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R. v. Castor, 2014 SKQB 14

Gunn, April 17, 2017 (QB14422)

Criminal Law – Judicial Interim Release – Application for Review

The accused applied for an order pursuant to s. 520 of the Criminal Code, reviewing the denial of bail at a show cause hearing in Provincial Court. A publication ban was imposed at the review hearing. The accused was charged with six offences under the Criminal Code, including theft while armed with an offensive weapon and using an imitation firearm while committing robbery. The accused was 26 years of age and had a lengthy criminal record of 57 previous convictions, including 8 for failing to appear, 14 for breaching court orders, 9 for assault, and 11 for property-related offences. He had relatives who offered to post bail of $100 and to have him live with them. The accused argued that the judge had made an error in principle in failing to provide reasons for his continued detention. The Crown disputed the allegation that the reasons were insufficient by pointing to the transcript, which showed that the judge had noted the accused's criminal record showed he might fail to attend at court, and that there was a concern for public safety because the accused had been convicted of 12 violent offences. HELD: The application was dismissed. The court found that the reasons of the Provincial Court judge were adequate in the circumstances.

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R v Neary, 2017 SKCA 29

Ottenbreit Caldwell Whitmore, April 25, 2017 (CA17029)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Marijuana – Sentencing – Appeal
Constitutional Law – Charter of Rights, Section 7, Section 12

The appellant was convicted of possession of marijuana for the purpose of trafficking under s. 5(2) of the Controlled Drugs and Substances Act, trafficking in marijuana in an amount exceeding three kilograms contrary to s. 5(1) of the Act, and possession of proceeds obtained by a crime contrary to ss. 354(1) and 355(b) of the Criminal Code. The appellant pled guilty to possession of psilocybin contrary to s. 4(1) of the Act. He received a suspended sentence of two years on all charges concurrent (see: 2016 SKQB 218). The Crown appealed all four sentences. The appellant had no prior criminal record. He attended university on an athletic scholarship and had been a good student. He volunteered at charitable and community organizations. He had maintained steady employment since 2007 and had a strong support network from his family, friends and the community. The trial judge decided that since the federal government was taking steps to legalize marijuana, he would impose a suspended sentence (see: 2016 SKQB 218). The Crown appealed the sentence in respect of all four offences. The appellant appealed the decision of the trial judge to dismiss his application under ss. 7 and 12 of the Charter that the Safe Streets and Communities Act was unconstitutional because it removed a conditional sentence option for those convicted of offences under s. 742.1 of the Code. He argued on appeal that the amendment of s. 742.1 by the Act was overbroad, contrary to s. 7 of the Charter. The offences for which he had been convicted should not be treated as serious offences where favourable personal circumstances such as his existed and institutional imprisonment was not required.
HELD: The Crown's appeal was allowed. The court found that the suspended sentence was unfit and substituted a sentence of 15 months' incarceration. It apportioned the sentence as follows: 15 months for the first charge; 15 months for the second charge, concurrent to all other convictions; 30 days concurrent for the third charge; and six months concurrent for the fourth charge. The court found that the trial judge had erred in law in considering future changes to the law and overemphasized the appellant's personal circumstances. He failed to take into account the seriousness of the offences and the level of the appellant's moral culpability as he had trafficked in a large

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Statutes – Interpretation – Workers' Compensation Act, 2013, Section 23(3)

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volume of marijuana, held a high position in the distribution system and participated in it for commercial gain. The court dismissed the appellant's appeal. The amendment to s. 742.1 of the Code was not overbroad. It found that the principles of deterrence and denunciation were paramount in the sentencing of drug offences as committed by the appellant. Removal of the conditional sentence option served the legislative purpose of the Act to deter serious crime and in the appellant's case, to deter individuals such as him from engaging in illegal activities that appear to generate quick and easy money.

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R v Nguyen, 2017 SKCA 30

Lane Ottenbreit Caldwell, April 27, 2017 (CA17030)

Criminal Law – Appeal – Acquittal
Criminal Law – Assault – Sexual Assault – Consent
Criminal Law – Assault – Sexual Assault – Mistaken Belief

The Crown appealed the respondent's acquittals on Criminal Code charges of committing sexual assault, contrary to s. 271, and sexual touching with a part of his body on a person under 16, contrary to s. 151. The Crown argued that the trial judge erred in law when she found that the respondent honestly believed the complainant was of legal age to consent to sexual intercourse, and she further erred when addressing whether the respondent took all reasonable steps to ascertain the age of the complainant. The respondent had consensual sex with a 13-year-old complainant when he was 32 years old. The appellant first met the complainant when she was 10 years old, at which time he knew she was prepubescent. When they had sex, the respondent and complainant had little or no preliminary conversation about doing so, nor did the appellant ascertain her age.
HELD: The appeal court quashed the verdict of acquittal because the trial judge failed to consider whether the respondent's mistaken belief arose from recklessness, willful blindness, or self-induced intoxication. Section 273.2 applies to all sexual assaults, so the availability of the mistake of fact defence rests on whether there is an air of reality to it. If the mistaken belief resulted from recklessness, willful blindness, or self-induced intoxication, the defence of mistake of fact was not available. If the belief was honest, the analysis proceeded to the second stage. The court found the same two-stage analysis occurred in s. 150.1, where legal capacity to consent to sexual

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R v Shain

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S.A.F. v R.A.M.

S.K. v J.Z.

Saskatchewan (Office of the Information and Privacy Commissioner) v University of Saskatchewan

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activity was determined on the basis of the complainant's age. Therefore, s. 150.1(4) requires a court to draw inferences from the evidence as to whether the accused held an honest belief that the complainant was over the legal age of consent. The court concluded that where a defence of mistake of fact as to the age of the complainant was advanced, the court had to have regard for whether recklessness, willful blindness or self-induced intoxication were raised on the evidence, and if so, how those factors affected the honesty of the accused's belief. There was sufficient evidence to give rise to an inquiry as to whether the respondent's mistaken belief that the complainant was 16 years of age or more had arisen from self-induced intoxication. A new trial was ordered because the trial judge did not make all the findings necessary to permit the appeal court to decide whether the respondent did not honestly believe the complainant was 16 years of age or more.

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R v Bird, 2017 SKCA 32

Richards Ottenbreit Whitmore, May 5, 2017 (CA17032)

Criminal Law – Long-term Offender – Long-term Supervision Order – Breach – Acquittal – Appeal

The Crown appealed the decision of a Provincial Court judge that acquitted the respondent of the charge of violating a term of his long-term supervision order under s. 753.3(1) of the Criminal Code (see: 2016 SKPC 28). The respondent had been found to be a long-term offender and was given a sentence comprised of a penitentiary term followed by a period of long-term supervision. The Parole Board determined that as a condition of the supervision, the respondent was to begin it by residing at a community correctional centre. After completing his prison sentence, the respondent began residing in such a centre but left it and did not return. He was eventually apprehended and charged under s. 753.3(1) of the Code. At trial, he defended by arguing that the residency requirement was unlawful and the trial judge agreed, finding the requirement to be a violation of s. 7 of the Charter. The Crown appealed from the decision on the ground that the trial judge should not have allowed the respondent to make a collateral attack on the board's order. HELD: The appeal was allowed and the respondent's acquittal was set aside. The court found that the trial judge erred by permitting the respondent to collaterally attack the residency condition. After reviewing the factors set out in Maybrun, the

court found that although it was not clear in this case how to construe Parliamentary intention, the balance tipped in favour of the Crown.

