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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Subject Index

***Akpan v The University of Saskatchewan Council*, 2021 SKCA 129**

Whitmore Schwann Barrington-Foote, 2021-09-29 (CA21129)

Administrative Law – Judicial Review – Standard of Review – Reasonableness – Appeal
Interpretation - Regulations - Regulations on Student Academic Misconduct
Administrative Law - Hearings - Procedure

The appellant appealed the decision of a Queen's Bench judge to dismiss her application for judicial review of the decision of the University Appeal Board of the respondents, the University of Saskatchewan Council and the University of Saskatchewan (see: 2021 SKQB 21). In March 2020, the College of Nursing's Academic Integrity Committee decided that the appellant, then a fourth-year nursing student, should be expelled for plagiarism. She appealed to the board, which upheld the committee decision. The processes followed by the committee and the board are governed by The Regulations on Student Academic Misconduct under The University of

Civil Procedure - Court of Appeal Rules, Rule 13, Rule 43, Rule 71

Civil Procedure - Family Property - Consent Judgment - De Minimis non Curat Lex

Civil Procedure - Jury Trial - COVID-19 - Requirements

Criminal Code - Appeal - Conviction - Assessment of Credibility

Criminal Law - Assault - Sexual Assault - Conviction - Appeal

Family Law - Child Support - Interim - Appeal

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

Family Law - Custody and Access - Interim - Primary Residence - Appeal

Family Law - Spousal Support - Interim - Appeal

Interpretation - Regulations - Regulations on Student Academic Misconduct

Statutes - Interpretation - Court of Appeal Act, 2000, Section 9(5)

Statutes - Interpretation - The Animal Protection Act, 2018, Section 4

Statutes - Interpretation - Workers' Compensation Act, 2013, Section 169

Youth Criminal Justice Act - Mandatory Annual Sentence Review

Saskatchewan Act, 1995. In her application for judicial review, one of the appellant's grounds was that the board erred in failing to set aside the decision of the committee after concluding that the committee had made procedural errors because i t had imposed the sanction of permanent expulsion without adhering to the requirements of s. 3 of Part VIII of the Regulations (s. VIII.3), which provides that "the University Secretary will provide the Hearing Board of a record of any sanctions imposed by other University Hearing Boards or Appeal Boards for similar academic misconduct matters." The committee had not obtained such records before it rendered its decision regarding expulsion. With respect to that ground, the judge found that the committee had not made a fundamental procedural error that seriously affected the outcome. In her analysis of the word "will," used in s. VIII.3 of the Regulations, she found that it did not make the provision mandatory. Further, the committee's administrative status meant that it was not bound by previous decisions, and thus the record of prior academic misconduct decisions was not not binding upon it. The information contained in such a record was merely an assistive tool. In making its decision, the board was acting upon its mandate, as provided by s. IX.2.c of the Regulations, to hear appeals based on the ground that the original hearing board (in this case, the committee) made a fundamental procedural error that serious affected the outcome. She also found that the board had not made a material error, as expulsion was a reasonable sanction. The appellant's grounds of appeal were that the chambers judge erred: 1) by failing to find that non-compliance with s. VIII.3 of the Regulations was a breach of the duty of fairness; 2) in law, by relying on inadmissible evidence submitted in argument by counsel for the respondents; and 3) by failing to find that the board and the committee misapprehended the appellant's paper, failed to consider the seriousness of her misconduct, and failed to justify their decision. HELD: The appeal was allowed with respect to the first ground and the remaining two were dismissed as being without merit. The court ruled that the decision the appellant be expelled was quashed, and the issue of the appropriate sanction to be imposed in accordance with this decision was remitted to the committee. It cautioned that the committee should ensure that it obtain the records referred to in s. VIII.3 of the Regulations and that they be shared with the parties, who should then be provided with an opportunity to make further submissions before determining the sanction to be imposed. Respecting the first ground, the court stated that to determine the content of the duty of fairness, required contextual analysis, which in this case required interpretation of the Regulations in accordance with s. 2-10 of The Legislation Act. It found that the chambers judge erred in her interpretation of s. VIII.3. The obligation

imposed by "will" is mandatory and a failure to comply with that provision results in prejudice to the right of a fair hearing, in circumstances where important interests are at stake. Non-compliance constituted a material breach of the duty of fairness. The judge was unable therefore to determine whether the sanction imposed on the appellant was reasonable. The object of s. VIII.3 is to ensure that a hearing board shall receive a record of the decisions made in relation to similar academic misconduct so that such a board is aware of them before imposing sanctions. As described in Vavilov, this requirement is a constraint imposed upon an administrative body that a reviewing court should consider when determining whether an administrative decision is reasonable.

***MacLennan v MacLennan*, 2021 SKCA 132**

Leurer Barrington-Foote Kalmakoff, 2021-10-07 (CA21132)

Family Law - Child Support - Interim - Appeal
Family Law - Spousal Support - Interim - Appeal

The appellant appealed the decision of a Queen's Bench chambers judge to grant the respondent wife's application for interim child and spousal support. The parties' marriage ended in June 2019 after 23 years. The appellant, an oral surgeon, was the sole shareholder of a professional corporation. The respondent looked after the children and the home. From 2017 to 2019, the professional corporation paid her an annual salary of $47,000 that ended when the separation occurred. They had seven children, four of whom were under the age of 18. Of the other three children, two were full-time university students and one of them attended university in Vancouver. The third adult child was no longer in school but still lived in the family home. After separating, the parties agreed formally to joint custody and each of them would exercise equal-time shared parenting of the minor children in the family home on a rotating weekly basis. They also agreed to take an allowance of $6,000 per month to cover their personal expenses, but they were unable to reach an agreement regarding future support payments. The respondent applied for interim relief. The chambers judge determined the appellant's average annual income from 2017 to 2019 to be $1,373,948.

