Case Mail

The Law Society of Saskatchewan Library's online newsletter
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ADAG Corporation Canada Ltd. v SaskEnergy Incorporated, 2021 SKCA 74

Whitmore Schwann Tholl, May 11, 2021 (CA21074)

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The appellants, ADAG Corporation Canada (ADAG) and Geschlossene Grundstucksgesellschaft GGG 10 (GGG) had appealed the original trial decision of a Queen's Bench judge (see: 2015 SKQB 143). The Court of Appeal (CA) partially allowed it and remitted the matter to the judge for a determination of issues that had not been decided at trial (see: 2018 SKCA 14, leave to appeal to SCC refused, 2019 CanLII 414). The respondent, SaskEnergy, was successful at the conclusion of that instalment of the trial (see: 2019 SKQB 263). The background to the dispute was extensive but the case was initiated when the respondent asserted an option to purchase (OTP) a building in Regina in 2011. The building was owned by GGG, a German limited partnership formed solely for the purpose of acquiring it as an investment. A term in GGG's partnership agreement

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stipulated that a two-thirds majority vote of the limited partners (LPs) was required to approve the sale of the building. GGG operated in concert with ADAG, its general partner in whose name the property's title was registered. ADAG leased the building to SaskEnergy in 2000 and executed as a schedule to the lease an options agreement that included five possible OTPs, two of which explicitly required a two-thirds approval by the limited partners (LPs) of GGG. The others contained no such condition. Apparently, ADAG never told the LPs of the existence of the unconditional OTPs, nor did they hold a vote to approve any of the OTPs prior to SaskEnergy seeking to exercise its OTP in 2011. However, in 2008, ADAG had received a letter from a German lawyer describing himself as the trustee for the LPs. He advised ADAG that after reviewing the lease and schedules, the OTPs could not be exercised without the approval of the LPs and that the matter must be resolved or legal action would be taken to protect their interest. ADAG informed SaskEnergy of this by email, saying that the lawyer was a trustee for the LPs. SaskEnergy responded to ADAG by letter, providing a copy to the lawyer, indicating that it had no doubt that the lease and OTP were valid and it would defend. Nothing further was heard from the lawyer nor was any action undertaken. When SaskEnergy exercised one of the unconditional OTPs, ADAG contended that the LP approval condition applied and as the LPs would not vote to approve it, the OTP was unenforceable. SaskEnergy commenced its action for breach of contract and sought specific performance, and the trial ensued wherein the OTP was upheld. The CA determined the trial judge erred in his interpretation and application of The Partnership Act and found that ADAG did not have actual, apparent or implied authority to bind GGG 10 to the OTP without the approval of two-thirds of the LPs and that SaskEnergy had notice and knowledge of this restriction at the time it entered into the lease. As a result, the OTP was unenforceable at the outset. However, the trial judge had not addressed whether it was enforceable because of the doctrines of ratification or estoppel by election, so the matter was remitted to the Court of Queen's Bench to address those issues. The trial was reconvened for further argument and no additional evidence was adduced. The two main issues were whether GGG had ratified ADAG's actions and whether it was estopped from denying the validity of the OTP by reason of election. Central to both issues was whether the LPs of GGG had, at some point, obtained knowledge that ADAG had exceeded its authority. The trial judge found that he could impress knowledge of ADAG's misconduct upon the LPs of GGG. This finding hinged on the contents of the letter from the German lawyer to ADAG that noted ADAG had exceeded its authority and threatened legal action. The judge determined that the lawyer was indeed a trustee for the LPs, based upon evidence that included: his description of himself as such in the letter; an amendment to the GGG partnership agreement appointing him as a replacement for the previous trustee as at 2003; and the email from ADAG to SaskEnergy that referred to the lawyer as a trustee. Although he threatened legal action in his letter, the lawyer took no further action after receiving SaskEnergy's response to it. The judge stated that it was inconceivable that the lawyer acting as a trustee would not have informed the LPs of the situation. In the face of that knowledge, the LPs continued to treat what ADAG had done as not only enforceable but a result beneficial to them. The conduct of the LPs demonstrated an election to treat ADAG's actions as lawful.

Partnerships - Limited Partnerships - Appeal
Real Property - Lease - Option to Purchase - Enforceability - Appeal

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Cases by Name

ADAG Corporation Canada Ltd. v SaskEnergy Incorporated

Anderson v Mueller

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SaskEnergy had made out both ratification and estoppel by election. The issues on appeal were: 1) whether the trial judge erred by determining the doctrines of ratification and estoppel by election were available to SaskEnergy in light of the provisions of The Partnership Act and the previous findings of the Court of Appeal regarding SaskEnergy's knowledge; 2) whether knowledge of ADAG's unauthorized acts ought to be imputed to its limited partners. GGG contended that the judge had made a palpable and overriding error in finding that the lawyer who wrote the letter to SaskEnergy was a trustee for the LPs; 3) whether the trial judge applied the incorrect test for ratification and further erred by disregarding evidence of repudiation found in the threat of legal action contained in the lawyer's letter; and 4) whether the trial judge applied the incorrect test for estoppel by election and further erred by disregarding evidence of repudiation.
HELD: The appeal was dismissed. The court found with respect to each issue that: 1) the trial judge had not erred. Section 111 and the narrow focus of ss. 7 and 10 of the Act did not preclude the doctrines in question from being applicable to agent-principal relationships; 2) the trial judge had not erred in imputing knowledge of ADAG's unauthorized acts to the LPs of GGG. The judge's finding that the lawyer was a trustee for the LPs regarding the lease and the OTP was confirmed by the evidence. In these circumstances, it would strain credulity to suggest that a lawyer who is a trustee in such a position would not be required to provide such critical information to the LPs. The knowledge of the trustee in this matter can be imputed to the limited partners; 3) the trial judge had not erred in finding that the LPs had ratified the previously unauthorized actions of ADAG of entering into the lease, which included the unconditional OTP, and they were valid and enforceable. There was clear and unequivocal evidence in both their action and inaction after the June 2008 letter was sent by their trustee. The LPs had done nothing over the next three years until SaskEnergy gave notice in 2011 that it intended to exercise its option. The judge had not erred by declining to treat the lawyer's letter as repudiation of the OTP in light of its contents; and 4) the trial judge had applied the correct test for estoppel by election and, as mentioned, correctly found that the lawyer's letter had not constituted repudiation. As the LPs knew in 2008 of ADAG's unauthorized acts, they could have taken steps to repudiate the lease, including the OTPs, which might have led to litigation, or not taken such steps and adopted the previously unauthorized acts of ADAG. GGG elected the second option. Having done so, the choice was taken out of their hands and they could not successfully assert, in 2011, that the OTP provisions of the lease were unenforceable.

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Cannon v Saskatchewan (Court of Queen's Bench), 2021 SKCA 77

Jackson Ryan-Froslie Barrington-Foote, May 18, 2021 (CA21077)

McCabe v Kowalyshyn

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T.C. v A.E.

Turpie Farms Ltd. v 613168 Saskatchewan Ltd.

University of Saskatchewan v Administrative and Supervisory Personnel Association

Civil Procedure - Costs
Civil Procedure - Queen's Bench Rules, Rule 3-64
Civil Procedure - Judicial Review - Habeas Corpus - Appeal

The self-represented appellant appealed the decision of a Queen's Bench chambers judge to dismiss his application that sought permission to dispense with service on the respondents regarding his application for habeas corpus (HC) on behalf of four individuals. The judge found that in two of the appellant's previous applications, he had been ordered to serve his application in accordance with The Queen's Bench Rules. He had not done so and she was not satisfied that notice of the application should be dispensed with. The grounds of the appellant's appeal included that the chambers judge erred: 1) in finding that the application for HC should be dismissed because the appellant lacked standing to bring it under Queen's Bench rule 3-64(2); 2) in refusing to permit one of the individuals, on behalf of whom the application for HC had been brought, to speak on his own behalf; 3) in ignoring evidence that suggested breaches of the Charter rights of two of the individuals named in the application and of judicial interference by the RCMP and the Saskatchewan Health Authority; 4) by determining the application for HC was moot; and 5) by shifting the burden of proof to the appellant to establish that the named individuals were wrongfully deprived of their liberty; and 6) in determining the four named individuals were not unlawfully detained. Of the 41 named respondents, 36 of them were represented by counsel at the appeal. With the exception of the Attorney General of Saskatchewan, they sought costs against the appellant and some of them requested solicitor-client costs on the grounds that the appeal against them was vexatious, frivolous and an abuse of process.
HELD: The appeal was dismissed. The appellant was ordered to pay costs of $12,000, to be distributed amongst the Attorney General of Canada and the respondents represented by counsel. The court found with respect to each ground that the chambers judge had: 1) erred in this finding. Queen's Bench rule 3-64(2) permits any person to bring an application for HC; 2) not erred, as under Queen's Bench rule 3-64(3), she was entitled to determine whether the applicant or the subject of the application was to have carriage of the proceedings; 3) and 4) not erred based on the evidence that the two individuals were properly detained for different reasons; 5) not erred in finding the application for HC moot. At the time the application was made, the individuals who had been apprehended for medical reasons were no longer detained. Another individual, a minor, was in the legal custody of her mother, a situation to which s. 10(c) of the Charter has no application; and 6) and 7) it was unnecessary to address these two grounds as a result of finding there was no error in the judge's conclusion that the application was moot. The court spoke to the matter of costs because s. 10(c) of the Charter only applied to four of the respondents as institutions of the state associated with the alleged deprivation of the two individuals' liberty and the remaining 36 respondents had nothing to do with it. The appellant failed to connect his allegations that they were guilty of conspiracy, torture and terrorism to the detentions. It would not award solicitor-client costs against the appellant because the amount would be excessive and crippling but an award of costs was warranted. As he was self-represented, the appellant's

approach to the chambers application and this appeal were not legally sound and the respondents had paid a significant price for his actions.

