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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***Jackson v Jackson*, 2023 SKCA 70**

Richards Schwann Tholl, 2023-06-14 (CA23070)

Appeal - Family Law - Custody and Access
Family Law - Child Custody and Access - Best Interests of the Child
Family Law - Self-Represented Litigant

The appellant father and respondent mother had one child. The trial judge ordered joint custody of the child, with primary residence and final say on parenting decisions resting with the respondent. The trial judge also imputed both parties' incomes and concluded the appellant should pay child support. The self-represented appellant appealed the decision. After the appeal was launched, the appellant refused to return the child to the respondent and left the province with the child. The appellant and child were located and the appellant was found in contempt of court and imposed a 60-day period of incarceration. The appellant was also charged with violating s. 282(1) of the *Criminal Code* for taking the child contrary to a court order. He was held and released on

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conditions including that he have no contact with the child unless contact was expressly permitted by family law court order. No such order was on the court file. The Court of Appeal considered: 1) was the appeal moot; 2) should *Gordon v Goertz*, [1996] 2 SCR 27 be struck down; 3) did the trial judge err by proceeding with undue scrutiny of the appellant's evidence; 4) did the trial judge improperly interfere in the appellant's presentation of evidence; 5) did the trial judge misapprehend the evidence; 6) did the trial judge fail to consider the child's best interests; 7) did the trial judge show improper religious discrimination; 8) did the trial judge err by overlooking perjury; 9) did the trial judge err in quashing a subpoena to compel evidence from staff of the Ministry of Social Services; and 10) did the trial judge err in ordering the appellant to pay child support? HELD: The appeal was dismissed. 1) The appeal was moot because of the dramatic change in circumstances occurring since the trial. It was appropriate, however, to address the merits of the appellant's appeal to make things clear to him. 2) *Gordon v Goertz* is the leading case in the realm of parental relocation. The appellant argued this case should be struck down because children need two parents in their day-to-day lives. The Court of Appeal rejected the argument because it is required to follow precedents established by the Supreme Court of Canada. 3) The decision could not be overturned because of the appellant's concerns about the trial judge allowing the respondent's lawyer to ask the appellant questions about living conditions at his residence, and whether the trial judge was reluctant to accept certain exhibits that were marked, and a video not being viewed when the appellant's description of the events was accepted. 4) The trial judge's comments about the need to move the trial along and what lines of questions were relevant to the child's best interests did not warrant overturning the trial decision. The trial judge was dealing with a self-represented litigant, in an emotionally charged situation, and attempting to keep the proceedings focused. The trial judge's conduct might have been impatient or arguably unpleasant, but the trial was not unfair. 5) For a decision to be overturned on appeal because of a trial judge's fact-finding error, the error must be obvious and affect the outcome of the case. The appellant identified a number of errors in factual findings, such as a dog having been purchased for the child and the judge stating the dog was purchased for the child's mother. These errors had no impact on the trial judge's decision. Other alleged errors were factual findings supported by the evidentiary record. There were no errors that were both palpable and overriding. 6) The appellant's argument that the trial judge assessed the child's best interests differently than the appellant does is not a basis for allowing an appeal. 7) The appellant described himself as a born-again Christian. The trial judge specifically indicated the appellant had a right to his own beliefs. There was no error in the trial judge's observation that the child was entitled to grow and develop without the negative, critical and abusive nature which the appellant displayed. This finding did not preclude the appellant from instilling Christian or other religious beliefs in the child. There was no

Criminal Law - Dangerous Offender Application - Long-term Offender

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basis to overturn the trial decision. 8) The appellant did not agree with the testimony of a witness called by the respondent. The trial judge appears to have accepted the witness's testimony. The trial judge's assessments of the evidence do not provide a basis to overturn the decision. 9) The appellant subpoenaed an employee of the Ministry of Social Services to obtain the records of when the child went to daycare. The subpoena was quashed in light of s. 18 of The Social Services Administration Act, which states staff of the Ministry are not compellable to give this type of evidence. It appeared the appellant was able to enter the evidence about daycares and the appellant made no reference to daycare issues in final argument. This was not an issue that could lead to the decision being overturned or varied. 10) The trial judge imputed to the appellant an income of $31,300 per year and imputed to the respondent income of $15,000 per year. The appellant was ordered to pay $250 per month for child support and $166 per month for s. 7 expenses. The appellant argued that his ongoing health problems left him broke. The focus on appeal is on the situation revealed by evidence before the trial judge, rather than circumstances at the time the appeal is argued. There was no reviewable error in the trial judge's assessment of the evidence in front of him. The appellant was not entitled to have the trial judge lower support payments just because the appellant found travel costs to see the child burdensome. The Court of Appeal also dismissed arguments related to whether previous appeals ought to be revisited and whether judges of the court had discriminated against him. The respondent was entitled to costs.

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***R v Lonechild*, 2023 SKCA 75**

Jackson Tholl Kalmakoff, 2023-07-05 (CA23075)

Criminal Law - Dangerous Offender Designation - Crown Appeal
Criminal Law - Dangerous Offender Designation - Intractability
Statutes - Interpretation - *Criminal Code*, Section 753(1)

The Crown appealed the decision of a King's Bench judge (judge) not to designate the respondent, R.L., a dangerous offender in relation to two convictions for sexual assault (see: 2021 SKQB 174). The court described the Crown's grounds of appeal as a "broad basis of arguments directed to a conclusion that the sentencing judge erred in her interpretation and application of s. 753(1) of the *Criminal Code*." The Crown raised three questions of law, being whether the sentencing judge erred: 1) in considering whether the offender's violent conduct was intractable, or this finding was subsumed in her

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Statutes - Interpretation - *Extradition Act*, Section 40, Section 57(1)

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conclusion that the offender is highly likely to reoffend; 2) by confusing issues relating to risk management with the concept of substantial or pathological intractability; and 3) by misinterpreting section 753(1) as requiring proof that the offender is untreatable or absolutely intractable before being declared a dangerous offender. Before assessing the grounds of appeal, the court noted that the decision under appeal was the result of R.L.'s second dangerous offender hearing. The first decision had declared R.L. a dangerous offender and had subsequently been set aside with the consent of the Crown and a new dangerous offender hearing ordered (see: 2017 SKQB 338 and *R v Lonechild* [Unreported], SaskCA, CACR 3047, Regina, Jun19/19). The new hearing was held three years later. In 2017, R.L. was diagnosed with schizophrenia – "only in 2017", the court noted, "notwithstanding the fact that … [R.L. had] been in almost continuous federal custody since committing his very first offence at the age of 19." Two mental health experts who assessed R.L.'s chances of recidivism in 2017 were again engaged for reports in 2020. Both found that R.L.'s prospects for rehabilitation had improved. HELD: The court dismissed the appeal. 1) The Crown argued that the judge was required to designate R.L. a dangerous offender because she had found all the criteria of subsection 753(1) had been met. The court found that in this argument, the Crown assumed that a finding of a "high risk" to reoffend was equivalent to a finding of intractability. *R v Lyons*, [1987] 2 SCR 309 (*Lyons*), was the first authority to consider the element of "substantial or pathological intractability" in what is now s 753(1). The majority of the Supreme Court remarked that the 1977 amendments to that section were designed to ensure that the dangerous offender designation applied to "a very small group of offenders". *R v Boutilier*, 2017 SCC 64, [2017] 2 SCR 936 (*Boutilier*) endorsed *Lyons* and enumerated the statutory criteria for the designation: "(1) the offender has been convicted of… a "serious personal injury offence"; (2) this predicate offence is part of a broader pattern of violence; (3) there is a high likelihood of harmful recidivism; and (4) the violent conduct is intractable." The judge had found the first three criteria were satisfied but was left with reasonable doubt as to the fourth. The Crown had submitted that R.L.'s criminal behaviour was intractable because to avoid it, R.L. would need to take his medication and abstain from drugs and alcohol. She had rejected this, stating "amelioration of the risk of recidivism is invariably contingent upon an offender's compliance, something that is never guaranteed", as well as reminding the Crown that "an offender under a long-term supervision order can be compelled to undertake treatment and take medication, to abstain from drugs and alcohol and to submit to regular testing to ensure abstinence." 2) The Crown alleged that it was an error for the