The appellant reported that the pandemic would cause a reduction in his 2020 income. The judge imputed an annual income of $1,500,000 to the appellant, finding that his income would recover and that he had retained earnings income available to him from his corporation. The respondent's income was imputed to be $50,000. After deciding the eldest child was no longer a child of the marriage, the judge proceeded to assess the amount of child support payable, acknowledging that, because the appellant's income exceeded $150,000, s. 4 of the Guidelines was relevant to the question whether the s. 3 table amount was inappropriate. He decided that it was not, because the children were entitled to support to continue to live as they had. The appellant had the means to make the required payment whereas the respondent did not. He used the formula set out in the Guidelines and the parties' respective incomes, performed a set-off, and calculated the appellant's obligation at $33,000 per month, effective September 1, 2020. He rejected the appellant's argument that he should instead be allowed to continue to pay household expenses of $8,971 per month in lieu of a portion of that support because the payment of child support by him to the respondent ensured that both parents were able to contribute equally to the financial support of their children. The judge found that the respondent was entitled to interim spousal support on a compensatory and non-compensatory basis due to the parties' respective roles in their long marriage and set it at $22,000 per month, retroactive to March 1, 2020, based on their imputed incomes and taking into account the revised range of monthly spousal and child support calculated with Childview 2019.2.0, using the "With Child Support" formula. He noted that the issue of determining quantum under the SSAG as the appellant's income exceeded the $350,000 ceiling. After the judgment was rendered, the parties raised a concern regarding the amounts of support. The judge issued a corrigendum to correct a mistake in the chambers decision regarding calculation of support payments and substituted $22,000 per month and $19,000 per month as the appropriate amounts of child and spousal support respectively. He expressed that his intent was to ensure both parents could contribute equally to the support of their children and it would be achieved by providing the parties with 50 percent of the available combined incomes. The amounts originally granted would skew the income away from that intended result. The appellant's grounds were that the chambers judge erred with respect to: 1) determining his income, because he used historical income information rather than his most current income information that indicated it had fallen dramatically, and by attributing pre-tax income of the corporation to him for support purposes; 2) erred in his calculation of child support; and 3) erred in his calculation of spousal support. He also argued that the judge should not have awarded retrospective spousal support at the interim stage because the relevant facts had been in dispute.

HELD: The appeal was granted. The court varied the orders made by the Queen's Bench judge and set the monthly child and spousal support payable by the appellant at $12,000 and $14,000 respectively. The appellant was to continue to pay the household expenses and s. 7 expenses were to be shared proportionately, at 84.6 and 15.4 percent by the appellant and respondent respectively. The standard of review applicable to interim support awards was deferential absent the judge's reasons disclosing an error in principle, a significant misapprehension of the evidence, or the award being clearly wrong. The court found that the chambers judge had: 1) not erred in determining the appellant's income. It was based on the evidence and the application of the principles set out in ss. 15 to 18 of the Guidelines. The judge's conclusion that the appellant's reported income from the previous three years was the best and most reliable information and that the decrease in his income was temporary were findings of fact entitled to deference, and he had not made any palpable error; 2) erred in a number of ways in determining the amount of child support. He failed to conduct the analysis demanded in this case, involving a large family with several adult children, which required deciding whether the table amounts were appropriate under ss. 3(a), 3(b) and 4 of the Guidelines. He also erred in principle when he took the approach in his chambers and corrigendum decisions to determine the amount of child support by way of achieving the goal of equalizing the parties' income, which is not the purpose of child support. He then failed to undertake the analysis required by the number of minor

and adult children in a shared parenting and a nesting arrangement, under ss. 3(2), 4 and 9 of the Guidelines and Contino (2005 SCC 63). He did not take into account that the appellant paid all of the household expenses and well as the adult children's university expenses. The court substituted its calculation of the appellant's child support obligation as $12,000 per month by applying the principles set out in Contino and s. 9 of the Guidelines. The factors that displaced the table amounts were the appellant's income level and the nesting arrangement whereby he paid all of the children's housing costs, relieving the respondent of bearing the extra cost of obtaining a separate residence. Consequently, it assessed the respondent of receiving half of the benefit of the appellant's payment of monthly household costs of $8,971 and debt obligations, which it set at $4,485 per month and which may properly be characterized as a payment in lieu of a portion of the spousal support to which she would otherwise be entitled. It also reviewed other expenses incurred on behalf of the children submitted by each of the parties to determine the respondent's share of monthly expenditures; and 3) erred in determining the amount of spousal support because he had first erred in the exercise of his discretion by his mistakes in determining the quantum of child support payable and by calculating both child and spousal support with a view to equalizing the parties' incomes and without considering their respective needs. The court substituted its calculation of interim spousal support to be $14,000 per month based on: the appellant's after-tax income; his monthly payments for daily child expenses and child support and household expenses; the respondent's imputed monthly income, her estimate of her monthly expenses; and the benefit she received through the appellant's payment for the household expenses. The retroactive portion of spousal support was set aside because the judge had not dealt with the conflicts in the evidence.

