**The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
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A different version of this digest was published in the June 1 CaseMail (Vol. 25, No. 11)

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Family Law - Appeal - Stay
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The appellant filed a notice of appeal of a parenting decision and applied under the newly amended Rule 15 of *The Court of Appeal Rules* to stay the trial decision pending the determination of the appeal. The parents had one child together. The trial judge decided the parties had shared decision-making responsibility and ordered the child reside primarily in Saskatoon with scheduled weekend access for the father, and ordered the father pay child support. The father did not return the child to the mother after the trial decision. The father sought an order staying the trial decision and substituting an order the child reside primarily with him, with parenting time from Wednesday afternoon to Sunday morning each

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week. The Court of Appeal chambers judge considered whether the trial judgment ought to be stayed pending the appeal.
HELD: The trial decision was stayed and a modified parenting regime put in place pending the outcome of the appeal. On January 1, 2023, Rule 15 was changed to provide, with limited exceptions, that an order is not stayed by filing a notice of appeal. Before the change, the stay was automatic. This case was the first time the changed Rule was considered. The change reflects the basic idea that court decisions are presumed to be correct, not incorrect. The change also addresses a concern that some appellants used the automatic stay as a negotiating tactic or to avoid the impact of a trial decision. When deciding whether to grant a stay, the judge needs to assess the strength of the appeal, assess whether the appellant has demonstrated a meaningful risk of irreparable harm, and assess the balance of convenience. Only appeals raising a serious question as to the validity of the judgment under appeal can ground a stay. The balance of convenience is the core of the analysis. Relevant considerations include the relative strength of the appellant's care, the relative likelihood of irreparable harm, and the nature and amount of such harm. Some cases require a special approach. Appeals concerning parenting of a child necessarily must consider the best interests of the child as the overriding concern. Stays may be in whole or in part, and the chambers judge can order new terms. In this case, the appeal raised serious grounds of appeal. The child had been living with the father in Regina since 2020, and the mother had limited contact with the child because of her difficulty arranging travel. The child was enrolled in school and speech therapy in Regina. The father said he was unable to drive the child to Saskatoon because of his vision problems. The chambers judge reluctantly concluded the child's best interests were served by staying the trial decision pending the appeal and ordering the child reside primarily with the father in Regina with extended weekly parenting time for the mother, if she could arrange transportation. All other aspects of the trial decision would remain, and the Court would expedite the appeal.

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***R v Tinker*, 2023 SKCA 54**

Richards Jackson Drennan, 2023-05-09 (CA23054)

Criminal Law - Appeal - Sentencing - Demonstrably Unfit - Proportionality

The offender pled guilty in provincial court to resisting arrest, uttering a threat to a peace officer, obstructing a peace officer, and failing to comply with a release order. The RCMP obtained a warrant for the offender's arrest upon receiving a report from a third party that the offender had weapons and was planning a shootout with police. When the RCMP executed the warrant at the

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offender's residence, the offender fled on foot. Officers tasered the offender, took him into custody, and he threatened the officer. The offender was released from custody on conditions including a curfew and that he not attend Pinehouse. The RCMP learned that he breached that condition and executed a warrant to search a residence where they found him hiding in a furnace. He was bitten by a police dog and injured during the arrest. He was charged with obstructing a peace officer and breaching a release order. The offender was not charged with any offence arising from the initial report made to police about the shootout. He remained in custody following this arrest until sentencing. Defence counsel pointed to significant Gladue factors which reduced moral culpability or were mitigating circumstances. The offender spoke on his own behalf at the sentencing hearing. He noted that in the week he was sentenced, there was a suicide by hanging by a community member in Pinehouse. He told the sentencing judge that he was transported by the RCMP to the courthouse in a vehicle with the rope used in the suicide next to him. The provincial court judge imposed a sentence of "time served", identifying that the offender had spent seven months in custody before being sentenced. The Crown appealed this sentence under s. 676(1)(d) of the *Criminal Code*, arguing that the provincial court judge: 1) failed to follow ss. 718.1 and 718.2 sentencing principles; 2) failed to impose a proportionate sentence; and 3) imposed a sentence that was demonstrably unfit.
HELD: The Court of Appeal (court) granted leave to the Crown's appeal but dismissed the sentence appeal. The court could only intervene in sentencing if the sentencing judge committed an error in principle that had an impact on sentence, or if the sentence was demonstrably unfit. An error in principle cannot arise from a judge imposing a sentence that is not "long enough." A demonstrably unfit sentence is one that is "clearly or manifestly excessive or inadequate, or one that represents a substantial and marked departure from what would be a fit sentence." 1) The sentencing judge did not fail to apply sentencing principles. The sentencing judge referred to specific principles of denunciation and deterrence, rehabilitation, reparation to victims, promoting responsibility for offenders, and imposing sanctions proportionate to the gravity of the offence and the offender's degree of responsibility. She also applied these principles. She considered aggravating and mitigating factors. She considered that the offender pled guilty, spent time on remand where he contracted COVID-19 twice, and that many of the original charges had been withdrawn. A judge is not required to set out each and every argument made by the parties, nor articulate every legal principle – this was an oral decision in a busy provincial court involving a contested sentencing hearing with an accused who was in custody. While the Crown on appeal suggested that specific probation conditions should have been imposed, these conditions had not been proposed by the Crown to the sentencing judge. The court did point out that the offender was already on a probation order

from a prior disposition. Here, the sentencing judge considered the parties' submissions and found probation to be unnecessary to achieve rehabilitation. 2) There was no error in the proportionality analysis by the sentencing judge. She considered the traditional *Gladue* factors, and the connection of those factors to the offender's relationship with police, and the ongoing role of law enforcement in colonialism. 3) The Crown did not meet the high threshold to demonstrate that the offender's sentence was demonstrably unfit. The sentence imposed was within the range for similar offences. The Crown failed to demonstrate that the sentence was clearly unreasonable or representative of a substantial or marked departure (*R v L.T.N.*, 2021 SKCA 73). A review of the facts and sentencing judge's findings established that the seven-month custodial sentence was within the range for such offences.