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judge to confuse the issue of managing R.L. under community supervision with the issue of whether he represented a high risk to reoffend, because strategies to mitigate risk were dealt with at the sentencing stage rather the designation stage. The Court found support in *Boutilier* for the proposition that treatability was a relevant factor at the designation stage: “offenders will not be designated as dangerous if their treatment prospects are so compelling that the sentencing judge cannot conclude beyond a reasonable doubt that they present a high likelihood of harmful recidivism or that their violent pattern is intractable” (emphasis the Court of Appeal’s). 3) The Crown argued that the judge imposed an unreasonable burden on the Crown, requiring it to prove that R.L. was “absolutely” intractable or untreatable: i.e., that he had no possibility of rehabilitation whatsoever. The court agreed that this would have been an error but did not find the judge had committed it. The judge had considered the changes in R.L.’s risk and treatability extensively and concluded that his trajectory appeared to be positive in relation to the reduction of risk and treatability. The judge also found that R.L. had shown a track record of declining risk. Her findings in this regard were findings of fact, and therefore could not be reversed on a Crown appeal.

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***Clarke v Canada (Attorney General)*, 2023 SKCA 84**

Leurer Barrington-Foote Kalmakoff, 2023-08-09 (CA23084)

Administrative Law - Judicial Review - Appeal
Statutes - Interpretation - *Extradition Act*, Section 40, Section 57(1)

The United Kingdom (UK) sought the extradition of the applicant, a dual resident of Canada and the UK, on historical charges of sexual assault of two children in his care. The applicant sought judicial review of this decision. In the mid-1980s, the applicant admitted to abusing children in his care when he was an employee at separate children’s homes in Northern Ireland in the late 1960s and early 1970s. At the time the admissions were made, officials decided not to lay charges because the time that had elapsed made proceedings “stale and inappropriate.” Recently, UK officials decided to proceed with these charges. In 2012, an inquiry was established to investigate the abuse of children who lived in institutions in Northern Ireland between 1922 and 1995, with the final report published in 2017. During a British Broadcasting Corporation television

R v Saulteaux

Yapi ve Kredi Bankasi Anonim Sirketi v Arslan

Zapshalla v Ram Manufacturing Ltd.

documentary interview of the applicant, the applicant admitted to a journalist that he had indecently assaulted teenage boys in care homes in Northern Ireland. As a result, the Public Prosecution Service for Northern Ireland asked the police to conduct a fresh investigation. UK officials provided a record of case to the Minister of Justice and Attorney General of Canada (Minister), which included a document summarizing the evidence available for use in the prosecution of the applicant and certifying that the evidence was sufficient to justify prosecution under UK law. The Minister ordered that the appellant surrender himself so that he could be sent to the UK under s. 40 of the *Extradition Act*, SC 1999, c 18 (Act). The applicant sought judicial review of this decision under s. 57(1) of the Act, requesting that the order be quashed. The applicant argued that the UK's change in position amounted to an abuse of process and a breach of his *Charter* rights. In an affidavit, the applicant pointed to his advanced age (nearly 80 years old), serious health problems and other personal circumstances to set out why it would be unjust or oppressive having regard to all the relevant circumstances that he now be ordered to surrender for extradition after all these years. The applicant had an elderly wife who needed assistance, as well as two adult children who needed assistance. The Minister rejected these arguments. The Court of Appeal (court) reviewed the Minister's decision for reasonableness. Specifically, the court determined: 1) whether the Minister unreasonably refused to deny surrender given that UK authorities should have been considered estopped from raising the question of whether the applicant's actions were "punishable in law"; 2) whether the extreme delay combined with the reversal of the decision to prosecute meant that the Minister acted unreasonably in refusing to deny surrender; and 3) whether the Minister's decision was unreasonable given the first two points considered holistically with the applicant's serious health concerns and family responsibilities.

HELD: The court dismissed the application. The court held that the Minister's decision to extradite the applicant was reasonable. 1) It was not unreasonable for the Minister not to have found that the authorities should have concluded that issue estoppel prevented the resurrection of these criminal charges. The court noted that the applicant did not make this argument in his submissions to the Minister. The applicant argued on appeal that he was entitled to rely on the principle of issue estoppel to prevent the charges from being resurrected, given that the decision had initially been made not to prosecute. The court disagreed, indicating that issue estoppel guards against re-litigation. Here, issue estoppel did not apply, because there had been no judicial determination of any of the issues associated with the applicant's alleged criminal liability. 2) The court could not find that delay combined with the reversal on whether to proceed with the offences meant that the Minister acted unreasonably in refusing surrender. The Minister's decision was discretionary. The key constraint under s. 44(1)(a) of the Act was that the Minister shall refuse to make a surrender if satisfied that the surrender would be unjust or oppressive having regard to all of the relevant circumstances. This provision required the Minister to "consider all relevant circumstances, singly and in combination, to determine whether surrender would be unjust or oppressive (*Canada (Justice) v Fischbacher*, 2009 SCC 46). The question for the court was not whether it would have assigned the

same weight to various factors, but rather, whether the Minister's decision bore the hallmarks of reasonableness – justification, transparency and intelligibility, as set out in Vavilov. The court reviewed the Minister's decision. The Minister concluded that the UK authorities sought the extradition in good faith. The claims regarding delay were not a valid basis for concluding that the applicant's surrender would be unjust or oppressive or contrary to s. 7 of the *Charter*. The applicant could raise delay at trial. The authorities had chosen to reconsider the earlier decisions not to prosecute in light of the publication of the 2017 report after the public inquiry. The Minister found that the long-term effect on victims of sexual offences and the societal interest in protecting children provided compelling reasons for pursuing prosecution, notwithstanding the passage of time. The court found that the Minister explained in a fully transparent way why he decided that the exercise of prosecutorial discretion by the UK authorities did not constitute an abuse of process that would justify a refusal to order the applicant's surrender. Delay alone, on these facts, was not sufficient to have rendered the UK's extradition request to be an abuse of process. There was nothing on the record that might amount to a representation or a promise that the applicant's potential criminal responsibility would never be reopened. There was also no suggestion that the applicant relied to his detriment on the communications that were made to him about these potential charges. 3) The court did not agree that the Minister failed to undertake a holistic analysis as required by the jurisprudence. The court was satisfied that the administrative decision was justified. The applicant did not identify any overt legal error in the Minister's analysis, and the Minister carefully considered each factor the applicant raised on appeal. The Minister reviewed the applicant's age and health issues as being relevant to his decision, but noted that only in exceptional cases will such circumstances outweigh the legitimate aims of extradition. The UK authorities represented that they would be able to provide care and treatment during his transfer to the UK, and if necessary, while in custody or serving a term of imprisonment. The applicant's personal circumstances and the impact on his family if he were surrendered did not amount to the type of compelling and overriding factors that would shock the conscience and require the Minister to decline surrender.

