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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***R v Brick*, 2023 SKCA 107**

Richards Jackson Drennan, 2023-09-14 (CA23107)

Criminal Law - Appeal - Fresh Evidence
Criminal Law – Appeal – Ineffective Counsel

After a trial, the appellant was convicted of second-degree murder, possession of a firearm while prohibited, and failing to comply with a recognizance. He was sentenced to life in prison for the murder and was ineligible for parole for 12 years. The defence had not called any evidence. The appellant argued that his trial counsel provided ineffective representation by failing to properly advise the appellant on the issue of self-defence and the application of section 34 of the *Criminal Code* in the context of a self-defence claim. As a result, he argued that he could not make an informed decision on whether to testify. The appellant also argued that trial counsel was ineffective by determining that the appellant was lying about acting in self-defence without obtaining the appellant's account of the events underpinning the self-defence claim. The court determined: 1) whether the fresh evidence should be admitted;

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and 2) whether that evidence demonstrated that trial counsel acted in an ineffective manner, resulting in a miscarriage of justice.

HELD: The court allowed both the appeal and the fresh evidence application. The court found that a miscarriage of justice occurred due to ineffective representation, quashed the conviction, and remitted the matter to the Court of King's Bench. 1) The court found that the evidence of defence counsel, the appellant, and a witness should be admitted. The court noted that a modified test applied when ineffective counsel was a ground of appeal. In this situation, fresh evidence may be admitted if it is a) relevant to an issue before the appellate court; b) credible; and c) sufficient (if uncontradicted) to warrant the making of the order sought (*R v Bear*, 2020 SKCA 86). Overall, the court found the appellant to be a credible witness and found that the appellant likely would have testified to his account of self-defence at trial but for the ineffective assistance of trial counsel. The proposed fresh evidence met the credibility part of the test. 2) The appellant demonstrated that a miscarriage of justice occurred because the ineffective conduct of trial counsel undermined the reliability of the verdict. The appellant had to establish that: i) trial counsel's acts or omissions amounted to ineffective representation; and ii) a miscarriage of justice resulted. There were two components to a claim of ineffective representation: prejudice and performance. If it was apparent from the record that no prejudice occurred due to the alleged incompetence (i.e., there was no miscarriage of justice) then there was no need to consider the performance part of the claim. To establish prejudice, the appellant had to show that i) the ineffective assistance of trial counsel caused an adjudicative unfairness, or ii) if trial counsel had performed competently, there was a reasonable probability the verdict would have been different. The appellant argued that had he testified and put forward his claim of self-defence, the Crown would have been required to prove beyond a reasonable doubt that the defence did not apply, and that his act in response to the force or threat of force by the victim was unreasonable. There was the possibility of an acquittal if the defence was successful. In addition, trial counsel concluded the appellant was lying without having interviewed him about his account of the shooting. The court cited *R v Wong*, 2018 SCC 25 for the principle that "subjective prejudice" required that "an accused demonstrate there was a 'reasonable possibility' they would have acted differently" if they were aware of the legally relevant consequences. The court noted that this reasonable possibility existed here, because the appellant wanted to testify at his trial that he was acting in self-defence. The court concluded that the appellant demonstrated there was a reasonable possibility he would have acted differently and that he would have testified had he known about the operation of s. 34 and the possibility of an acquittal. This met the subjective prejudice test. Next, the court turned to the performance aspect of the test, which required the appellant to establish that trial counsel's representation fell below the standard of reasonable professional judgment expected from a lawyer. The court agreed with the appellant that effective representation included providing an accused person with reasonable advice on the decision to testify in language that the accused person understands. Here, there was no pathway to an acquittal or to manslaughter unless the appellant testified. The court agreed that trial counsel fell below the standard of effective

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representation. Even though trial counsel may have had an honest belief that the appellant was lying, trial counsel still had to advise the appellant about the framework for self-defence and the impact of that defence being raised. The appellant had been diagnosed with FASD, and it was evident that the appellant struggled to understand complex questions and concepts. Additional care in advising on a major decision, like whether to testify, was required by trial counsel in this situation.

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***Leier v Leier*, 2023 SKCA 108**

Leurer Kalmakoff McCreary, 2023-09-11 (CA23108)

Family Law - Appeal - Division of Family Property

The parties separated after a marriage of over 40 years. They accumulated substantial family assets valued in the millions. The parties mostly accepted the Court of Queen's Bench summary judgment dividing the parties' property, but the appellant argued that the judge overlooked an investment fund valued at just under $100,000. The appellant argued that the judge should have counted the fund when identifying assets to be divided.
HELD: The Court of Appeal (court) dismissed the appeal, finding that the judge did not err in the identification or division of family property. The parties had agreed before the judge as to which assets were to be divided, and they did not mention this fund. There was no error in the fact that the judgment did not refer to the purported fund as being an item of property for division.