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R v Thompson, 2017 SKCA 33

Ottenbreit Caldwell Whitmore, May 5, 2017 (CA17033)

Criminal Law – Assault – Sexual Assault – Conviction – Appeal
Criminal Law – Assault – Sexual Assault – Sentencing – Appeal

The appellant was convicted of sexual assault, pursuant to s. 271 of the Criminal Code, and sentenced to 22 months of incarceration followed by two years of probation (see: 2014 SKQB 313). The complainant was 36 years of age and had an intellectual disability. The appellant, a friend of the complainant's family, had given her massage treatments commencing when the complainant was in her twenties. During the treatments, the appellant had, over a period of years, inserted his fingers into her vagina approximately 40 to 50 times. The appellant confirmed that he had done so but testified that he had always asked and received permission to do so from the complainant. He appealed his conviction on the grounds that the trial judge erred: 1) by incorrectly applying the standard of reasonable doubt; 2) by providing inadequate reasons for his decision regarding the conviction; and 3) by failing to consider the defence of honest but mistaken belief in consent. The Crown appealed the sentence.
HELD: The conviction appeal was dismissed. The sentence appeal was allowed and a sentence of three years' incarceration was substituted. The court found with respect to the appellant's grounds of appeal that the trial judge had not erred: 1) in his W. (D.) analysis. He clearly believed the complainant's evidence that she had not consented and decided that her memory issues had not detracted from her reliability. After considering the evidence as a whole, the judge rejected the appellant's evidence; 2) in the provision of adequate reasons. Although he did not specifically indicate why he disbelieved the appellant, the lack of such indication did not mean that his reasons as a whole were inadequate; and 3) in not considering the defence, because there was no air of reality to it and therefore it was not necessary for him to address the issue. Regarding the sentence, the court found that the sentence imposed by the trial judge was unfit because it was not proportional. The appellant followed a persistent course of abusive conduct toward the complainant

over many years and in the context of a relationship where the appellant was in a position of trust and authority. The complainant's mental age was that of a 13-year-old and her vulnerability was high. The mitigating factors consisted of the appellant not having a criminal record, being remorseful and having been found to be at low risk to reoffend.

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Sikora v Sikora, 2017 SKCA 37

Ottenbreit Caldwell Ryan-Froslie, May 12, 2017 (CA17037)

Family Law – Custody and Access – Variation
Family Law – Child Support – Variation

The appellant appealed against the order of a chambers judge that varied a shared parenting arrangement and child support order originally made in September 2014 and confirmed under a consent order in January 2016. Prior to the initial order, the appellant committed the offences of break and enter and assault with a weapon at the respondent's residence. In November 2015, he pled guilty and was sentenced to ten months' incarceration. At the time of his sentencing, and seemingly because of it, the respondent applied to vary the initial order, requesting sole custody of the three children with reasonable access to the appellant and a determination of his income for support purposes. The chambers judge found that because of the appellant's incarceration, there was a material change that could not have been contemplated at the time of the initial order. He gave sole custody of the children to the respondent with reasonable access to the appellant. He varied the appellant's support obligation commencing May 1, 2016.
HELD: The appeal as to custody and access was allowed, but the child support obligations were varied. The court found that the chambers judge mistakenly referred to the terms of the initial order. The parties had confirmed their agreement by the consent order while they had knowledge of the very circumstances that the judge relied upon to find a material change. The finding must be set aside as the product of an error in principle. As the appellant's imprisonment had ended, the joint custody and shared parenting arrangement that was in place under the final order was reinstated. The appellant's employment income had been affected by his incarceration, which was reasonably foreseeable at the time the parties consented to the final order. Therefore, the appellant must be taken to have agreed to have his 2016–2017 child support obligations determined on the basis

of his 2015 income. His 2017–2018 support obligations would be determined on the basis of his 2016 income, which would take into account any reduction in his income. The court adjusted the amount of child support and s. 7 expenses owed by the appellant during the period when the respondent had sole custody. Effective June 2017, the parties were to reassess their respective ongoing monthly child support and s. 7 expense obligations on the basis of their respective 2016 incomes in accordance with the terms of the final order.

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R v K.A., 2017 SKCA 39

Richards Ottenbreit Whitmore, May 2, 2017 (CA17039)

Criminal Law – Appeal – Acquittal
Criminal Law – Assault – Sexual Assault
Criminal Law – Mens Rea

The Crown appealed the acquittal of the young person on a charge of break and enter a dwelling house and commit therein the indictable offence of sexual assault with a weapon, contrary to s. 348(1)(b) of the Criminal Code. The accused was convicted of the lesser included offence of break and enter and commit assault with a weapon, contrary to s. 348(1)(b) of the Criminal Code. The complainant woke up to find the accused standing at the side of her bed touching her. The accused went into the kitchen when the complainant screamed. He got a kitchen knife and followed the complainant back to her bedroom where she got him some money. The accused then told the complainant to take her clothes off and he began touching her again. They struggled and the accused ran out of the house. One ground of the Crown's appeal was that the trial judge erred in his application of the essential elements of the offence of sexual assault.
HELD: The trial judge committed an error of law because he misunderstood the mens rea of sexual assault. Sexual assault only requires general intent. The trial judge erred because he required touching that was clearly directed at violating the complainant's sexual integrity. The appeal court found it clear that the accused exhibited conduct that, on the whole, was sexual or carnal to a reasonable observer. The acquittal was set aside and a conviction substituted. The matter was remitted to the trial judge for sentencing.

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Dunnison Estate v Dunnison, 2017 SKCA 40

Jackson Caldwell Ryan-Froslie, May 31, 2017 (CA17040)

Real Property – Joint Property – Right of Survivorship
Wills and Estates – Gifts
Wills and Estates – Trusts – Resulting Trusts

The testator transferred the family cottage into joint names of herself and her two sons—the appellant executor and the respondent—with right of survivorship. After her death, the appellant applied to the court for an opinion as to whether a resulting trust or gift had been created by the transfer. The chambers judge concluded that no resulting trust had been created when the property was transferred. The appellant appealed. The transfer to joint tenants occurred shortly after the testator's husband's death in 1995. In 2010, the sons had disagreements, and the respondent wrote to the applicant seeking to sell his interest in the cottage to him. The testator wrote back to the respondent's lawyer indicating that she had transferred the cottage into the joint tenancy "for estate simplification purposes and for no consideration and that it was not her intention that any beneficial interest in the cottage would be disposed of to [either son]". She indicated that she had not reported any disposition of the cottage for tax purposes and that she had paid most of the costs associated with the cottage. She requested that the respondent transfer his interest back to her. The respondent did not transfer his interest back to her so she excluded him as a beneficiary of her estate. The will indicated that all of the testator's interest in the cottage be transferred to the appellant. She also indicated that the transfer of the cottage was for estate planning purposes only and that the bare legal interest the respondent obtained on the transfer was held by him for the estate. The chambers judge concluded that there was no written agreement establishing a trust and, thus, based on her interpretation of the law, a transferor could not regain his or her beneficial interest in land without a written agreement. The issues for the court were as follows: 1) could the presumption of resulting trust and voluntary transfer resulting trusts exist with respect to land in Saskatchewan; 2) whether the Statute of Frauds applied to resulting trusts; and 3) if voluntary transfer resulting trusts can exist with respect to land in Saskatchewan, did such a trust arise.
HELD: The appeal was dismissed. The issues were dealt with as follows: 1) the type of possible resulting trust was a voluntary resulting trust where property was voluntarily transferred to another. The Supreme Court of Canada has endorsed the

application of resulting trusts and the presumption of resulting trust to the gratuitous transfer of property, but has not considered whether those concepts are compatible with land titles legislation such as in Saskatchewan. The Court of Queen's Bench has found that voluntary transfer resulting trusts cannot be imposed on land in Saskatchewan. In Saskatchewan, it runs counter to the central tenets of The Land Titles Act, 1978 to speak of a "presumption of indefeasible title", which is capable of being rebutted as if it were an evidentiary rule. The voluntary transfer resulting trust can arise with respect to land in Saskatchewan, but the appeal court found that the presumption that accompanies the trusts is incompatible with ss. 90(1) and 213(1) of The Land Titles Act, 1978. Those sections indicate that the transfer is taken as conveying absolute title to the transferee; 2) pursuant to s. 8, the Statute of Frauds does not apply to resulting trusts; and 3) because the presumption of resulting trust is incompatible with ss. 90(1) and 213(1) of the The Land Titles Act, 1978, the onus was on the appellant to establish on a balance of probabilities that the testator did not intend a gift when she transferred the cottage into the joint names with a right of survivorship. The issue was the testator's intent at the time of the transfer. The testator did not prepare a deed of gift or a declaration of trust. There was no conflict in the evidence that the sons understood that they were receiving the cottage on their mother's death and not before. The court found that the evidence established that the testator had donative intent. The testator had recently received the cottage through right of survivorship when her husband died so the court presumed that she understood its effect. The testator intended a gift.

