance of probabilities. Here, the burden of proof was on the respondent, who had to prove that the subsequent attachment complied with s. 37 of the Act.
HELD: The respondent proved that the will with the subsequent attachment including the bequest to her of $20,000 constituted the last will and testament of the deceased to be admitted for probate. Costs were awarded to the respondent on a solicitor-client basis, payable out of the estate. The court held it was obvious that the subsequent attachment was testamentary in the same manner as the original will. The subsequent attachment set out a deliberate expression of the testator’s intention to dispose of his property by

including the specific bequest to the respondent, and thus met all the criteria required by s. 37. While the applicant argued the potential for the emails to have come from someone other than the deceased, the court rejected this argument. The applicant could have had the lawyer explain the communications between her and the deceased, but the applicant did not do so. The court noted this was an "obvious situation" for invoking the rule of evidence where an adverse inference may be drawn from the failure of a party to bring before the court evidence that may not support that party's case.

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***McCormack v Piller*, 2023 SKKB 37**

Mitchell, 2023-02-14 (KB23027)

Family Law - Trial Adjournment

The self-represented respondent filed a request to adjourn a scheduled two-week family law trial because she could not leave the farm for that length of time during calving season. The trial was scheduled for one week in the beginning of April, and one week at the end of April. She filed several affidavits in support of her request, from experienced cattle farmers and a veterinarian. The petitioner and his counsel strongly opposed the request. Counsel for the petitioner indicated he planned to retire in the summer of 2023. At the pre-trial conference, trial dates were set for calving season despite the respondent stating that she could not be away from the farm in the spring. The pre-trial judge did not have the benefit of affidavit evidence.
HELD: The court allowed the application seeking adjournment of the trial under Rule 9-4(2) of *The Queen's Bench Rules* in part. The court noted that the decision involved discretion, and a balancing of the rights of the parties involved. There had been a "tortured procedural history" already, with high conflict between the parties, six judges in conflict on the file, and the need for resolution of the issues. The court settled on a compromise, changing the start of the trial from the beginning to the end of April, when calving season was not at its peak.

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***L.E.S. v L.L.S.*, 2023 SKKB 46**

Brown, 2023-02-23 (KB23036)

Family Law - Division of Family Property
Family Law - Divorce - Severance

The petitioner initially sought a division of family property and divorce. He subsequently applied for an order severing property issues from the divorce claim and a judgment of divorce from his wife of over 50 years (respondent). The unresolved pension

property in the context of the petitioner's rapidly failing health was the main issue. Significant aspects of the family property had been dealt with by agreement, but pension plans with designated beneficiaries were dependent on spousal status. The petitioner was dying of cancer. The respondent raised the issue of competence and diminishing capacity of the petitioner. The respondent indicated the petitioner made unusual decisions over the past year, and exhibited strange behaviour. The court decided whether the divorce should be severed from the family property relief claimed.
HELD: The court issued the judgment of divorce. The family property issues were severed from the divorce on the condition that 50 percent of the petitioner's pension assets be retained by the pension administrator and not distributed until a further order of the court wherein family property and spousal support issues had been resolved. This decision to sever the property issues from the divorce was a discretionary decision. The court weighed the potential prejudice or irreparable harm to the respondent in granting the divorce and was satisfied that the order holding back half of the pension assets was sufficient. The respondent already had a pension of her own, and received the family home and other assets in the property division. The court began by setting out the relevant provisions of *The Public Employees Pension Plan Act*. Under the legislation, the petitioner was obliged by law to designate the respondent as his beneficiary so long as they were married. The court also considered the legal test for capacity as turning on the nature of the task for which capacity was required (*Hess v Thomas Estate*, 2019 SKCA 26). Parties have the capacity to seek a divorce even if they are not entirely their former selves and even if they may not be competent in all areas for all decisions. The court noted that there was insufficient evidence to conclude that the petitioner lacked the requisite capacity for divorce, and declined to require further testing to prove capacity. The respondent also argued that the court should dismiss the petitioner's application because she still wished to reconcile. The petitioner said he did not intend to reconcile. The court noted that it takes two people to reconcile: here reconciliation was not a realistic possibility.