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R v Goodman, 2021 SKCA 78

Ottenbreit Barrington-Foote Tholl, May 19, 2021 (CA20178)

Criminal Law - Motor Vehicle Offences - Driving with Blood Alcohol Exceeding .08 - Conviction - Summary Conviction Appeal - Appeal

The appellant sought leave to appeal the decision of a Queen's Bench judge to dismiss his conviction appeal (see: 2020 SKQB 45). He had been convicted after trial in Provincial Court of driving while his blood alcohol content exceeded the legal limit contrary to s. 255(1) of the Criminal Code. In his notice of appeal, the appellant alleged that the appeal judge had erred by failing to find that his ss. 7, 8 and 9 Charter rights had been violated and therefore failed to exclude the evidence and by finding that samples of his breath were taken "as soon as practicable" as required by s. 254(3) (now s. 320.28(1)) and, as a result, erroneously found that the presumption specified in s. 258(1)(c) (now s. 320.31) of the Code applied. The appellant had been arrested by two police officers at 11:33 pm. One officer called for another police unit to assist in impounding the appellant's vehicle at 11:34. He called again at 11:41 and was informed the unit would be there soon. It arrived at 11:54, whereupon the officers drove directly to the police station, arriving at 12:05 am. The appellant's breath samples were taken and his blood alcohol concentration recorded. At the voir dire, one officer testified that he had found the 65-year-old appellant to be very cooperative and polite but he would not leave the other constable with the appellant's vehicle and drive alone with the appellant to the station because of safety concerns. He explained that despite the appellant's age and demeanour, he was aware that some people had escaped from the back seat while handcuffed by crawling through the window to the front seat. He testified that the vehicle could not be left unattended as the police might be liable for damages if anything happened to it and that he was required by provincial law to impound it because the appellant had been arrested for impaired driving. This information regarding impounded vehicles was repeated in the testimony of the second officer. Neither officer testified that there were safety concerns in leaving one officer behind in the parking lot to wait for the second police unit. The trial judge found no fault with the officers' decision to impound the vehicle because something might happen to it, but pointed out their belief that the law required it was incorrect as there was no provincial law imposing it. He concluded that the second police unit would have been

expected to reach the scene within 12 minutes of the first call and as it took 20 minutes, the issue was whether it was reasonable to wait for the additional eight minutes. The judge then found that it was reasonable for the officer to wait for that period. He assessed the officer's safety concerns regarding the appellant and found that they were reasonable, that it was not incumbent on him to leave his partner behind and that the eight-minute delay was reasonable in the circumstances. The samples were therefore taken within a reasonably prompt time. The certificate was admitted making the presumption of identity applicable and the appellant was found guilty. The appeal judge dealt with the standard of review and noted that the factual findings of the trial judge were entitled to deference and reviewable on the standard of palpable and overriding error. The application of a legal standard to the facts is reviewable on a correctness standard. He took the approach that the issue was whether the entire 21-minute delay violated the appellant's Charter rights. After reviewing the decision in Wetzel, he determined that it had not held that waiting for a tow truck was unreasonable per se regarding delay but the length of time in that case was. The analysis was dependent on the facts and whether the delay had been satisfactorily explained. He concluded that the trial judge had observed the correct legal principles, considered the cases and the circumstances and it was open to him to decide as he did. That ground of appeal was dismissed. The appellant appealed on the grounds that the appeal judge erred by failing to find his Charter rights had been violated and by finding that samples of his breath were taken as soon practicable as required by s. 254(3) (now s. 320.28(1)) and, as a result, erroneously found that the presumption specified in s. 258(1)(c) (now s. 320.31) applied.

HELD: Leave to appeal was granted, the appeal was allowed, the conviction set aside and an acquittal was substituted. The court found that the appeal judge erred in finding the breath samples were taken as soon as practicable and therefore the assumption in s. 258(1)(c) of the Code did not apply. The appeal judge did not decide whether the trial judge was correct by engaging in the necessary de novo analysis. Although he found that the trial judge correctly identified the legal standard and applied it to the facts, the appeal judge did not decide whether the trial judge did so correctly. It was not necessary to address the appellant's Charter arguments. Summary conviction appeals under s. 839 of the Code are limited to questions of law, reviewable on the standard of correctness. It is settled law in Saskatchewan that "as soon as practicable" in s. 258(1)(c) of the Code and the application of that legal standard to the facts as found by the trial judge are both questions of law reviewable on the correctness standard. An appellate court must engage in a de novo analysis and if it reaches a different conclusion from that of the trial judge, then it must substitute its own view of the correct answer. This applies not only to a summary conviction appeal court but to the court hearing an appeal from the result of a summary conviction appeal. As a result of the appeal judge's failure to conduct a de novo analysis, the court engaged in it. It reviewed the trial judgment and found that the Crown had not demonstrated that the officers acted reasonably in the circumstances. The officers' explanations were not satisfactory. Although the trial judge erred in law when he decided that the breath samples were taken as soon as practicable, he had identified the correct legal test, took the right approach by noting the importance of the officer's explanation

that they were required to impound the vehicle and it would be unsafe to separate from his partner and assessing whether they were reasonable, he did not find that that the officers were obliged to impound the vehicle because he did not have the evidence to do so. The officer did not testify that he had concerns about the appellant's vehicle in the circumstances, but rather that he followed his standard practice. The judge did not find that the officer's claim that he might be in danger if he drove the appellant to the station without his partner was reasonable as he did not find the appellant to be a risk.

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T.C. v A.E., 2021 SKCA 79

Jackson Barrington-Foote Tholl, May 20, 2021 (CA21079)

Family Law - Child Custody and Access - Interim Order - Appeal

Each of the parties appealed the decisions of different Queen's Bench chambers judges that made interim orders regarding the parenting arrangements between them for H.E., their five-year-old son. The first interim order was granted on May 28, 2020 and placed H.E. in the primary care of his mother, A.E. The father, T.C., appealed the first order and a different chambers judge made a second interim order for shared parenting on August 14, 2020. A.E. appealed the second order. Both appeals were heard together. The parties began residing together in March or May 2018. In March 2020, T.C.'s formal adoption order for H.E. was granted. At the first chambers hearing, A.E. averred that the relationship ended in August 2019 while T.C. claimed they continued to live together and parent H.E. until the end of April 2020. As of May 2020, however, the parties were no longer residing together and each was having parenting time with H.E. On May 8, 2020, T.C. refused to return him to A.E., alleging that she engaged in alcohol and substance use, exhibited irrational behaviours and had begun living with a new partner. A.E. filed a petition on May 15 seeking joint custody and primary residence of H.E. with T.C. having reasonable access, and applied concurrently for an order placing H.E. in her primary care and an order that T.C. deliver him to her forthwith. At the hearing, each party contended that they were the primary parent. The chambers judge accepted A.E.'s evidence that the separation occurred in August 2019 and following it, H.E.'s primary residence was with her. He acknowledged his concern regarding the allegations made by T.C. but was not persuaded that A.E.'s possible mental health issues justified an abrupt transfer of H.E.'s primary residence to T.C. He ordered that H.E. have his primary residence with A.E. and T.C. would have reasonable parenting time as agreed upon by the parties, and ordered him to return H.E. to A.E. After complying with the order, T.C. appealed the entirety of the order, which imposed a stay of