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Dearborn v Saskatchewan (Financial and Consumer Affairs Authority), 2017 SKCA 41

Richards, May 31, 2017 (CA17041)

Courts – Court of Appeal – Chambers Motion – Production of Materials
Statutes – Interpretation – Securities Act, 1988

The appellant made a motion requesting various relief, including relief pursuant to rules 38 and 59 of The Court of Appeal Rules and a request for an order requiring production of specified materials relating to the June 15, 2015 hearing and the May 7, 2014 order. The June 15, 2015 hearing was regarding the identity of the person that provided the tip leading to the

investigation into the appellant's matters. The appellant requested release of the Memorandum of Fact and Law that was provided to the hearing panel, but the respondent resisted on the grounds that it was not relevant to any of the grounds of appeal in the case. The appellant also requested any pleadings relied on and all other materials and evidence submitted and relied upon to obtain the May 7 order.
HELD: The application was dismissed insofar as it was brought pursuant to rules 38 and 59, because those applications had to be made to the court rather than to a judge in chambers. The court concluded that it had authority to order the production of the documents relevant to the appeal pursuant to s. 20 of The Court of Appeal Act, 2000 and s. 11(3) of The Securities Act, 1988. The court ordered that the Memorandum of Fact and Law and any other written submissions made to the hearing panel be provided to the appellant's counsel forthwith. There was no suggestion that the submissions were privileged or that they contained confidential information. The court found that there was nothing to suggest there was a decision underpinning the May 7 order. Subsection 12(2) of The Securities Act, 1998 indicates that the commission may order or appoint a person to make any investigation considered necessary, it does not indicate that a decision is made first. The appellant also did not explain how documents relating to the order would be relevant.

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R v O'Dell, 2017 SKPC 35

Green, May 3, 2017 (PC17030)

Criminal Law – Controlled Drugs and Substances Act – Trafficking – Fentanyl
Criminal Law – Defences – Charter of Rights, Section 8
Criminal Law – Search and Seizure

The accused was charged with trafficking fentanyl, contrary to s. 5(1) of the Controlled Drugs and Substances Act (CDSA). An officer received information the accused was sending fentanyl through the mail to a relative in Manitoba. He was not sure where the package had been dropped off, but he and another officer attended at the correct postal outlet and were given the package by a postal employee. The postal employee and her supervisor advised the officers that they did not need anything to seize the package. The officer applied for and received a warrant to open the package. The package contained patches of fentanyl. The officer later learned from the Postal Inspector that

he did not follow the correct process in seizing the package pursuant to the Canada Post Corporation Act. The other officer indicated that they wanted to act quickly to seize the package due to a concern for public safety. Neither officer had been involved in seizing packages in the mail before. The issues were as follows: 1) did the accused have a reasonable expectation of privacy in the package to engage protection for her under s. 8 of the Charter; 2) if so, was the seizure unreasonable and a violation of the accused's rights under s. 8; and 3) if so, should the evidence be excluded under s. 24(2).
HELD: The issues were determined as follows: 1) the court disagreed with the Crown that the accused did not have a reasonable expectation of privacy in the package after she mailed it and at the point it was seized. The accused did not have a reasonable expectation of privacy regarding the information the postal employee gave the officer that the accused had been at the postal outlet that day to mail a package. The court said that a reasonable person would expect a package just mailed at a Canada Post outlet to be secure from interference, except as authorized by law, until the package is delivered to the addressee; 2) the court held that the seizure was not authorized by s. 11(1) of the CDSA because the requisite exigent circumstances were not present. The court also found that s. 489(2) did not authorize the seizure because the officers only had a reasonable suspicion that the package contained drugs. They did not have reasonable grounds to believe the offence of trafficking had been committed. The Canada Post Corporation Act also did not authorize the seizure. The seizure was unreasonable and in violation of the accused's s. 8 charter rights; and 3) the court concluded that the breach was at the mid-range of seriousness. The officers were acting in good faith and did obtain a warrant before they opened the package. The impact of the breach on the accused's Charter-protected rights was not at the upper end of the scale. The court had no doubt that the evidence sought to be excluded was relevant and reliable. Society's interest in adjudicating the case on its merits was found to favour the admission of the evidence. The admission of the evidence would not bring the administration of justice into disrepute. The Charter application was dismissed.

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R v Otu, 2017 SKPC 40

Lang, May 5, 2017 (PC17032)

Criminal Law – Assault of a Peace Officer in Execution of his

Duty
Criminal Law – Beyond a Reasonable Doubt
Criminal Law – Evidence – Credibility

The accused was charged with two counts of assaulting peace officers of a correctional centre engaged in the lawful execution of their duty, contrary to s. 270(1)(a) of the Criminal Code. Both victims were guards of a provincial correctional facility. The Crown indicated that it was only going to call the two guards as witnesses but was not going to enter the video of the entire incident that it had in its possession. Only one guard ended up testifying, and the charge involving the other guard was stayed. The guard testified that the accused was on a tier where he was not supposed to be. The accused was asked to return to tier one. The guard told the accused that he was going to be confined to his cell for the rest of the day because he was moving too slowly. When the accused got to the bottom of the stairs he went to the basketball court instead of to his cell. The two guards then went to the basketball court and instructed the accused to go to his cell at least six times. The accused was slim and shorter than average and one guard was a medium build and the other was large. According to the guard, the accused fought both guards as they were trying to restrain him. Two video segments were entered into evidence: the first showed the accused descending the stairs and the second showed the alleged assault on the basketball court. The issues were as follows: 1) did an assault occur; and 2) was the guard acting in lawful execution of his duty when he applied force to the accused.
HELD: The court viewed the video and did not find that the accused was walking down the stairs too slowly. The guard's order that the accused be confined to his cell for the day was excessive for such a minor infraction. The court viewed the video evidence numerous times and saw the guards entering the basketball court, grabbing the accused and applying considerable force to him as they pushed him back against the wall. The accused did not throw any punches. The guards were on top of the accused 18 seconds after they first made contact with him on the court. The court determined the issues as follows: 1) the guard said the accused punched him in the right side of his face, but the court found that did not happen. The accused's head may have struck the right side of the guard's face during the take down. The accused's arm also appeared to graze the left side of the guard's neck as a reflex or inadvertent action. An assault was not proven; and 2) the guard testified that he was acting within the scope of his authority during the incident. The court found that the guard was not a credible witness. The court found that the guards had only one purpose and that was to physically take down the accused as quickly as possible. Further, the court determined that the accused was not being

antagonistic to the guards as they approached him. The guards were not acting lawfully. The accused was found not guilty.