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***R v R.D.*, 2023 SKCA 111**

Kalmakoff, 2023-09-29 (CA23111)

Criminal Law - Conviction - Appeal - Application for Court-Appointed Counsel
Criminal Law - Sentence - Appeal - Application for Court-Appointed Counsel

The appellant was convicted of sexual assault in Provincial Court after a trial and was sentenced to 30 months' imprisonment. The appellant argued that trial counsel failed or refused to call relevant witnesses in the appellant's defence. The appellant appealed against both

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Cantos v University of Saskatchewan

Creative Saskatchewan v Royal Bank of Canada

Erickson v Johnson

Farm Credit Canada v Willow Ridge Bison Ranch Ltd.

International Brotherhood of Electrical Workers, Local 2038 v Stuart Olson Industrial Contractors Inc.

Jans v Jans

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R v Brandt Industries Canada Ltd. (2023 SKPC 50)

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Ring v Ring (2023 SKKB 212)

Roske v Samuel, Son & Co. Limited

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conviction and sentence and sought publicly funded counsel to represent him on appeal.
HELD: The Court of Appeal (court) appointed counsel on a limited basis for the appeal because it was desirable in the interests of
justice to do so. The court did not find that the appellant had an arguable sentence appeal. Section 684(1) of the *Criminal Code* allowed the court to appoint publicly funded counsel where it was "desirable in the interests of justice" that the accused have legal assistance, and where the accused did not have sufficient means to obtain counsel. The court noted that the record was incomplete, but with a properly argued fresh evidence application, a meritorious appeal was possible. The appellant did not have the means to obtain counsel. The court appointed counsel under an initially limited retainer to assess the allegation that trial counsel failed or refused to call relevant witnesses in the appellant's defence. If appeal counsel found there was an arguable evidentiary and legal basis for proceeding, the appeal counsel's retainer could be extended to prepare, file, and perfect the appeal.

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***International Brotherhood of Electrical Workers, Local 2038 v Stuart Olson Industrial Contractors Inc.*, 2023 SKCA 115**

Leurer Tholl Kalmakoff, 2023-10-25 (CA23115)

Administrative Law - Appeal - Labour Relations Board
Administrative Law - Appeal - Reasonable Apprehension of Bias

The appellant argued that a particular member of a hearing panel assigned by the Labour Relations Board (board) should not have participated in an adjudication due to a reasonable apprehension of bias. The board did not find that a reasonable apprehension of bias existed, so the member participated in the adjudication. When the decision was appealed to the Court of King's Bench, a chambers judge upheld the board's decision. The appellant appealed to the Court of Appeal (court).
HELD: The court dismissed the appeal. The court reached the same conclusion as the chambers judge about the correctness of the board's decision on the question of reasonable apprehension of bias. For a judicial review of a decision of an administrative tribunal, the court assessed whether the reviewing judge correctly identified the standard of review to be applied by the administrative body, and whether the judge correctly applied that standard of review. There was no error in the way the board applied the law to determine that there was no reasonable apprehension of bias. The board understood the legal test to apply in determining whether the member had to recuse himself from the hearing, which was whether reasonable

and right-minded people, apprised of the relevant information and viewing the matter realistically and practically, would think it more likely than not that the arbitrator would not fairly decide the issue. The court noted that in *The Saskatchewan Employment Act* (Act) the composition of the panel for matters adjudicated by the board included one member appointed to “represent employers” and another to "represent organized employees.” The very structure of the Act meant that members of the panels may have prior history with the parties or issues in dispute. The “reasonable and informed person” must be a person who was aware of this structure. The court stated that a reasonable apprehension of bias was not established simply because it was possible to identify a scenario in which a representative member of a panel may be seen as having an indirect interest in the matter or certain knowledge or preconceptions.