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***Stewart v Stewart*, 2023 SKCA 59**

Richards Jackson Drennan, 2023-05-17 (CA23059)

Family Law - Appeal - Pension Assets - Divorce - Severance

The appellant (respondent) and respondent (petitioner) had been married for nearly 50 years. The appellant appealed a King's Bench Chambers decision which granted the respondent a divorce and ordered pension administrators to hold back 50 percent of the respondent's pension assets until further order of the court. This order allowed the respondent to deal with up to 50 percent of his pension assets prior to the final resolution of spousal support and family property issues. The respondent was in a new relationship and sought to name his new partner as a named beneficiary. He was terminally ill. He petitioned for divorce in 2022 asking for an equal division of the family home and an unequal division of family property. In addition to seeking a judgment granting a divorce, he asked the court to sever the divorce claim from the corollary relief under *The Family Property Act*. He filed an affidavit in support, indicating that most of the family property had already been dealt with by way of agreement. He added that without a certificate of divorce, he was unable to remove the appellant as the designated beneficiary of his pensions. The appellant argued that it was an error to sever the divorce judgment from questions of spousal support and property division, and that making the order

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was an improper interim division of family property. She also argued that the chambers judge erred in dealing with the respondent's mental capacity. The Court of Appeal (court) determined: 1) whether the chambers judge erred in his ruling on the respondent's mental capacity; and 2) whether the chambers judge erred in severing the divorce from the other issues in the proceedings.

HELD: The court dismissed the appeal. The court was not persuaded that that appellant made out a basis for overturning the decision of the chambers judge. 1) While the court had concerns about the procedural way in which the mental competency issue was dealt with by the chambers judge, it was not persuaded that these concerns necessitated overturning the decision. This was because the chambers judge had detailed affidavits from both parties addressing the mental competency issue, including a medical opinion attesting to the respondent's competency provided by the respondent's oncologist (without a judicial order) as requested by the appellant. It also seemed as though the mental competency issue was added as a last-minute attempt to derail the respondent's application. The appellant had no issue with the respondent's capacity when he signed the agreement during the same timeframe. 2) The court was not persuaded that the chambers judge's order should be overturned because the relief granted was not formally requested by the respondent in his notice of application. While the respondent did not specifically ask for the relief of holding back 50 percent of the pension assets, the issue was front and centre on the face of the materials filed with the chambers judge. The possibility of this type of order was well canvassed by the chambers judge hearing from both parties, and there was no evidence that the appellant was prejudiced by the way things unfolded. Neither party took issue with the approach the chambers judge took when deciding whether to sever the divorce, and neither party made submission on the issue. The court noted that there was variation across the country in how severance is approached, and that the court may wish to "take a considered view of the issue" in an appropriate future case. The chambers judge expressed concern that granting the divorce might prejudice the appellant in relation to her family property claim. The chambers judge accordingly made an order requiring the pension administrator to retain 50 percent of the pension assets pending a further court order to prevent potential prejudice to the appellant. The chambers judge did not make an interim distribution of pension assets by way of his order. The chambers judge also noted that it was unlikely that the appellant would be successful on her spousal support claim given her significant assets.

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***Unifor Locals 1-S & 2-S v Saskatchewan Telecommunications*, 2023 SKCA 68**

Schwann Kalmakoff Drennan, 2023-06-06 (CA23068)

Administrative Law - Appeal - Collective Bargaining - Strike Action - Remuneration

Unifor was the bargaining agent for certain SaskTel employees who began a lawful strike action. The striking employees were locked out a few days later, with the labour stoppage lasting about two and a half weeks. The issue under appeal was how these employees' remuneration should be calculated during the pay periods that were affected by the stoppage. Specifically, the issue was whether the employees should have been paid for the actual time worked during the disrupted earned day off (EDO) blocks, or

whether they should have been paid under the pay averaging system that had been in place since at least 1999. SaskTel argued that under the collective bargaining agreement (CBA), the employees should be paid based on an average daily wage rate, without entitlement to pay for earned days off during the stoppage. Unifor argued that the employees were entitled to be paid an hourly rate for each hour actually worked during the relevant pay period, and that some employees were shortchanged. The arbitrator ruled in favour of SaskTel, finding that the CBA terms provided for the employees to be paid a daily wage rate. Unifor appealed to the Court of King's Bench for judicial review, which was granted in part. The chambers judge made a declaration that the employees who would have received their EDO benefit were entitled to it. Unifor appealed the chambers decision. SaskTel cross-appealed, arguing that the chambers judge improperly interfered with the arbitrator's award.
HELD: The Court of Appeal (court) dismissed Unifor's appeal and allowed SaskTel's cross appeal. Under the terms of the CBA, the employees were eligible for EDOs based on the number of hours worked or scheduled to be worked. Unifor applied the principle of quantum meruit to argue that the employees must be paid for their actual hours of work. The arbitrator found that this principle did not apply because the provisions of the CBA set out the basis of payment, which was a daily wage rate. The court applied *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 to the arbitrator's decision and found that it bore the necessary hallmarks of reasonableness. The arbitrator interpreted the CBA in a clear and logical manner. He correctly identified and applied the principles that govern the interpretation of collective agreements in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 and referred to *Alberta Union of Provincial Employees v Alberta Health Services*, 2020 ABCA 4. The court agreed that *quantum meruit* did not apply because the presumption of *quantum meruit* had been rebutted by the express terms of the CBA. The court allowed SaskTel's cross appeal, which meant that one paragraph of the chambers decision was set aside, and the arbitrator's award was reinstated in its entirety. The chambers judge misapprehended the evidence that was before the arbitrator in undertaking the reasonableness aspect of the arbitrator's decision. On the evidence, there were no employees who could have been entitled to an EDO for that particular block of time.

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***Andritz Hydro Canada Ltd. v The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*, 2023 SKCA 69**

Caldwell Barrington-Foote Kalmakoff, 2023-06-07 (CA23069)

Administrative Law - Saskatchewan Labour Relations Board - Judicial Review - Appeal
Labour Law - Collective Agreement - Interpretation