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R v Lariviere, 2017 SKPC 41

Schiefner, April 26, 2017 (PC17026)

Criminal Law – Assault – Sexual Assault – Consent – Mistaken Belief
Criminal Law – Evidence – Credibility

The accused was charged with sexually assaulting his coworker, contrary to s. 271 of the Criminal Code. The accused admitted a sexual encounter with the complainant, but said it was consensual. The accused met up with the complainant, her aunt, and others at a bar. He was the designated driver. The complainant said that she, her aunt, and the accused then went to another bar where she and her aunt had a few drinks. The accused then drove the complainant and her aunt to the complainant's house. The aunt got out of the vehicle and went to the house. The complainant said that she then asked the accused to drive her to her boyfriend's house, but he would not answer the door so the accused drove the complainant back to her house. The complainant said that she eventually went into her house and went to bed and admitted to being pretty drunk. She said that she woke up to find the accused in bed beside her. The complainant said that the accused then sexually assaulted her. She said that she tried to push him off but couldn't. She said that she told the accused to stop more than once and called out her boyfriend's name. The accused's evidence differed from the complainant's. The accused said that he and the complainant held hands and kissed twice at the second bar. He said that the complainant was upset when the boyfriend did not answer the door and they went and bought her some more alcohol. He said that they both went inside when they returned to the complainant's house. He went to sleep on the couch. According to the accused, he went to the complainant's bedroom when he was going to leave early in the morning so that she could lock the door behind him. He said the complainant started kissing him when he woke her up and they started having sex. The accused said that he stopped when the complainant referred to him by her boyfriend's name. The accused initially told the police that they did not have sex, but then went back to the police station two days later and admitted to having sex.
HELD: The court concluded that both witnesses presented as

credible, honest, and forthright. The court concluded that the complainant did not intend and did not consent to having sex with the accused. The Crown proved the actus reus of the offence. The accused's evidence raised an air of reality to his defence that he had an honest but mistaken belief in consent. The court found that the complainant would have had the capacity to consent and would have been capable of communicating a valid consent. Both witnesses testified that the encounter ended when the complainant called out her boyfriend's name. Prior to the complainant calling out the boyfriend's name, the accused would have no way of knowing that the complainant thought she was having sex with her boyfriend. The court was not satisfied beyond a reasonable doubt that it was reckless for the accused to assume that the complainant was consenting to a sexual encounter with him or that he was willfully blind in the circumstances. The court was also not satisfied beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain that she was consenting to have sex with him. The accused could have reasonably and plausibly held the honest but mistaken belief that the complainant had consented. The accused was found not guilty.

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R v April, 2017 SKPC 42

Anand, April 25, 2017 (PC17027)

Criminal Law – Controlled Drugs and Substances – Possession for the Purpose of Trafficking – Methamphetamine

The accused was charged with possession of a controlled substance, methamphetamine, for the purpose of trafficking under s. 5(2) of the Controlled Drugs and Substances Act. Under a warrant, the police searched the residence into which the accused had moved just one day earlier. All of the entrances to the residence were barricaded with metal bars that could only be unlocked from the inside. The police found the accused and another person in the kitchen. The accused had $1,074 in his wallet. Items such as cell phones, score sheets, plastic baggies and digital scales were nearby in plain view. Behind a baseboard in the basement, the police found plastic bags containing over 50 grams of methamphetamine. The Crown called an expert witness regarding the packaging, distribution and pricing of the drug, and he testified that drug traffickers often barricade the buildings in which they store their drug supplies. The quantity

of drugs found in the search and the other items found indicated that the drug was possessed for the purpose of trafficking. He could not confirm that the cash found on the accused's person was proceeds from crime because it was not a large amount nor was it bundled. The Crown argued that the accused was in constructive or joint possession of the drugs found in the residence because there was no evidence that the accused was in personal possession. The issues were as follows: 1)whether the accused had the requisite knowledge to find him in possession of the drugs; and 2) if so, whether he had the requisite element of control necessary to find him in possession of the drugs as required by s. 4(3) of The Controlled Drugs and Substances Act. HELD: The accused was acquitted. The court found that the accused was in possession because he had the requisite element of knowledge. The drug paraphernalia led to the inference that he knew or was willfully blind to the presence of drugs in the residence. However, the court found that the accused did not have the requisite element of control necessary to find him in possession since he was not the only occupant of the house.

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R v Neapetung, 2017 SKPC 43

Singer, May 5, 2017 (PC17034)

Criminal Law – Assault – Aggravated Assault – Sentencing
Criminal Law – Unlawful Confinement – Sentencing
Criminal Law – Sentencing – Aboriginal Offender

The accused pled guilty to charges of unlawful confinement and aggravated assault contrary to s. 279(2) and s. 268(1) of the Criminal Code. He also pled guilty of carrying a sawed-off rifle with ammunition, violating the terms of a prohibition order. The first set of charges arose as a result of gang activity. The victim, a member of the Terror Squad, was confined by the accused and others who were members of the rival gang, the Indian Posse. During the confinement, the accused committed many severe assaults on the victim. The accused admitted to the police what he had done shortly after being arrested. Both the Crown and defence counsel raised the Gladue factors as pertinent to the accused. He was raised in an abusive home where he had to look after his siblings because his mother and stepfather were either absent or intoxicated. After being placed in a number of different foster homes, he ran away at the age of 13. His criminal record started at that point, and he committed 26 offences as a young offender. When he was 15 and just about to be released

from a detention centre to the care of his stepfather, his mother and her boyfriend murdered the stepfather. As a result of his grief, the accused became a member of a street gang at 16. As an adult, the accused had committed 18 offences. After serving a number of prison terms, the accused stopped drinking and obtained regular employment for a period of three years. When his mother died, the accused's grief caused him to return to using drugs and associating with gang members. The Crown argued that the mitigating factors were that the accused had pled guilty early, which demonstrated remorse. The Gladue factors would reduce his sentence for confinement and aggravated assault to eight years concurrent and the firearm offence to one year concurrent. As the accused had been on remand, he would receive credit of 1:1.5, resulting in a total sentence of nine years less 18 months. The defence suggested a sentence of six years and one year consecutive respectively for the two sets of charges, resulting in a total sentence of seven years less remand credit as calculated by the Crown.
HELD: The accused was sentenced to seven years for aggravated assault, seven years concurrent for confinement and one year consecutive and one year concurrent for the firearm charges, resulting in a total sentence of eight years less 19 months' credit for time on remand. The court found that the Gladue factors directly related to the accused's commission of the crimes and resulted in a less lengthy jail sentence from the maximum sentence.

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R v C.M.S., 2017 SKPC 48

Anand, May 23, 2017 (PC17036)

Statutes – Interpretation – Youth Criminal Justice Act, Section 29(2)

The young offender, 17 years of age, was charged with a number of offences. Pursuant to s. 31 of the Youth Criminal Justice Act (YCJA), she was released to the care of a responsible person. Shortly thereafter, the young offender was charged with new offences, including a breach the conditions of her s. 31 undertaking. The Crown applied to detain her in custody on the new charges, revoke her previous release documents and remand her until she could be dealt with according to the law, pursuant to s. 524(8) of the Criminal Code and s. 29(2) of the YCJA. The defence argued the adult bail provisions contained in s. 524(8) of the Code did not apply to a young person.

HELD: The application was dismissed. The court found that a youth justice court judge does not have jurisdiction to grant such an application. Section 29(2) of the YCJA restricts the ability of youth court judges to order pre-trial detention for youths. The comprehensive nature of this provision also precludes youth justice court judges from revoking youth bail under s. 524(8) of the Code. The court noted that the young offender's bail conditions could be revisited and the Crown could apply to have her release order reviewed by the Court of Queen's Bench under s. 521 of the Code, which applies to youths by virtue of ss. 28 and 140 of the YCJA. Alternatively, the Crown could apply to a youth justice court judge under s. 31(4) of the YCJA to review the undertaking made by the young offender.