execution. A.E. immediately filed an application to lift it and both the stay of execution and the stay of proceedings were lifted on June 17, 2020. Independent of T.C.'s appeal, A.E. applied in mid-summer, 2020 in Queen's Bench for an interim order. She requested, among other things, that T.C. pay child support and that his parenting time be on alternate weekends. T.C. filed his own application, asking the court to order shared equal parenting of H.E. on a week-on, week-off basis. He and his mother deposed in their affidavits that, based on alleged examples of A.E.'s conduct, she was attempting to alienate H.E. from T.C. A.E.'s lawyer advised the court that she intended to rely on three affidavits she had filed previously and she did not file any material in response to the allegations. Both applications were heard together. The chambers granted joint custody and shared parenting of H.E. She found that the evidence showed that the parties continued to live together with H.E. until they separated in May 2020, that T.C. had been an active, involved parent to that point and that there was no custody arrangement or parenting schedule in place prior to the first order. She did not attempt to reconcile her findings with those of the first chambers judge regarding the time at which the common law relationship ended and that H.E.'s primary residence had been with A.E. T.C.'s application was treated by the judge as an application to vary the first order and she found, in accordance with the requirement in such applications, there was compelling evidence of a material change in circumstances affecting H.E.'s best interests because A.E. was attempting to alienate H.E. from T.C. and he was at risk of becoming alienated from him. She noted the evidence was uncontroverted and had not been before the first chambers judge. Thus, it was in H.E.'s best interest to vary the first order to an interim order for equal, shared parenting. A.E. appealed the second order respecting the variation of the parenting arrangement, which stayed that portion of it. The stay was lifted in September 2020, restoring the shared parenting order. A.E. applied to admit fresh evidence on her appeal from the second order and T.C. provided reply affidavits. In her affidavit, A.E. said that her previous counsel had not provided her with all of the affidavits filed by T.C. nor a copy of the notice of application. In his appeal, T.C. submitted that the only standard of review in child custody was the best interests of the child which permitted the court to reweigh the evidence, make its own findings of fact and substitute its own view on any issue. Among the grounds of his appeal of the first order were whether the first chambers judge erred by: 1) making findings of fact on controverted affidavit evidence instead of directing a vive voce hearing or expedited pre-trial conference and trial; 2) determining H.E.'s best interests by changing the status quo whereby H.E.'s primary residence until May 2020 with T.C. was transferred to A.E.; and 3) misapprehending and ignoring evidence regarding A.E.'s past conduct, including alleged substance abuse and the introduction of a new father figure. The grounds of A.E.'s appeal of the second order were whether the second chambers judge had erred: 4) by failing to obtain reply evidence from A.E., resulting in a procedurally unfair hearing. She argued that this error could be cured by the acceptance and consideration of her fresh evidence on appeal; and 5) by varying the first order.

HELD: Each of the appeals was dismissed. In his judgment, Tholl, J.A., with Jackson, J.A. concurring, held that the standard of review in appeals of interim custody orders is that of deference to the decision-making of

the chambers judge. It is in the best interests of children, for their stability and certainty, to encourage parties to quickly reach a final resolution. Due only to the complicated nature of the circumstances here, it would examine the first order in great detail. It found with respect to each ground that the chambers judge had: 1) not erred. In the circumstances, he could not have declined to make an interim order. There was nothing in the evidence that required a referral to a vive voce hearing or indicated that T.C. had requested one. Chambers judges have the authority to make an interim order on the basis of controverted evidence alone and such orders are regularly made in custody disputes on the basis of highly controverted evidence; 2) had not erred. Because he accepted A.E.'s evidence, he reached his decision that the status quo should be maintained respecting H.E.'s primary residence with her; and 3) had not erred. There was evidence to support all of his findings. He was not satisfied that the evidence regarding A.E.'s mental health issues was sufficient to justify an order changing H.E.'s primary residence. The judge's order provided for the risk of her alleged substance abuse by including an abstinence term and enabling T.C. to monitor the situation with his reasonable access to H.E. In reaching his decision, the judge was not required to mention every single factor he considered, including whether A.E. was living with a new partner. With respect to each ground raised by A.E. in her appeal of the second order, the court found that: 4) it had no merit. It would not permit A.E. in these circumstances to relitigate her application based on her assertion she would have filed additional material if she had seen all of T.C.'s material and to permit her to file the evidence on the appeal. It was not up to the judge to request further evidence after A.E.'s senior and experienced counsel had clearly advised that she was content to rely on material already filed. The application to admit fresh evidence was dismissed. The items proposed to be adduced did not meet the Palmer test, as the information had been available to A.E. before the application. Further, the affidavit evidence submitted by her and in T.C.'s reply relating to events that occurred after the second order was not relevant to H.E.'s best interests; and 5) the second chambers judge had not erred in any way that allowed it to interfere after applying the deferential standard. The judge was satisfied that T.C. met the onus to establish that a material change had occurred, based on the uncontroverted evidence of A.E.'s attempt to alienate H.E. from T.C. after the first order was granted. Her decision to order shared parenting as being in H.E.'s best interests was within her discretion. For the purposes of this appeal, it would not attempt to reconcile the inconsistent findings of fact between the first and second chambers judge regarding the parties' date of separation and A.E.'s role as primary parent. In a separate opinion, Barrington-Foote, J.A. dissented in part. He concurred with the majority in dismissing the appeal from the first order but allowed the appeal from the second order only with respect to shared parenting and would not disturb its other provisions. He ordered that H.E. should reside primarily with A.E. and set a schedule whereby T.C.'s parenting time would be gradually reduced from the shared parenting regime in place for the previous seven months since the stay of the second order was lifted in September 2020. He found that the second chambers judge made two errors of law. First, she erred in finding material change when there was insufficient evidence. She could have ordered more generous parenting time to T.C. rather than abruptly changing H.E.'s primary residence; and second, she failed to base

her inquiry on the findings made by the first chambers judge, contrary to the direction in Gordon, and instead reversed the key finding that underpinned the first order: that A.E. had been H.E.'s primary parent. A.E.'s application to adduce fresh evidence on appeal should be granted as it was in support of the court's consideration of the best interests of the child. In her fresh evidence, A.E. explained why she had not responded to T.C.'s allegations of alienation and provided evidence that conflicted with the allegations.

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Arcand v Atsu, 2021 SKCA 81

Caldwell Leurer Tholl, May 21, 2021 (CA21081)

Family Law - Access and Custody - Interim - Appeal
Family Law - Custody and Access - Appeal - Mobility

The appellant mother appealed the decision of a Queen's Bench judge to grant the respondent's application pursuant to The Children's Law Act, 1997 for joint custody, primary residency and an order requiring the appellant to return the parties' eight-year-old daughter to Regina from Swift Current. Amongst other terms, the order specified that the child would reside primarily with the appellant if she relocated to Regina by February 1, 2021 and otherwise, her primary residence would be with the respondent. The issues of the child's primary residence and its location were set down for resolution in an expedited pre-trial conference. The orders had been stayed when the appeal was filed. The parties separated before their child was born in 2012. The appellant had been her sole caregiver until July 2016 when she moved with her from Alberta to Regina to enable the respondent to have greater access. The appellant deposed that during the next four years, she continued to have primary responsibility for the child and that the respondent's parenting time was sporadic, a claim that the respondent rejected, saying he was a very involved parent. When the appellant and her new partner learned that she was expecting a baby, she began planning a move to Swift Current where her partner resided. She averred that she advised the respondent in May 2020 that she and their daughter would be relocating there in the fall, that he accepted this change and she understood it constituted his consent to the move. In September 2020, the respondent revoked his consent. The respondent disputed this version and said that he told the appellant in mid-July 2020 that he did not agree to the move. The appellant appealed on the grounds that the chambers judge: 1) misapprehended the affidavit evidence when he found that the respondent had not consented to the child's relocation to Swift Current; and 2) failed to address whether it would be in the child's best interests to place her in the respondent's primary care if the appellant declined to return to Regina

with her.
HELD: The appeal was dismissed. The chamber judge's fiat was amended so that the reference in the order to July 5, 2021 was changed to February 21, 2021. The matter should proceed to pre-trial settlement conference as ordered by the judge or to trial on the issue of the child's relocation. The court stated that the standard of review respecting the judge's finding and inferences of facts was that of deference, absent palpable and overriding error. It reiterated its reluctance to interfere in interim orders of this sort and that interim relocations by a custodial parent are allowed only in compelling circumstances. It found with respect to each issue that the chambers judge had: 1) not made a palpable or overriding error that would permit the court to interfere. The judge inferred from the evidence that the appellant made a unilateral decision to relocate. There was no evidence of express consent and he was not persuaded that the respondent had tacitly consented. Even if it found that the judge made a palpable error in drawing the inference, it would not have overridden the result in this case as the respondent had clearly withdrawn his consent by the time of the hearing; and 2) not erred. He canvassed the relevant factors before concluding there were insufficient grounds to uproot the child from her life in Regina. He did not assess the evidence of the child's relationship with the respondent but there was no evidence that he could not meet the child's needs or that she would be harmed in his care. The judge also observed that moving the child would impede her contact with the respondent. Although the evidence established that the appellant was the child's primary parent, that finding was not dispositive of whether she should be permitted to relocate with the child.

