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.

Volume 19, No. 20 **October 15, 2017**

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The accused was charged with operating a vehicle while impaired by alcohol and while his blood alcohol content exceeded the legal limit. The Crown stayed the first charge at trial. The defence alleged that he was not kept under proper observation by a police officer during the 15 minutes before the first or second breath test. He alleged that he remembered that the officer was texting on his cell phone on six occasions and could recall this exactly because a friend had texted him with advice, telling him to record and remember everything that happened at the detachment. He argued that his evidence rebutted the presumption of accuracy afforded the Crown under s. 258(1)(c) of the Criminal Code. Under cross-examination the officer testified that he could not recall texting but agreed that if he had been, he would have been distracted from his observation of the accused.
HELD: The accused was found not guilty of the second charge because there was no admissible evidence. The court found that the accused's evidence that the officer had been texting was plausible. The officer had not conducted proper observation periods before the first and second breath samples taken from

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the accused. Therefore, a reasonable doubt had been raised regarding the proper administration of the Intoxilyzer and the Crown was unable to rely upon the presumptions contained in the Certificate of Analysis.

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R v Webb, 2017 SKPC 20

Jackson, February 24, 2017 (PC17044)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 8, Section 9, Section 10(a), Section 10(b), Section 24(2)
Criminal Law – Citizen's Arrest

The accused was charged with impaired driving and driving while his blood alcohol content exceeded .08. The accused brought a Charter application, alleging breaches of his ss. 9, 10(a) and 10(b) Charter rights and requesting that the evidence of the Certificate of Analysis be excluded pursuant to s. 24(2). A blended voir dire and trial was held. The charges were laid after an off-duty police officer followed the accused's vehicle, suspecting that he was intoxicated. After observing the accused almost cause an accident, the officer starting honking and waving for the accused to pull over. After stopping the accused, the officer was able to detain the accused through force. He did not identify himself as a police officer and testified that he was relying on the common law powers of arrest under s. 494 of the Criminal Code. When the police officers arrived, the off-duty officer related the entirety of his involvement and his observations to the investigating officer that included the accused's manner of driving, the smell of alcohol on his breath and his slurred speech. The investigating officer escorted the accused to the police cruiser where he was formally charged. He was taken to the detachment and provided two breath samples of 140 and 130 milligrams. The defence argued the following: 1) the officer who arrested the accused did not have sufficient grounds to make the breath demand pursuant to s. 254(3) of the Criminal Code and thereby breached ss. 8 and 9 of the Charter; 2) the accused had been detained by the off-duty officer without lawful authority and therefore his detention was arbitrary, contrary to s. 9 of the Charter; 3) the off-duty officer did not advise the accused of the reason for his detention or his right to counsel in violation of ss. 10(a) and (b) of the Charter; and 4) thus the Certificate of Analysis should be excluded from the evidence

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under s. 24(2).
HELD: The application was dismissed and the accused was found guilty of both charges. The court found the following with respect to the issues: 1) it accepted the evidence that prior to the breath demand being made by the investigating officer he had received all the off-duty officer's observations regarding the accused and had made his own observations that confirmed that the accused was impaired. Therefore, he had sufficient grounds to make the breath demand because he subjectively believed that the accused's ability to operate a vehicle was impaired by alcohol and his belief was objectively reasonable in the circumstances. There was no breach of the accused's ss. 8 and 9 Charter rights; 2) the off-duty officer's common law arrest of the accused pursuant to s. 494(1)(a) of the Code was justified and lawful and therefore not arbitrary; 3) there was no requirement for the off-duty officer acting as a private citizen to comply with ss. 10(a) or (b) of the Charter; and 4) as there were no breaches of the Charter, the evidence would not be excluded. If the court was wrong in its findings, it determined that excluding the evidence would have brought the administration of justice into disrepute.