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R v Shain, 2017 SKQB 115

Elson, April 21, 2017 (QB17104)

Criminal Law – Motor Vehicles Offences – Driving with Blood Alcohol Exceeding Legal Limit – Conviction – Appeal
Constitutional Law – Charter of Rights, Section 10(b) – Appeal

The appellant was convicted of operating a motor vehicle while his blood alcohol content exceeded .08, contrary to s. 255(1) and s. 253(1)(b) of the Criminal Code. He appealed his conviction on the ground that the trial judge erred in finding that his right to counsel under s. 10(b) of the Charter had not been violated at the time of his arrest. Because of this finding, the trial judge admitted the evidence of the breath sample. The appellant had been stopped by an RCMP officer to check his sobriety. Because his eyes were bloodshot, the officer asked him if he had been drinking, and the appellant said that he had had three beers. The officer administered the ASD test and the appellant failed. The officer placed the appellant under arrest for impaired driving and read him his Charter rights. Although her usual practice was to inquire as to whether the detainee wanted to consult a lawyer, she failed to do so and went directly to the breath demand. At the detachment, the Breathalyzer technician was called and the observation period had commenced before the officer realized that she had not asked the appellant if he wanted to speak to a lawyer. She then asked him and he responded, "No, not now". Immediately following this, the appellant provided a breath sample. The trial judge found that the appellant's words meant that he did not want to consult a lawyer. The defence contended that the appellant's response was

equivocal and thus the officer was required to follow up and ensure that he understood his s. 10(b) rights before breath samples were taken. As the officer did not fulfill her implementation duty, the evidence should have been excluded pursuant to s. 24(2) of the Charter.
HELD: The appeal was dismissed. The court held that the trial judge had not erred. The officer had properly fulfilled her informational duty and the appellant's response indicated that he did not want to consult a lawyer. Therefore, he had not invoked his right to counsel and the officer's implementation duties were not triggered. No violation of s. 10(b) of the Charter had occurred.

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R v J.T.B., 2017 SKQB 121

Chow, April 28, 2017 (QB17107)

Criminal Law – Assault – Sexual Assault

The accused was charged with committing sexual assaults, contrary to s. 271(1) of the Criminal Code. The offences were alleged to have first occurred in 1995 when the complainant was nine and ended in 2001 when she was 15. The accused was the complainant's brother-in-law. The complainant visited her sister's house and stayed overnight there frequently. She said that the accused had touched her vagina on at least 30 separate occasions while she was asleep on the couch of his house. The accused denied that he ever touched the complainant. The second type of assaults described by the complainant began when she was 14. She alleged that they occurred between 20 and 30 times while she and the accused were driving in his vehicle. She would sit on his lap and he would rub her thighs and insert his fingers into her vagina. The accused admitted that he took the complainant driving on two occasions when she was 14 and that he placed his hands on her thighs but denied that he did anything else. He testified that he asked the complainant the first time if it was okay with her, and she confirmed that it was. He did not expressly ask her when they went out the second time. The complainant testified that she could not recall the events with precision. When she was 14, she told her mother about the incidents in the accused's vehicle and the mother confronted him and he apologized. The complainant told her sister about the driving incidents in 2011 after learning that her sister was having marital difficulties. The complainant's sister and her mother then confronted the accused and said that they "knew

what he had done" and the accused agreed to sign an agreement giving his then-wife ownership of various family assets. The accused testified that he did not know what it was that he was supposed to have done but agreed to sign the agreement because he knew the marriage was over and wanted to meet his obligations. He argued that the complainant was motivated to lay the charges against him because it would help his former wife to obtain consent from the court to move from Saskatchewan.
HELD: The accused was found guilty of sexual assault. The court reviewed the evidence of the complainant, her mother and her sister and the version of events provided by the accused against the standard set out in R v W.(D.). With respect to the first set of allegations, the court found that because she had not disclosed them to her mother or her sister when she informed them about the second set, it did not believe her. When she made the allegations, she had a motive to fabricate. These findings raised a reasonable doubt, and the court resolved it in favour of the accused. Regarding the second set of allegations the court accepted the accused's evidence as to what occurred on the two occasions in his vehicle. The touching was sexual in nature and the accused had not obtained the complainant's consent to the second incident or incidents.

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R.J., Re, 2017 SKQB 126

McIntyre, May 3, 2017 (QB17117)

Family Law – Child in Need of Protection – Temporary Order

The Ministry of Social Services sought an order finding two children in need of protection and that they be permanently committed to the care of the Minster with the intention that the children would be adopted by their maternal grandmother. The parents of the children had severed their relationship. Both of them lived in British Columbia, where the mother had formed a new relationship. The mother opposed the application and requested that the children be returned to her care. The father supported her position but had no wish to be involved in his children's lives until they were older. While they lived together, the parents had had a history of abuse of prescription medications. At different times, the family had lived in British Columbia and in Saskatchewan, near the maternal grandmother. In May 2014, the father was in a car accident and his 5-year-old daughter was in the vehicle with him. He was charged with

operating a motor vehicle while impaired by a drug. The RCMP went to the family's residence to explain what had happened but could not rouse the mother. The children were then apprehended by the Ministry and placed with their maternal grandmother. She testified that the children had behavioural problems when they began living with her and had not been eating properly. Their medical and dental care had been neglected. Three months after the apprehension, the parents moved to Manitoba after being evicted from their residence near the maternal grandmother's home. They began to miss scheduled visits with their children. In January 2015, the parties agreed upon an interim order pursuant to s. 35 of The Child and Family Services Act that provided the children would remain in the care of the Ministry and established a set of conditions for the parents. Without notice to the Ministry or the maternal grandmother, the parents moved to British Columbia. During the following period, the parents had telephone contact with their children, although the father's calls seemed to have a detrimental effect on the son's conduct. Social workers reported that the children were thriving in the care of their grandmother and her husband. The mother advised the court that she was in a stable relationship with a new partner. She had stopped using medications such a hydromorphone since December 2014 and provided recent drug screens, which were negative. When asked why she had not returned to Saskatchewan at the end of March 2015 when she and her husband had separated to work on getting her children back, the mother said that she did not feel that the province had adequate resources. She denied that she had a serious problem abusing prescription medication. She testified that she would be prepared to return to Saskatchewan for a period of one to six months in order to rebuild her relationship with the children and demonstrate that she could care for them but ultimately she would reside in British Columbia with her new partner.

HELD: The children were found to be in need of protection pursuant to s. 11 of the Act. The court rejected the mother's explanation for leaving Saskatchewan after the interim order was made and it was not convinced that if the children were placed back in her care that she could meet their needs. The court decided that it would be appropriate to place the children in the custody of the Ministry for six months under s. 37(1)(c) of the Act subject to the conditions that the mother would obtain a suitable residence in Saskatchewan. For two months, the children would visit their mother a minimum of three times each week for three hours and the duration should increase as the visits increased. After two months, the children would be placed in their mother's full-time care subject to the Ministry's supervision. The mother was to participate in any programs as

directed by the Ministry. At the conclusion of the six-month period, the children could accompany their mother to British Colimbia if approved by the Ministry.

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S.A.F. v R.A.M., 2017 SKQB 129

Goebel, May 5, 2017 (QB17119)

Family Law – Custody and Access
Family Law – Child Support
Statutes – Interpretation – Family Maintenance Act, Section 3(3)

During the course of their common law marriage, the parties had three children, now aged 16, 13 and 7. The respondent admitted that there was substantial conflict during the relationship but denied that he physically abused the petitioner. After their separation in 2013, the children lived variously with their mother, father, maternal grandmother and a third party. The youngest child had lived primarily with the petitioner for some time. After the respondent assaulted the two oldest children in 2016 while he was inebriated, the oldest child moved in with her boyfriend's family, where she remained, and the middle child began residing with his maternal grandmother. The grandmother sought an order designating her a person of sufficient interest respecting this child under s. 6 of The Children's Law Act, 1997 and an order that would provide her with joint custody of him with his mother. She also sought support from the respondent. She testified that when she asked if he would contribute toward his child's care, he threatened to quit his job. At that time, he had been employed as a truck driver and because of his Aboriginal status, had earned tax-free income of $71,000 in 2015. He did in fact quit his job. The petitioner applied for joint custody with her mother of the middle child and requested sole custody of the youngest child. She argued that any contact the child had with the respondent should be supervised. She also sought child support for all three children. The respondent did not oppose the current parenting arrangement for the primary care of the children but wanted to be able to have contact with the oldest and middle children on a flexible basis. He also opposed the petitioner's request for sole custody of the youngest child and argued that he should have unsupervised parenting time with him. He was willing to pay support for the middle and youngest child but argued that as the oldest child had voluntarily withdrawn from her parent's care, she was not entitled to support. As he was receiving

employment insurance at the time of the application, the amount of support should be based upon that income. The petitioner argued that the respondent was intentionally underemployed and that income should be imputed to him.
HELD: The grandmother's application was adjourned sine die. The court found that it would complicate the matter to grant it at this time but directed that it could be brought back with 14 days' notice in the event of a dispute between the parties. The court found that the children should remain in their current residences. It denied the petitioner's application for sole custody of the youngest child and ordered that the respondent have regular short periods of supervised access to him. The amount of time was to increase to full weekends without supervision. He was to refrain from using alcohol or drugs during the visits. He was to have reasonable access to the oldest child, and the court gave him access to the middle child on alternate weekends. The respondent was found to be intentionally underemployed under s. 19 of the Guidelines and income of $50,000 per annum was imputed to him. Under s. 3(3) of The Family Maintenance Act, the respondent was responsible to support his oldest child. The court ordered the respondent to pay support in the amount of $893 per month to the petitioner, and she would then provide financial support to the caregiver for the oldest child and to the maternal grandmother for the support of the middle child.