The appellant contracted with SaskPower to work on a substantial project over the course of six years and had entered into collective agreements with various trade unions to supply workers for different aspects of the project. As a result of a certification order by the Saskatchewan Labour Relations Board (board) in 2004, the International Brotherhood of Electrical Workers, Local 529 (IBEW) was the certified bargaining agent for all electrical workers on the project. However, the collective agreement between the

appellant and IBEW also allowed IBEW to dispatch workers from other trades if the appellant required. The appellant required pipefitters for part of the project. IBEW does not normally represent pipefitters. IBEW contacted the respondent, asking if it would be prepared to supply such workers. The respondent's business manager representing pipefitters declined, but two members of the respondent union responded to an advertisement for the project and were signed up as members of IBEW for the purpose of the project. The respondent later applied under s. 6-9 (the Construction Industry Division) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 (SEA) for an order certifying it as the bargaining agent for any pipe trade workers working on the project. This was important because of how labour relations work in the construction industry in Saskatchewan. Under the Construction Industry Division provisions of the SEA, where a union is certified as the bargaining agent for workers on a project involving "construction industry" work as defined under s. 6-65(a), individually negotiated collective agreements do not apply. Instead, the relationship between the employer and workers is automatically governed by a single, provincially negotiated collective agreement. The definition of "construction industry" in 6-65 specifically excludes maintenance work, a term not defined anywhere in the SEA. Therefore, s. 6-65(a)(ii) provides an exception to the application of the provincial collective agreement to labour relations in the construction industry when maintenance work is involved. The appellant opposed certification at the board hearing, taking the position that the pipe trade workers were already represented by a certified bargaining agent, IBEW, and that the work carried out was maintenance work, not construction work. The respondent was successful in its application to the board to be certified under the SEA as the bargaining agent for the pipe trade workers the appellant required for the project, and the board found that the work was construction work. The appellant appealed against a chambers decision where the judge dismissed the appellant's application for judicial review of two decisions from the board – the board's certification decision and its reconsideration decision. The appellant argued that the chambers judge erred in upholding the board's conclusions. The court decided the following issues: 1) whether the chambers judge selected the wrong standard of review; 2) whether the board's conclusion that the certification application was properly brought under s. 6-9 was unreasonable; and 3) whether the board came to a reasonable conclusion that the work performed was construction, and not maintenance.

HELD: The Court of Appeal (court) allowed the appeal, but only to remit the matter to the board to consider whether the work was construction work or maintenance work as defined by s. 6-65 of the SEA. The court was unwilling to substitute its own view of the appropriate answer. The appropriate remedy was to remit the matter to the decision-maker for reconsideration. 1) The chambers judge correctly determined that reasonableness was the applicable standard of review. The court set out that reasonableness is the presumptive standard of review when reviewing an administrative tribunal's decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). However, there are exceptions to that presumption. Correctness review applies when the decision involves: legislated standards of review, statutory appeal mechanisms, constitutional questions, general questions of law of central importance to the legal system as a whole, questions related to the jurisdictional boundaries between two or more administrative bodies, and where courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute (*Vavilov*; *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30). The court did not find that the issue here attracted a correctness review standard on the basis that it was of central importance to the legal system as a whole. The court indicated that "legal questions do not rise to this standard simply because their answers may affect certain parties, or even a certain industry in a profound way." 2) The board's decision on whether the respondent's certification application was properly brought under s. 6-9 instead of s. 6-10 demonstrated "the hallmarks of reasonableness described in *Vavilov*." There was a clear basis for the board's conclusion that the existing certification order with IBEW did not include pipe trade workers, and that an agreement between the appellant and the other union to bring pipe trade

workers into the previously certified electrical worker bargaining unit did not constitute a certification of the pipe trade workers or displace the effect of the existing certification order. 3) The court found the board's determination that the work performed by the pipe trades was construction and not maintenance to be unreasonable. The board stated that determining whether work is construction or maintenance always requires consideration of the entire context. However, the board only considered one factor in concluding that the work was construction and not maintenance. Specifically, the board pointed to the fact that if any increase in production capacity whatsoever resulted from the work being performed, then that fact alone meant that the work was construction and not maintenance. It was unreasonable to reach such a conclusion on one factor standing alone. The decision was unreasonable, because the board failed to apply the contextual framework it explicitly identified as being required. This aspect of the board's decisions was quashed by the court, but the court remitted the issue to the board for reconsideration.

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***Mann v Mann*, 2023 SKCA 73**

Caldwell Leurer Tholl, 2023-06-22 (CA23073)

Appeal - Abandonment - Show Cause

The appellant and respondent brothers were equal shareholders in AgraCity Crop & Nutrition Ltd., and both were also directors and officers of that corporation. The application under appeal involved the calling and content of meetings of the directors of the corporation. The appellant took steps to oust the respondent from positions of authority, and an order was granted and affirmed by Queen's Bench judges. The order preserved the status quo of the business arrangements while matters in dispute were litigated. There was other pending litigation on many other matters. The Court of Appeal (court) had granted an order extending time for the appellant to appeal. In a fiat, the court reminded the appellant that he had not filed a factum in this appeal, nor in several other appeals. There were nine separate appeals by the appellant and entities he controlled that were pending. The court ordered the appellant to serve and file his appeal books by a deadline. The appellant did not meet the deadline. Later, the appellant was granted an extension to perfect his appeal, so that it could be heard at the same time as two other appeals. The court ordered that if this deadline was missed, the hearing would be for the purposes of the appellant to show cause as to why the appeal should not be dismissed due to delay. This deadline was also missed. The court determined whether to dismiss the appeal and consider it as having been abandoned.
HELD: The Court of Appeal dismissed the appeal as abandoned, because the appellant failed to prove that his appeal should be allowed to proceed. The appellant had the burden to satisfy the court that it was in the interests of justice that the appeal be allowed to proceed. There were two parts. First, the court assessed the appeal to determine if it was "manifestly without merit." If so, then that was the end of the matter. However, where it could not be said that the appeal was manifestly without merit, the court must examine other factors to determine if it was in the interests of justice that the appeal be allowed to proceed. Show cause hearings are not major proceedings and are intended to be to the point and expeditious. Given these limits, the court could not conclude that the appeal was manifestly without merit, so it considered the second part of the test. The court considered factors set out in the case law to conclude that it was not in the interests of justice that the appellant be allowed to proceed with the appeal. The appellant had

not filed any evidence in support of his appeal. He twice failed to meet deadlines ordered by the court over the course of 15 months, yet commenced many different legal proceedings at the court and in the Court of King's Bench. The disposition of this appeal was also unlikely to affect the substantive rights between the parties.