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***Pellegrini v Tkach*, 2023 SKCA 85**

Schwann McCreary Drennan, 2023-08-09 (CA23085)

Family Law - Appeal - Supervised Parenting Order - Decision-Making Authority
Federal Child Support Guidelines, Section 19(1)(a) - Imputing Income

After a trial, the respondent was awarded sole decision-making and primary residence of the parties' child, and the trial judge ordered that the appellant pay retroactive and ongoing ss. 3 and 7 support according to the *Federal Child Support Guidelines*, SOR/97-175 (*Guidelines*) based on an imputed income amount. At trial, the respondent sought sole decision-making authority and primary residence due to ongoing conflict between the parties, their inability to communicate, and concerns with the appellant's mental health. The appellant was self-represented at trial. He pursued ongoing joint custody and parenting time but did not strongly oppose the respondent being the primary resident parent. He testified that his mental health had stabilized and provided evidence from his psychiatrist to that effect. At trial, the appellant testified that he was taking a realtor course and working part-time at a restaurant. The trial judge found that the appellant's evidence established an unwillingness on his part to communicate and

co-parent with the respondent and ordered that the respondent have sole-decision-making authority and primary residence of the child. The appellant was granted specified parenting time and holiday parenting time, but it was to take place “in the company of” his mother, sister or grandmother. Even though the appellant provided a sworn financial statement, the trial judge found that the annual income amount was not reliable evidence of his past earnings or earning potential and imputed a higher income to him retroactive to 2017. The Court of Appeal (court) determined 1) whether the supervised parenting order was made in error; 2) whether the limits on the appellant’s parenting time were made in error; 3) whether the order for sole-decision making was made in error; 4) possible remedies for parenting time; and 5) whether the trial judge erred in imputing income to the respondent.
HELD: The court allowed the appeal. The court imposed an interim parenting order, remitting the issues of decision-making and parenting time back to the Court of King’s Bench for trial. The court adjusted the retroactive and ongoing child support payable based on the appellant’s actual earnings after determining that it was an error for the trial judge to impute his income. 1) The trial judge erred in ordering supervised parenting. This aspect of the order was set aside by the court. The trial judge stated that he did not believe supervised parenting was necessary but imposed it anyway. The trial judge erred by making an indefinite and final determination that the appellant’s parenting time must be supervised without a proper evidentiary foundation for the order. There was no legal analysis included on the need to impose this kind of order. The order was inconsistent with the jurisprudence: given the significant restriction on parenting time, supervised parenting orders are confined to clear and exceptional circumstances, typically where risk to the child exists. Such orders are intended to deal with short-term transitional issues. There was no evidence on the record that the child was at risk while in the care of the appellant. 2) The trial judge committed errors in law regarding parenting time. This aspect of the order was set aside by the court. The appellant pointed out that the parenting time order imposed by the trial judge resulted in two days of Christmas holiday parenting time every second year, and that his parenting time was less than that he had enjoyed under the interim orders. The court found that the order for supervised parenting impacted the scope of the appellant’s parenting time. The appellant lived in Saskatoon, but his mother, grandmother and sister all lived in Prince Albert. This made mid-week parenting time impractical, if not impossible. All parenting time was also contingent on the availability and proximity of the appellant’s family members. The court found that the parenting order was made punitively, addressing the appellant’s conduct towards the respondent during exchanges. The trial judge failed to consider that parenting time is the right of a child. It was also not apparent on the evidence that an order for the equal sharing of holiday time was not in the child’s best interests. The court did not disturb the trial judge’s order directing that the appellant seek out and complete anger management. However, the court did set aside the part of the order wherein the respondent could request proof of the appellant’s mental health treatment and to apply for a review of parenting if he did not comply. 3) The trial judge erred in granting sole decision-making authority for the child to the respondent. This decision was tainted by the trial judge’s overall punitive and parent-centred approach to the appellant’s request for parenting time and decision-making authority. The trial judge placed undue weight on the appellant’s declaration that he could not communicate or coparent with the respondent. The trial judge was entitled to consider whether this inability to communicate could give rise to a sole decision-making disposition when considered with other factors, but the trial judge did not consider issues around communication and cooperation in the context of a child-focused best interest analysis. 4) The court found that the information relating to the child’s best interests was dated, preventing the court from making a final disposition on matters of parenting. The court remitted this issue to the Court of King’s Bench for a determination of decision-making authority for the child and the appellant’s parenting time. The court imposed an interim order. 5) The trial judge erred by not conducting a proper imputation analysis pursuant to s. 19(1)(a) of the *Guidelines*. This part of the order was set aside. The court substituted a new child support order, fixing the appellant’s income for the purposes of retroactive child support based on the tax information provided at trial. Section 19(1)(a) includes a three-part analysis: a) whether the appellant was intentionally underemployed; b) if the trial judge found

that the appellant was intentionally underemployed, then he had to consider whether any of the exceptions found in the section applied; and c) if the trial judge found that none of the exceptions applied, then he should determine whether to exercise his discretion to impute income to the appellant. Here, the trial judge did not engage in the analysis demanded by the section, did not make any finding that the appellant was intentionally underemployed, and did not consider whether the exceptions set out in the section applied; specifically, whether the realtor studies constituted a "reasonable" educational need under the exceptions. The analysis was incomplete and there was no basis for the trial judge to impute income to the appellant. Even if the trial judge had conducted the first two stages of the imputation analysis and proceeded to exercise discretion to impute income, the appellant never earned the amount of income imputed to him in any tax year.

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***Medynski v Rural Municipality of Prince Albert No. 461*, 2023 SKCA 88**

Caldwell Kalmakoff Drennan, 2023-08-10 (CA23088)

Barristers and Solicitors - Privilege - Solicitor/Client Privilege
Practice - Disclosure of Documents - Solicitor and Client Privilege
Civil Procedure - Discovery - Documents - Privilege - Solicitor/Client - Litigation
Civil Procedure - *Queen's Bench Rules*, Rule 5-12

The appellants appealed the dismissal of their application under rule 5-12 of *The Queen's Bench Rules* to compel the respondent rural municipality to produce documents. The respondent had asserted solicitor-client privilege over the documents. The appellant argued solicitor-client privilege had been waived. The respondent had voluntarily produced a statement quoting emails sent to the respondent's lawyer. The appellants had sought disclosure of all correspondence between the respondent and the lawyer. The respondent had produced the emails quoted from but refused to produce the rest of the emails. The chambers judge decided solicitor-client privilege had not been waived in relation to the unproduced emails. The appellants sought and received leave to appeal the interlocutory decision. The Court of Appeal considered whether the chambers judge erred: 1) by failing to find an implied intention to waive solicitor-client privilege; 2) in deciding the issue of implied waiver based on subjective rather than objective intentions; 3) in failing to find the respondent had voluntarily waived solicitor-client privilege; and 4) by failing to inspect the additional emails.
HELD: The appeal was dismissed. 1) Solicitor-client privilege can be waived implicitly even in the absence of an express intention to do so, but only where fairness and consistency requires it. Implied waiver looks to actions objectively. Implied waiver exists where a litigant voluntarily takes a position inconsistent with the maintenance of the privilege or makes legal assertions that make it unfair to permit the litigant to retain the benefit of the privilege. A court must consider the important role of solicitor-client privilege in the legal system. Disclosing receipt of legal advice or communication with a lawyer does not create implied waiver. The party asserting implied waiver must establish: voluntary disclosure of seeking or receiving legal advice; that receipt of legal advice is material to the claim or defence; and reliance on the legal advice to justify a course of action, such that it would be unfair for the holder of the privilege to retain the benefit of the privilege. Express waiver of some documents from a legal file does not automatically waive