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R v Longman, 2017 SKPC 31

Snell, March 31, 2017 (PC17053)

Criminal Law – Motor Vehicle Offences – Driving While Disqualified
Criminal Law – Motor Vehicle Offences – Failure to Stop/Evading Police
Criminal Law – Evidence – Alibi
Criminal Law – Evidence – Identity of Accused

The accused was charged with driving while disqualified, contrary to s. 259(4) of the Criminal Code, and evading police, contrary to s. 249.1(1) of the Code. The alleged offences occurred when two police officers, who were operating a device that provided an alert regarding either an issue with a motorist's registration or licence, received an alert when the accused passed their cruiser. They drove until they were parallel to the accused's vehicle and then pulled in beside it. One of the officers testified that he immediately recognized the accused because of his distinctive haircut and tattoo on his neck. He told his partner the name of the accused and that he was known to stop when signaled by the police but then would immediately drive off when the police got out of their vehicle. This communication was confirmed by the audio recording from the police vehicle. The

officers followed the accused's vehicle with the cruiser's emergency lights on. The accused stopped, but after the officer got out of the cruiser, the vehicle accelerated quickly away. The officers followed the vehicle for a short distance, but they elected not to engage in a high-speed chase following a "no pursuit policy" designed to protect the public. Counsel for the accused advised the Crown one week before the trial that the accused had an alibi. The Crown took the position that the court should draw an adverse inference from the late disclosure and give the alibi evidence little weight. The accused explained that he only just recalled that the date on which the alleged offences had occurred was Mother's Day, and he testified that his mother had picked him up on that day and they had shopped together and spent the remainder of the day at her residence before she drove him home. He said that after remembering the significance of the date, he called his mother to ask her if she would consent to being named as an alibi witness. The mother's testimony corroborated the accused's version but with some differences, the most significant being that she denied having had any telephone conversation about being an alibi witness and had only heard about it when the accused's lawyer contacted her. The defence argued that if the accused was found to have been the driver of the vehicle, that he should be found not guilty of the second charge because he had been acquitted after trial of the same offence (see: 2013 SKPC 201). The issues were as follows: 1) had the Crown proven that it was the accused who was driving the vehicle on the date in question; and 2) if so, had the Crown proven that the accused was being "pursued" by the police, an essential element of the charge of evading police under s. 249.1(1).

HELD: The accused was found guilty of both offences. The court found the following with respect to the issues: 1) the Crown had proven beyond a reasonable doubt that the accused was driving the vehicle in question. The court believed that the officer recognized the accused simultaneously with predicting his behaviour. The court ruled that the accused gave a reasonable explanation for the late disclosure of his alibi and would not apply any adverse inference or reduction in weight given to his evidence. However, the court found that the accused's mother had lied when she said that she had not spoken to him on the telephone about the alibi since it was too close in time to the trial to have been forgotten and it was the only call she had received from him since he had been incarcerated; and 2) the court rejected the defence's argument that the Provincial Court's earlier decision in R v Longman was applicable and distinguished the case because the police behaviour was different. Because the police officers in this case followed the accused at the speed limit for a short distance with their

emergency equipment activated, the court found that that was sufficient to fall within the definition of "pursue", following the Court of Appeal's decision in R v Briltz. The accused knew that the officers wanted him to stop and then accelerated away in a dangerous fashion to frustrate the officer's purpose in stopping him, and he had not provided any reasonable excuse for his behaviour.

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R v Clinton, 2017 SKPC 36

Green, June 22, 2017 (PC17040)