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***Patel v McMurtry*, 2023 SKCA 74**

Caldwell Schwann Barrington-Foote, 2023-07-04 (CA23074)

Civil Law - Appeal - Doctrine of Witness Immunity
Civil Procedure - Application to Strike Statement of Claim - No Reasonable Cause of Action

The appellant sued the respondents (Dr. McMurtry and Western Medical Assessments Corporation (WMAC)) for negligence, negligent misrepresentation, defamation, and wrongful interference with economic relations. At the request of WMAC, the respondent doctor prepared reports calling into question the appellant's surgical competence. The Saskatchewan Health Authority relied on these reports when it suspended the appellant's surgical privileges. Disciplinary proceedings occurred. The respondents relied on the defence of absolute privilege under the doctrine of witness immunity to have all the appellant's claims struck as disclosing no reasonable cause of action. The chambers judge agreed that the doctrine applied, concluded that it was plain and obvious that the appellant's claims could not succeed, and struck the claim in its entirety. The chambers judge relied only on the application of the defence of absolute privilege under the doctrine of witness immunity to strike the claim on the basis of failing to disclose a reasonable cause of action. The appellant appealed on several grounds, all relating to the argument that it was not plain and obvious that his claims were barred under the doctrine of witness immunity.
HELD: The Court of Appeal (court) allowed the appeal. The court set aside the chambers judge's order that had struck the claim in its entirety and remitted the matter back to the Court of King's Bench to determine the other bases for the respondents' application to strike (i.e., whether the claims were frivolous, vexatious, or otherwise an abuse of process). The court upheld only the portion of the chambers judge's decision which struck the paragraphs in the claim setting out an action in defamation. It was not plain and obvious that this absolute privilege attached to all communications and conduct by the respondents, or that the doctrine provided a defence to all the causes of action pled by the appellant. The court set out the doctrine of witness immunity and the scope of its application (*Elliott v Insurance Crime Prevention Bureau*, 2005 NSCA 115). The doctrine applies to words said or conduct performed during judicial or a quasi-judicial proceeding. Under this doctrine, publishing defamatory words is not actionable if done in the course of judicial or quasi-judicial proceedings. The doctrine negates the usual rules of civil liability but is only justified when demonstrably necessary to achieve important objectives. The chambers judge correctly found that the proceedings were quasi-judicial, and that the immunity applied. Absolute privilege attached to everything the respondents communicated or did during the proceedings. However, the court noted that it was not plain and obvious that the immunity extended to all reports, or all causes of action claimed by the appellant. It was at least arguable that the absolute privilege did not bar the appellant's claims in negligence, negligent misrepresentation and wrongful interference with economic relations. In this situation, the doctrine of witness immunity definitively provided a defence only against the appellant's claims in defamation, and the court upheld the chambers judge's decision to strike

from the claim those paragraphs that set out a cause of action in defamation.

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***Jantzen Estate v TD Life Insurance Company*, 2023 SKCA 76**

Leurer Tholl McCreary, 2023-07-05 (CA23076)

Insurance Law - Appeal - Contract Interpretation - Death Benefit - Criminal Offence

The policy holder was found dead from a cocaine overdose in 2018. The pathologist found lethal levels of cocaine in the policy holder's blood and liver. Foul play had been ruled out. Prior to his death, the policy holder had a loan secured by a mortgage and a separate line of credit. When he died, he owed approximately $213,000 on the mortgage and $5,000 on the line of credit. The loans were insured under two policies of insurance: the mortgage policy and the line of credit policy. The policy holder disclosed that he had been addicted to cocaine for four years but had stopped using. The estate applied under both policies for payment of the debts. The insurers declined coverage, relying on similar exclusions found in both policies whereby the insurers would not pay life or terminal illness benefits if the death happened as a result of, or while committing, a criminal offence. The estate commenced an action seeking damages in the amounts owing, and the insurers brought an application for summary judgment dismissing the estate's claim. A Queen's Bench judge granted summary judgment dismissing the estate's claim under the applicable insurance policies. The estate appealed. The Court of Appeal (court) determined if the estate could collect on two policies that insured the policy holder's debts in the face of exclusions that denied coverage if the death occurred as a result of or while committing a criminal offence. Specifically, the court determined: 1) whether the judge applied the wrong onus and standard of proof; 2) whether the judge erred by failing to properly consider ss. 4.1(2) and 4.1(3) of the *Controlled Drugs and Substances Act* (CDSA); and 3) whether the judge erred in his interpretation of the exclusion clauses found in the policy.
HELD: No death benefit was payable under the policies in the circumstances of this case. The court dismissed the estate's appeal. 1) The judge did not misapply the onus and standard of proof. The judge agreed that the insurers had the onus of proving that the exclusion clauses applied. The judge understood that the insurers had the onus to either adduce or point to evidence on the record that was sufficient to raise the issue that the deceased had committed a crime, as well as the persuasive burden to prove that fact to the applicable standard of proof. There is only one civil standard of proof at common law in Canada: proof on a balance of probabilities. The estate relied on outdated case law for the submission that the judge applied the wrong standard of proof. 2) The judge did not err in his consideration of the CDSA sections, sometimes referred to as the "Good Samaritan" provisions. The estate argued that ss. 4.1(2) and 4.1(3) of the CDSA prevented the deceased from being charged with or convicted of the offence of possession of cocaine if medical care had been requested before he died. This argument was not before the Queen's Bench judge, but even if it had been, the court found that it had no merit. These provisions do not provide for blanket immunity from criminal liability. They also did not apply here, because the evidence about the death was not gathered as a result of medical or law enforcement assistance sought for a medical emergency. 3) While the judge erred in his interpretation of the exclusion policy, the judge did not err in granting the insurers summary judgment dismissing the claim. The death was the result of the deceased's illegal possession of cocaine, and the insurers were entitled to deny coverage under the two policies on this basis. The judge erred in finding that the insurers properly denied coverage simply because the deceased died with a wallet on his person that contained

trace amounts of cocaine. The judge found that, because the deceased died while in possession of a measurable quantity of cocaine in his wallet, the exclusion against coverage when death occurs "while committing" a criminal offence applied. The insurance policy on the mortgage was a standard form contract, so the court reviewed the judge's interpretation of it on a correctness basis. The case law outlined that the first step of interpreting standard form contracts of insurance was to give the words used their ordinary meaning as they would be understood by the average person (*Sabean v Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7). The court was satisfied that an average person applying for insurance would understand that the words used in the mortgage policy would require a temporal connection between a criminal act and the death of the insured before the exclusion would operate. A reasonable person would also expect there to be a connection between an exclusion and the risk assumed by the insurer under the policy of insurance. A sensible interpretation requires that the death both occur at the same time as a criminal offence and that the actions that constitute a criminal offence be connected in some way with the death of the insured. The insurers argued that the judge erred by concluding that the deceased's death was not the result of committing a crime. To reach this conclusion, the judge relied on the correct understanding that in Canada, it is not a crime to consume illicit drugs. The judge erred when he found that the deceased's death was not the result of his commission of a crime. Had the deceased not committed the criminal act of possessing cocaine, he would not have consumed the drug and could not have died from it. The deceased's illegal possession was a sufficient cause of the deceased's own death to fall within the scope of the exclusion. The words of the exclusion required only that the criminal act be one of the causes of death, not that it be the only cause of death, for it to apply.