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Germain v Saskatchewan Government Insurance, 2021 SKCA 88

Kalmakoff, June 10, 2021 (CA21088)

Statutes - Interpretation - Automobile Accident Insurance Act, Section 194
Automobile Accident Insurance Act - Automobile Injury Appeal Commission - Decision - Application for Leave to Appeal

The applicant applied for leave to appeal from a decision of the Automobile Injury Appeal Commission (AIAC) rendered in April 2021 (see: 2021 SKAIA 7). Appeals of such decisions are limited to questions of law and require obtaining the leave of a judge of the Court of Appeal under s. 194(1) of the Automobile Accident Insurance Act (AAIA) that came into force on July 3, 2020. Prior to that date, appeals were a matter of right. The applicant had been injured in a motor vehicle accident (MVA) in 2001. In the years following the

accident, the applicant received four separate decision letters from Saskatchewan Government Insurance (SGI). In the first, dated January 8, 2003 and another dated August 26, 2004, SGI denied the applicant's claim for Insurance Replacement Benefits under s. 112 of the AAIA because her injuries had not rendered her entirely unable to perform the essential duties of her employment as a lawyer and, based upon on her income tax information, she had not established that she suffered economic loss as result of her injury. In November 2014, SGI denied the applicant's claim for coverage of the cost of a prescription drug and for assistance with yard care in its decision letter. It asserted that the applicant had not established that the drug was necessary to treat her MVA injuries or that her injuries left her unable to do yard work. In a decision letter of June 2005, SGI discontinued all of the applicant's benefits because it determined her injuries had all healed. The applicant appealed from the decision letter but the AIAC did not hear her appeal until March 2013 and rendered its decision upholding SGI's denial of benefits (see: Germain SKAIA 2013). After her successful appeal of that decision, the Court of Appeal ordered a new hearing because further evidence would be required as a result of the amount of time that had passed since the decision letters were issued (see: 2015 SKCA 84). SGI engaged an independent medical examiner to review the file and then issued a decision letter in January 2018, advising the applicant that it had not changed its position regarding her entitlement to benefits. She appealed again from the decision letters and the AIAC dismissed her appeal. For the most part, it found that the applicant had not satisfied it on the balance of probabilities that she had succeeded in any of her claims. It said that it did not have jurisdiction regarding yard care costs because under s. 193(7) of the AAIA, it was only entitled to make decisions respecting benefits that the insurer was entitled to make and at the time of the MVA, the Personal Injury Benefit Regulations did not entitle SGI to award benefits for yard care expenses. The applicant first argued that leave to appeal was not required in this case because as it is a substantive right, the amendment to the AAIA should not have retroactive application. Her MVA had occurred before the legislative change and she was entitled to appeal without obtaining leave. The applicant raised 11 proposed grounds of appeal, amongst which were that the AIAC: 1) was biased against her; 2) erred in admitting an engineer's report; 3) disregarded evidence; and 4) erred in its interpretation of the Regulations.

HELD: Leave to appeal was not granted. The chamber judge found that the applicant was required to obtain leave. In accordance with the Supreme Court's decision in Puskas ([1998] 1 SCR 1207), he held that her right of appeal had not accrued until the AIAC rendered its April decision and, at that point, the current version of the AAIA was in force. He reviewed the applicant's proposed grounds and found that only six of them identified questions of law. It assessed each of those under the Rothmans criteria and found generally that leave should not be granted because the applicant had not met the onus of establishing that her grounds met the test of possessing sufficient merit and importance. The judge found with respect to each of the applicant's proposed grounds identified above that the AIAC: 1) was biased against her was destined to fail. It had simply preferred some evidence over other evidence in reaching its decision; 2) had erred in admitting the engineer's report had no merit. It was not supported by any authority and under s. 196.3 of the AAIA, the AIAC is not

bound by the strict rules of evidence; 3) had disregarded relevant evidence could not succeed. The decision of the AIAC did not reveal that it had done so; and 4) erred in its interpretation of the Regulations relating to inclusion of yard work as a personal home assistance expense was not without merit but it lacked importance. The applicant sought retrospective, not retroactive, application of the amendment to the provision in the Regulations that may have allowed the expenses, but a question that involved interpreting a provision that was repealed and replaced 19 years earlier was not of sufficient importance.

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Premium Fire Protection Ltd. v Moffatt, 2021 SKQB 121

McCreary, April 21, 2021 (QB21119)

Employment Law - Wrongful Dismissal
Appeal - Small Claims Court

G.H.M. was dismissed without cause by the appellant. She brought a claim for damages for wrongful dismissal in Small Claims Court. The trial judge allowed her claim and awarded her damages equivalent to six months of wages and lost benefits of 10% of her wages. The appellant appealed pursuant to s 44 of The Small Claims Act, 2016 (Act) on the basis that the trial judge erred: 1) in setting the notice period at an overly long period of 6 months; 2) in awarding damages for G.H.M. not having been paid benefits, although she was required to prove actual pecuniary loss as a result of having no benefits during the six-month notice period and had failed to do so; 3) in finding the lost fringe benefits should be valued at 10%; and 4) in relying on hearsay evidence in valuing G.H.M.'s lost RRSP contributions. As to the standards of appeal to be applied, the appeal court judge followed Housen v Nikolaisen, finding that questions of law are to be reviewed on a standard of correctness; questions of fact on a standard of palpable and overriding error; questions of mixed law and fact on two possible standards, one, if the judge came to a wrong conclusion on the evidence, the decision will be overturned only if that conclusion involves a palpable and overriding error, two, but if the judge mischaracterized the applicable legal standard to the evidence, correctness is the governing standard; and a judge's discretionary decisions will not be scrutinized unless a palpable or overriding error can be demonstrated by the appellant.
HELD: The appeal was dismissed on all grounds. The trial judge correctly reviewed and applied the factors set out in Bardal v Globe & Mail Ltd. (1960), 24 DLR (2d) 140, and its treatment in other wrongful dismissal cases to determine an acceptable range within which the notice period he decided upon would be reasonable.

The court could not find that the trial judge's choice of six months' notice was outside a "range of reasonableness." Next, as to the award of an amount of damages for the loss of the value of fringe benefits such as health benefits, insurance and RRSP contributions, the court found that the trial judge did not err in applying the reasoning from a line of cases which decided that a claimant whose work-related benefits were discontinued upon termination of her or his employment need not prove on the evidence that she or he suffered a pecuniary loss to receive damages for unpaid benefits. The case law was clear that all provinces but BC applied the law accordingly. Neither was the 10% of wages that would have been earned an unreasonable percentage to determine the lost value of the benefits. Lastly, as s 32 of the Act permits the judge to "admit as evidence any oral or written testimony or report" that "the judge considersâ€¦ to be credible and trustworthy," the testimony of G.H.M. in which she related a conversation she had with a financial advisor about RRSP contributions was within the discretion of the trial judge to admit.

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Hayes v Swift, 2021 SKQB 132

Crooks, May 5, 2021 (QB21135)

Wills and Estates - Accounting
Wills and Estates - Interpretation
Wills and Estates - Costs

The chambers judge was required: 1) to determine whether there remained any woodworking tools specifically bequeathed by will to M.H. in the possession of the executor, and who should bear the shipping costs to deliver tools to M.H. and 2) whether he should order an accounting with respect to the tools which M.H. claimed had not been disclosed by the executor. M.H. was the testator's son and the son of the executor of the will. The other specific legatees and applicants, M.H.'s siblings, had been bequeathed cash, which they had received. The executor was the residuary beneficiary of the balance of the estate. She had, prior to the application, shipped to M.H. at her own expense what she believed were the woodworking tools the testator had intended to be bequeathed to M.H. and had provided what she believed was a true inventory of all tools in her possession. M.H. lived in B.C. Ahead of the application, the executor offered to gift any remaining tools in her possession to M.H. but not to pay to have them shipped to him. She acknowledged that a box of various odds and ends were for woodworking. The applicants put forth a person who called himself the "Personal Intercessor Agent and Representative of Martyn Bernard Lancaster Hayes, Jeremy Bernard Hayes and