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***Ring v Ring*, 2023 SKKB 154**

Brown, 2023-07-19 (KB23145)

Contract - Interpretation - Oral Agreement - Parol Evidence Rule

The petitioner alleged that an unwritten agreement was made at a pretrial conference concerning a gravel pit. The petitioner sought a determination from the court that the unwritten agreement be enforced. Her belief was that the respondent was required to execute an aggregate yardage agreement whereby the petitioner arranged with a construction company to permit excavation, stockpiling and sale of gravel, with half of the proceeds payable to the petitioner. The parties entered into a formal, written agreement at the pretrial conference, but there was no mention of the terms of the unwritten agreement as alleged by the petitioner. The pretrial judge directed a trial of the issue as to whether the petitioner was correct about her belief. Here, the court determined whether an oral agreement was created at the pretrial and whether the parol evidence rule prevented it from being enforceable. HELD: The court dismissed the petitioner’s application to enforce the unwritten contract. The court did not find that there was a binding but unwritten agreement. However, the court ordered the respondent give timely and complete notice of any sale or potential sale of aggregate from the land, and that the respondent was prohibited from selling the land until 2033 unless he had written consent from the petitioner. The court cited *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 and *Boutin v Boutin*, 2023 SKCA 41 for the approach to contract interpretation. The goal in interpreting an agreement was to discover the parties’ intention at the time the contract was made. This was an objective rather than a subjective exercise. The court examined what was agreed to in writing and what was alleged to be the oral agreement regarding the minutes of settlement. The petitioner’s belief was that the agreement included her being able to hire a contractor to excavate, stockpile, use or sell all aggregate in the farmland. This belief was different from what was stated in writing in the minutes of settlement. The court found that the belief was not part of the terms as opposed to it being an oversight. The agreement was read carefully by both parties and by counsel. While it was proper to take the circumstances regarding contract formation into account, they could not overwhelm the language in the text chosen by the parties. Parol evidence is generally not admissible to vary or modify the express terms of a written contract. If the parties have

reduced the terms of their contract to writing in a clear and unambiguous manner, the express terms of that contract define the mutual obligations of the parties; oral evidence in contradiction of the terms is inadmissible (*Prairie Pulse Inc. v. Lacasse*, 2005 SKCA 80). The court found that the words of this contract were not ambiguous.

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***Erickson v Johnson*, 2023 SKKB 191**

Bardai, 2023-09-15 (KB23185)

Class Actions - Applications Prior to Certification - Demand for Particulars - Statement of Defence

The plaintiffs commenced a class action against the Legacy Christian Academy and Mile Two Church for allegations of abuse of students. The class action had not yet been certified. Here, the court considered two applications by the defendants: 1) an application for particulars of the allegations against the defendants from the plaintiffs; and 2) Mile Two Church and several other defendants requested that they not be required to file a statement of defence until after certification was determined. The defendants cited *Hoffman v Monsanto Canada Inc.*, 2002 SKCA 120 (*Monsanto*) for their position that for the past 20 years in Saskatchewan, the practice had been to allow defences to be filed after certification. The plaintiffs argued that this practice ought to be revisited, and pointed to jurisprudence demonstrating that the preferred practice in Canada requires defences before certification. The plaintiffs also argued that *Monsanto* was not binding and that the decision to permit defences to be filed after certification was discretionary. HELD: The court set out a timeline for the application for particulars and granted the defendants' application to delay the filing of defences until after certification. 1) The application for particulars was largely unopposed, so the court set out a timeline for the defendants to serve their requests for particulars on the plaintiffs, and for the plaintiffs to serve all responses to requests for particulars on all defendants. 2) The court granted the defendants' application to delay the filing of defences until after certification. The court found that it did not have to determine whether *Monsanto* was binding or not, because discretion favoured delaying the filing of defences. The court noted that certification was a procedural step where the court applies the legislation to determine whether the statement of claim discloses a cause of action, by an identifiable class, who can be represented by a representative plaintiff, that raises common issues, which are best dealt with by a class proceeding. The certified claim allows matters to proceed to trial where the certified common issues can be decided. Requiring defences to be filed in relation to issues that do not end up going ahead would be inefficient; the claim had already been amended twice and might need other amendments at the certification stage. Defendants should not have to file multiple rounds of defences.