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***Witzaney v Fisher*, 2023 SKCA 77**

Schwann McCreary Drennan, 2023-07-05 (CA23077)

Appeal - Wills and Estates - Proof of Will in Solemn Form
Wills and Estates - Capacity - Undue Influence

The appellant appealed an order dismissing her application to have two codicils of the deceased proven in solemn form. The appellant was the daughter of the deceased. The appellant took no issue with the validity of the will, but argued that the testator lacked testamentary capacity and was unduly influenced into making the codicils. One codicil had the effect of divesting the appellant as a beneficiary of the will, and the other removed the appellant as executor. The chambers judge determined that the evidence put forth by the appellant regarding testamentary capacity was insufficient to raise a genuine issue to be tried. The deceased's lawyer swore an affidavit, and the lawyer found the testator to be fully competent to make the codicils. The lawyer noted that the testator was "very firm" with him when she told him that she wished to remove the appellant from the will. The chambers judge concluded on the admissible evidence before him that there was nothing indicating undue influence.
HELD: The appeal was dismissed. There was no error in the chambers judge's identification of the proper legal test, nor in its application. The chambers judge's decision regarding whether the codicils must be proven in solemn form was discretionary in nature. Appellate intervention in a discretionary decision is only available when there is a palpable and overriding error in the assessment of the facts, where the judge misapprehends or fails to consider material evidence, fails to correctly identify the legal

criteria governing the exercise of their discretion, or misapplies those criteria. The evidence of the lawyer was uncontradicted. The court ordered that the respondents be fully indemnified from the estate for their actual legal fees and disbursements on the appeal.

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***Pointer v Saskatchewan Government Insurance*, 2023 SKKB 90**

Currie, 2023-04-27 (KB23094)

Civil Procedure - Leave to Cross-Examine on Affidavit
Civil Procedure - *Queen's Bench Rules*, Rule 6-13

The defendants applied for leave under Rule 6-13 of *The Queen's Bench Rules* to cross-examine the plaintiff on his affidavit. The affidavit was in support of the plaintiff's application for certification of a class action. The court reviewed the jurisprudence generally and specifically to the law on class actions and stated that the need for comprehensive evidence on the certification application means that many defendants will not find it difficult in a prospective class action to obtain leave to cross-examine a plaintiff on his affidavit. However, such an order from the court is "not automatic."
HELD: The court granted leave to cross-examine because the defendants established that the cross-examination would assist the court in determining whether to certify the action and would not result in an injustice. The court set out topics for which the plaintiff could provide additional useful information, related to whether he had a cause of action, whether there were other prospective class members, whether there was an identifiable class with common issues, whether limitation periods would affect the action, and information about the plaintiff's ability to act as representative plaintiff.

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***Champ Estate v Champ*, 2023 SKKB 122**

Currie, 2023-06-15 (KB23114)

Constitutional Law - *Constitutional Questions Act* - Constitutional Challenge
Civil Procedure - Collateral Attack

This was a fiat concerning an application by the Attorney General to strike out a notice given under *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01. The respondent had been the power of attorney and later executor of the estate, but he renounced as executor. The new executor and applicant estate previously applied to the court for two actions: one relating to the administration of the estate, and the other in which the estate commenced an accounting from the former executor from when he was power of attorney and when he was executor. A chambers judge ordered that the respondent provide accountings for all actions he took as

power of attorney and as executor. This formal order was served on the respondent. The respondent did not appeal the order, nor did he provide an accounting. The new executor served notice of an application for an order finding the respondent in civil contempt. The respondent then served notice of his application for an order declaring that s. 18.1 of *The Powers of Attorney Act, 2002* is "invalid, inapplicable or inoperable due to a conflict with Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11." The respondent did not raise the validity of this section before the chambers judge. The Attorney General, in response to the notice, brought this application as an intervener for an order striking out the notice of application as a collateral attack constituting an abuse of the process of the court.
HELD: The court granted the Attorney General's application and struck out the constitutional challenge as an abuse of process under *The Queen's Bench Rules*, Rule 7-9(2)(e). The respondent's constitutional challenge to the section was invalid because it constituted an attack on the order made by the chambers judge. The sole purpose for the application for a declaration that the section as invalid was to render the chambers judge's order invalid.

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***R v Burghardt*, 2023 SKKB 124**

Klatt, 2023-06-16 (KB23115)

Criminal Law - Manslaughter - Unlawful Confinement

This was a sentencing decision after the offender pled guilty to manslaughter and forcible confinement in the death of her two-year-old daughter. In the weeks leading up to the child's death, the offender became frustrated with her daughter because she would not go to sleep. At the suggestion of her partner, she started restraining the child by taping her up during naptime and bedtime to get her child to sleep. She became angry with the child and threw her against the wall three or four times, killing her. She tried to mislead the police about killing her daughter, initially claiming that her daughter fell down the stairs. After throwing her daughter against the wall, she did not call 9-1-1. Instead, she called her partner, and they concocted a story to give to the authorities. An ambulance was not called until well over an hour after the injuries were inflicted, and it was not the offender who called. The main issue the court determined was an appropriate sentence, and whether the offender's cognitive functioning mitigated her moral culpability.
HELD: The court imposed a sentence of seven years in prison for manslaughter, and a consecutive sentence of 365 days for unlawful confinement. The sentencing range for manslaughter in the death of a child was from four to 12 years' imprisonment (*R v Will*, 2015 SKCA 11). The court assessed aggravating and mitigating factors. There were many aggravating factors, including failing to meet the statutory duty to protect her own child. The court noted that it was reasonable for society to expect that the courts will punish a parent who kills their child more severely than a stranger who kills a child. The offender tried to mislead the police, did not call 9-1-1, and there was evidence that she mistreated her child on other occasions prior to her death. She tried to blame the child's doctors for doing nothing about the child always "falling." Mitigating factors included the offender's relatively early guilty pleas, and that the offender expressed remorse and understanding of the crimes she committed. The court did not find the offender's cognitive

deficits to be significantly mitigating. She had two other children that she cared for, and the fact that she specifically targeted the victim for abuse and confinement could not be explained by the existence of cognitive limitations.