***S.G. v K.B.*, 2021 SKCA 133**

Ottenbreit Schwann Tholl, 2021-10-08 (CA21133)

Family Law - Custody and Access - Interim - Mobility Rights - Appeal
Family Law - Custody and Access - Interim - Primary Residence - Appeal

The appellant appealed the decision of a Queen's Bench chambers judge to grant the respondent's application to have the parties' three-year-old child returned to the family home in Indian Head, Saskatchewan from Alberta. The judge's interim order specified that the child be returned within 30 days of her fiat and that the parties would have equal, shared parenting, provided that the appellant also returned to Saskatchewan and resided within 20 km of the respondent's residence. If she did not, then the respondent would have primary residency of the child and the appellant would have generous access. The appellant also applied pursuant to Court of Appeal rule 59 to adduce fresh evidence on appeal in relation to her ability to reside in the required area. The parties had cohabited from 2015 but had separated in 2017 when the appellant moved to Alberta, where her family lived, following the birth of their child. She remained there until 2018 when she began residing with the respondent again, although they separated at different times for varying periods. They moved to Indian Head in August 2020. The appellant deposed that she had informed the respondent and obtained his consent to her plan to take the child and move back to Alberta permanently before

doing so in December 2020. The respondent brought a without notice application seeking the immediate return of the child to his care in January 2021, saying that he believed that when the appellant left with the child, it was only for a short visit with her family. The appellant filed her response affidavit to which the respondent filed a reply affidavit and the appellant filed a notice of objection to portions of it, pursuant to the Family Practice Directive #3. After the chambers hearing, the judge reserved her decision and ordered that the parties share parenting on two-week rotating basis until it was rendered. In her judgment released in March, the judge reviewed the factors set out in ss. 10 and 15 of The Children's Law Act, 2020 to determine the paramount consideration of the best interests of the child on an interim mobility application. Although the appellant had deposed that she provided the bulk of the child's care during the parties' relationship, the judge accepted the respondent's evidence that both parties had shared equally in parenting the child and were equally capable of providing appropriate care. She found appellant had not communicated with the respondent on matters affecting the child and had moved to Alberta without the respondent's approval. In assessing the impact of the move on the child, the judge decided that there had been no compelling reason to vary the status quo existing in December 2020 and it was in the child's best interests to be returned to Indian Head. As this appeal stayed the Queen's Bench order, the parties continued the shared parenting regime first ordered by the chambers judge. The appellant argued on appeal that the chambers judge erred by: 1) failing to address her objections to the respondent's affidavit evidence; 2) making palpable and overriding errors of fact, including findings that: the respondent was not aware of the permanency of the appellant's move and had not consented to it; the respondent had been an active parent, and that the status quo consisted of two parents engaged in shared parenting; and the appellant's father lived in Indian Head; 3) failing to consider the child's best interests, impermissibly varying the status quo and ignoring evidence of family violence; and 4) requiring the appellant to reside within a 20 km radius of the respondent's home in order to have equal shared parenting. This issue related to whether fresh evidence could be admitted.

HELD: The appeal was dismissed but the court adjusted the radius within which the appellant must reside to 100 km and imposed a new consequential date amendment of 30 days from the date of its judgment rather than the date set by the original fiat that would enable the appellant to have equal shared parenting. The application to adduce fresh evidence was allowed. The standard of review for a chambers judge's findings of fact, based either on affidavit or viva voce evidence, was that of palpable and overriding error. The standard applicable to a judge's determination of the best interests of a child is one of deference. The court found with respect to each ground that: 1) the chambers judge had erred by failing to address the notice of objection on the record but it had not had a material effect on her determinations. Various portions of the respondent's reply affidavit were struck; 2) the judge had not erred, according to the standard of review, in her weighing of the conflicting evidence presented on the matters raised by the appellant. The judge simply preferred the respondent's evidence regarding the first two findings and the third was not a factor in her decision; 3) the chambers judge had not erred. As her findings that the respondent had not consented and that the status quo involved the parties sharing parenting equally could not be disturbed, the appellant's argument on this ground could not be sustained. Regarding the allegation of family violence, the judge's determination that she could not make a finding that it had occurred was not in error. She had reviewed the conflicting evidence and had considered violence as a factor in considering the best interests of the child; and 4) the judge erred by not providing any reason why she imposed the geographical restriction of 20 km in relation to the pre-school-aged child. The appellant's fresh evidence was admitted and indicated the scarcity of appropriate accommodation and the absence of any suitable jobs within the specified geographical area. That portion of the interim order was amended to 100 km, which included Regina and other communities in the radius of Indian Head. This amendment reflected the child's best interests that included the reasonable availability of appropriate accommodation and employment for the appellant.