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***R v Fertuck*, 2023 SKKB 200 (not yet published on CanLII)**

Danyliuk, 2023-09-22 (KB23192)

Criminal Law - Admissibility of Statements - Voluntariness of Statements - Mr. Big Operations
Criminal Law - Evidence - Admissibility - Confessions - "Mr. Big" Confessions
Criminal Law - Evidence - Admissibility of Statement - Voluntariness
Criminal Procedure - *Voir Dire* - Re-opening

The accused was charged with first degree murder and offering an indignity to a body. In addition to interviewing the accused on four occasions, police employed an undercover investigative technique sometimes called a “Mr. Big” operation. The Crown tendered evidence of statements made by the accused to police during interviews and statements made by the accused during the Mr. Big operation. The court held a *voir dire* to determine the admissibility of both types of statements. The accused dismissed his counsel during the course of the *voir dire*, and the court appointed an *amicus curiae* to aid the court. The *voir dire* had been reopened three times, in each case based on trial fairness and with written reasons. The accused brought a fourth re-opening application. In this decision, the court considered: 1) the fourth re-opening application; 2) whether statements made to the police in authority should be admitted into evidence; and 3) whether statements made to undercover officers should be admitted into evidence.
HELD: 1) The re-opening application was denied. The accused had not laid a proper foundation to bring the application and had no satisfactory explanation for bringing the application at such a late stage in the *voir dire*. He sought to raise evidence that was either inadmissible, had little probative value, or had no bearing on the *voir dire* decision. Re-opening the *voir dire* would further delay the trial. While the accused was self-represented, he had received considerable guidance from the court and amicus and remained subject to the same laws as everyone else. 2) The accused made four statements to police in authority. The first statement, made in the early stages of the investigation, was voluntary and admissible in its entirety. The second statement was provided while the accused was intoxicated and was entirely inadmissible. *R v Oickle*, 2000 SCC 38 and other authorities require that an interview subject have an operating mind, which is not met where the subject is intoxicated. Such a statement is not voluntary. The third statement was a warned statement and was admissible only from its commencement until the point where the accused was taken out of the interview room and his daughter was brought in. When the accused re-entered the room, his daughter made comments that could be construed as threats, such as, “Dad you have to tell them the truth or you will spend your life in jail.” Taken in the overall context of the interview, such comments raised a reasonable doubt about the voluntariness of the recorded statement from that point on. As the police took no steps to dispel the daughter’s threats after she left the room, her statements remained operative for the balance of the accused’s statement, rendering it inadmissible. The fourth statement was a warned statement made following the accused’s arrest. While 23 hours elapsed between the time of arrest and the statement, there was no evidence the accused was mistreated during the intervening period. Therefore, the passage of time was not oppressive, and the statement was voluntary and admissible. 3) All statements made by the accused during the Mr. Big investigation were admissible. The Crown demonstrated, on a balance of probabilities, that the statements were reliable and that there was a lack of undue prejudice and an absence of police misconduct. The judge applied the framework set out in *R v Hart*, 2014 SCC 52 (*Hart*). The first segment of the *Hart* framework compels a court to review the confession and its surrounding circumstances, to consider the prejudicial effect of admitting the confession, and to balance the probative value of the confession against the prejudicial effect. Regarding the circumstances of a

confession, the court may consider the length of operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including their age, sophistication, and mental health. When examining the confession itself, the court must consider other evidence, particularly confirmatory evidence, to determine the reliability of the confession. In weighing the prejudicial effect of a Mr. Big confession, the trial judge must be alive to the potential for moral and reasoning judgment. In the second segment of the *Hart* test, the court must consider abuse of process. Regarding the potential for abuse of process, the accused bears the onus to demonstrate an abuse of process. In this case, the court was satisfied that the accused was not dependent on the fake criminal organization economically, socially, or emotionally. The case was complex owing to there being no body, murder weapon, or witnesses at the outset of the investigation. The Mr. Big operation took place over a period of 10 months and involved 136 scenarios. This was longer than many Mr. Big operations. During the investigation, the accused sustained a head injury (not related to the investigation) that required several weeks of recovery, which led to some delay in the operation and repetition of some scenarios. The court was satisfied that the accused's injury caused only temporary incapacity and that the accused possessed a free and operating mind through all the scenarios. The relationships between the accused and the operatives were complicated and multi-dimensional. There was no evidence that the accused was pressured to join and stay with either the legitimate or criminal segment of the fictional organization, nor of the accused sublimating his own self-interest to the organization. He suffered no intellectual or emotional disadvantage, including during his time of injury, and was not economically vulnerable. The inducements made to the accused were modest and did not increase over time, totaling approximately $16,000 over 10 months. The evidence did not disclose any overt threats made against the accused, either directly or indirectly. The accused was sober during the Mr. Big interview itself and there was very little leading in the interrogation. The accused was allowed to give his account of the murder and Mr. Big reviewed it more than once, asking open-ended questions. There were no problems with the conduct of the interview or tactics employed by the operatives. Finally, the accused was a mature and experienced individual with no ongoing or historical mental health concerns. He was neither isolated, nor socially stunted. He drank too much, but the police were aware of this and managed the scenarios to minimize alcohol consumption. The accused's Mr. Big statements amounted to an unequivocal, clear, and detailed confession. Those details were consistent throughout recorded conversations between the accused and alleged gang members and the recordings did not indicate any pressure or coercion. The statements were confirmed, albeit not perfectly, with other evidence, led to new evidence, and provided some linkage to holdback evidence. There was a sufficient degree of reliability in the confession to militate in favour of its admission at trial. The prejudicial effect of the evidence was not as acute as in some other cases, largely because violence played a very minimal role in the undercover operation. The judge was alive to the potential for prejudicial effect and carefully instructed himself in this regard. Considering the entire body of evidence at the *voir dire*, the judge was satisfied that the probative value of the Mr. Big statements far exceeded any prejudicial effect. In the second stage of the *Hart* test, the judge considered any potential abuse of process by the police. The defence did not put forward any evidence of abuse of process and, in light of the accused ending the *voir dire* self-represented, the judge conducted his own analysis and search for abuse of process. The officers' reaction to the accused's head injury that occurred during the Mr. Big operation, their prioritization of his life and health over the investigation, and their suspension of active investigative scenarios during his recuperation indicated a lack of abuse of process by the police.