privilege over all communications. Waiver is implied if a party is attempting to take unfair advantage or present a misleading picture by selective disclosure. Partial waiver does not justify a fishing expedition into a lawyer's files. The appellants had the onus of establishing why the information they sought was relevant. The appellants had not done so. Nothing in the pleadings suggested the respondent was relying on legal advice received as part of its defence. No legal advice had been disclosed or put in issue in the litigation. 2) The subjective intention is not the determining factor where an implied waiver of privilege is asserted. The chambers judge made no explicit finding about the respondent's subjective intention. The evidence did not demonstrate an intention to disclose privileged communications. 3) The chambers judge did not err in concluding the appellants had not established that partial production presented an incomplete or misleading picture that placed them at a disadvantage. 4) Rule 5-12 permits a judge to inspect the documents in question to decide the validity of a claim of privilege. The judge has discretion but not an obligation to inspect documents before deciding. The appellants had not raised legitimate questions about whether partial production created a disadvantage or misleading picture.

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***CPC Networks Corp. v Miller*, 2023 SKCA 89**

Richards Tholl Kalmakoff, 2023-08-10 (CA23089)

Civil Procedure - Security for Costs
Civil Procedure - *Queen's Bench Rules*, Rule 4-23, 4-24
Practice and Procedure - Appeal - Security for Costs

The appellant appealed an order requiring it pay into court $95,000 as security for costs. The appellant had sued the respondent lawyers and law firms, who had represented the appellant in earlier legal proceedings. The respondents applied in chambers for an order for security for costs. Rule 4-24 of The Queen's Bench Rules lists the factors to be considered by the judge in making this discretionary decision. The application was granted, and the appellant appealed. The Court of Appeal considered whether the chambers judge erred: 1) in the analysis of the merits of the action; and 2) in the assessment of whether an order for security for costs would likely prejudice the plaintiff's ability to continue the action.
HELD: The appeal was dismissed. 1) The chambers judge made no reviewable error in assessing the claim as neither strong nor compelling. The key allegation was that the respondent lawyers and law firms ought to have looked behind instructions and determined whether what the client asked the lawyers to do was in the client's best interests. The claim was novel and not self-evidently meritorious. Further, there was a live limitation of actions issue, as the events look place in 2010 to 2013 and the claim was not issued until 2018. 2) The chambers judge was required to consider whether the order of security for costs would unduly prejudice the plaintiff's ability to continue the action. The appellant's only asset was $10,000 in cash. The chambers judge was aware of this but said there was no evidence the appellant could not raise additional money. A corporation was being used by its two shareholders to sue their former lawyers. The shareholders would be able to recover full costs if the litigation were successful but would have a maximum exposure of $10,000 if not successful. There was no evidence the corporation could not raise funds. The chambers judge did not make a reviewable error.

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***CPC Networks Corp. v McDougall Gauley LLP*, 2023 SKCA 90**

Richards Tholl Kalmakoff, 2023-08-10 (CA23090)

Barristers and Solicitors - Ownership of Client File
Barristers and Solicitors - Fiduciary Duty

The appellant appealed a chambers judge's decision refusing to order a law firm to produce solicitor's notes and internal memos generated while representing the appellant on a matter. This decision relates to production of a former client's property held by a law firm, rather than a defendant's production of documents in the discovery process of a lawsuit. The respondent law firm refused to provide "solicitor's notes and inter-office memoranda", asserting those documents were property of the law firm and not of the former client. Production of the files held by the law firm was the subject of an earlier appeal: *CPC Networks Corp. v McDougall Gauley LLP*, 2021 SKCA 127. The earlier appeal required the law firm to identify any documents removed from the files and the reason for doing so. The chambers judge in the judgment appealed from sustained the law firm's position and refused to order production of solicitor's notes and inter-office memoranda, because those documents were owned by the law firm and not by the former client. The Court of Appeal considered whether the chambers judge erred in deciding all documents identified as solicitor's notes and inter-office memoranda were owned by the law firm.
HELD: The appeal was granted, and the law firm was directed to review the documents through the lens of the principles identified in the decision and provide the former client with the documents the client owned. The appellant was further reminded that, regardless of who owns a document, the law firm may be obliged to produce documents in the course of a lawsuit. Authorities and textbooks regarding ownership of a lawyer's file have been frequently misunderstood. Authorities to the effect that lawyers' "working files" belong to the lawyer must be approached with significant caution because these authorities do not reflect current practices and the fiduciary obligations of a lawyer. Documents prepared by a lawyer for the benefit of the client, including legal research memos, pleadings, briefs, court documents, witness statements, lawyer's notes of conversations about the substance of the file with the client, other lawyers and third parties, are the client's property. Documents prepared by the lawyer for the lawyer's own benefit or protection, including accounting records, conflict searches, time entry records, and draft statements of account, are the lawyer's property. Internal communications and notes about internal law firm administration, including the role a lawyer or staff may play on a file, may fall into the category of being the lawyer's property. Documents often are prepared for more than one purpose. The predominant purpose controls ownership. Any doubt should be resolved in favour of the client. The category of documents prepared for the benefit of the lawyer is a narrow category. The fact a client has been billed for the time involved in preparing a document is a significant but not necessarily decisive factor. The burden of showing that a document in a file is the property of the lawyer rests with the lawyer. The chambers judge erred in treating all solicitor's notes as having the same ownership status. Notes of interviewing witnesses belong to the client. An internal note from the firm's accounting department about the manner to send a statement of account belongs to the law firm. Not all inter-office memoranda belong to the law firm. Legal research memoranda belong to the client. A memorandum for which no billable time was recorded seeking ethical advice from a senior partner belongs to the law firm.

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***A.N.H. v L.D.B.*, 2023 SKKB 120**

Keene, 2023-06-13 (KB23112)

Civil Procedure - *Forum non conveniens*
Statutes - Interpretation - *Court Jurisdiction and Proceedings Transfer Act*, Section 10

The plaintiff alleged that the defendant intentionally inflicted mental suffering on him with the intent to cause personal and financial harm. The defendant did not submit to the court's jurisdiction, arguing that British Columbia (BC) was the appropriate forum, and relying on *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 (Act). The defendant's grounds for requesting the transfer of the claim to BC included that there had been ongoing case management in BC, and that the plaintiff had been declared a vexatious litigant in BC. The court reviewed the affidavit material, noting it was clear that almost all of the plaintiff's complaints contained in the Saskatchewan lawsuit allegedly arose in BC and not in Saskatchewan. The court determined whether BC was a more appropriate forum in which to try the proceedings.
HELD: The court ordered that the proceeding be transferred to BC. The court considered the interests of the parties and the ends of justice and declined to exercise its territorial competence on the ground that BC was a more appropriate forum. The court set out the relevant sections of the Act (sections 4, 9, and 10). The defendant did not argue that the Court of King's Bench lacked territorial jurisdiction, rather, she asserted that BC was the more appropriate forum in which to try these proceedings. The court applied s. 10 of the Act which codified the common law doctrine *forum non conveniens*. The court analyzed the factors enumerated in s. 10. The common law doctrine "focuses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient" (*Club Resorts Ltd. v Van Breda*, 2012 SCC 17). The defendant had the burden of demonstrating why BC was the more appropriate forum. The court found that this action was a continuation of what appeared to be unsuccessful actions filed in BC and amounted to an unnecessary multiplicity of legal proceedings. The cause of action as pled seemed to be overwhelmingly situated in BC. The comparative convenience and expense for the parties to the proceeding pulled towards BC. The plaintiff had been found to be a vexatious litigant in BC and had been enjoined from commencing any legal proceedings in BC without first obtaining leave of a judge, and then could only file applications for leave that were limited to three pages or less and accompanied by only one affidavit not exceeding five pages in length. The court noted that the current proceedings exceeded those limitations.