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***Kowalinski v Kowalinski Estate*, 2023 SKKB 131**

Smith, 2023-06-19 (KB23119)

Wills and Estates - Estate Distribution - Chattels

The applicant estate (applicant) sought an order under s. 46.4(1) of *The Administration of Estates Act*, SS 1998, c A-4.1 seeking approval of a proposed distribution of the estate. The deceased appointed her three children as executors. The deceased had loaned money to her children, which contributed to suspicion between the siblings. None of the siblings trusted each other, and there had been numerous applications. The court was tasked with ordering the distribution of the $500,000 estate. In particular, the court determined: 1) whether the executors should receive executors' fees; 2) the amount each of the beneficiaries were indebted to the estate; 3) whether expenses incurred by beneficiaries should be reimbursed; 4) whether legal fees should be paid for from the estate; and 5) how to distribute contested chattels.
HELD: 1) The court found that some level of compensation to the executors was appropriate, but it was at the low end. One percent of the value of the estate was payable out of the final distribution to one of the executors, with 0.5 percent to be paid to the other executor. 2) The court reviewed the materials to set out specific amounts owed by each of the four beneficiaries to the estate. 3) The court set out the specific amounts of out-of-pocket expenses that were payable by the estate as well. 4) With regards to the legal costs, the court held that each sibling would bear their own costs. 5) The court pointed out that each party had a different list of chattels that they could not agree on dividing. The court resolved this by directing the parties to compile a list of the chattels in dispute, and a date would be set to draw names from a hat in the courtroom and on the record.

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***Inland Steel Products Inc. v Higgins*, 2023 SKKB 132**

Morrall, 2023-06-23 (KB23120)

Civil Procedure - Pleadings - Application to Strike
Civil Procedure - Queen's Bench Rules, Rule 5-12

The plaintiff alleged that the defendant solicited an employee contrary to the release document and employment contract. The plaintiff brought an application under Rule 5-12 of *The Queen's Bench Rules* to compel the defendant to serve his affidavit of

documents on the plaintiff and to produce copies of specified documents. The defendant brought his own application, requesting the court to strike the plaintiff's claim in its entirety. In this decision, the court only decided whether to strike the claim under Rule 7-9(2)(a) for failing to disclose a reasonable cause of action, or under Rule 7-9(2)(b) (scandalous, frivolous or vexatious claim) or under Rule 7-9(2)(e) (abuse of process).
HELD: The application to strike was dismissed. The plaintiff set out an appropriate legal cause of action related to breach of contract and the damages resulting from that breach. The case law was clear that the defendant had to provide affidavit evidence to indicate that no basis for the claim existed. He did not provide any evidence. The court set out the applicable legal principles for the defendant's application to strike based on failing to disclose a reasonable cause of action, that the action was scandalous, frivolous or vexatious, or was an abuse of process (*Harsch v Saskatchewan Government Insurance*, 2021 SKCA 159; *Siemens v Baker*, 2019 SKQB 99). If a pleading is any of "scandalous, frivolous or vexatious", it is also an abuse of process.

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***Conexus Credit Union 2006 v Engen*, 2023 SKKB 134**

Robertson, 2023-06-26 (KB23121)

Property Law - Real Estate - Doctrine of Rectification - Foreclosure Proceedings - Unconscionability - Assumption of Mortgage

The applicant plaintiff applied for summary judgment seeking enforcement of a mortgage debt and to dismiss the defence. The defendants entered into a lease agreement with the owner of an acreage and occupied the acreage. The owner of the acreage wanted to sell it to the defendants, but they were unable to secure financing. The defendants then entered into a sale agreement which included swapping properties, with the owner of the acreage taking title to the defendants' residential property in Regina and assuming the existing mortgage. The defendants eventually obtained financing from the plaintiffs to purchase the acreage. The plaintiffs held the existing mortgage on the acreage under the earlier mortgage agreement with the previous owner. The lawyer representing the defendants indicated in his affidavit that he had no doubt that the defendants understood that they assumed the mortgage on the acreage. The defendants made regular payments until 2018, when they stopped paying. The defendants acknowledged that they were liable for the debt but argued that they did not assume the plaintiff's mortgage and, therefore, that it could not be enforced by foreclosure proceedings. The defendants also argued that if they did assume the mortgage, it was unenforceable because of errors in the mortgage documents or because the transaction was unconscionable. The plaintiffs acknowledged errors in the mortgage documents but argued that there was a mutual mistake, and no one was misled as to the agreement. The plaintiffs argued that the errors should be corrected under the doctrine of rectification. The court determined the following issues: 1) whether the defendants assumed the mortgage; 2) whether the equitable remedy of rectification should be applied to the plaintiff's mortgage assumption documents to correct errors in the description; and 3) whether the resulting transaction was unconscionable.
HELD: The plaintiff's application to dismiss the defence was granted and the court declared that the defendants assumed the mortgage against the acreage. The court rectified errors in the mortgage and transfer documents according to the doctrine of rectification. The plaintiff was granted leave to file a revised order *nisi* for sale by real estate listing. The court was satisfied that there

was no genuine issue requiring a trial, and that it was therefore appropriate to grant summary judgment. 1) It was clear on the evidence that the defendants assumed the mortgage. They took title with the mortgage registered against the acreage. Therefore, the land was subject to foreclosure proceedings. The mortgage was continually registered against title to the acreage and had never been discharged. The sale and purchase agreement expressly provided for the assumption of the existing mortgage. After the transfer was complete, the lawyer for the defendants provided a report including a copy of the title which showed registration of the mortgage. The defendants regularly made mortgage payments for five years after taking title to the property and stated that the reason they stopped making payments was due to financial difficulties. The defendants' claim that they were not aware or did not understand they had assumed the mortgage was not raised until they filed their statement of defence, which was years after the relevant transactions. 2) The court corrected the errors in the mortgage documents. The court noted that the doctrine of rectification is to be used sparingly and cannot be used to re-write an agreement. Instead, the doctrine is applied to restore an agreement by correcting errors to reflect the original and mutual intent of the parties. To succeed on an application for rectification, the applicant must prove on a balance of probabilities that there was an original agreement between the parties; that there was a mistake made when the original agreement was reduced to writing; and that either it was a mutual mistake by both parties, or it was a unilateral mistake by one party and the other took advantage of the mistake. Some of the documents contained errors, but no one noticed those errors until litigation started years later, and no one was misled by those errors. Correcting the errors would simply return the mortgage agreement to the original intent of the parties. 3) The mortgage agreement was not unconscionable. The court reviewed the law of unconscionability in the context of a mortgage agreement set out in *Mountain Investment Corp. v Quewezance*, 2022 SKQB 266. There is a two-part test for unconscionability: i) proof of inequality in the positions of the parties; and ii) proof of an improvident bargain. The court accepted that commercial lenders had an advantage over most borrowers. The court found it was not an improvident bargain nor an unconscionable transaction. An absence of legal advice was not proof of unconscionability, it was just one of many factors to consider. Here, the defendants had the benefit of legal advice from an experienced lawyer.