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***Roske v Samuel, Son & Co. Limited*, 2023 SKKB 201**

Robertson, 2023-09-22 (KB23188)

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

The defendant applied under Rule 4-44 of *The Queen's Bench Rules* to dismiss the action for delay, or alternatively, to create a litigation plan for the next steps to be taken. The background was an employment dismissal case where the statement of claim was filed in 2019. After the statement of defence was promptly filed and served, no further action was taken by either party. The court determined whether the claim should be dismissed for delay.
HELD: The court dismissed the application to strike the claim. The court cited *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48 for the application of Rule 4-44. The court considered whether the delay was inordinate and inexcusable and whether it was in the interests of justice that the claim proceed. Three years had passed since the statement of claim was filed and a statement of defence promptly served and filed. Since then, not even the mandatory dispute resolution had occurred. The court agreed that the delay was inordinate and mostly inexcusable, but neither party had done anything to move the matter forward until this application to strike. The court concluded that the application to strike should be dismissed. Neither party proposed a timetable for the alternative relief.

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***V.B. v S.V.B.*, 2023 SKKB 206**

Richmond, 2023-09-28 (KB23195)

Family Law - Dispute Resolution - Exemption from Dispute Resolution - Interpersonal Violence
Statutes - Interpretation - *King's Bench Act*, Section 7-4(6)(c)

The parties had a negotiated settlement agreement that had been incorporated into a final parenting order. The mother applied to vary that order. *The King's Bench Act* (Act) requires that parties participate in family dispute resolution prior to any variation of a final order. The mother alleged interpersonal violence and further applied for an exemption from the dispute resolution requirement pursuant to s. 7-4(6)(c) of the Act. The father argued that the matter of the exemption application was substantive and required further notice than what was given.
HELD: The mother's application for a temporary exemption from participation in the dispute resolution process was granted given the evidence of interpersonal violence. A finding of interpersonal violence and a determination that a party should be exempted from mediation is a procedural matter that does not determine the outcome of a variation application on parenting. *The King's Bench Act* makes no reference to the *Divorce Act*, and in assessing interpersonal violence, the court is not constrained by the definition of

family violence that appears in the *Divorce Act*. The mother established a level of interpersonal violence that met the threshold for an exemption. The father sent vitriolic and abusive texts and emails to the mother. The materials filed before the court indicated an ongoing rampage of vile name calling bent on degrading and controlling the mother. The father's stated reasons for wanting to participate in the dispute resolution process appeared disingenuous and the court expressed concern that he was attempting to weaponize the process, create delay, and provide a further forum to exercise intimidation tactics.