 Back to top

***R v Adebogun*, 2021 SKCA 136**

Jackson Leurer Kalmakoff, 2021-10-20 (CA21136)

Criminal Code - Appeal - Conviction - Assessment of Credibility

The appellant advanced the argument on appeal that the trial judge erred in law by making credibility findings against him on the essential element of absence of consent in a sexual assault charge by engaging in impermissible stereotypical and generalized reasoning unconnected to the evidence presented at trial, and in particular, by failing to assess Facebook apologies made by him to the complainant in the light of his personal characteristics and background. The evidence before the trial judge pertinent to this sole ground of appeal was contained in Facebook apologies sent by the appellant to the complainant following sexual activity between them, as well as his testimony as to what he meant to say by the apologies. The consistent testimony of both the complainant and the appellant involved sexual touching by the appellant of her breasts and crotch, including digital penetration of her vagina, and the appellant pulling his pants down, exposing his penis and touching the complainant's face with it. The complainant testified that she did not consent to any of the sexual activity and that she told him to stop and pulled away from him, but that he nonetheless tried to put his penis in her mouth. The appellant testified that they mutually agreed to the sexual touching, including kissing and fondling, and that he did have his penis exposed but it touched her face accidentally. He also testified that he told her he could not wait until he told everyone he had been with her. It was not in issue that the appellant was 18 years of age at the time of the encounter. He testified that he had apologized in the Facebook messages only for the accidental brushing of his penis against her face, and the words about bragging to everyone that he had been with her, and not about anything else. He maintained the rest of the sexual activity was consensual. He said that the sexual encounter was his first; that he was the son of a minister and had a devout religious upbringing; that he felt guilty about even consensual sexual activity outside of marriage, and that as a result he felt compelled to apologize profusely and in a generalized way. The Facebook messages were tendered in evidence at trial, and were lengthy, but did not specifically mention the penis contact to her face or the need to apologize for suggesting he would tell everyone about having sex with her. He did state that he was sorry for "the shit I did yesterday," "the stuff I did yesterday," and other expressions to that effect. The trial judge reviewed the effusive apologies in detail, and ultimately concluded that they were excessive for what the accused alleged was an accidental touching with the penis, and found his testimony as to what he meant went counter to "common human experience" and as such he was not being truthful about the reason for his apologies.
HELD: The appeal court dismissed the appeal, first stating the standard of appeal: credibility findings are questions of fact which are subject to deference, unless the trial judge assesses the evidence on a wrong legal principle or bases the assessment on irrelevant or inappropriate considerations, in which case she would have erred in law, which "open[ed] the door to appellate intervention." The

appeal court then acknowledged that it is an error of law to base an assessment of credibility on notions of common human experience, if in doing so the trial judge had allowed herself to be influenced in her thinking by stereotypes, myths, and prejudices, which by their nature are inherently unreliable in the individualized fact-finding process of a trial. In so stating, the court agreed with the wording of this principle in R v Pastro, 2021 BCCA 149. Though the court acknowledged that such thinking in a trial is an error in law, it was satisfied in this case that the trial judge did not fall into this error, because she based her assessment of the appellant's credibility not on empty stereotypes, but on the evidence, and applied her experience and common sense about human behaviour to that evidence, which she was not only entitled but required to do.

 Back to top

***Saskatchewan Mutual Insurance Company v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 8933*, 2021 SKCA 137**

Ottenbreit Caldwell Tholl, 2021-10-21 (CA21137)

Administrative Law - Saskatchewan Labour Relations Board - Judicial Review - Appeal

Saskatchewan Mutual Insurance Company (SMI) appealed the decision of the Queen's Bench chambers judge in 2020 SKQB 149 (Chambers decision) upholding the decision of the Saskatchewan Labour Relations Board (board) in 2019 CanLII 43212 (LRB decision), which ruled in favour of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 8933 (union) that SMI committed an unfair labour practice by designating a new IT supervisory position without the agreement of the union or a board order. The court, through Ottenbreit J.A., canvassed the LRB decision and the chambers decision. In his review, he focused on the board's finding that SMI failed to comply with the often-cited "Battlefords principle," which originates from a number of LBR decisions including Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v Battlefords and District Co-operative Limited, 2015 CanLII 19983 (Sask LRB) and which provides that an employer in an "all-employee" bargaining unit will commit an unfair labour practice if it unilaterally designates a new position as out-of-scope and thereby excludes an employee from the bargaining unit. He noted the board's conclusion that SMI had failed to follow the Battlefords principle by not specifically negotiating the designation of the new position with the union or, failing agreement following good faith bargaining, not obtaining a board order allowing the employee to be designated as out-of-scope. Turning to the decision of the chambers judge upholding the board's ruling, the court agreed with the chambers judge that the standard of appeal to be applied was reasonableness, to be reviewed for correctness, and noted that in deciding that the board's interpretation of the Battleford principle was within the reasonableness standard, the chambers judge found that there was "no actual bargaining with respect to the new position" and the board could not be said to have been unreasonable in its thinking and conclusions in interpreting the Battlefords principle. As such, the board acted reasonably in declaring that SMI had committed an unfair labour practice. SMI appealed on a number of grounds, but the court decided the appeal on the question of whether the chambers judge was correct in upholding the board's decision as being reasonable in its interpretation of the Battlefords principle and its application to the case at hand.
HELD: The court allowed the appeal, quashed the board's decision, and remitted the matter to the board for redetermination, ruling that the chambers judge should have overturned the board decision as being an unreasonable interpretation of the Battlefords

principle and an unreasonable application of that principle to the matter under appeal. The court stated that in the case before it, the board should have found that SMI had complied with the Battlefords principle to bargain in good faith as it had bargained for, and the union had agreed to amend, the scope clause during CBA negotiations. The CBA scope clause caused the more limited scope clause in the certification order to be "spent" and created an exclusion for a category of employee from the bargaining unit. SMI did not commit an unfair labour practice, since it was not required to renegotiate the exclusion category as the board had ruled. SMI was within its rights to purport to designate the new IT supervisory position within the negotiated scope clause. However, this finding was not the end of SMI's legal duties in the circumstances because the union was entitled to require SMI to engage in good faith bargaining to determine if the new position was properly within the exclusion category.