Amanda Margaret Campbell (nee Hayes)," claiming to be their assistant for purposes of bringing the application and representing them in court. He was the brother-in-law of M.H. and charged a fee of $1,000.00. HELD: The chambers judge first determined that, given the sparsity of evidence from M.H. as to what tools the testator had at the time of his death, he would have needed to speculate about that question were it not for the evidence presented by the executor. He was satisfied that the executor was truthful as to the tools that remained in her possession, and that other than the box of odds and ends, these were not intended by the testator to be bequeathed to M.H. The evidence showed that the testator was a woodworker and would have known that woodworking tools are a grouping of tools which would not include the tools being claimed by M.H. In his determination of what the testator meant by woodworking tools, the chambers judge referred to trade-related tribunal decisions classifying woodworking tools as a unique category of carpentry tools. He concluded that M.H. had no right to the remaining tools, other than the contents of the box. The executor had offered to gift the remaining tools to M.H., regardless of their classification, but M.H. did not take up the offer due to the dispute concerning shipping costs. The chambers judge, after a thorough review of relevant case law from England, ruled that M.H. was required to pay for any shipping costs to have the tools delivered to him. The request for an accounting was denied. Though s 35 of The Administration of Estates Act uses mandatory language, that an executor "must render a just and full accounting," the courts have interpreted the legislation as maintaining the discretion of the courts to order an accounting (see: Tinline v Tinline Estate, 2013 SKQB 167 and Kusch Estate v Muller Estate, 2016 SKQB 69). The case law considered by the chambers judge requires an applicant to show cause why an accounting is required, and an application will fail in showing cause if the request is frivolous and vexatious, as in this case. The application was frivolous and vexatious because the accounting request included tools that had already been delivered to M.H. Lastly, the chambers judge made an order of costs of $2,200.00 against the applicants, payable forthwith. Though the applicants eventually limited their request to an accounting concerning the tools only, they initially requested an accounting of the entire estate, though they had no claim to it. They engaged a person who was not a lawyer who attempted to do lawyer's work, which resulted in protracted proceedings and bad advice concerning the mandatory nature of an accounting, taken only to frustrate the executor. M.H. presented no evidence to substantiate his claim for the tools.

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R v Mills, 2021 SKQB 134

Danyliuk, May 6, 2021 (QB21137)

Criminal Law - Bail - Estreatment

This matter was an application to the chambers judge by W.J.M. for the release of $12,500.00 paid to him to secure his release from jail pending his trial. He had initially been arrested for drug trafficking offences and then released with conditions on a recognizance upon payment of $2,500.00 cash bail. He reoffended while bound by these release terms and was arrested again and rereleased after depositing a further $10,000.00 cash bail. He was arrested for breaching his conditions a second time and again released, and then arrested a third time, finally being held on remand after a bail hearing, at which time he pled guilty to some offences and was sentenced to 3 years' imprisonment in the penitentiary. The Crown applied for estreatment of the bail monies pursuant to ss 770 and 771 of the Criminal Code four years after the bail monies were deposited, and followed all procedures required by these provisions to estreat the bail money, including the filing of an evidentiary certificate from the sentencing court stating that W.J.M. was in default of his recognizance and setting out that "the ends of justice have been defeated or delayed by reason of the default." On the hearing, the applicant had a right to show cause why the presumption in the certificate that his default defeated or delayed the ends of justice was rebutted and the judge should exercise his discretion in favour of W.J.M. and release the bail money to him. W.J.M. put forward the argument that the Crown had simply taken too long to apply for estreatment, though he presented no legal basis for this proposition, and neither did he present any evidence to rebut the evidentiary presumptions contained in the certificate.
HELD: The chambers judge allowed the application and ordered that the bail monies on deposit with the court be forfeited. In doing so, he had reference to R v Cote, 2014 SKQB 269 and its analysis of the applicable principles that should guide a judge on such an application, and in particular the overarching principle that bail money is meant to assist in upholding the judicial release system by creating an incentive through the "pull of bail" for the released accused to attend court. The chambers judge indicated that he had no basis at law to find that the four-year delay was an impediment to the granting of the application. He also found that W.J.M. had failed to show cause why his repeated defaults did not defeat or delay the ends of justice. He found it was clear that W.J.M. had flouted the bail system and his actions could not but threaten it if no meaningful measure, such as estreatment, were taken.

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Anderson v Mueller, 2021 SKQB 135

Smith, May 6, 2021 (QB21138)

Family Law - Dependants' Relief - Family Maintenance Act
Family Law - Domestic Contracts - Interspousal Agreement

The chambers judge on an interim application for spousal support brought pursuant to The Family Law Act (FMA) and The Dependants' Relief Act (DRA) pending the conclusion of the applicant's trial was required to determine whether it was equitable in the circumstances to allow the interim application in the face of a binding cohabitation agreement between the applicant and the deceased spouse. The applicant, N.L.A., and the deceased, L.M., had cohabitated from October 2013 to L.M.'s death on March 31, 2020. They had met in their fifties and each had led separate lives, raised children to adulthood, and accumulated their own property. L.M. was a wealthy person whose estate was worth $10,000,000.00. While they were together, N.L.A. benefitted from L.M.'s largesse, enjoying the trappings of a luxurious lifestyle, all of which she deposed came to an end upon L.M.'s death. She claimed to be destitute, and that she was entitled "to be properly cared for by the estate." L.M. had not made provision for N.L.A. in his will, though evidence was presented to the effect that he had intended to do so. It was not contested that N.L.A. and L.M. had entered an enforceable binding cohabitation agreement which recognized the nature of their relationship and, as such, was drafted to keep their estates separate. It also expressly excluded any entitlement to spousal support by N.L.A. Both had obtained independent legal advice prior to the agreement being executed.
HELD: The application was dismissed. The chambers judge first determined that, though N.L.A. had not commenced the proceeding before the expiry of six months from probate of the will as required by s 4(1) of the DRA so as to bring a claim as of right, he chose to exercise his discretion, pursuant to s 4(2) of the Act, to allow her to make the claim because she brought it as soon as she learned about probate of the will and the estate would not suffer any prejudice. The primary question to be decided, though, was whether the court should make an order for interim support in the face of the clear wording of the cohabitation agreement by which N.L.A. waived any claim to spousal support. After an extensive review of Steinke v Steinke, 2018 SKQB 13, in which the court examined the Miglin test (see: Miglin v Miglin, 2003 SCC 24), which was to be applied by the courts to determine whether spousal support should be ordered, though such a claim was barred by the binding agreement of the parties, the chambers judge ruled that only through a trial could the application of the Miglin test be fully canvassed. An interim order would unfairly displace the cohabitation agreement, to the prejudice of the estate, which would be required to pay spousal support for which it might not be liable to pay after the trial, and would not be able to recoup.

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Elles v Elles, 2021 SKQB 137

Keene, May 10, 2021 (QB21139)

Civil Procedure - Queen's Bench Rules, Rule 3-81

The plaintiff, Elles, commenced an action in which he claimed ownership of a parcel of land through alleged gift or inheritance against multiple defendants. In another action commenced in July 2020, the plaintiff, Prescott, sued some of the same defendants, based on her claim of legal ownership to the same parcel of land. She alleged fraud perpetrated by one of the defendants named in the Elles action. The defendants brought an application pursuant to Queen's Bench rule 3-81(1) for consolidation of the two actions.
HELD: The application was dismissed. The court found that although there was a common thread in both actions because of the common defendants, they involved different types of evidence. Consolidating the two actions would cause prejudice because the Elles action appeared to be more complex, factually and legally. The Prescott action should proceed first and independently because if Prescott were successful, then Elles might have to reconsider his approach to the case. Costs of $1,000 were awarded to Prescott against the applicants.

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Cooper v Cooper, 2021 SKQB 140

Crooks, May 11, 2021 (QB21141)

Corporations - Shareholders' Remedies - Oppression

The applicant, the son and only child of the respondents, L. and P. Cooper, applied under s. 234 of The Business Corporation Act for numerous remedies to rectify alleged acts of oppression by the corporate and individual respondents. The parties were the only shareholders and directors of Khitan Holdings, the corporate respondent. The individual respondents had, with other partners, built up two business corporations (the operating companies). The respondents incorporated a holding company, Khitan, and the shares in the operating companies were transferred to it in 1987. The respondents set up a family trust in 1997 with the applicant and the respondents named as beneficiaries for the purpose of providing a legacy fund for him and his children. When the trust expired in 2015, a new one was set up with the applicant and his family as beneficiaries. Class H shares were issued to him as the capital of the original trust. The purpose of the trust continued to be to ensure long-term security for the beneficiaries and the fund would be financed by continued earnings from Khitan. The operating companies were sold in 2014 and the proceeds were paid out to the

associated holding companies which created the value of the class H shares. As at the time of the hearing, the applicant held one-third of the outstanding class H shares. At some point, the applicant advised the individual respondents that he wanted to redeem his shares, and they resisted, saying that the purpose of Khitan was for the family's collective benefit. Following his disclosure, a number of events occurred that led the applicant to bring this application wherein he alleged oppressive behaviour by the individual and corporate respondents and sought a final order for the forced redemption of his shares. The oppression alleged by the applicant was that: a) the respondents had prevented the applicant from having access to Khitan's minutes, financial information and corporate information in December 2019. The respondents aver that all corporate documents had been and remained available for review and inspection; and b) the respondents had not provided notice to him of the shareholders meeting held on January 3, 2020, and where the individual respondents, acting in their capacity of Khitan's Class A shareholders, voted and passed a resolution to amend the articles of incorporation, relating to class H shares in which the right of shareholders to redeem was removed. The respondents deposed that L. Cooper had advised the applicant of the meeting in late December 2019 by email. The applicant argued that the appropriate remedy would be the redemption of his shares and payment of his shareholder's loan. The respondents' position was that the applicant had no reasonable expectation to "plunder" the corporation by redeeming over one-third of its value. Khitan continued to fulfill its purpose to support their retirement and provide a financial legacy for the applicant and his family.