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***R v Saulteaux*, 2023 SKKB 123**

Elson, 2023-06-15 (KB23126)

Criminal Law - Dangerous Offender Application
Criminal Law - Dangerous Offender Application - Long-term Offender
Statutes - Interpretation - *Criminal Code*, Section 753, Section 753.1

The court provided reasons for judgment. In October 2015, the offender was found guilty of three counts: break and enter and aggravated assault, using a weapon in the commission of an assault, and assaulting a police officer. The Crown brought an application for an assessment under s. 752.1 of the *Criminal Code*, which was granted. After receiving the report, the Crown sought a dangerous offender designation for the offender. Many hearing dates were scheduled and vacated to address the Crown's application. Delay in the proceedings began even before the trial, with the offender being represented by five different counsel, all appointed by the court. By the time the assessment was received, seven further counsel had been appointed to represent the offender. The offender underwent open heart surgery, which further contributed to delay. There were difficulties in locating a writer for a *Gladue* report. The offender's criminal history was "long and extensive" with 29 youth and adult sentences, and recommittal for violating release conditions. Many of the violent offences involved domestic partners. His past confrontational interactions with correctional staff were too numerous to mention individually, often involving self-harm, damage to property, and bodily fluids. There were some positive aspects related to programming completed by the offender while in custody. The psychiatrist's report included a violence risk assessment to determine whether the offender was a "threat to the life, safety or physical or mental well-being of other persons." The offender's score was high on the assessment used to measure psychopathy. The psychiatrist was of the opinion that the offender was at high risk for future violence and that it was unlikely that treatment would reduce the offender's violence risk in a meaningful way.
HELD: The court found that the evidence presented proved, beyond a reasonable doubt, the elements or requirements necessary under s. 753(1)(a) of the *Criminal Code* to designate the offender as a dangerous offender and imposed a sentence of detention in a penitentiary for an indeterminate period. The court referred to the criteria the Crown must prove beyond a reasonable doubt as set out in *R v Boutilier*, 2017 SCC 64: (a) the offender has been convicted of, and has to be sentenced for, a "serious personal injury offence"; (b) the predicate offence is part of a broader pattern of violence; (c) there is a high likelihood of harmful recidivism; and (d) the violent conduct is intractable. Part XXIV dispositions are designed to address the perceived risk of future misconduct and contemplate preventive detention in the interests of protecting the public. The court had three options for sentencing under s. 753(4) of the Code, one of which was an indeterminate sentence. The court did not find that a lesser and determinate sentence would adequately protect the public given the offender's likelihood of violent conduct.

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***Yapi ve Kredi Bankasi Anonim Sirketi v Arslan*, 2023 SKKB 126**

Robertson, 2023-06-16 (KB23116)

Judgments and Orders - Foreign Judgments - Registration
Statutes - Interpretation - *Enforcement of Foreign Judgments Act*, Section 4, Section 12, Section 14

The applicant commercial bank operating in Turkey applied by originating application to register a foreign judgment in Saskatchewan. The bank obtained judgment in Turkey against the guarantors of a loan. The respondent was one of several guarantors for the loan. The outstanding principal amount of the total debt was over $64 million US. The respondent owed over $200 million Canadian. The court considered: 1) had the applicant bank met the statutory requirements for registration; and, if so, had the respondent debtor established a reason to refuse to register in that the decision was 2) not final, 3) not for a certain monetary amount, or 4) contrary to fair procedures.
HELD: The application to register the foreign judgment was granted. 1) The Enforcement of Foreign Judgments Act is a complete code for the registration of foreign judgments. The applicant had the onus to establish the judgment was eligible for registration. The Turkish courts had jurisdiction over the judgment debtor and subject-matter. The parties were Turkish companies and residents. Agreements had been made in Turkey under Turkish law. The litigation was commenced, defended and conducted in Turkish courts. The respondent participated in the litigation. There was no allegation of fraud or impropriety. Although there are general concerns about the rule of law and judicial independence in Turkey, these concerns do not prevent enforcement of Turkish judgments. The judgment was issued within the ten-year limitation. The Turkish judgment was eligible for registration. 2) The respondent had the onus to establish reasons why the foreign judgment should not be registered for a reason listed in s. 4 of The *Enforcement of Foreign Judgments Act*. The respondent argued the Turkish judgment was not final because the Turkish Supreme Court decision dismissing the appeal directed a copy of the case file be sent back to the trial court. The decision was final. A similar transmittal of the court file occurs in Canada. The argument that further litigation was possible was speculative. There was no evidence of further proceedings. An uncontradicted expert report regarding Turkish law supported the conclusion the decision at issue was final. 3) The amount of judgment debt was ascertainable. The amount was argued at trial and on appeal. The exact amount of the judgment would need to be calculated by converting the amount from US dollars to Canadian dollars, adding interest where applicable and adding various amounts. Sections 13 and 15 of the Act contemplate this accounting exercise. The fact the defendant may be able to recover amounts he pays from other guarantors does not make the amounts uncertain. 4) The respondent argued the process was unfair because the Turkish appellate court fees were exorbitant. Fairness has three aspects: notice of the claim, opportunity to defend, and the opportunity to be heard. The respondent was not singled out to pay the court fees. Canada and Turkey both have court filing fees payable upon filing, although the Turkish fees are much higher. The Turkish filing fees serve as security for costs. The Turkish court filing fees reflect a legitimate policy choice not contrary to fundamental justice. The respondent applied for relief from payment of court filing fees in Turkey, but the application was refused based upon the court's finding that the respondent was solvent. In considering whether to register a foreign judgment, the court does not re-consider the merits. The respondent was a sophisticated party, and the court fees were not a surprise. The respondent had over two years to make the payment. His appeals were then dismissed for failure to pay court fees only after he applied for relief and the court considered his ability to pay. The respondent exercised his full rights as a party at trial. The respondent did not establish a breach of fundamental justice to justify that the Turkish judgment should not be registered.