 Back to top

***Herold v Wasserman*, 2021 SKCA 142**

Kalmakoff, 2021-11-01 (CA21142)

Civil Procedure - Court of Appeal Rules, Rule 13, Rule 43, Rule 71
Statutes - Interpretation - Court of Appeal Act, 2000, Section 9(5)

The appellants made four applications related to their appeal of the July 20, 2021 decision of a Queen's Bench judge that granted the respondents' application for a stay of the plaintiffs' action until a determination is made regarding the respondents' application for certification of their class action regarding the Humboldt Broncos bus crash (see: 2021 SKQB 204). In that decision (the July decision), the judge did not rule on one aspect of the plaintiffs' application, made in March 2021, for an order striking various portions of two affidavits filed by the respondents in support of their application and the appellants sought leave to appeal against the decision, citing as one of their grounds that the judge erred by failing to determine the application to strike. Leave to appeal was granted on September 8, 2020 and the appellants filed their notice of appeal. On October 6, they learned that the Queen's Bench judge had in fact rendered a separate fiat dated March 31, 2021, dismissing the strike application on the basis that the evidence was admissible. Due to a clerical error, the parties were not notified of the release of the fiat nor provided with a copy of it. As a result, the appellants now sought an extension of time to apply for leave to appeal and an order granting them leave to appeal against the March 31 fiat (the March fiat). They also sought an order granting them an extension of time to file their factum, as did the respondents.
HELD: The appellants' applications were granted for: an extension of time to apply for leave to appeal the March fiat; for leave to appeal the March fiat; to amend their notice of appeal; and an extension of time until November 30, 2021 to serve and file their appeal book and factum. The respondents were to have until January 17, 2021 to file their factums. The Court of Appeal chambers judge exercised his discretion under s. 9(6) of The Court of Appeal Act, 2000 (CAA, 2000) to extend the appeal period. The appellants had demonstrated that they had met the four factors set out in Dutchak (2009 SKCA 89): there was a reasonable explanation for the delay; a bona fide intention to seek leave to appeal; an arguable case regarding the admissibility of the evidence; and no prejudice to the respondents. The chambers judge found that it was just and equitable to extend the time. He noted that the March fiat and the July decision were both interlocutory in nature. Pursuant to s. 9(5) of the CAA, 2000, the July decision was a judgment as it disposed of the matter in issue but the March fiat was an "incidental decision." These kinds of decisions are usually

not subject to appeal until the judgment is rendered. Therefore, the clock did not begin to run with respect to the exercise of a right of appeal from the March fiat until the July decision was rendered and is properly included as part of the appeal against the latter. Regarding whether leave to appeal should be granted in relation to the proposed amended ground of appeal, the judge found, after applying the Rothmans test (2002 SKCA 119), that it was appropriate to grant leave. The appellants' proposed amendment raised a point of law that was not settled and of importance to the practice in general: whether affidavit evidence from a legal assistant should have been admitted in relation to controversial or contested matters. Consequently, the judge was satisfied that it was appropriate to permit the appellant to amend the notice of appeal pursuant to Court of Appeal Rule 13. It was also appropriate, pursuant to Court of Appeal rule 71, to grant the parties' request for extension of time to file their materials. As it was an expedited appeal under Court of Appeal rule 43, the judge set the dates for serving and filing of the appellants' factum and the respondents' factum at November 30, 2021 and January 17, 2022 respectively.

 Back to top

***Sabata, Re*, 2021 SKQB 239**

McMurtry, 2021-09-03 (QB21249)

Adult Guardianship and Co-decision-making Act - Property Guardian

The applicants, G.L. and R.B., were sisters in a dispute concerning the welfare of their mother, B.J.S., who was diagnosed with a form of dementia while a patient at the Regina General Hospital. They brought the application pursuant to The Adult Guardianship and Co decision making Act (Act). The respondents to the application were B.J.S. herself and her son, C.B., G.L.'s and R.B.'s brother. B.J.S. had seven children in all. G.L. and R.B. sought a joint and temporary personal and property guardianship order for six months so they could take the steps they believed were required to protect B.J.S.'s person and property from the actions of C.B. pending the gathering of medical information required to apply for a permanent order. The chambers judge commented that the material filed was conflicting and the conflicts were not resolvable without a trial in which the evidence could be tested by cross-examination. For instance, the applicants advanced that C.B. had arranged for B.J.S. to buy and sell a house twice to his benefit. No documents filed proved that this had happened. He noted further that the material left him uncertain about her mental condition and how her dementia affected her ability to care for herself and her property. In her affidavit, she herself said she could take care of herself. The lawyers who prepared her numerous documents deposed that she had capacity to understand their nature and effect. At the end of the day, after changing and replacing many documents over a period of time, her most recent documents included an enduring power of attorney, a living will and health care directive and a further power of attorney, whose terms provided protection to her person and her estate.
HELD: The chambers judge reviewed the Act. She was satisfied that the applicants were persons of sufficient interest to apply for the orders; that B.J.S.'s capacity was impaired to an extent that she could not make reasonable decisions about her own personal welfare or to protect her estate from serious damage or loss. However, she was not satisfied that the applicants had satisfied the requirement of need of a property guardian. Given that the powers of attorney bound the attorneys named by law to act only for the benefit of B.J.S., no temporary order was necessary.