HELD: The applicant's request for relief under s. 234 of the Act related to forcing the purchase of his shares or requiring payment of his shareholder loan was dismissed. The court ordered Khitan to advise the applicant of the location of the corporate records, and provide him access to: the financial statements, copies of all bylaws, minutes and resolutions history of his class H shares and the transactions and balance of his shareholder loans, as required by ss. 20 and 21 of the Act, within 30 days of the judgment. It set aside the shareholder's resolution made January 3, 2020 and the change it made to the clause governing redemption of class H shares. It was to be amended to reflect the wording that existed prior to the resolution and the corrected version was to be filed with the Director of Corporations within 15 days of the order. The court considered the applicant's issues within the framework of the two questions set out in the Supreme Court's decision in BCE (2008 SCC 69), being whether the evidence: 1) supported the reasonable expectation asserted by the applicant; and 2) established that the reasonable expectation was violated by conduct described by the Act as oppression, unfair prejudice or unfair disregard of a relevant interest. It found with respect to each of the applicant's issues, reviewed under the first question posed in BCE, that: 1) a) there is a reasonable expectation to have access to the financial records. The respondents were not opposed to providing the information sought by the complainant; 1) b) there is a reasonable expectation that procedural requirements for calling and holding director/shareholder meetings and for voting at them would be in accordance with the corporate bylaws and the Act. It made no finding as to whether there had been oppressive conduct. As the evidence was controverted regarding whether the records were and remain available to the applicant as required by s. 20 of the Act, it

made the above-noted order; and 1) c) the applicant had not demonstrated, on the evidence, that he had a reasonable expectation to redeem his class H shares at any time he chose or to demand immediate repayment of his shareholder's loan in light of the purpose of the corporation which included financing the individual respondents' retirements. It was not a reasonable expectation of a shareholder to redeem one-third of the shares in the corporation in these circumstances, where the applicant had been added as a shareholder at no personal expense and received many benefits from the corporation. Regarding the second question posed in BCE: 2) a) it made no finding as to whether there had been oppressive conduct, as the evidence was controverted as to whether the records are and remain available. As it is a requirement that they be accessible, it made the order noted above; 2) b) the applicant had not received sufficient notice of the meeting held on January 3, 2020 based on the evidence. On a balance of probabilities, the evidence established that there had been an "unfair disregard" for the applicant's interests. The respondents, acting as Class A shareholders were not permitted to unilaterally vote to amend the articles with respect to impacts on shareholders of another class but they had not acted in bad faith as they were responding in a protective fashion in an effort to preserve Khitan's assets when the applicant informed them of his intention to redeem his shares. The acts of the respondents were not so prejudicial so as to warrant the remedy of extracting the applicant from the corporation. The appropriate remedy was to put the articles back to their pre-meeting state but without prejudice to further amendments being made in accordance with the provisions of the Act; and 2) c) it was unnecessary to decide whether there had been oppressive conduct because it had found that the applicant did not have a reasonable expectation to redeem his shares.

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R v Wolfe, 2021 SKQB 141

Danyliuk, May 13, 2021 (QB21140)

Criminal Law - Motor Vehicle Offences - Sentencing
Criminal Law - Criminal Negligence Causing Death - Sentencing

The trial judge convicted B.W. after trial of two counts of criminal negligence causing death and one count of criminal negligence causing bodily harm (see: 2020 SKQB 324) and turned to the matter of sentencing. The facts found at trial were that: B.W., an experienced driver, drove a Chevrolet truck westbound in the eastbound lanes of a divided four-lane highway for at least one kilometre; ignored signage indicating he was driving westerly in the eastbound lanes; ignored road line markings indicating he should not cross onto these lanes;

and failed to react when the operator of a motor vehicle, driving towards him easterly in the southeast lane, flashed his lights to alert him that he was driving in the opposite direction he should have been travelling. The evidence also proved he had alcohol in his blood. While operating his vehicle in this manner, the accused collided head-on with a Toyota motor vehicle traveling easterly in the same northeast lane of traffic in which the accused was travelling westerly. The collision was devastating since both vehicles were travelling at about the speed limit of 110 kilometres per hour. Upon impact, the operator of the Toyota and the back seat passenger were killed, and the front seat passenger was seriously injured. The accused was also seriously injured. The driver and front seat passenger were husband and wife respectively, and the parents of the back seat passenger. The survivor was devastated by the horrendous result of the offence.
HELD: After a thorough review of all the principles of sentencing as codified in s 718 of the Criminal Code, and the authorities governing his analysis, including R v Ipeelee, 2012 SCC 13; R v Knott, 2012 SCC 42; R v Yuzicapi, 2011 SKCA 134; and R v Klemenz, 2015 SKCA 89 (Klemenz), the trial judge determined that the primary goals of sentencing in this case were denunciation and general deterrence, which were particularly suited to this case as the message would be brought home forcefully to those members of the public most open to hearing it, ordinarily law-abiding citizens. He determined that to effectively achieve these goals, a penitentiary term of incarceration was required, the length to be determined with the overarching principle of proportionality in mind, which requires that a sentence should reflect the gravity of the offence and the degree of responsibility of the offender. He found that the offences were at a very high level of gravity as reflected by a potential maximum prison sentence of life in prison, and the moral blameworthiness of B.W. was also very high as he had a recent history of driving accidents, and his reckless actions had caused an irreparable loss: the soul-wrenching death of loved ones and valuable members of the community. He found B.W. was otherwise a contributing member of society and was truly and profoundly remorseful for what he had caused. In applying the principle of parity, and reviewing the relevant sentencing cases for these offences, he recognized that he was not to conduct a "matching exercise" (see: Klemenz) but was to use the case law to assist him in individualizing the offender and arriving at a proportionate sentence. With this full "calculus of factors" in mind, he pronounced a global sentence of 6 years' imprisonment.

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McCabe v Kowalyshyn, 2021 SKQB 144

Layh, May 14, 2021 (QB21144)

Wills and Estates - Estate Administration - Sale of Real Property
Statutes - Interpretation - Administration of Estates Act, Section 50.5

The executor of the estate of Mike Kowalyshyn brought an application in March 2021 to have the court approve the sale of eight quarters sections of farmland belonging to the estate pursuant to s. 50.5 of The Administration of Estates Act (Act). Establishing the value of the farmland and its sale had been a controversial matter among the 12 children of the deceased, who were all beneficiaries under his will. In an effort to resolve the dispute, counsel for the executor suggested that would see the beneficiaries submit offers to purchase the land in a type of closed, inter-family auction with a deadline date. The acceptance of an offer by the executor was to be subject to the executor being able to comply with the requirements of s. 50.5 of the Act. None of the parties objected and the proposed method of sale proceeded. The highest and last offer was made by Nicky and Debby Kowalyshyn (the purchasers) in the amount of $1,325,000. No further offers were made by a group of four of the beneficiaries who had been involved in bidding (the group). The executor then made this application. After the hearing, eight beneficiaries, including the group, applied to adduce further evidence. One of the group, J. Kowalyshen (J.K.), had contacted the Saskatchewan Assessment Agency (SAMA) after the final offer was made and learned that the estate land had been newly assessed at $1,422,700. Because of the increase, they refused to consent to the sale for $1,325,000. J.K. then contacted a realtor and asked him to prepare a marketing plan for the estate land. He advised that he believed that land would sell for between $1,448,100 and $1,544,800. Because of this evidence, the eight beneficiaries proposed that the land be sold in the fall under the direction of the realtor. The executor responded by commissioning a formal appraisal of the land by a certified appraiser who determined the value of the land, including buildings, was $1,209,000 using a .86 multiple of the new SAMA assessments. The executor also applied to adduce this information as fresh evidence. The court consented to consider the new evidence. The parties agreed that whether the court should approve the sale proposed by the executor was dependent upon s. 50.5 of the Act. HELD: The court approved the sale of the land for $1,325,000 pursuant to the executor's application. It found that having agreed to the proposed method of sale, the group's opposition to the sale was a reversal of positions that it was not prepared to sanction. It was in the estate's best interest and that of the beneficiaries to finalize the sale. The group's proposal was subject to uncertainty and the court preferred the evidence of value provided by the certified appraiser to that of the realtor. It deferred to the appraiser's qualifications and experience in using the SAMA assessment to arrive at the fair market value of the land. Costs of $2,000 were ordered in favour of the estate and costs in favour of the purchasers in the amount of $1,500 were to be paid from the distribution of the estate assets in favour of the eight applicants.