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***Unifor Canada – Local 594 v Consumers Co-operative Refineries Limited*, 2023 SKKB 47**

Robertson, 2023-02-24 (KB23037)

Administrative Law - Arbitration Award - Judicial Review

This decision concerned an application for judicial review of an arbitration award. The union (applicant) and employer (respondent) were parties to a collective agreement, which included a letter of understanding. The letter of understanding permitted the use of temporary employees in certain sectors during high work-load periods. The applicants grieved the decision of the defendant to assign certain work to contractors only, arguing that it violated the letter of understanding. The grievances proceeded to arbitration before a panel (2022 award). This hearing was prolonged. During the hearing, another arbitration panel chaired by a different arbitrator issued a decision involving the same parties and the same issue over assignment of similar work at the same worksite, but for a different dispute (2018 award). The 2018 award dismissed the applicant grievance on the basis of the interpretation of the letter of understanding. The 2022 award also dismissed the applicant's grievances. It considered the 2018 award and found it to be

binding and correct. Both awards agreed that the letter of understanding prohibited displacing union employees by contractors. The judicial review application raised the following issues: 1) Should the record be supplemented by adding the affidavit evidence filed by both parties? 2) What is the standard of review? 3) Was the interpretation of the letter of understanding unreasonable?
HELD: The court dismissed the application for judicial review. 1) The court declined to admit any of the affidavits filed by the parties, finding the record filed by the arbitrator complete and sufficient for judicial review. 2) There was agreement between the parties that the standard of review of the merits of an arbitration award was reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65). The reviewing court should not overemphasize "a minor misstep" in the decision under review. The applicant had the onus of proving that the decision was unreasonable. The applicants argued that the award failed to justify an erroneous conclusion about the proper interpretation and application of the letter of understanding. The court noted that the reasonableness standard required some deference to the decisionmaker if the decision could be rationally supported by the evidence and came to a reasonable conclusion, even if the court might have relied on different reasons or come to a different result. 3) The applicant did not meet the burden of establishing that the arbitration award was unreasonable. The court on review noted that the arbitration award had the "hallmarks of reasonableness: justification; transparency; and intelligibility." The respondent was entitled to costs of the application.

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***R v Kahmahkotayo*, 2023 SKPC 10**

Schiefner, 2023-01-24 (PC23012)

Criminal Law - Aggravated Assault

In this decision, the accused was charged with one count of aggravated assault and one count of assault with a weapon for allegedly assaulting his ex-father-in-law (victim). The accused went to the residence of his ex-partner and children to bring a birthday present for his daughter. The accused was active in spending time with his children but had an acrimonious relationship with the victim. The accused's ex-partner told him not to attend her residence that day to avoid a confrontation with the victim, who was going to be there. The accused stopped by anyway with a gift, and a violent confrontation occurred. The accused argued that he acted in self-defence. The victim sustained significant trauma to his head. The "weapon" referred to in the assault with a weapon was the gift bag.
HELD: The court held that the accused was not guilty of assault with a weapon but instead, guilty of aggravated assault. The court was not satisfied that the gift bag became a weapon during the assault. The court rejected the claim of self defence. The victim was not capable of being a serious physical threat to the accused, and even if there were a threat of force, the accused's response was not reasonable. The *mens rea* for aggravated assault was objective foresight of bodily harm, not that the accused intended to wound, main or disfigure the victim. The court noted that there were contradictions in the testimony: there was concern about the reliability of some of the victim's evidence because of his injuries, but also concern about the credibility of the accused's testimony. The ex-partner's evidence, however, was reliable and credible. She was critical of both the accused and the victim. The court acknowledged that the victim was actually a catalyst for the confrontation. Had he not been there, the accused would have been welcome to stay.

Even if the victim took a “swing” at the accused (which the court thought was unlikely), the nature of the threat of force that the accused was exposed to was not serious. The victim presented as a “frail individual who has not aged well” but whose conduct towards the accused “was unnecessarily disrespectful, if not insulting.”

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***R v Moore*, 2023 SKPC 16**

Harradence, 2023-01-26 (PC23019)

Criminal Law - Assault - Sexual Assault - Conviction

The accused pleaded not guilty to six counts of sexual offences against two of his grandchildren (D.L.2 and M.L.) dating from 2003 to 2013. The matters went to trial, following which the Provincial Court judge rendered this decision. D.L.2 and M.L. alleged that they were sexually assaulted by the accused in the night while they were sleeping with him in the upstairs bedroom during summer visits. M.L. acknowledged on cross-examination that she suffered from a serious brain injury when she was 12, which had caused her short-term memory problems for years and difficulty distinguishing between dreams and real life. The accused testified in his own defence and denied the charges. He agreed that his grandchildren stayed at his house in the summer, but he testified that during this time, he was farming and working at a hardware store. He left home at 4:00 am and returned at 10:00 pm. He testified that his time with his grandchildren was limited. The trial judge referred to *R v van Deventer*, 2021 SKCA 163 for considering the accused’s denial of the allegations in the context of the evidence of the complainant and the evidence as a whole. The trial judge also cited *R v Levac*, 2020 SKQB 171, for the distinction between credibility and reliability.

HELD: The trial judge found the accused guilty of the three counts involving D.L.2, and not guilty of the remaining three counts involving M.L. He found D.L.2’s evidence to be “generally, although not wholly, credible and reliable.” The trial judge found M.L.’s evidence unreliable and it did not satisfy him of the accused’s guilt. The accused’s memory of the circumstances was “questionable at best” and overall, his evidence was “both unreliable and incredible.”

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