 Back to top

***R v D.J.S.*, 2021 SKQB 257**

Robertson, 2021-10-04 (QB21243)

Criminal Law - Assault - Sexual Assault - Conviction - Appeal

The appellant appealed his conviction for sexual assault following trial before a Provincial Court judge. He had been charged in 2015, when he was 13, with sexually assaulting the 13-year-old complainant, contrary to s. 271 of the Criminal Code. The offence had occurred during the night following a birthday party for the appellant held at his mother's home. The complainant slept in a bedroom with the appellant's sister. Two friends of the appellant, I.L. and N.H., slept in his bedroom with him. The appellant's mother slept in her own bedroom at the end of the mobile home. The complainant gave an interview to the police wherein she described the appellant entering the bedroom in the early morning hours and sexually assaulting her. The interview was video-taped, the Crown entered it into evidence pursuant to s. 715.1 of the Code and it was admitted with the consent of defence. The complainant, I.L. and N.H. testified at trial regarding the night in question. The complainant adopted her video statement. The defence only called the appellant's mother as a witness. The trial judge assessed the testimony of each of the witnesses in detail. She observed that the complainant's testimony was consistent with her video statement. For numerous reasons, she did not find the testimony of the appellant's mother, I.L. or N.H. to be credible or reliable. The appellant's grounds in his summary conviction appeal were whether the trial judge: 1) misapplied s. 715.1 in relying on prior consistent statements to bolster the credibility of the complainant; 2) misapplied the R v D.W. (1991 CanLII 93) analysis and thereby shifted the onus of proof to the appellant; and 3) misapprehended the evidence and convicted based on evidence not before her. The Crown characterized this ground as a challenge under s. 686(1)(a)(i) or (iii), suggesting an unreasonable verdict or a miscarriage of justice.
HELD: The appeal was dismissed. The court noted the standard of review applicable to summary conviction appeals set out in R v A.M.B. (2015 SKQB 383) and the role of appellate courts in reviewing trial judges' reasons set out in the decision of the Supreme Court in R v G.F. (2021 SCC 20). It found with respect to each issue that the trial judge had: 1) not erred by using the video statement. Her comments on consistency did not go further than permitted. By its admission and adoption by the complainant, the video statement became part of the evidence-in-chief. The judge's repetition of her comment that it was consistent with the complainant's testimony did not make it impermissible. Under G.F., the appellate court should prefer the interpretation of the judge's statements that accords with the law; 2) had not erred in her application of the D.W. analysis because she only addressed the first step, saying that she did not wholly believe the evidence relied upon by the defence. The analysis was sufficient and she properly applied the onus of proof. It was important to note that before undertaking the analysis, the judge had previously reviewed the evidence of each witness intensively and identified where it was and was not consistent with that of the complainant, and considered the credibility and reliability of each. There was no evidence contradicting the complainant's account of the sexual assault; and 3) the judge's decision to convict was nether an unreasonable verdict nor a miscarriage of justice involving a misapprehension of the evidence. She had not erred in her findings regarding the credibility and reliability of each witness and her assessment must be accorded deference. She gave reasons for findings and they were supported by the evidence.

 Back to top

***Ross v Warnez*, 2021 SKQB 260**

Megaw, 2021-10-06 (QB21245)

Civil Procedure - Family Property - Consent Judgment - De Minimis non Curat Lex

The petitioner, a party with the respondent to a consent judgment following a pre-trial settlement conference dividing the family property, brought an application for judgment in the sum of $2,313.58, representing his opinion as to the worth of a bathroom cabinet and a garage door screen which he claimed were taken by the respondent. He also claimed the respondent owed him for her portion of property taxes in the sum of $421.58 and the cost to repair holes in the wall which the petitioner claimed were caused by the respondent's removal of the cabinet. Both parties hired counsel to represent them and filed extensive affidavits.
HELD: Though he was the presiding judge at the pre-trial settlement conference, the Queen's Bench Chambers judge found he had no jurisdiction to consider a claim involving personal family property, as all family property had been finally dealt with by the consent judgment; he could not deal with the money claim because the affidavit evidence was conflicting as far as who had the items, whether they were fixtures and how the holes were made; and in any event, he dismissed the application on the basis of the maxim "de minis non curat lex:" the court does not deal with trifling matters. He was of the view that it would make a mockery of the right to access to justice to hear the application. He declined to award costs as to do so would seem "to reward one side and punish the other" when they were equally responsible for the matter being before the court.