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H.-L.M., Re, 2021 SKQB 145

Rothery, May 14, 2021 (QB21145)

Family Law - Child in Need of Protection - Child and Family Services Act - Person of Sufficient Interest
Child Protection - Indigenous Children

The applicant, M.C., a non-Indigenous person, applied pursuant to s 23(1)(c) of The Child and Family Services Act (CFSA) to be designated a person of sufficient interest to H-L.M., an Indigenous infant, and thereby obtain standing at the pending protection hearing of H-L.M., whose foster parent had been M.C. since she left the hospital, a period in excess of two years. At the time of the application by the Minister of Social Services (MSS) pursuant to s. 37(3) of the CFSA for an order that H-L.M. be placed in its custody until she attained the age of 18, no one had come forward to care for H-L.M. Her mother, V.M., had visited her regularly for the first 4 months, but her visits "gradually tapered off," as did those of her father, G.L., who was in the penitentiary at the time of the application and who did not participate. V.M. had problems with drug abuse. Since the application, two family members of H.-L.M. came forward as possible caregivers, one, C.Y., a stepdaughter of G.L.'s stepfather, who was caring for two of H.-L.M.'s cousins, and a maternal aunt, A.M. The chambers judge found that the material filed by MSS in response to M.C.'s application concerning these two family members was scant. M.C. had filed an affidavit in which she deposed that the child had bonded with her, and a second older child in her care was seen by her as a sibling. She also deposed to working part-time and not full-time as a registered nurse to care for H.-L.M. Under both the CFSA and An Act respecting First Nations, Inuit and MÃ©tis children, youth and families, SC 2019, c 24 [Federal Act], M.C. was a person who had standing to apply as a person into whose care H.-L.M. could be placed. The only issue for the chambers judge to decide was whether she had the power to make an order under s 23(1)(c) of the CFSA prior to the placement hearing, which order all the respondents, MSS, V.M., and the agencies supporting the claims of C.Y. and A.M. opposed.
HELD: The chambers judge ruled that she had the power to make an order designating M.C. as a person of sufficient interest to have standing prior to the placement hearing, relying on the authority of A.C. v C.B., 2018 SKCA 19, which upheld the decision of a chambers judge to make such an order. In this case, upon consideration of the evidence filed, she was satisfied that the order in favour of M.C. should be granted.

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T.P. v S.S.M.T., 2021 SKQB 146

Brown, May 14, 2021 (QB21146)

Family Law - Custody and Access - Interim
Statutes - Interpretation - Children's Law Act, 2020, Section 10, Section 15

The mother of two children, S.T., applied pursuant to The Children's Law Act, 2020 for an order returning the children to her primary care. The children, aged two and four respectively, were present in the family home in April 2020 when S.T. held a party where the guests used alcohol, cocaine, ecstasy and crystal meth and one guest was killed. At some point following the party, the children went to live with T.P., their maternal grandmother, who also suffered from substance abuse problems. She applied for primary care of them in September 2020. The children's paternal grandmother, J.K., applied for primary care in October 2020. In November 2020, the court ordered that J.K. should have the children's primary care with T.P. having specified weekend access. In December 2020, the Ministry of Social Services apprehended the children and brought an application for a protection hearing to prevent the children from entering T.P.'s care. The hearing was adjourned and the children placed with J.K. to await the outcome of this application. In March 2021, S.T. applied to have the children placed back in her primary care. She disputed some of the key allegations from the previous applications that resulted in the order giving primary care to J.K. As she was now living with her grandmother and had attended programmes to address her challenges, she advised that she was able to resume parenting. S.T. relied on A.O. v T.E., 2016 SKQB 92, to support her position that the children should reside with her because of her status as the children's biological parent. J.K. opposed the application. She alleged that S.T. had left her grandmother's home and at one point had been homeless.
HELD: The court granted an interim order that provided S.T. with graduated parenting time with her children over the next six months, divided into six-week periods. She would have to provide bi-weekly drug screens to her counsel and J.K.'s counsel for the initial three periods. For each successive six-week period, the length and terms of S.T.'s access would increase from 11 hours per week to four days per week and change from supervised to unsupervised. S.T. was to remain clean and sober and have stable housing, and if the graduated parenting regime occurred without incident, it was possible, with the agreement of J.K., that the boys would be transferred to S.T.'s primary care. Access by T.P. was suspended pending further agreement of all the parties or order of the court. The court noted that under the new provisions of ss. 10 and 15 of the CLA, 2020, the major consideration continued to be the best interests of the children, determined from the children's perspective. Although the biological connection was one very important factor, all other factors were still of significance and had to be considered. It reviewed the factors and concluded that because there was insufficient evidence regarding the stability of S.T.'s housing, mental health and addiction issues, it was not appropriate to make a

long-term parenting or access order, but S.T. should have as strong a relationship with her children as could be safely fostered.

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Sundararajan v Periasamy, 2021 SKQB 148

Richmond, May 18, 2021 (QB21147)

Family Law - Federal Child Support Guidelines - Section 7 Expenses

A trial of certain issues between the petitioner, E.S., and the respondent, R.P. was held. The litigation between them had been ongoing for 11 years. Though there were a number of minor issues to be ruled on, the main question to be decided concerned the costs of the medical school education of their daughter, S., which she was pursuing in London, England at an annual cost of $75,000.00. E.S. had guaranteed a loan to pay the education costs and was required to pay monthly insurance and interest on the loan. A previous order in chambers had apportioned the payment of these costs between E.S. and R.P. as a percentage of their respective incomes, and as R.P. was unemployed for much of the three-year period covered by the order, the much larger share was paid by E.S. At trial, R.P. sought a payment increase from E.S. for S.'s education costs so she would not "suffer... as she is attending school with wealthy children" and the additional contribution would cut into her student loans, and help were she to specialize later. S. had not yet completed medical school.
HELD: The trial judge ruled that the evidence presented at trial could not lead to a finding that E.S. should pay any more of S.'s education costs. S.'s education costs were covered by the present arrangement, and E.S. would be prejudiced by an order that he pay more because he was potentially liable to pay the principal amount of the loan should S. be unable to, and his current payments and financial responsibilities, including for the second daughter and E.S.'s new family, were becoming overly burdensome to him.

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University of Saskatchewan v Administrative and Supervisory Personnel Association, 2021 SKQB 154

Meschishnick, May 26, 2021 (QB21150)

Administrative Law - Arbitration - Judicial Review

The applicant, the University of Saskatchewan, applied for judicial review of the decision of an arbitrator to sustain a grievance against the dismissal by the applicant of the head coach of its volleyball team (the Huskies) in May 2018 (see: 2020 CanLII 49268). After considering the grounds relating to the alleged misconduct of the coach (the grievor), presented by the applicant as worthy of discipline, the arbitrator made six rulings and found only one of the grounds constituted such conduct. The arbitrator then directed that the grievor be reinstated to his former position. The grievor was a member of and represented by the respondent, the Administrative and Supervisory Personnel Association (ASPA), at the arbitration. The parties each prepared a summary of facts for the arbitrator on which he based his conclusions. The facts included that the grievor had worked for the applicant for 25 years as a head coach of the Huskies and had not been subject to any discipline prior to his termination. In January 2016, the grievor learned that a young man (the player), whom he had known previously though his son's high school volleyball team, had been charged with sexual assault in Medicine Hat. In April, the player asked the grievor whether the player could practice with the team, and informed him that he had applied to transfer from Medicine Hat College (MHC) to the University and that he intended to plead not guilty to the charge. As part of its procedure for transfers of student athletes, the applicant required the transferring institution to complete and submit a form to the Huskies Athletics Office attesting to the student's sports participation and asking whether the student would be eligible to compete at that institution in accordance with its jurisdiction rules. MHC replied no to the question and explained on the form that due to privacy laws, it could not reveal its reasons. MHC did not answer another question on the form requesting information regarding the proposed transferee's history re: previous transfer; suspension; discipline; doping infractions, etc. The officer responsible for athlete eligibility for the applicant did not pursue the matter of the player's ineligibility with MHC on the assumption that it related to academic reasons, nor did they bring the form or the information it contained to the grievor's attention. The grievor knew of other times when a student athlete facing criminal charges had been permitted to play and based on the understanding that that would be so in this case and because he believed the player to be innocent, allowed him to practice with the team for the 2016-2017 season. At some point, the player was apparently accepted as a student of the applicant and later the grievor moved him to active status on the team. In November 2017, the player advised the grievor that he still intended to plead not guilty and continued to maintain that position until spring 2018. After that season concluded, the player entered a guilty plea and was then sentenced to two years in prison. When the grievor's supervisor at that time learned of the charges against the player on May 15, 2018, he placed the grievor on leave, pending investigation. The grievor gave an interview to the media on May 15. Following an investigation meeting on May 17, the grievor was terminated that day. In the arbitrator's decision, he agreed with the applicant's allegation that the grievor's conduct was worthy of discipline when he failed to advise his