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***Cechanowicz v Cechanowicz*, 2023 SKKB 133**

Goebel, 2023-06-23 (KB23129)

Family Law - Variation of Interim Order - Parenting Time
Family Law - Parenting Time - Best Interests of the Children

The petitioner mother (mother) and respondent father (father) had married in 2013 and separated in 2021. They were parents to three children, aged eight, five, and two years. The father applied to the court to order an interim parenting regime because the parties had been unable to come to a consensus. The parties had begun living together in Regina in 2011 and the following year, had moved to Fort Qu'Appelle. In 2019, they moved to Pilot Butte, and a few months later purchased an acreage near Edenwold where they lived until their separation in 2021, the father taking up residence in Regina. Once the acreage was sold, in 2022, the mother moved to Melville with the children, where she had family. The father's understanding was that this would be a temporary arrangement and that the mother and children would be moving back to the Regina area within a year. The mother denied that they had agreed on such a plan. The father consistently exercised his parenting time, having primary care of the children every weekend and exercising alternative parenting time on the occasions that the mother had primary care on a weekend. The father requested that the court order the mother to relocate with the children to Regina or the Regina area, or if she failed to do so, that he be given primary care of the children commencing July 1, 2023, with parenting time for the mother every other weekend. The mother requested that she be granted interim primary care of the children with parenting time for the father three out of every four weekends. The sole issue for the court to decide was the care arrangement that would be in the best interests of the children.
HELD: The court ordered that the children remain in their mother's primary care in Melville and that the father have generous parenting time. The primary consideration was, as usual, the bests interests of the children: section 16(2) of the *Divorce Act*. The court was mindful of the recent amendments to the *Divorce Act* resulting in several components to the best interest test listed at section 16(3), as well as the pre-amendment jurisprudence. A parent's rights were not relevant to the best interest analysis. Any interim decision on parenting ought to preserve the status quo as much as possible to ensure stability in the children's lives. The father argued that the current arrangement did not best reflect the status quo, since the mother had relocated with the children to Melville without his full consent, and that the arrangement prior to separation, when he had daily involvement with the children, should be considered the status quo. The mother disagreed, arguing that the status quo had always been for the children to be in her primary care, even before separation; that the children had settled in Melville; and that there was no compelling reason to impose the dramatic change the father wanted. The court appreciated that the father had commuted to work while the children were young while the mother had consistently cared for the children, and that the income was crucial, and further appreciated his frustration that the mother had made a unilateral move to Melville that made shared parenting impracticable. However, the court was not permitted to make a parenting order designed to denounce a parent for such a decision if the result would not be in the best interest of the children. The court declined to make an order for costs; although the mother had been successful, the father's position was reasonable and he had made concerted efforts to find compromise through discussion and mediation. The court ordered that a pre-trial conference proceed at the earliest opportunity.

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***R v Holmes*, 2023 SKKB 160 (Not yet published on CanLII)**

Zerr, 2023-06-26 (KB23151)

Constitutional Law - *Charter of Rights*, Section 8 - Unreasonable Search and Seizure
Constitutional Law - *Charter of Rights*, Section 9 - Arbitrary Detention
Constitutional Law - *Charter of Rights*, Section 24(2) - Exclusion of Evidence

The accused was charged with possession of MDMA and methamphetamine for the purpose of trafficking, and several firearms offences. The officer was dispatched after a report of a suspicious vehicle. The officer stopped the vehicle to check licence, registration, and driver sobriety. The officer did not have concerns about driver sobriety after speaking to the accused. However, the officer saw two live shotgun shells in the front center console. The officer returned to his police vehicle to conduct a search on his computer as to whether the accused held a possession and acquisition licence. The accused did not. The officer found out that the accused had been previously convicted of unauthorized possession of a firearm. The officer arrested the accused for unauthorized possession of ammunition. The officer subsequently conducted a search of the vehicle incident to the arrest and found one prohibited, one restricted and one non-restricted firearm. The accused filed written notice that he sought an order declaring that his s. 8 right to be secure from unreasonable search and seizure was breached by the warrantless search of a vehicle. He also sought an order under s. 24(2) of the *Charter* to exclude evidence arising from the alleged breaches. The court considered the following issues: 1) was the accused's *Charter* notice inadequate in that it did not reference s. 9 of the *Charter*, or allege an unlawful arrest? 2) Was the arrest for unauthorized possession of ammunition unlawful and therefore a breach of s. 9? 3) Did the warrantless searches of the vehicle and the accused's person infringe the s. 8 right to be secure from unreasonable search and seizure? 4) If the accused's *Charter* rights were infringed, should the results of the searches be excluded under s. 24(2)?
HELD: The application was dismissed. While the arrest was unlawful, the court admitted the evidence. 1) The Crown was sufficiently notified that it would have to prove the lawfulness of the arrest at trial. Whenever the Crown must justify a warrantless search conducted incident to arrest, the lawfulness of the arrest is placed squarely in issue (*R v Tim*, 2022 SCC 12 [*Tim*]). 2) The arrest was unlawful and arbitrary within the meaning of s. 9. The arrest here was based on a mistake of law: unauthorized possession of ammunition is not an offence under the *Criminal Code*. Canadians are entitled to possess ammunition that is not prohibited ammunition without a licence. The court noted that Crown counsel seemed to concede the unlawfulness of the search. The court set out the finding in Tim: an arrest based on a mistake of law was unlawful, even if the arrest was made in good faith. In addition, an unlawful arrest based on a mistake of law constitutes an arbitrary detention contrary to s. 9 of the *Charter* (*Tim*). 3) The warrantless searches of the accused and the vehicle were conducted incident to an unlawful arrest, violating s. 8. 4) The court conducted the three-part s. 24(2) analysis and concluded that the admission of the evidence would not bring the administration of justice into disrepute. The court considered: A) the seriousness of the *Charter*-infringing conduct; B) the impact of the breach on the accused's *Charter*-protected interests; and C) society's interest in adjudication on the merits. A) The *Charter*-infringing conduct was at the low end of the spectrum of seriousness. The *Charter*-infringing conduct was inadvertent, and the officer's mistake was an honest one.

There was an absence of evidence to indicate a wilful or reckless disregard of the accused's *Charter* right or a pattern of *Charter*-infringing conduct. B) While the initial vehicle stop was lawful, the officer then made no observations that the driver was impaired. The accused's continued detention was solely attributable to the unlawful arrest. Despite the lawfulness of the initial vehicle stop, the lowered expectation of privacy in a vehicle, and the minimally intrusive nature of the searches, the impact of the breaches on the accused's *Charter*-protected interests was substantial. C) The charges were serious – a substantial quantity of methamphetamine was found with a prohibited, a restricted, and a non-restricted firearm, as well as ammunition. The evidence was reliable and critical to the Crown's case.

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***Behm v Sun Life Assurance Company of Canada*, 2023 SKKB 140**

Elson, 2023-06-28 (KB23134)

Insurance - Designation of Beneficiary
Insurance - Beneficiary - Criminal Wrongdoing