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Chapman v Saskatchewan (Workers' Compensation Board), 2017 SKQB 134

Schwann, May 9, 2017 (QB17121)

Statutes – Interpretation – Workers' Compensation Act, 2013, Section 23(3)
Administrative Law – Judicial Review – Workers' Compensation Board

The applicant applied for judicial review of a decision of the Saskatchewan Workers' Compensation Board (WCB) sitting as an appeal tribunal under The Workers' Compensation Act, 2013 (WCA). The applicant claimed that he had been injured at the work site in July 2015 but did not report it to his employer. In August 2015, he sought medical attention. He worked until December 2015, when he was laid off for reasons unrelated to his injury. In February 2016, he submitted a report of the injury to his employer. The applicant's injury claim had initially been accepted by a WCB adjudicator although wage loss benefits

were denied because the applicant had been laid off. The applicant and his employer appealed the decision to an appeals officer who concluded that the injury had not been sustained in the course of employment. The WCB upheld the decision. The applicant advanced numerous grounds for judicial review, among which were the following: 1) the WCB had unreasonably failed to provide a meaningful basis for discounting the applicant's evidence in finding no evidence of a workplace injury; and 2) the WCB had unreasonably failed to apply the statutory presumption in favour of a worker set out in s. 23(3) of the WCA.
HELD: The application for judicial review was granted and the WCB decision set aside because it had not met the reasonableness standard and referred back to the WCB for a re-hearing on the evidence. The court found the following with respect to each issue: 1) the WCB's decision was not unreasonable on the evidence. The decision showed that the WCB relied upon other evidence in reaching its conclusion, such as the employer's correspondence and the applicant's failure to report the injury on a timely basis or to inform his doctor that the injury was work-related; and 2) the WCB failed to determine for the purposes of s. 23(3) of the WCA if the weight attached to the evidence presented by the two sides was approximately equal. This failure to make its reasons intelligible or transparent regarding a statutory presumption did not allow the court to understand why the WCB made the decision it did or determine whether its conclusions were within the range of acceptable outcomes.

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S.K. v J.Z., 2017 SKQB 136

Dufour, May 12, 2017 (QB17129)

Family Law – Custody and Access – Children Wrongfully Retained – Acquiesce or Consent
Family Law – Custody and Access – Hague Convention
Family Law – Custody and Access – International Child Abduction Act, 1996

The parties and their two children visited Canada from Australia in September 2016. The applicant returned to Australia in October, as planned, but the respondent and children did not return in November as planned. The respondent advised the applicant by a Facebook message that she would not be returning to Australia. The applicant had a history with clinical

depression and had voluntarily quit taking his medication, saying he could self-medicate with marijuana. The applicant applied under The International Child Abduction Act, 1996, which adopts The Hague Convention on the Civil Aspects of International Child Abduction, for an order that the children be returned to him immediately. Australia and Canada are both signatories of The Hague Convention. The issues were as follows: 1) was the retention of the children in Canada wrongful within the meaning of Article 3 of The Hague Convention; and 2) if the retention was wrongful, did the respondent establish a defence under Article 13 of The Hague Convention.
HELD: The court addressed the second issue first. The parties' affidavits were diametrically opposed as to whether the applicant gave the respondent permission to remain with the children in Canada, so the court agreed to allow vive voce evidence of the parties only. The vive voce evidence was limited to whether the applicant acquiesced or consented to the children remaining in Canada. The respondent testified to four times that the applicant suggested she and the kids stay in Canada. Each instance was during a heated argument. The applicant testified that he never consented. The court concluded that the respondent tailored her testimony towards her argument that the applicant consented to her staying in Canada with the children. More weight was given to the respondent's affidavit than her vive voce testimony. The applicant was found to be more credible than the respondent. The court found that the applicant may have said the respondent could stay in Canada in bursts of anger that were manifestations of his depression. He never intended that the children stay in Canada. Further, the court found that the applicant's actions did not lead the respondent to believe that the applicant was not going to assert his right to have the children returned. The applicant also did not acquiesce to the children staying in Canada. The applicant's desire to have the children return began almost immediately after receiving the respondent's Facebook message. The court then considered whether the children were wrongfully retained in Canada by determining: a) where the children's place of habitual residence was; b) whether the applicant had rights of custody that were breached when the respondent retained the children in Canada; and c) whether the applicant was actually exercising rights of custody when the children were retained in Canada. They were determined as follows: a) the habitual residence was that immediately before the retention, which was Australia; b) the court looked at the principles of the Western Australia Family Court Act 1997 and concluded that both parties had the right to care for the children and to determine where they would live; and c) the applicant was exercising his rights of custody until the children were retained in Canada, regardless of

whether he was a deficient father. The children were wrongfully retained in Canada. The applicant did not consent or acquiesce to the children remaining in Canada. The court did not find a grave risk to the children if they were returned to Australia. The children were ordered to be returned to Australia by a date approximately four weeks away. The applicant agreed to pay for all the flights, including the respondent's, if she also returned to Australia.

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J.G. v P.G., 2017 SKQB 137

Wilson, May 12, 2017 (QB17130)

Family Law – Child Support – Imputing Income
Family Law – Child Custody and Access – Best Interests of the Child
Family Law – Child Custody and Access – Children's Law Act
Family Law – Child Custody and Access – Conduct of Parties – Violence
Family Law – Child Custody and Access – Custody and Access Report
Family Law – Child Custody and Access – Evidence – Expert Evidence

The respondent sought access to his three children. The parties were in a 13-year relationship and had three children. The respondent physically abused the petitioner mother and the children witnessed it. The youngest child was subjected to the respondent's physical abuse starting at the age of 16 months. The petitioner sought sole custody with no access for the respondent, child support, and divorce. The petitioner was in a new relationship. The respondent pled guilty to assaulting the petitioner and the youngest child during the relationship. The parties lived separate and apart since September 2010 and the respondent moved to Edmonton. The initial interim order granted the petitioner primary residence of the children and gave the respondent one overnight access every three weeks. A few months later the respondent's access was changed to supervised access and an order was made for a full custody and access assessment. In June 2013, Family Justice Services advised the respondent that his supervised access would be suspended for three months because of a family physician's recommendation. The respondent did not attend the trial, nor was he represented by counsel. The respondent has not had the children in his care since May 2013. At trial, there was evidence presented that the petitioner and the middle child suffered from

post-traumatic stress disorder as a result of the abuse. The oldest child suffered from depression and anxiety, and the youngest child had anger and obsessive-compulsive issues. The custody and access assessor concluded that access with the respondent would pose more risks than benefits for the children. A counsellor concluded that it was not in the best interests of the children to have access with the respondent until they initiated contact on their own as adults. The respondent did not provide any evidence of his income, but the petitioner proposed that he be imputed an income of $41,600 for the purposes of determining child support. The petitioner's income for 2014 was $18,845.