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***Cantos v University of Saskatchewan*, 2023 SKKB 211**

Currie, 2023-10-04 (KB23208)

Administrative Law - Judicial Review - University of Saskatchewan Appeal Board

The appellant applied for judicial review of the decision to remove her from the College of Medicine Obstetrics and Gynecological residency program. She sought judicial review of the decisions of the University of Saskatchewan Appeal Board (UAB), the Appeals Adjudication Board (AAB), and the Post Graduate Medical Education Office (PGME Office). She argued that she was denied procedural fairness at each level of the proceedings and asked the court to quash the decisions and to reinstate her in the program. She began her residency in 2014. In her second year, the college placed her on a knowledge-based modified learning plan. She took a maternity leave in her third year. On her return, she continued a modified learning plan, and in 2018 she began the fourth year of her program. She was placed on remediation in 2018, but the college deferred the commencement of that remediation as she was about to begin another maternity leave. In 2020 the appellant was removed from clinical duties and placed on paid leave while a probation plan was developed for her. The appellant notified the College that she received a medical diagnosis, and the college implemented a plan of accommodation relating to the diagnosis. She began two phases of a probation program: a knowledge-building phase which she successfully passed; and one involving clinical rotations. The college extended the probation period and added a professionalism requirement. The Resident Assessment Subcommittee recommended that the appellant be dismissed from the program on the basis that she had not passed the second phase of the probation plan. The appellant was advised of this by letter. She appealed the decision to dismiss her to the AAB, which dismissed the appeal. The AAB found that there was no evidence of failure to follow procedural regulations, no differential treatment of the appellant, no evidence of discrimination or harassment, and no evidence of failure to implement the approved policy and procedures of the college or university dealing with accommodations for students with disabilities. The appellant then appealed to the UAB, which also dismissed the appeal. The respondent set out the context of the appellant's residency and dismissal, noting that the appellant was dismissed after two modified learning plans, remediation, and probation. She was expected to be able to manage the labour and delivery floor at near independence and see 10 to 12 patients a day, but at the end of her program she was seeing three or four patients in a day and was making potentially dangerous errors that could lead to poor patient outcomes. The court noted that only the decision of the UAB was subject to judicial review, but the court considered procedural fairness at all three levels. The court considered whether the UAB erred in its own proceedings or in reviewing the proceedings below, in relation to whether the appellant was denied procedural

fairness in: 1) document disclosure; 2) not being advised of the case against her; and 3) the tribunal's failure to consider relevant evidence or submissions. The court also considered 4) what the appropriate remedy would be if the appellant was denied procedural fairness.
HELD: The court dismissed the appeal and awarded costs to the respondent. The appellant was not denied procedural fairness at any level of the proceedings. The court outlined the relevant principles in conducting judicial review. The court applied a high standard of procedural fairness to the process because the appellant's dismissal from the program had a severe effect on her career. The court considered the importance of the university context as well. Courts choose not to exercise their jurisdiction when claims involve academic issues but will ensure the fairness and the regularity of internal university processes (*Taheri v Buhr*, 2021 SKCA 9). 1) There was no procedural unfairness in the AAB's decision or in the UAB's decision that nothing was to be gained through the production of the requested recordings. 2) The court concluded that the appellant simply could not have been unaware of the college's concerns about her performance and of their seriousness. There was no procedural unfairness in how the appellant was notified of her dismissal because she was informed that she had been dismissed and why she had been dismissed. The policies and procedures emphasized that a student may not appeal an academic decision itself. The appellant could not appeal on the basis that the decision to dismiss her was wrong. The court outlined the modifications that were made to her program, and the documentation that specified the concerns the college had with her performance as a resident, including references to poor judgment and risk to patient safety. 3) The appellant was not denied procedural fairness. The tribunal considered relevant evidence and submissions. The appellant was given the opportunity to address the college's arguments, and she did. The court found that there was no sense of procedural unfairness in the conclusions the UAB reached regarding the appellant's allegations of bias, discrimination, late assessments, and problems with the accommodation of her diagnosis. While a failure to consider a legitimate argument typically constituted procedural unfairness, the record here established that there was no such failure. The UAB considered each of the allegations regarding bias, discrimination and late assessments. The court found that the UAB was correct in ruling that a decision as to whether a resident passed a probation plan was not affected by accommodations that had been granted to the resident. Accommodations assist a resident in achieving academic goals, and do not lower the standard for achieving the goals. The court also considered whether the proceedings were fair to the appellant. The court found that the appellant knew the information on which the dismissal was based, that she had an opportunity to affect and change that decision by making submissions, and that the decision-makers heard and considered her perspective. 4) There was no breach of procedural fairness, so it was not necessary to find a remedy. The court awarded costs under column two to the respondent.

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***Farm Credit Canada v Willow Ridge Bison Ranch Ltd.*, 2023 SKKB 213**

Clackson, 2023-10-10 (KB23203)

Civil Procedure - *Queen's Bench Rules*, Rule 10-47
Mortgage - Foreclosure - Judicial Sale - Selling Officer

The plaintiff applied for judicial sale of mortgaged farmland. The form of order sought was that mandated by Rule 10-47(5)(c); however, the plaintiff sought to appoint its own lawyer as selling officer rather than appointing an independent lawyer.