Constitutional Law – Charter of Rights, Section 8

The accused was charged with impaired driving, contrary to s. 253(1)(a) of the Criminal Code, and with committing mischief by giving a false statement to a police officer, contrary to s. 140(1) of the Code. The charges arose after the accused had reported his vehicle had been stolen with his cell phone in it. An RCMP officer found the vehicle in a ditch. There was blood on the steering wheel and it contained a number of cans of beer. The officer seized the cell phone. He did not know to whom the cell phone belonged but when he picked it up, it turned on and he could see a text message that said, "This was your responsibility so you'll have to deal with it". The officer testified that he thought that it was possible the owner of the vehicle knew the vehicle had not been stolen and had been in an accident. The alcohol in the vehicle suggested to him that the driver had been impaired. He did not obtain a warrant before seizing the cell phone because at that point he was investigating a stolen vehicle. The defence claimed that the seizure of the cell phone violated the accused's s. 8 Charter rights and that evidence of any information obtained by the officer from it should be excluded under s. 24(2) of the Charter. A voir dire was held. The issues were as follows: 1) whether the accused had a reasonable expectation of privacy in the cell phone when it was seized so as to provide him with protection under s. 8; 2) whether the search and seizure of the cell phone violated s. 8; and 3) whether the evidence should be excluded if the accused's s. 8 right had been infringed.
HELD: The Charter application was dismissed. The court found the following with respect to the issues: 1) the officer was entitled to enter the vehicle as part of his lawful investigation of the complaint. The accused did not have a reasonable expectation of privacy in the cell phone found in the vehicle in

such circumstances; 2) if it was wrong regarding the expectation of privacy issue, it regarded that the search and seizure of the cell phone was authorized by law under s. 489(2) of the Criminal Code. There was no suggestion that that section of the Code was unreasonable or that the search and seizure by the officer was done unreasonably. There was no violation of the accused's s. 8 Charter right; and 3) it was therefore unnecessary to decide whether to exclude the evidence under s. 24(2) of the Charter.

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R v Hitchings, 2017 SKPC 56

Penner, May 11, 2017 (PC17054)

Constitutional Law – Charter of Rights, Section 7
Criminal Law – Disclosure

The accused was charged with impaired driving and driving while his blood alcohol content exceeded the legal limit, contrary to s. 253(a) and s. 253(b) of the Criminal Code, after he had collided with two other vehicles. The defence wrote to the Crown and requested the names, addresses and telephone numbers of any potential witnesses. The Crown provided a copy of the investigating officer's notes, which included the names of a number of individuals but their contact information was blacked out. The notes did not include any information about the individuals' versions of events. The defence made another request for the contact information and the Crown advised that it would contact the people identified in the officer's notes to determine if they wanted their contact details disclosed to the defence. The defence told the Crown that it did not have the authority to withhold the information requested and brought this pre-trial application under the Charter, asserting that the accused's s. 7 rights to make full answer and defence were breached by the Crown's failure to disclose the contact information, and sought an award of costs.
HELD: The application was granted. The court ordered the Crown to provide a copy of the officer's notes without redaction along with any contact information for the individuals identified in the notes. The court found that the Crown had fettered its discretion regarding witnesses' contact information by failing to look at the particular circumstances of the case. As it had not raised any specific individual privacy or security concerns in relation to the potential witnesses, it had breached the accused's Charter rights. The defence counsel was directed to inform the witnesses when he contacted them they were not obliged to

submit to an interview with him and that he was subject to an undertaking not to provide the disclosed information without an order of the court. The court declined to order costs to be paid by the Crown. It found that the Crown had not violated fundamental principles of decency and fair play in this case as it had disclosed the witness statements and identified all potential witnesses.

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LeBlanc v Lexterra Land Ltd., 2017 SKPC 57

Demong, June 29, 2017 (PC17049)