 Back to top

***Nunweiler v Nunweiler*, 2021 SKQB 261**

Smith, 2021-10-06 (QB21251)

Civil Procedure - Costs - Family Law

It was uncontested that on a number of occasions prior to proceeding to trial, the petitioner father, K.O.N., made offers of settlement to the respondent mother, S.D.N., including serving her with a formal offer to settle as contemplated by Rule 4-31 of The Queen's Bench Rules. The effect of service of the formal offer to settle was that if after trial the respondent was less successful than she would have been had she taken the offer to settle, the petitioner would be entitled to claim double costs under Column 1. The respondent rejected the offer to settle proposing that the parties have joint custody of the child, D., and shared parenting rights if the respondent moved with D. back to Saskatoon from Beaumont, Alberta. The matter proceeded to trial. (See: 2021 SKQB 166.) The trial judge, who would not have known of the offer to settle until the trial judgment had been rendered, awarded sole parenting rights to the petitioner to take effect on August 19, 2022, with D. to reside primarily in Saskatoon. Until then, the shared parenting arrangement would continue. The trial judge recognized that an offer to settle which is more advantageous to a party than the trial result allowed him to award double column 1 costs should he choose to exercise his discretion to do so, and that Rules 11-1 and

15-96, the latter of which applied exclusively to family law matters, affirmed the discretionary nature of cost awards.
HELD: The trial judge found that the offer to settle would have been more advantageous to the respondent than the result of the trial, and so it was open to him to order double column 1 costs. In this case, however, he chose not to do so. In a custody matter, the motive for proceeding is not money but the love of a child, and the cost award in this case would be $40,000.00 and would therefore be punitive to the respondent and D. The trial judge thus decided against an order of costs.

 Back to top

***R v L.M.*, 2021 SKQB 266**

Robertson, 2021-10-12 (QB21252)

Youth Criminal Justice Act - Mandatory Annual Sentence Review

The court record showed the young person was sentenced for second degree murder on November 7, 2017 to a seven-year closed custody and supervision order (See: R v L.M., 2017 SKQB 336). The four-year closed custody portion of the sentence was set to expire on November 6, 2021, with the supervised custody portion to take effect immediately upon its expiration. Pursuant to s. 64 of the Youth Criminal Justice Act (Act), the youth justice court judge was mandated to reconsider the sentence by way of an annual review, and had the power under s. 94(6), should he find that the young person had satisfied him he had met his onus to prove any one of the five enumerated grounds, including whether he had made sufficient progress in his rehabilitation, that the circumstances which had led to the sentence had changed materially, or on any other ground he considered appropriate, to review the sentence by changing it to open custody or to supervision. Under s. 105 of the Act, he was also required to consider the optional conditions to be included in the supervision order.
HELD: As to the mandatory sentence review, the youth justice court judge adopted the reasoning in R v A.A.Z., 2013 MBCA 33, agreeing that where the offence was a serious one as in this case, the balance between the young person's needs and the interests of society must be weighted in favour of the public's need to denounce the conduct so that on a review application, the young person must show "exceptional evidence of [rehabilitative] changes" since his initial sentence was imposed, and neither the mandatory review report filed on the review application nor the court record demonstrated such changes. On the contrary, since the last report, the young person was charged and sentenced to probation for assaulting a staff member at a youth facility. The youth justice court judge confirmed the initial sentence. As to the optional conditions to include in the supervision order, the young offender opposed the inclusion of a curfew clause, arguing that it was punitive and outside of his jurisdiction to impose. After a review of the principles and objectives of the Act, the court was satisfied that the curfew clause, by assisting in the supervision of the young person and preventing him from engaging in criminal activity after his release, was "consistent with the goals of the Act," and ordered that it be included in the supervision order.

 Back to top

***Overs v Shared Services Saskatchewan*, 2021 SKQB 270**

Robertson, 2021-10-14 (QB21256)

Civil Procedure - Jury Trial - COVID-19 - Requirements

The lawyers for each of the parties in the action and the trial judge met in a pre-trial jury conference and reached an agreement as to the manner in which the civil jury trial would proceed in November 2021. The conditions and restrictions established for the selection of the jury and the conduct of the trial were intended to protect those attending the trial and to avoid adding to the current health crisis caused by the fourth wave of the COVID-19 pandemic by reducing the opportunity for transmission of illness.
HELD: The court issued this fiat in which it stated that the Directive for Jury Trials in place when the trial is held will apply except as modified by this order. Compliance with it will be the responsibility of the sheriff. The trial will be held in a hotel to allow for greater spacing of seats than would be available in a courthouse courtroom. A mask mandate will be in place and no one will be allowed into the courtroom without proof of full vaccination and until they have had their temperatures checked by a non-contact infrared thermometer. If a witness is unvaccinated, arrangements must be made for them to testify remotely. The jurors must be vaccinated and since most adults in Saskatchewan have been vaccinated, this requirement will not unduly limit or skew the pool of potential jurors. Although the decisions in R v Morales (2021 SKQB 269) and R v C.D. (2021 SKQB 268) pertained to the authority of the court under s. 632(c) of the Criminal Code to excuse any juror who is not fully vaccinated or unwilling to disclose their status in a criminal trial, the court agreed with the reasons and found its authority in the context of a civil trial to rest in the inherent jurisdiction of the court, and the restriction was consistent with the jurisprudence. Anyone unable to attend in person may submit a written request to the registrar for remote viewing access and provide an undertaking not to recording the proceedings. Respecting jury selection, the court will review the qualifications to serve as a juror under ss. 5 and 6 of The Jury Act, 1998 with the jury pool. Persons selected from the pool will be asked to identify in writing why they are unable to serve and the judge and the lawyers will discuss whether to select or excuse them. Regarding evidence, the parties will prepare a joint exhibit book of documents where the authenticity of the record is admitted. The judge will distribute six copies to the jury after the opening address. The witnesses who testify in person will be excluded from the courtroom until they testify and witnesses testifying remotely are given leave to use any platform supported by the Court Information Technology Unit. Consultations between the judge and lawyers will take place at the start and end of each day and they will review the judge’s charge to the jury before it is given.