HELD: The application was dismissed without prejudice to the plaintiff to reapply for judicial sale to be overseen by an independent lawyer as selling officer. It was not appropriate to appoint the plaintiff's lawyer as selling officer. The fair market value of the property far exceeded the amount due under the mortgage. In such circumstances, there is incentive for a mortgagee to secure a quick sale to minimize the time and expense of foreclosure proceedings. It is in the mortgagee's financial interest to sell the property to any person willing to pay the upset price rather than wait for a better offer regardless of any reduction in the mortgagor's equity. If the mortgagee is the selling officer's client, then the selling officer is placed in a conflict of interest. While the plaintiff suggested that any sale of the property at below fair market value could be overcome when the court is asked to approve the sale, the onus should not be on the court to detect objectionable conduct by the mortgagee while placing the selling officer in a position where they must choose between promoting their client's interests or complying with their duty to the court. Further, waiting until the confirmation stage to detect and address improper conduct by the mortgagee lessens the integrity of the judicial sale process, lengthens the process to the detriment of the mortgagor, and risks the possibility that market forces occurring after the aborted sale negatively impact the price at which the property can be sold.

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***Ring v Ring*, 2023 SKKB 212**

Brown, 2023-10-11 (KB23200)

Civil Procedure - Costs - Double Costs
Civil Procedure - *Queen's Bench Rules*, Rule 4-26

The respondent sought an order of double costs against the petitioner after he successfully defended a trial. The respondent offered to settle the matter, but it was not accepted. The terms of the offer stated that it was open for eight days. It expired before the trial began. The court considered whether the application to assess double costs met the requirements in Rule 4-26 of *The Queen's Bench Rules*.
HELD: The court did not order double costs because the requirements in Rule 4-26 were not met. A time-limited offer that was not in compliance with the time periods set out in the rule will not be rewritten by the rule. Here, the offer was not still open for acceptance at the beginning of the trial because it had expired by its own terms. To be a valid formal offer to settle, the offer had to be made 10 days or more in advance of the trial and remain open until the beginning of the trial or for a minimum of 30 days. Here, the offer was only open for eight days. An award of double costs was at the discretion of the judge, and the court declined to exercise this discretion here. The court awarded costs on a column one basis.

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***Jans v Jans*, 2023 SKKB 218**

Richmond, 2023-10-17 (KB23205)

Civil Procedure - Amendment of Order - Rule 10-10
Civil Procedure - Queen's Bench Rule 1-3
Contracts - Formation - Mistake

The parties had been involved in lengthy litigation. Costs were ordered at trial and subsequently negotiated between the parties. Both parties were represented by senior counsel in the negotiations. The bill of costs, which was the subject of negotiation, was silent as to interest. Costs were ultimately quantified in a consent judgment and the negotiated sum was subsequently paid. B.J. asserted that the negotiated sum was exclusive of interest. B.J. applied pursuant to s. 114 of *The Enforcement of Money Judgments Act* for a binding declaration that the respondents be found responsible for post-judgment interest. J.J. argued that the sum set out in the consent judgment included interest. He brought an application pursuant to Rules 1-3 and 10-10 for equitable rectification and variation of the consent judgment on the grounds of unilateral mistake. Although an application to amend or vary an order should be made to the judge who rendered the original order, the matter was heard by a new judge with consent of counsel and in consideration that the consent judgment had been prepared and endorsed by senior counsel without input in wording from the original judge.
HELD: The consent judgment was set aside. The court advised the parties to renegotiate and/or tax the bill of costs, having consideration for interest. While it is the intention of the court rather than the intention of the parties that determines the meaning of an order, principles of contract interpretation play a greater role in interpreting a consent order. In an application to vary an order, where everyone knows what the order means, the court can exercise discretion where there is a common mistake, fraud, collusion, duress, illegality, or other grounds that might vitiate a contract. The evidence was that correspondence sent by J.J.'s counsel upon tendering of the sum referred to the sum as "the all-in figure for QB costs". J.J. contended that "all-in" included interest. B.J. asserted that "all-in" referred only to the bill of costs that the parties were working from in their negotiations. Both interpretations were plausible, and both were borne out by the evidence. Amending the consent judgment to refer to "all-in" was an omission that could be corrected pursuant to Rule 10-10, but that would not end the matter as there was disagreement as to its meaning. The parties were never ad item, or on the same page, during negotiations. J.J.'s lawyer was negotiating a final number regardless of the source of the claims and B.J.'s lawyer was only negotiating the itemized bill of costs. There was a fundamental mistake in the agreement rendering the agreement void. As neither party was successful, the court made no order as to costs.