HELD: The court determined that the respondent would not have any access to the children for the following reasons: the evidence of the respondent's conduct was accepted; the children suffered due to witnessing the abuse of the petitioner; and there was no long-term benefit to the respondent having access. The court concluded that the petitioner was telling the truth regarding the marital relationship. The court reviewed cases and found that expert evidence could be helpful to determine the best interest of the children, but it was not necessary. The respondent did not have a real bond with the children and they expressed no interest in seeing him. It would not be in the best interests of the children to have any access with the respondent. The court accepted the petitioner's position with respect to the respondent's income. The respondent was ordered to pay $796 per month, in two installments if he preferred, and to pay 73 percent of any special or extraordinary expenses. The court also continued the civil restraining order, restraining the respondent from having any contact with the petitioner except through a member of the Law Society of Saskatchewan. It was clear that the parties lived separate and apart for more than a year so the court ordered the parties' divorce.

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Saskatchewan (Office of the Information and Privacy Commissioner) v University of Saskatchewan, 2017 SKQB 140

Mills, May 17, 2017 (QB17132)

Statutes – Interpretation – Local Authority Freedom of Information and Protection of Privacy Act

An applicant applied for access to records from the respondent, a designated local authority within the meaning of The Local Authority Freedom of Information and Protection of Privacy

Act. The respondent refused access pursuant to s. 21 of the Act, arguing that the record contained information that was subject to solicitor-client privilege. The applicant applied to the Office of the Information and Privacy Commissioner for a review of the respondent's decision and advised the respondent to produce the records. The respondent provided evidence to the commissioner in the form of an affidavit of an employee relying on information and belief. The affidavit indicated only that some of the records were subject to the privilege, but did not list any of the documents. The commissioner initially requested only information about the documents, but then brought the application by originating notice to compel production of the records for its review to prepare the required report. The commissioner had no authority to release the records and indicated that they would be destroyed upon their review. The respondent argued that the original applicant could appeal the decision to the court and the court could then review the documents, rather than the commissioner applying for release of the documents. The respondent also argued that s. 43 of the Act offends ss. 7 and 8 of the Canadian Charter of Rights and Freedoms.

HELD: The commissioner followed the correct initial approach by requesting basic information about the documents to assist in determining if the solicitor-client privilege applied without actually reviewing the documents. If the information is found not to be sufficient, the commissioner does have the power under s. 43 to demand the actual document for the purpose of examination on a document-by-document basis to determine if the claimed privilege is well-founded. Just because the court has the power to examine the actual records does not mean that the commissioner cannot. The court found that the respondent was fulfilling a government role in providing information that ensures public transparency and accountability, and therefore, the constitutional question was not properly before the court. The commissioner had to make the court application because the respondent refused to provide basic information about the documents. The commissioner was awarded costs in the amount of $8,000.

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Primewest Mortgage Investment Corp. v Antonenko, 2017 SKQB 141

Danyliuk, May 17, 2017 (QB17133)

Mortgages – Foreclosure – Leave to Commence Action

The proposed plaintiff brought an application for leave to commence an action for foreclosure. The proposed defendants sought a further adjournment of two months because more time was needed to investigate alleged irregularities that occurred when the defendants sought refinancing of their mortgage through brokers. The proposed plaintiff granted a mortgage in 2014, and it and the loan matured in September 2016. All money outstanding became due and payable, but the defendants were in arrears in the amount of $319,900.
HELD: The application for leave to commence the action for foreclosure was granted. The court acknowledged that if there had been an unconscionable transaction, the proposed defendants would have ample opportunity to address the matter within the context of the foreclosure action.

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Amin v Saskatchewan (Ministry of the Economy), 2017 SKQB 142

Danyliuk, May 17, 2017 (QB17134)

Administrative Law – Judicial Review

The applicant, a foreign national living in Bangladesh, applied to be nominated under the Saskatchewan Immigrant Nominee Program (SINP) in 2011. Her application was made under the family member category, which allowed Saskatchewan immigrant families to sponsor family members living outside Canada to move to the province if the applicant provided proof that they had $10,000 on deposit for a minimum of three months. The applicant filed her application in 2011 and was advised by SINP in February 2014 that the information she provided had not met the requirement. She was requested to provide an updated bank statement or letter from her financial institution indicating balances and transaction history of the account for the last three months within 45 days. In March 2014, a reminder letter was sent seeking the applicant's response within 15 days. Documents were sent by the applicant's brother within the time limit and included a letter from the applicant's bank saying that an account had been opened in 2011 and presently contained $14,000 CAD on deposit. An immigration officer reviewed the material and recommended that it be denied. The recommendation was reviewed and approved and the application denied because it had not met the requirement of proof of transferable funds. The applicant requested a secondary review as permitted under the SINP Guidelines. Under the

secondary review, new documents or information could not be added. The applicant set out her grounds for the review indicating that bank errors had been made in supplying information and she sought to correct it with new documents. The secondary review upheld the initial decision on the basis that there was insufficient proof of the required settlement funds tendered with the initial application. The applicant then applied for judicial review of the two decisions made by officials in the SINP. The applicant sought to have the decision quashed and remitted to the respondent to be properly determined. She argued that there had been a denial of natural justice or procedural fairness.
HELD: The application was dismissed. The court expressed doubts as to the following: whether judicial review was available in the circumstances where decisions were made pursuant to government policy rather than delegated statutory power; whether both decisions were reviewable; and what was the appropriate standard of review for issues of procedural fairness. It decided that it would conduct a judicial review of both decisions and that, regardless of which standard applied, the respondent's decisions were owed significant deference. The court found that the respondent afforded procedural fairness to the applicant. The process required that the applicant had to prove her financial viability and she failed to do so. The applicant was advised on two occasions of the deficiencies in her application but she did not remedy the problem.

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Agrium Vanscoy Potash Corp. v United Steel Workers Local 7552, 2017 SKQB 143

Rothery, May 17, 2017 (QB17135)

Labour Law – Arbitration – Judicial Review

The applicant applied for judicial review of an arbitrator's decision and an order quashing or setting it aside. The arbitrator's decision was bifurcated in that she first found the applicant employer had breached the collective agreement with the respondent union and secondly dealt with the remedies granted to the respondent. The respondent had originally filed a grievance against the applicant alleging that the applicant had violated the collective agreement by hiring employees of Thyssen to do bargaining unit work in the employer's mine because the hiring constituted "contracting in". The applicant advanced multiple grounds for review under both the

arbitrator's liability decision and her second decision regarding remedies.
HELD: The application was dismissed. The court reviewed the arbitrator's decisions and her reasons in accordance with standard of reasonableness. It found with respect to each of the applicant's grounds that the arbitrator's analysis of the law and its application to the grievance and the question of remedies was reasonable.

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T.G. v Saskatchewan, 2017 SKQB 146

Popescul, May 19, 2017 (QB17138)

Civil Procedure – Summary Judgment
Class Action – Certification
Class Action – Procedure

The plaintiffs brought a claim against the Government of Saskatchewan pursuant to The Class Actions Act for abuse allegedly suffered during their attendance at the Saskatchewan School for the Deaf. The claim issued in March 2009 and sat dormant until April 2016, when the plaintiffs requested the court's assistance in creating an agenda for the certification application. The plaintiffs indicated that they would be in a position to bring their certification application very shortly. The government applied for the summary dismissal of the claims for negligence, breach of trust, and breach of fiduciary duty on the basis that the claims were statute-barred. The court had to determine which application to hear first. The plaintiffs argued that, as a general rule, the first application on a class action should normally be the certification application.
HELD: The court determined that it could hear a summary judgment application before the certification application. The court noted that the plaintiffs' argument that the certification argument should be heard first to ensure an efficient and expeditious process lost considerable support when eight years' delay on the court file was considered. The court held that the certification and the summary judgment application should be held at the same time to permit both parties the opportunity to fully argue all outstanding matters.