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***R v Zaya*, 2023 SKPC 19**

Green, 2023-04-14 (PC23027)

Criminal Law - Assault - Assault with a Weapon
Criminal Law - Peace Officer - Use of Force
Criminal Law - Resisting Arrest

D.Z., an RCMP officer, was charged with assault with a weapon for using pepper spray on J.D., a passenger in a vehicle that had been stopped for having open alcohol. The other passengers in the vehicle admitted to being inebriated, but all evidence received at trial indicated the driver was sober. D.Z. claimed that J.D. was resisting arrest, so he tripped him to the ground and used pepper spray to subdue him. J.D. denied resisting arrest but admitted that he was drunk and might not remember the events clearly. J.D. and several friends had been drinking on November 1, 2020, when D.Z. responded to a request to support a fellow officer who had stopped the vehicle J.D. was traveling in. D.Z. asked the backseat passengers, including J.D., to slowly exit the vehicle and he

suggested they would be issued a traffic ticket for having open alcohol within the vehicle. D.Z. placed handcuffs on J.D. The other witnesses and D.Z. testified to different versions of what they observed (or heard): D.Z. maintained that the larger and stronger J.D. was resisting arrest, and this required him to trip J.D. to the ground and ultimately use pepper spray to subdue him. J.D. testified that he did not resist arrest but admitted that he may not recall the events during that evening as he was “buzzed.” An expert called on behalf of D.Z. testified to the reasonable use of force that police officers are permitted to use. The court also reviewed video of the incident and an audio recording that captured a conversation between J.D. and D.Z. later in the evening that J.D. was arrested, when he apologized to D.Z. and told him that he was thankful that he was not punched and that the officer had not used a taser gun. The court set out three issues to determine whether D.Z. was guilty of committing assault with a weapon: 1) Was D.Z.’s arrest of J.D. authorized by law? 2) If the arrest was authorized by law, were there reasonable grounds for the actions D.Z. took in arresting and further detaining J.D.? and 3) Taken together, had the Crown proven beyond a reasonable doubt that D.Z. was not justified by section 25(1) of the *Criminal Code* in the actions he took against J.D.
HELD: Constable D.Z. was acquitted of the charge of assault with a weapon. The court found that D.Z. was authorized by law to arrest J.D. and that he used reasonable force in subduing J.D., who was resisting arrest. The court established in its analysis that section 25(1) of the *Criminal Code* permits peace officers to use reasonable force in the administration or enforcement of the law, if the officer acted with reasonable grounds, and was justified in doing what he or she was required to do and in using as much force as would be necessary for the purpose of completing their duties. The court found that D.Z. had reasonable grounds to believe that J.D. was resisting arrest, and that the use of pepper spray was necessary to protect D.Z. and others from harm. The court also found that D.Z.'s actions were in accordance with the principles of reasonable force set out in the *Criminal Code*. The expert witness who testified about the reasonable use of force was not challenged on his conclusion that based on video surveillance, it appeared J.D. was resisting arrest, given the length of time that was being taken to respond to D.Z.’s demands. Further, the expert testified that D.Z. bringing J.D. to the ground was a minimally invasive use of force, and that the use of the pepper spray seemed reasonable in light of the size difference between the parties and J.D.’s escalating hostility. The court confirmed the long-standing principle that peace officers cannot use any force they wish in the execution of their duties as was discussed in the case of *R v Gelowitz*, 2019 SKQB 183, but in the present instance, D.Z.’s actions were reasonable, and he did not contravene section 267(a) of the *Criminal Code*.

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***R v Fern*, 2023 SKPC 27**

Anand, 2023-04-17-23 (PC23028)

Constitutional Law - *Charter of Rights*, Section 10 - Right to Counsel
Constitutional Law - *Charter of Rights*, Section 8, Section 9, Section 10(b), Section 24(2)
Criminal Law - Impaired Driving
Criminal Law - Impaired Driving - Approved Screening Device - Breath Demand - Forthwith

T.J.F. was charged with impaired driving and having a blood alcohol concentration (BAC) of 80 mg or more. He argued that his *Charter* rights had been infringed and that the evidence should be excluded from trial. On January 2, 2022, T.J.F. was pulled over by the Saskatoon Police Service after a member of the public reported that he was driving erratically. The officer who pulled him over testified that T.J.F.'s eyes were glassy and that there was a strong smell of alcohol coming from the vehicle. T.J.F. was asked to provide a breath sample, which indicated that his BAC was over 80 mg. The officer admitted under cross-examination that he had not indicated to T.J.F. that he was being detained. This grounded T.J.F.'s first *Charter* arguments to exclude evidence. At the police station, T.J.F. asked to speak with a specific lawyer he knew. There was some contention about whether a voice message was left for this lawyer, but evidence received at trial confirmed that after the specific lawyer could not be reached, a police officer immediately provided T.J.F. contact information for other lawyers and Legal Aid. T.J.F. then proceeded to provide breath samples that resulted in two Certificates of Analysis demonstrating T.J.F.'s BAC exceeded 80 mg or more. This grounded T.J.F.'s second *Charter* application to exclude evidence based on *Charter* infringements, as he was not given a reasonable opportunity to speak with a specific lawyer before submitting breath samples. The court had five issues to determine: 1) Were T.J.F.'s section 8, 9, and 10(a) *Charter* rights infringed when he was stopped by the officer? 2) If yes, should the evidence of the "Fail" result from the approved screening device to be excluded from trial pursuant to section 24(2) of the *Charter*? 3) Were T.J.F.'s section 8 and 9 *Charter* rights infringed because of the admissibility of the "Fail" result? 4) Were T.J.F.'s section 10(b) *Charter* rights infringed at the police station? 5) If so, should the evidence of the Certificate of Qualified Technician (two breath samples showing a blood alcohol concentration greater than 80mg) be excluded from trial pursuant to section 24(2) of the *Charter*?