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***Creative Saskatchewan v Royal Bank of Canada*, 2023 SKKB 222**

Robertson, 2023-10-20 (KB23212)

Civil Procedure - Production of Records
Personal Information Protection and Electronic Documents Act - Production of Records

Creative Saskatchewan was victim to a fraud under which it paid fraudulent invoices via transfer of funds to an RBC bank account. None of the funds were received by the intended recipient. Creative Saskatchewan applied for a declaration that it is the lawful owner of any proceeds traceable to the funds it transferred to the RBC bank account and for return of any monies remaining in the account. The main application was adjourned for argument. At issue in this hearing was whether RBC should be directed to disclose the name of the bank account holder and the amount remaining in the bank account.
HELD: The court ordered RBC to disclose the amount remaining in the bank account and the identity of the account holder. RBC is subject to the Personal Information Protection and Electronic Documents Act (PIPEDA). In *Royal Bank of Canada v Trang*, 2016 SCC 50 (*Trang*) at para 29, the Supreme Court of Canada considered Ontario's *Rules of Civil Procedure*, RRO 1990, Reg 194 related to production of records and confirmed that PIPEDA does not interfere with the authority of courts to make orders, including for release of records. *The Queen's Bench Rules* similarly provide rules relating to production of records. Thus, the court has the same jurisdiction recognized in *Trang* both under *The Queen's Bench Rules* and its inherent jurisdiction as a superior court. An order for disclosure was necessary so that the main application could proceed. The court noted that RBC did not oppose to the order and cooperated with the fraud investigation, but asked for a court order to ensure it did not contravene PIPEDA.

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***R v Brandt Industries Canada Ltd.*, 2023 SKPC 50**

Kovatch, 2023-10-20 (PC23049)

Practice - Demand for Particulars
Saskatchewan Employment Act - Workplace Injury - Health and Safety

The employer accused was charged with four charges under ss. 3-78(g) and 3-79 of *The Saskatchewan Employment Act* (Act) for failing to provide the information, training and supervision necessary to protect the health and safety of a worker, resulting in injuries to two employees. It was also charged with failing to ensure that only trained operators be permitted to operate mobile equipment. The accused entered not guilty pleas to all the charges. Here, the accused's counsel brought an application for particulars. The court determined whether to grant the application for particulars for one of the employees whose leg was injured when he operated a forklift.
HELD: The court declined to make an order for particulars. The court held that before the court orders particulars, it should be satisfied that the accused does not know the case it has to meet. Here, the court found that the case was known and that no particulars were required. The court summarized the Crown's argument, which was that proof of the circumstances of the accident established that the worker did not have adequate training in the operation of the forklift or was not adequately supervised when he

operated it. An order for particulars should not be made simply because the Crown might make an unforeseen argument.

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***R v Brandt Industries Canada Ltd.*, 2023 SKPC 51**

Kovatch, 2023-10-20 (PC23050)

Saskatchewan Employment Act - Workplace Injury - Health and Safety
Practice - Demand for Particulars

This was a companion decision to 2023 SKPC 50. Here, the accused also sought particulars from the Crown. The accused was charged with four counts related to a workplace accident which resulted in injuries. The injured employee here was a millwright who was called in to do an inventory count. He and other employees were using a forklift and tape measure to do the inventory count of round bars. After their coffee break, the forklift was being used by another group, so they measured the round bars without first using the forklift to lift them down. The tape measure became stuck. When employees tried to get it out, round bars fell on the millwright's leg, injuring him. The court determined whether to grant the accused's application for particulars.
HELD: The court granted this application for particulars. The court directed the Crown to particularize the counts, identifying specific acts or actions that the employer was required to perform and failed to perform, or identify acts or actions of the employer that breached a specific duty, and allege that the breaches resulted in an unsafe situation for a worker and the injury to the worker. After reading the charges and the materials, the court was unable to determine what the accused was alleged to have done that resulted in the injury. The fact that an injury occurred does not mean that the employer breached its duty. The accused must be able to determine the *actus reus* of the alleged offence so the accused is in a position to defend itself by asserting that the Crown did not prove the *actus reus*, or so the employer can prove due diligence.

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