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Custom Foundations Ltd. v Welcome Homes Ltd., 2017 SKQB 148

Danyliuk, May 23, 2017 (QB17140)

Debtor and Creditor – Preservation Order
Statutes – Interpretation – Enforcement of Money Judgments Act

The plaintiff applied pursuant to The Enforcement of Money Judgments Act for a preservation order, freezing certain assets of the defendants and preventing the defendants from dealing with the assets. The plaintiff was a contractor that worked for the defendant corporation, a general contractor. The two individual defendants were the shareholders and directors of the corporate defendant. They lived in Alberta. The plaintiff claimed that it was not paid for work on six homes with approximately $130,000 owing. The plaintiff registered liens on the defendants' properties. The plaintiff had concerns with the defendants' asset/debt situation. The corporate defendant had ceased conducting business and was apparently insolvent. There was also a question as to the individual defendants' solvency. Another corporation owned by the individual defendants owned and rented real property, and it had property with a net equity of $1.45 million. The issue was whether a preservation order should be granted and, if so, against which defendants and on what terms.
HELD: The plaintiffs sought a broad preservation order pursuant to s. 5 of the EMJA. Section 5(5) sets out a three-prong test for the granting of a preservation order. The only branch in issue was the second one: if a preservation order was not granted, would the enforcement of such a judgment or order likely be ineffective as a result of the defendants dealing with the property. To be successful, the applicant had to show more than that the defendants could not satisfy the plaintiff's eventual money judgment. The court found that there was evidence of something more, because assets had been disposed of. For example, the defendants sold a property in Las Vegas and did not direct any of the proceeds to creditors. The requisite prima facie case was established. The plaintiff discharged its onus regarding the second branch of the preservation order test, s. 5(5)(b). Section 5(7) of the EMJA makes it mandatory that a plaintiff provide security unless to do so would cause hardship on the plaintiff. There was no evidence that posting security would pose hardship for the plaintiff. The court did not agree that an undertaking will always satisfy the security requirement, but the court determined that posting a $20,000 bond would be appropriate. The court made the preservation order and required the applicants to obtain a $20,000 bond.

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Wall v GlaxoSmithKline Inc., 2017 SKQB 149

Popescul, May 24, 2017 (QB17141)

Civil Procedure – Class Action
Civil Procedure – Consent Order – Application to Set Aside
Class Action – Consent Order

The plaintiffs applied to set aside the consent order that stayed the action pending the determination of a parallel Ontario action. The plaintiffs argued that the foundation the consent order was based on had significantly changed so that it was no longer fair or equitable for the Saskatchewan action to remain stayed. The action was commenced pursuant to The Class Actions Act. The plaintiffs argued that the action in Ontario had stalled and asked the court to lift the stay imposed by the consent order. The Ontario action was adjourned to allow the consortium to address deficiencies in their certification application and allow the consortium to file better evidence. HELD: The Ontario action had ground to a halt, but the reason for the delay directly involved counsel for the plaintiffs. The Ontario action was originally commenced by the plaintiffs' counsel, but since November 2010 had been prosecuted by a consortium that included the counsel for the plaintiffs. A consent order can only be set aside on grounds that would otherwise vitiate a contract, for example, common mistake, fraud, collusion, misrepresentation, duress or illegality, or where there was a slip in drawing up the order. The plaintiffs did not show that there was a change in the circumstances besides the passage of time, which did not justify vacating the consent order. The court did not agree with the plaintiffs that the consent order must be varied because it would be absurd to require that the Saskatchewan action wait for an event that might never happen. The action in Ontario could still move forward once the plaintiffs in that action chose to do so. The plaintiffs' counsel was part of the consortium representing the plaintiffs in the Ontario action so had some control over that action. Also, the court did not find any evidence that counsel was acting without instructions when he agreed to the consent order. The court also did not find merit in the argument that there was a common mistake because no one thought the Ontario action would take so long. At best, the plaintiffs' counsel made a unilateral mistake. The plaintiffs' application was set aside.

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Park v 101143482 Saskatchewan Ltd., 2017 SKQB 156

Barrington-Foote, May 31, 2017 (QB17146)

Damages – Punitive Damages
Employment Law – Breach of Contract – Termination
Employment Law – Dismissal Without Cause – Damages

The plaintiff and his now deceased wife, also a plaintiff, were employed by the corporate and individual defendants to manage a motel, pursuant to an employment contract dated August 12, 2009. The plaintiffs argued that the employment contract was breached because they were terminated without cause, effective October 31, 2010. General, special, and punitive damages were claimed. The defendants said the termination was for cause. The plaintiff said that he and his wife went to manage the motel on the understanding that they would eventually be able to become 25 percent owners. The termination clause in the employment contract required two months' notice and stipulated that the employer could not give notice without warrant. The word "warrant" was not defined and the plaintiff thought it meant a court warrant, whereas the defendant said he thought it meant reasonable reason to terminate. The plaintiffs worked seven days a week and their two children also worked a couple of hours per day after school. The plaintiff faxed daily reports to the defendant, as required. The defendant alleged that the plaintiffs took advertising revenue that should have been the defendant's. The plaintiff indicated that he reported the amounts and kept the money pursuant to his understanding that he was entitled to it. The defendant also said that they had to pay for 20 space heaters because the plaintiff did not report that the heater boiler was damaged in a timely manner, so it could not be fixed expeditiously. The plaintiff indicated that the defendant was aware of the boiler heater issue because he was at the motel when it happened. The defendant called the plaintiff on September 23, 2010, to discuss his displeasure with the plaintiff purchasing TVs, and the parties agreed that the call resulted in the plaintiffs' termination. The defendant indicated that when he questioned the plaintiff about the purchase, the plaintiff threatened to use a gun to kill anyone who questioned him, and hung up. The defendant said he called back and the plaintiff asked why he could not be an investor and told the defendant that he would kill him if he came to the motel. The defendant had his lawyer send a letter to the plaintiffs advising of their termination, but it did not explain the reasons for the termination. The plaintiffs moved to a rented apartment where they paid $1,000 per month for five months before purchasing a

motel for $320,000. The issues were as follows: 1) whether there was cause to terminate the agreement. The defendants argued that the plaintiffs breached the employment contract by pressing for a partnership, demanding a bonus, taking the advertising revenue, failing to report the damage to the heater boiler, buying portable heaters, and purchasing the three TVs. The defendants did concede that they did not have cause unless the plaintiff threatened to kill the defendant; 2) damages; 3) punitive damages; and 4) counterclaim.

HELD: The court concluded that the plaintiff's evidence was more credible than the defendant's. The issues were discussed as follows: 1) the court interpreted "without warrant" to mean without justification or without grounds. The court accepted the plaintiff's explanations for the various alleged breaches of the employment contract. The court also found that the plaintiff did not threaten to kill the defendant. There was no just cause for termination; 2) the employment contract was a fixed term contract, so the plaintiffs were entitled to damages equal to what they would have received during the 21.67 remaining months. The amount they would have received was $103,189. The court then considered mitigation and held that it was reasonable for the plaintiffs to purchase the motel, so their duty to mitigate was discharged. The court did not include the amounts the plaintiffs' children were paid for necessary work actually done as income earned by the plaintiffs. The court found that it would not be appropriate to attribute the entire amount of earnings retained by the corporation operating the motel as income to the plaintiffs. The court attributed half of the pre-tax retained earnings, or $24,180, as income earned by the plaintiffs during the mitigation period. The court calculated that the plaintiffs lost $103,189 in compensation and $5,000 for replacement accommodations for a total of $108,189. They earned a total of $70,988 and were entitled to $42,201; 3) the defendants were guilty of reprehensible, hardball tactics that called for an award of punitive damages. The plaintiffs were each awarded $12,500 in punitive damages; and 4) the defendants were entitled to the return of the $4,055.78 in petty cash that the plaintiffs placed in their lawyer's trust account. The defendant was ordered to pay the plaintiffs the net amount of $63,145.22 with pre-judgment interest on all but the punitive damages. The plaintiffs were also awarded costs.

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