HELD: The court found that T.J.F.'s *Charter* rights had been infringed during the roadside stop, but that the infringement was not serious enough to warrant the exclusion of evidence. However, the court found that T.J.F.'s *Charter* rights were also infringed at the police station when the police did not allow him to contact his preferred lawyer. The court found that this infringement was serious enough to warrant the exclusion of the Certificates of the Qualified Technician. The court found that the police officer did not inform T.J.F. that he was being detained when the roadside stop occurred. This violated T.J.F.'s section 10(a) *Charter* right to be informed of the reasons for his detention. However, the court found that this infringement was not serious enough to warrant the exclusion of evidence. The court cited *R v Kelly* (1985), 1985 CanLII 3483 (ON CA), 17 CCC (3d) 419, among other cases, to confirm that police officers have an obligation under section 10(a) to explain the reasons for a detention immediately, which did not occur in this case. The court then completed the second prong of analysis to determine whether admitting evidence from the infringement would result in the administration of justice being brought into disrepute, as required by section 24(2) of the *Charter*. The court cited *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 (*Grant*) in determining whether the infringement was of such a degree that evidence was to be excluded and concluded that the admission of the breath sample would not result in injustice. The court completed the three lines of inquiry from *Grant* in weighing whether the evidence is to be accepted and held that given the reliability of the breath sample; the length of time of the detention being limited in affecting T.J.F., and the effect on justice, that it would be imprudent to exclude the breath sample. The court further found that the police were not diligent in providing T.J.F. time to communicate with his preferred counsel. The critical determination the court made on this issue was that T.J.F. should have been provided with a reasonable opportunity to wait to speak to his preferred lawyer rather than being immediately encouraged to contact other lawyers. In applying the first line of inquiry in *Grant* – whether the *Charter* breach would be viewed as being a serious breach of a reasonable person's rights – the seriousness of the breach was viewed as considerable and enough to exclude the Certificates of the Qualified Technicians that had been received.

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***R v Naytowhow*, 2023 SKPC 38**

Schiefner, 2023-05-24 (PC23036)

Criminal Law - Sentencing - Robbery - Use of Imitation Firearm
Statutes - Interpretation - *Criminal Code*, Section 129(a), Section 320.17

This was a sentencing decision. The offender was found guilty after trial of using an imitation firearm to rob the victim of a vehicle. A few days after the trial, the offender appeared with counsel to plead guilty to two additional charges: failing to stop a motor vehicle when pursued by a police officer and resisting arrest by running away. The victim came to Prince Albert in his truck but was unable to get back to his home on the Thunderchild Reserve. Instead, he stayed overnight at a friend's house at Sturgeon Lake. In the night, the victim was awoken by something hard striking his knee. The victim immediately recognized the offender, who was holding what appeared to be a shotgun in his hand. No firearm was located, and the Crown was unable to establish that the object was a shotgun. However, the victim believed the object was a shotgun. The offender demanded the victim's keys and struck the victim in the other knee with the butt of the shotgun, then pointed the barrel of the shotgun at the victim. The victim threw the offender the keys to the truck. The offender took the keys and left the house, and the victim watched the offender drive away. A few days later, the victim saw his truck at the Sturgeon Lake store. He asked the offender for the keys back. In response, the offender again pointed a firearm at the victim and drove away with the truck. The next month, police responded to a complaint of armed robbery at Sturgeon Lake, and that a red pick-up was involved. The officers located the truck and activated emergency lights. The truck fled at a high rate of speed, and only stopped after the police attempted to deploy two spike belts, and the truck crashed into a field. The several occupants all fled and were arrested, but the offender fled the scene on foot. It took a lengthy search involving multiple members of the RCMP and the K9 unit to locate the offender. He was arrested, and admitted he was the driver. The court received a pre-sentence report and a copy of the offender's criminal record. The court heard sentencing submissions. The court determined what would be an appropriate sentence in the circumstances.
HELD: The court imposed a global sentence of 5.5 years' incarceration. For the robbery, the sentence was 4.5 years. For evading police, the offender received one year consecutive to the robbery. For resisting arrest, the sentence imposed was six months concurrent. The court also ordered ancillary orders, including a DNA sample, weapons prohibition, and a two-year driving prohibition. The Crown's position was that a global sentence of seven years was appropriate, considering the gravity of the offences, the need to denounce and deter similar conduct, and the need to separate the offender from society. The Crown noted that the truck theft involved the aggravating factor of a home invasion. The offender's criminal record started in 2010 as a youth, and over the next 10 years he received 26 convictions, including break and enter, and other violent offences. The author of the pre-sentence report stated that the offender had a history of poor reporting habits and tended to avoid participation. Defence counsel took the position that a global sentence in the range of 4.5 to 5 years would be more appropriate. Counsel highlighted significant *Gladue* factors, including the tragic loss of both of his parents and that the offender's brother recruited him into the Terror Squad and gang culture. The court outlined the purpose of sentencing, the fact that sentencing is a highly individualized process, the preferred approach when sentencing multiple offences (*R v Smith*, 2019 SKCA 100), and how s. 85(4) of the *Criminal Code* mandates that consecutive sentences be imposed for offences involving the use of an imitation firearm in the commission of a robbery. The court reviewed

case law to determine an appropriate sentence. The court noted the gravity of the offences, involving home invasion and assault with an imitation firearm and pointing what appeared to be a firearm. The dangerous conduct a few weeks later in attempting to evade police in a motor vehicle was also dangerous.

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***R v Henderson*, 2023 SKPC 45**

Daunt, 2023-06-22 (PC23040)

Criminal Law - Sexual Assault

The accused was charged with sexual assault contrary to s. 271 of the *Criminal Code*. A trial was held, with the court finding the accused guilty. The complainant was friends with the accused's sister. The complainant testified she was drinking with her friend and another friend. Early in the morning, the sister picked up the complainant, and the accused was also in the car. They all went to the same residence, and talked, drank, and listened to music. The accused started to touch the complainant in a sexual way, but stopped when she told him to. The accused offered the complainant a line of cocaine. She testified that she experienced a blackout. She woke up to the accused having sexual intercourse with her. She asked him to stop, and he did not. She screamed and tried to push him away. He did not stop until his sister came into the room. The complainant attended the clinic in Montreal Lake, and then to the hospital in Prince Albert for a forensic examination. The accused testified and provided three different accounts of what happened. He told the police nothing happened. He told the court in direct examination that he did not remember what happened. In the third account on cross-examination, the accused admitted that he had intercourse with the complainant, but that it was consensual, and he remembered everything. The case turned on the credibility and reliability of the complainant and the accused. The sister claimed she could not remember anything.
HELD: The court found the accused guilty of sexual assault. The Crown proved that the accused intentionally applied force of an objectively sexual nature to the complainant without her consent, knowing or being reckless or wilfully blind to the fact that she did not consent. The accused was neither credible nor reliable. The complainant could not and did not consent to the sexual contact. She provided consistent testimony. The accused's testimony was internally inconsistent and not believable.

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