supervisor that he had: recruited the player; moved him from the inactive to active roster; and learned that the player would plead guilty. However, in this application, the applicant argued that a number of the arbitrator's other rulings were unreasonable. It classified five of them as related to the grievor's "pre-conviction" conduct and two of them related to his "post-conviction" conduct, as not being worthy of discipline. One of the arbitrator's rulings relating to the former conduct, considered key and challenged by the applicant, was 1) that the grievor's decision to recruit the player was not serious enough to warrant discipline because the applicant had made an error in judgment at the time of recruitment. The arbitrator noted that the applicant had given the power to the grievor to make the decision to recruit and it did not have a recruitment policy nor any policy preventing a student athlete facing criminal charges from playing on a team. The grievor exercised his judgment without intent to deceive or in bad faith, and honestly believed that nothing prevented the player from being placed on the team. The grievor assumed that the player's transfer from MHC had been vetted by the applicant and it was aware of the charges. It was only after the grievor learned of the details of the sexual assault that he realized he had made a bad decision. Although it was reasonable to expect coaches to use good judgment, the result of the grievor's error, given the circumstances noted above, was not serious enough to warrant discipline.
HELD: The court set aside a number of the arbitrator's rulings and remitted them for a rehearing, particularly on the key issue of whether the grievor's decision to place the player on the volleyball team was conduct worthy of discipline. It confirmed the reasonableness of the arbitrator's decision that the grievor had assumed the applicant knew of the outstanding sexual assault charges and that he had not breached any media protocols. The court applied the standard of reasonableness in its review of the arbitrator's decision in accordance with Dunsmuir and Vavilov. Amongst numerous findings, it agreed with the applicant that the arbitrator's ruling was unreasonable regarding the grievor's "pre-conviction" conduct as not worthy of discipline. He had not applied a rational and consistent chain of analysis in determining whether the separate and collective pre-conviction conduct of the grievor was worthy of discipline. He had found the grievor's failure to report his decision to recruit as worthy of discipline, but decided the recruiting decision itself was not, judging by what the grievor actually knew or assumed rather than what he ought to have known. The arbitrator thereby avoided considering the applicant's core issue of whether a reasonable person in these circumstances would grant the privilege of playing on one of the applicant's teams, even if the charges were not proven.

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Turpie Farms Ltd. v 613168 Saskatchewan Ltd., 2021 SKQB 155

Layh, May 26, 2021 (QB21151)

Contract Law - Interpretation - Arbitration Clause - Appeal

The appellant, Turpie Farms Ltd., owned and operated by Ken Turpie, and the respondent, 613168 Saskatchewan Ltd., owned and operated by the appellant's brother, Keith Turpie, had formed two partnerships in January 1997 whereby the four owners of 59 quarter sections of farmland, being the brothers, their father and uncle, signed a trust agreement wherein the farmland that the individuals owned would be held in trust for the partnership formed by the brothers' newly incorporated companies. The partnership dissolved in 2012, governed by a dissolution agreement with a schedule. It stated that any property not described in the schedule would continue to be jointly owned by both partners pending distribution "at a later date." The farmland was not described in the schedule. Following the dissolution, Ken Turpie remained engaged in grain farming and Keith Turpie in livestock-raising, but the ownership or status of the land was not clearly spelled out. The issue of the determination of the time to value and share the value of the 59 quarter sections arose, and in an attempt to resolve it, the brothers engaged the arbitration clause of the 1997 partnership agreement. The arbitrator decided that the land was not partnership property and that each brother held an undivided one-half interest in the entirety of the farmland. Accordingly, the value of the land was not to be determined as at the date of the partnership dissolution but at its current value. The arbitrator found, alternatively, that even if the land was partnership property, the dissolution agreement stated that the partnership assets that were not allocated or dissolved in the agreement would be jointly owned pending distribution at a later date. In either case, then, the value of the land was to be determined at its current value, not its 2012 value. After the court held that the appellant did not require leave to appeal the decision of the arbitrator (see: 2020 SKQB 345), it appealed the arbitrator's decision on six grounds. Amongst them, it alleged that the arbitrator erred in law in identifying and applying the proper test for determining the existence of a partnership.
HELD: The appeal was dismissed as it had no merit based on the arbitrator's decision. The court found that the appeal must be based upon the arbitrator's alternative decision, that if the farmland was partnership property, it would have fallen subject to the dissolution agreement of 2012. The real issue on appeal, then, was whether the arbitrator erred in interpreting the terms of the dissolution agreement. It found no error. Since farmland was not included in the property described in the schedule, it would continue to be jointly owned by both partners pending distribution at a later date. Since that "later date" had not occurred before the arbitrator's decision, the farmland remained jointly owned.

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R v Katcheech, 2021 SKPC 6

Koskie, April 23, 2021 (PC21021)

Criminal Law - Sentencing - Aboriginal Offenders
Criminal Law - Sentencing - Fetal Alcohol Spectrum Disorder

The sentencing judge was tasked with sentencing T.M.K., a 31-year-old Aboriginal offender charged with robbery and breach of probation. T.M.K.'s personal background was dominated by the deleterious effects endemic to Aboriginal people living in Canada, including inter-generational substance abuse, family breakup, dysfunctional relationships, criminal offending including crimes of violence, sexual and other abuse, poverty, community displacement, and FASD. The facts of the offence and the personal circumstances of T.M.K., as presented in a PSR, were not in dispute. As to the offence, while at a bar, T.M.K. ran out of money for alcohol. She went to the VLT section of the bar, where the victim, a 73-year-old woman, had just won $400.00, which she was holding in her hand. T.M.K. grabbed for the money, and tried to pull it away from the victim, who resisted. As a result, both fell onto the ground. T.S.K. then shoved the victim and pulled the money from her. T.M.K. was arrested soon after. Though she initially denied any involvement, after retaining counsel, she pled guilty. From the date of the offence to the date of sentencing she was bound by strict conditions of electronic monitoring, which she completed without breaching. She maintained sobriety and two of her children were returned to her care by the Ministry of Social Services (MSS), with which she had had a lengthy involvement. She accessed treatment and programming and began to live a pro-social lifestyle. The Crown sought a term of imprisonment in the penitentiary to address the sentencing goals of denunciation and deterrence and suggested that she would benefit in her rehabilitation while in the penitentiary. Her defence counsel asked for a 90-day intermittent custody order and two to three years of probation.
HELD: The sentencing judge accepted the defence position, referring to R v Gladue, [1999] 1 SCR 688; R v Ipeelee, 2012 SCC 13; R v Chanalquay, 2015 SKCA 141; R v Slippery, 2015 SKCA 149; R v Whitehead, 2016 SKCA 165; and R v J.P., 2020 SKCA 52, to guide him in applying s 718.2(e) of the Criminal Code. Section 718.2(e) requires that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." The trial judge concluded that this provision and the law fleshing it out required him to individualize the offender by asking what the appropriate sentence is "[f]or this offence, committed by this offender, harming this victim, in this community" (See: Gladue at para. 80). In the case of T.M.K., he determined that the overarching personal characteristic dominating T.M. K's life and her criminal offending was the debilitating effect of FASD, a condition it was not difficult to see was due to her own historic and systemic factors as an Aboriginal person. The sentencing judge had the benefit of J.P., which dealt directly with FASD and the sentencing of Aboriginal offenders. The Court of Appeal recognized that if diagnosed and a connection can be made between the condition and the offender's criminal behaviour, it should be a significant factor in reducing the offender's moral blameworthiness. In this

case, T.M.K. was assessed for FASD by a professional assessor at an institution established for that purpose. The sentencing judge relied on the contents of the assessment report, its description of the condition, and in particular the impulsivity and lack of forethought it caused. He emphasized these facts throughout his application of the sentencing principles codified in the Criminal Code, and was able to show how her impulsivity and lack of forethought, intensified by her substance abuse and disjointed life, led to the offences in this case, and to her criminal history, which was made up primarily of administrative offences. He recognized that s 718.2(e) is one facet of proportionality, and that parity in the case of Aboriginal offenders should not be seen as a constraint with regard to fashioning a fit sentence. For this offender, who was taking steps to rehabilitate by abstaining from substances and regulating her life with the assistance of support groups, and whose two younger children had been returned to her, a penitentiary term would be detrimental to her healing and to society in general. He recognized that renunciation of the robbery offence was a relevant sentencing principle, and that society cannot condone an attack on a 73-year-old for money, causing physical and emotional harm to her. In this case, he concluded that he could achieve the overall goals of sentencing, which included the principles of s 718.2(e) by limiting jail time to a 90-day intermittent sentence and probation for two years to follow with rehabilitative conditions.

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