Contract – Breach – Damages

The self-represented plaintiff brought an action against the defendant for breach of contract and for damages. He claimed damages of $9,600, the price offered for a mineral lease, and for $20,000 because the defendant had promised that the entire arrangement would be conducted in French. He alleged that the defendant chose to repudiate the contract because it refused to do so and in the result had discriminated against him based on his cultural heritage. The plaintiff was approached by the defendant company that was in the business of negotiating and entering into mineral rights leases for the benefit of third parties seeking to extract minerals. The defendant's employee telephoned the plaintiff initially to discuss acquisition of leases on his lands but the plaintiff hung up when he learned that the employee did not speak French. The employee contacted the plaintiff again and promised to communicate in French by email. The plaintiff was apparently mollified and the employee sent him a standard form letter which identified that the defendant sought, on behalf of its clients, to lease the plaintiff's mineral rights and the essential conditions of the offer: a CAP 91 Oil and Natural Gas Lease, a bonus exam of $150/acre, a duration head lease of three years and royalties of 15 percent. The plaintiff sent an email to the defendant agreeing to the terms but advised he would need to hire a lawyer to translate the lease from English to French. The employee responded saying that he would send the lease package that would include both a French and English copy and that both needed to be signed for legal purposes. The plaintiff replied with some questions and reiterated that the documents should be exclusively in French. The employee withdrew the offer to lease because it was unreasonable to have a lease contract in French. As the plaintiff was travelling in the United States, he did not receive the lease package before the

revocation. He attempted to execute the lease in Texas but the documents were not properly executed. The plaintiff sent the documents to the defendant but did not receive payment. The defendant advised that it had the right to withdraw its offer any time prior to acceptance, and as it had done so, there was no binding agreement. In any event, the documents had been improperly executed. The issues were as follows: 1) whether the written offer and acceptance constituted a binding contract or was only an invitation to treat; 2) whether the defendant was entitled to revoke its offer; 3) if there was a valid contract, did the plaintiff breach it when he insisted that the documents had to be in French; 4) whether the plaintiff's failure to properly execute the lease was fatal to the existence of the agreement; 5) whether the plaintiff was entitled to damages for breach of contract, and if so, had he mitigated his damages; 6) whether the defendant discriminated against the plaintiff based on its failure to deal with him exclusively in French; and 7) whether the court had jurisdiction to award damages based on an allegation of discrimination.

HELD: The action for breach of contract and damages in the amount of $9,600 was allowed. The claim for damages for discrimination was denied. The court found the following with respect to each issue: 1) there was a binding contract. The offer set forth all of the essential terms of the contract and the defendant provided a standard form lease; 2) the contract had formed and the defendant was not entitled to withdraw its offer; 3) the plaintiff had not repudiated the contract when he expressed frustration with the defendant's resistance to providing the documents only in French; 4) there was no evidence that the plaintiff executed the lease in a wrongful manner and it was the opinion of the court that the defendant would have allowed him to correct the deficiencies; 5) the plaintiff was entitled to damages. The defendant was represented by counsel and the issue of mitigation was not raised, thus the matter would not be dealt with by the court; 6) there was no basis on which to find that the defendant discriminated against the plaintiff personally and no basis upon which damages could be awarded; 7) if the finding was wrong that discrimination had not occurred, the court did not have jurisdiction to award damages as it was governed by the provisions of The Saskatchewan Human Rights Code.

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C.D.R. Developments Inc. v ACI Holdings Inc., 2017 SKQB 163

Danyliuk, June 8, 2017 (QB17160)

Civil Procedure – Default Judgment
Civil Procedure – Noting for Default – Setting Aside
Civil Procedure – Service – Proper Service

The defendant was noted for default and the plaintiff sought a default judgment, without notice, for damages of $1,384,705.02 plus costs to be assessed. The affidavit of service of the statement of claim indicated that the claim was sent to the defendant's office by registered mail, but it was sent back as unclaimed. The affidavit also indicated that the affidavit was sworn or affirmed but did not indicate which one. The issue was whether the plaintiff's service constituted valid service on the defendant. HELD: The application was dismissed and the noting for default was set aside, ex debito justitae. There were three problems with the service: 1) the opening line of the jurat of the affidavit was not amended to make it clear whether it was being sworn or affirmed. The issue was found to be a minor issue; 2) the mode that the request for judgment was made. There was no application and no supporting affidavit. There was only a statement of claim, a noting for default, and a default judgment. The plaintiff just tendered the default judgment to the registrar and requested it be issued. The registrar brought it to the court's attention. The default judgment tendered was designed for cases where the claim was for debt or liquidated demand, not for damages as was the case here. An application and evidence is required for a judgment for payment of damages. The procedure in rule 3-24 of The Queen's Bench Rules was invoked; and 3) the plaintiff filed evidence that did not prove service. It showed that the defendant had no actual notice of the statement of claim. The affidavit of service asserted that service was affected by registered mail, but then proved that it never happened. The court found this a clear case where the noting of default must be set aside and the judgment must be refused. The court found as a fact that the defendant did not receive notice of the claim being made against it. The purported service was set aside and the court ordered that the statement of claim be served properly on the defendant. The court also made a note to all counsel of the importance of proper service that gives notice to parties of the actions against them.