 Back to top

***Wasserman v Saskatchewan (Minister of Highways and Infrastructure)*, 2021 SKQB 274**

Mitchell, 2021-10-19 (QB21257)

Statutes - Interpretation - Workers' Compensation Act, 2013, Section 169

The applicants, the proposed plaintiffs in the class action relating to the Humboldt Broncos bus crash, applied for an order

directing certain of the proposed defendants in that action, the Minister of Highways and Infrastructure; the Attorney General; Premier Horticulture; Jaskirat Singh Sidhu and Adesh Deol Trucking Ltd. (the respondents) to ask the Saskatchewan Workers' Compensation Board (WCB) to adjourn their applications before it, pending the resolution of the certification hearing scheduled to commence in April 2022. The respondents had applied to the WCB, pursuant to ss. 20 and 169(1)(b) of The Workers' Compensation Act, 2013 (WCA) to determine whether certain claims advanced in the proposed class action are statute-barred pursuant to ss. 43 and 181 of the WCA. The applicants' direct request to the WCB seeking an adjournment of those applications had been denied. It stated that under s. 20(4) of the WCA, the WCB is not restrained by proceedings of the court. The applicants then made this application. They based it upon the authority of s. 14 of The Class Actions Act (CAA), s. 29 of The Queen's Bench Act, 1998 (QBA) and Queen's Bench rule 1-5(2)(c). The respondents relied upon the privative clause in s. 20(4) of the WCA. As this application was not a judicial review application, the residual authority of the Court of Queen's Bench over proceedings of the WCB, only to be exercised through the court's supervisory jurisdiction, was not available. Section 14 of the CAA was not applicable for such reasons, as it is only triggered when a class action has been formally certified. The Queen's Bench Rules are confined to proceedings before it.
HELD: The application was dismissed. The court found that, following the decisions in Pasiechnyk ([1997] 2 SCR 890) and University of Saskatchewan v Workers' Compensation Board of Saskatchewan (2009 SKCA 17), the WCB had exclusive jurisdiction respecting the issues presented to it in the respondents' applications. Further, there was no basis for interfering with the WCB's decision to refuse an adjournment of the respondents' s. 169 applications, as these were wholly discretionary decisions made within the WCB's exclusive jurisdiction. As the respondents were legally entitled to bring their applications to the WCB, the court has no authority to attempt to impede the respondents' access to it.

 Back to top

***R v LaPlante*, 2021 SKPC 52**

Metivier, 2021-10-28 (PC21041)

Statutes - Interpretation - The Animal Protection Act, 2018, Section 4

The accused was charged with offence of causing or permitting an animal to be or continue to be in distress under s. 4(2) of The Animal Protection Act, 2018. The charge was laid after animal protection officers executed a search warrant of the accused's 400 square foot house in which they found over 120 cats, two dogs and one turtle. The officers seized 106 cats, most of whom were later euthanized. The Crown alleged that the accused caused or permitted the animals to be in distress by keeping them in unsuitable conditions and/or by depriving them of food and water sufficient to maintain them in a state of good health. Numerous witnesses who had visited the house, including the officers and a veterinarian who had executed the warrant, testified as to its cluttered, filthy environment with poor air quality. Ammonia levels were measured as being at 25 ppm. The veterinarian, qualified as an expert on a voir dire, stated that ammonia levels over 5 ppm will cause respiratory harm to the eyes and skin of animals. She identified that in addition, her concerns included that the space in the house was insufficient for the number of cats. The maximum number that could reasonably be accommodated in the house was between 20 and 25. All of the witnesses said that the water

sources for the cats were contaminated. The accused denied that the animals were in distress and that they were happy and well cared for. She started a cat rescue service and it placed animals into foster care and she herself fostered between 60 and 80 cats normally. The number of rescue cats had increased dramatically since 2017, which explained why there was so many in her house. The accused provided evidence of the quality and amount of food she provided and explained that the search had happened early in the morning, before she had had a chance to attend to feeding and watering the animals. The issues were: 1) whether the animals were kept in conditions that constituted “distress” under the Act; 2) were the animals in distress as a result of being deprived of food or water sufficient to maintain them in a state of good health; and 3) if either of the previous issues were answered affirmatively, had the accused handled the animals in a manner that was reasonable in the circumstances?
HELD: The accused was found guilty. The offence was one of strict liability. The court found with respect to each issue that: 1) the Crown had established beyond a reasonable doubt that the animals were in distress; 2) the totality of the evidence had not proven beyond a reasonable doubt that the animals were deprived of food and water sufficient to maintain them in a state of good health; and 3) the accused had not acted reasonably in the circumstances. She had a responsibility not to take more cats for whom she could not provide reasonable housing and care.

 Back to top