The applicants applied to determine the remaining beneficiaries' entitlements to receive funds out of certain plans and accounts. The three applicants were the two adult children and the estate of a deceased man. The deceased man was the plan holder. He had an RRSP, Group Pension Plan and non-registered account all maintained and administered by the respondent plan administrator. He had designated his children's mother as the 98 percent beneficiary of these accounts, and their two children as each one percent beneficiaries. The children's mother had been charged with second degree murder in the man's death. She died by suicide while in custody awaiting trial. There were no contingent beneficiaries. The respondent plan administrator took no position on the merits of the application. The court considered: 1) was the deceased beneficiary's estate entitled to receive funds from the plans and accounts; and, if not, 2) can the funds that would otherwise have passed to the deceased beneficiary be transferred directly to the other two beneficiaries without passing through the plan holder's estate?
HELD: The deceased beneficiary was not entitled to receive the 98 percent share of the funds, and the 98 percent share could not be transferred directly to the remaining beneficiaries without passing through the plan holder's estate. 1) A previous decision involving the same parties and a life insurance benefit entitlement had concluded that the deceased beneficiary had caused the death of the deceased man by a criminal act. The court relied on the doctrine of *res judicata* and adopted the conclusion. As a matter of public policy rule, persons should not receive a benefit from their own criminal wrongdoing. By causing the plan holder's death through a criminal act, the deceased beneficiary was disentitled from receiving any portion of the accounts or plan funds, despite her designation as a named beneficiary. Her estate was also disentitled. 2) If the funds designated to the deceased beneficiary were not transferred directly to the remaining two beneficiaries, the funds would form part of the plan holder's estate and be subject to probate fees. Unlike British Columbia, Saskatchewan does not have a scheme that, either expressly or implicitly, recognizes rights for surviving or non-disentitled designated beneficiaries. The deceased beneficiary's entitlement to funds and accounts cannot, without a specific basis in law, result in the direct transfer of her otherwise designated interest in those accounts to the remaining beneficiaries. The court refused to exercise the court's inherent jurisdiction. There was no legislative void even though

the preferred remedy was not available. The less preferred remedy of the accounts passing through the plan holder's estate could still be pursued.

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***Moskowitz Capital Mortgage Fund II Inc. v Kolisnek Developments Inc.*, 2023 SKKB 148**

Danyliuk, 2023-07-11 (KB23138)

Equity - Equitable Remedies - Judicial Sale
Mortgage - Foreclosure - Application for Judicial Sale - Order Nisi
Foreclosure - Procedure - Selling Officer

The plaintiffs commenced a claim for foreclosure, sale, and a deficiency judgment. The background facts involved the plaintiff obtaining an assignment of a mortgage on land granted by the defendant to a credit union. That mortgage was held as security for the debt. The subject property forming the security for the loan was two business condominium units with parking units on site. The defendants fell into default, triggering the action. An order nisi for sale by judicial listing was granted. An independent selling officer was appointed. The initial listing of the property allocated nearly all of the parking to one unit and almost none to the other. An offer was presented to the selling officer through the realtors for the unit with all of the parking. A counter-officer was crafted and signed by the selling officer, and then presented to the offeror, who accepted it. The plaintiff disputed the offer, based on how the parking was allocated. Another better offer came in. Here, the court determined two applications: the selling officer sought directions from the court regarding the offer to purchase land subject to the order nisi; and the plaintiff sought amendments to the order nisi for sale by judicial listing to equitably distribute parking spots between the two commercial units for sale. By the time the application was before the court, there were no accepted offers, as they had both been retracted. The court determined the following issues: 1) what are the general legal principles involving judicial sales, including the nature of a selling officer; 2) whether the court had jurisdiction to amend the order nisi for sale after an offer on one unit had been accepted by the selling officer, subject to court approval; 3) whether directions should be given to the selling officer.
HELD: 1) The general rule in Saskatchewan is that under an order nisi for sale, the selling officer is to be an independent lawyer. The selling officer may independently apply to the court seeking directions or relief from the court. The law is settled on guiding principles pertaining to judicial sales. Judicial sales are equitable remedies. The foreclosure/judicial sale process is always subject to the court's overriding supervisory jurisdiction (*CIBC Mortgages Inc. v Taylor*, 2018 SKQB 118 [*Taylor*]; *Toronto-Dominion Bank v Gibbs*, 2019 SKCA 57). The court ensures that there is equity and balance in the land realization process. The court does not take a passive role in supervising a lender's enforcement of its mortgage security. The court referred to case law for the proposition that there are good reasons to appoint independent counsel as selling officers. The power to order a judicial sale is based in equity. There is an inherent conflict between the mortgagor and mortgagee in foreclosures and judicial sales, so courts have required independent selling officers to ameliorate that conflict. The Court of Appeal in *Toronto Dominion Bank v Sader*, 2021 SKCA 154

(*Sader*) was not convinced that the increased cost of independent selling officers was a factor that would permit a selling officer from the same firm as the mortgagee's counsel to be selected. 2) The court amended the order nisi for sale given the unique circumstances. The listing realtors mistakenly ascribed nearly all parking units to one condo unit. This error was not noticed by the selling officer. There are specific factors for a court to consider in an application to vary an order nisi (*Taylor*). The court agreed with the proposed amendments to the order nisi as set out in the draft amended order nisi filed by the plaintiff's counsel but rejected the paragraph preventing any party from bringing an action against the selling officer. 3) The issue of whether directions should be granted was moot, because the first offer had been withdrawn.

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***Haider v Stach*, 2023 SKKB 153**

Brown, 2023-07-14 (KB23142)

Family Law - Spousal Support
Statutes - Interpretation - *Family Maintenance Act*, Section 5, Section 7, Section 9

The parties separated after cohabiting for nearly 12 years. There were no children of the relationship. They attended family mediation but could not resolve issues of support or property. Both were employed, with the petitioner earning considerably less income. The petitioner sought spousal support. The respondent averred that the petitioner was underemployed and in a new relationship. The court determined: 1) whether the petitioner was entitled to interim spousal support; and 2) if the petitioner was entitled to interim spousal support, how much.
HELD: 1) Interim spousal support entitlement was established. The court ordered interim spousal support on a non-compensatory basis. There was a significant disparity in income on a substantial scale at the time of the parties' separation, and the disparity still existed. There was a loss to the petitioner's standard of living due to the couple's no longer cohabiting. The parties had been together for almost 12 years, and the respondent had the ability to pay. The court considered the factors set out in the legislation within the context of the specific circumstances of the application. The initial question was whether the petitioner had established an entitlement to interim spousal support. The court cited *Moge v Moge*, [1992] 3 SCR 813 and *Bracklow v Bracklow*, [1999] 1 SCR 420 as the starting point in the analysis. The support order should recognize economic advantages or disadvantages arising from the marriage or its breakdown; apportion the financial burden of childcare; provide relief of economic hardship arising from the breakdown of the marriage; and promote the economic self-sufficiency of the spouses. The court must also look at the "condition, means, needs and other circumstances of each spouse". The status of being married does not automatically entitle a spouse to support. Disparity in income alone is not sufficient at the stage of consideration of entitlement to spousal support. The court could not conclude that the petitioner was in a new relationship based on the evidence. The court found that a number of lifestyle options were available to the petitioner when she was with the respondent, and that these were now gone. 2) Because entitlement to support was established, the court went on to determine the amount. The court averaged three years of the respondent's income together to determine quantum of spousal support. The court set out the ranges of spousal support as calculated by ChildView, Version 2023.1.0. The court set an amount between the low end and mid-range amount. No retroactive support was ordered, as the

court determined that this would be more appropriate to determine at pre-trial or trial. The petitioner was entitled to costs in the amount of $1,500.

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***Zapshalla v Ram Manufacturing Ltd.*, 2023 SKKB 155**

Layh, 2023-07-20 (KB23146)

Civil Procedure - Application to Strike - Want of Prosecution
Civil Procedure - *Queen's Bench Rules*, Rule 4-44

The plaintiff filed a claim in negligence for the alleged mechanical failure of her in-home lift. She sought damages for personal injury. The defendants sought an order to strike the plaintiff's claim for want of prosecution. The defendants had to prove that the plaintiff's delay had been inordinate, inexcusable, and that the interests of justice did not favour continuing her claim (*International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48; *The Queen's Bench Rules*, Rule 4-44). The delay in this case had been four years and eight months. The plaintiff sought to excuse the delay based on the injuries she sustained, and her understanding that the defendants were assessing her damages and that settlement discussions would continue. She provided detailed affidavit evidence about her attendance at medical facilities and treatment dates.
HELD: The court did not strike the plaintiff's claim. While the court found that the plaintiff's delay of nearly five years was inordinate and inexcusable, the interests of justice required a more nuanced view of the delay. The court noted that one of the defendants waited 22 months to file a statement of defence. The other defendant did not respond to the plaintiff's counsel's correspondence re-stating that the plaintiff had provided all medical records more than a year prior. The defendants' reputations were not prejudiced, their livelihoods were not impacted by the delay, and the defendants could not complain about the witnesses' loss of memory. The defendants had not availed themselves of any proceedings to advance the litigation.

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***R v Krunick*, 2023 SKKB 165**

Mitchell, 2023-08-08 (KB23156)

Constitutional Law - *Charter of Rights*, Section 11(b) - Delay - Trial within Reasonable Time - Stay of Proceedings
Criminal Law - Defences - Delay - *Jordan*

The accused, J.K., applied pursuant to section 11(b) of the *Charter of Rights* for a finding that his right to be tried within a reasonable time of being charged had been breached and to have his matter stayed. He had been charged with one count of

trafficking cocaine in March 2017 and this hearing was held in March, 2023, some six years and 22 days later. The court needed to determine whether the presumptive ceiling established in *R v Jordan*, 2016 SCC 27 (*Jordan*) had been reached and J.K. had been deprived of the right to be tried in a timely manner. The court proposed to adopt the *Jordan* analytical framework as summarized in *R v Coulter*, 2016 ONCA 704.

HELD: Based on all the evidence filed by the parties, the court calculated that the total time that had elapsed from the date J.K. was charged to the date of the instant reasons amounted to 2,345 days or 6 years, 5 months, and 1 day. The first step pursuant to Jordan would be to deduct the number of days the court had taken writing reasons regarding six legitimate applications brought by the defence, subtracting 416 days for a total of 1,929 days. Secondly, the court calculated the number of days of delay attributable to the defence. The Crown argued that it had been prepared for trial within 26 months of the charge being laid on the first scheduled trial date, and that the defence was responsible for delay beyond that date. The court explained that the trial judge had allowed defence counsel to withdraw for ethical reasons and it was necessary to reschedule to allow J.K.'s new defence counsel to familiarize himself with the case and prepare. There were two components of defence delay described in *Jordan*: "(1) that arising from defence waiver, and (2) delay caused solely by the conduct of the defence." (1) One clear instance of defence waiver had occurred, when J.K.'s new defence counsel went on record for J.K. in May 2019, requested that the trial be adjourned to the next trial date, and submitted to the court that his client was prepared to waive the resulting delay. The Crown took no position on the waiver and acknowledged it was not prejudiced. Since then, disagreement had arisen between the parties as to what "the next trial date" meant. Defence took the position that the waiver operated only until February 7, 2020, when J.K. re-elected trial by judge alone and was arraigned. The Crown argued that the waiver was still in operation because a new trial date had yet to be scheduled. The court disagreed with both parties, taking the view that the date the trial was to begin, May 13, 2020, was the date the waiver expired. The waiver thus ran for 359 days, which must be deducted from the overall delay for a total of 1,570 days. (2) In terms of defence conduct, the court was mindful of the direction that any tactical choices on the part of defence that resulted in little apart from delay – including any frivolous applications and any time that the court and Crown were prepared to proceed but defence was not – could be laid squarely at the feet of defence. In this case, none of the applications brought by J.K.'s counsel were frivolous. However, there were three discrete periods of delay the court did attribute to defence. The first was when J.K.'s previous counsel advised the court and Crown on the date set for preliminary inquiry that she would not be proceeding with it and consented to have J.K. stand trial. She should have notified the Crown of her intentions well in advance of that date. The second period began when new defence counsel applied for production of third-party telephone records and the date for the hearing of the application was rescheduled three times. The third period of delay arose when J.K.'s current counsel made application pursuant to section 11(b) of the *Charter* but were unable to proceed with the hearing on the date set for it. In total, 280 days of delay were attributable to defence, bringing the net delay to 1,290 days. The presumptive ceiling for superior court matters being 30 months from the date of charge, or 913 days, the net delay exceeded the ceiling by 377 days. The court went on to analyze whether the discrete exceptional circumstances in this case could reduce that gap. There were two: one of J.K.'s counsel had taken medical leave in the fall of 2022, but given J.K. had two counsel, this did not qualify. The other exceptional circumstance was the COVID-19 pandemic. The trial dates beginning May 13, 2020 were vacated as a result of the Chief Justice's order suspending court operations, and 97 days of delay could be attributed to it. The net delay was accordingly 280 days. Finding that this case was not particularly complex, the court concluded the delay could not be justified and directed a stay of proceedings.

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***R v Dirie*, 2023 SKPC 40**

Schiefner, 2023-06-26 (PC23037)

Criminal Law - Aggravated Assault
Criminal Law - Assault - Assault Causing Bodily Harm
Criminal Law - Evidence - Identification

The accused was charged with aggravated assault contrary to s. 268(1) of the *Criminal Code* after an incident at the penitentiary. A corrections officer and a police officer who investigated the incident testified. Three videos were accepted as a reliable and accurate depiction of the events that occurred. The video showed the accused enter an area after another inmate. The other inmate appeared to stab a third inmate. The accused then pushed the victim to the ground and joined in kicking and punching him, while the victim lay on the floor with his hands over his head in a ball. A corrections officer who was familiar with all three inmates entered the area and the altercation stopped. The victim was bandaged on his arm and forehead and suffered bruising and lacerations which were later observed to be healing properly. The court considered: 1) was the accused involved in the incident; 2) did the evidence demonstrate the victim sustained injuries during the incident; 3) was the accused criminally responsible for the injuries sustained; and 4) how should the injury be classified?

HELD: The accused was guilty of assault causing bodily harm. 1) The accused was one of the individuals who assaulted the victim. Reliability is always a concern with eyewitness identification. The corrections officer had personal knowledge of all three individuals and had supervised them for approximately two months before the incident. The officer had a clear and close opportunity to observe the assault as it occurred, and the accused did not immediately run away. 2) The victim sustained two circular wounds on the arm and a superficial laceration to the forehead during the incident. 3) There were two components to the assault. First, the other inmate stabbed the victim on the arm, and second, the other inmate and the accused repeatedly punched and kicked the victim when he was lying on the ground, resulting in a laceration on the forehead. The accused did not stab the victim. Mere presence at the scene of an offence and acquiescence to the commission of that offence does not support a conviction for aiding and abetting. There was no evidence the accused know the other inmate had a weapon or assisted in the first component of the assault. The accused joined the other inmate in the kicking and punching. For criminal liability, it does not matter who caused the laceration to the victim's forehead because there is no distinction between a perpetrator and secondary party. The accused was responsible for the laceration wound to the victim's forehead. 4) There are three tiers of assault offences: common assault, assault causing bodily harm, and aggravated assault. Aggravated assault requires the complainant be maimed or disfigured or his life endangered. Injury does not need to be permanent but must be serious and interfere in a substantial way with the health and well-being of the complainant. The forehead laceration was not serious enough for aggravated assault but did qualify as bodily harm.

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