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X.M. v R.M., 2017 SKQB 167

Brown, June 9, 2017 (QB17170)

Family Law – Custody and Access – Variation

Family Law – Custody and Access – Voices of the Children Report

In 2012, after a trial, it was determined that the child should be parented on a shared basis with a one-week rotation between parents. An order was never issued and therefore, no judgment was taken out. The applicant now applied to have a formal judgment issued, and to vary the decision in favour of her having primary residence. Alternatively, she sought a Voices of the Child report. The applicant indicated that the child expressed a desire to live with her full-time. The parties' affidavits conflicted as to their behaviour. The applicant indicated that the child told her he was required to continue skiing with the respondent even though he was having a seizure. She also indicated that the child told her that the respondent told his roommate he was going to stab the applicant and he called her crazy.
HELD: The court found it appropriate to order a Voices of the Child report. It was determined that the variation application decision was dependent on the report. There were more issues at play than a bald statement by the applicant that the child requested to live with her full-time. The child was an appropriate age for the report, being over 12 years old. He was able to communicate effectively and the report would be meaningful to the court. The order was to be paid for through resources provided to the program. The parties were prohibited from discussing the report process with the child and they were ordered not to influence, coach, sway, or prompt the child towards particular views or statements for the purposes of the report. The application was adjourned sine die returnable not sooner than 14 days after the report was received by all parties. The judgment was directed to be issued.

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R v Landry, 2017 SKQB 169

Barrington-Foote, June 13, 2017 (QB17156)

Criminal Law – Motor Vehicle Offences – Failure to Stop at the Scene of Accident

The accused pled guilty to failing to remain at the scene of an accident, contrary to s. 252(1.1) of the Criminal Code, and to possession of stolen property, contrary to s. 355(b) of the Code. A joint submission was made that the accused should serve one year concurrent on the possession charge. Regarding the failure to remain charge, the Crown argued that the accused should be

sentenced to a term of 30 to 33 months in addition to the credit of 1.5 days for each day served on remand. The defence submitted that an appropriate range for the sentence was between one year and 18 months. The accused was 30 years old and on parole when he stole a vehicle, collided with the victim's vehicle and then left the scene. The accident occurred during the daytime and other people were able to help the driver of the other vehicle, who was not seriously injured. The accused had a lengthy criminal record of mostly convictions for property offences. He was Metis and had had a very difficult childhood, having lived in over 20 foster homes. He expressed remorse for his actions and apologized to the driver of the other vehicle. HELD: The accused was sentenced to 15 months in custody with credit for time served of 121 days and ordered to pay restitution to the driver and to Saskatchewan Government Insurance. The offence was serious but the circumstances in which it occurred lessened the culpability of the accused leaving the scene. His criminal record was considered an aggravating factor. The Gladue factors had little bearing on his moral culpability. The mitigating factors were that the accused had pled guilty, accepted responsibility for the crime and acknowledged the propriety of a restitution order.

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Rock Ridge RV Resort Ltd. v Close, 2017 SKQB 170

Zarzeczny, June 13, 2017 (QB17171)

Corporation Law – Business Corporations Act
Corporation Law – Shareholders/Directors – Determination of Status

The respondent, S., argued he was a shareholder and director in the applicant company. The company was a closely held company with all shareholders being relatives. S. expressed his intention to the company's solicitor of resigning as director and transferring his shares to his brother, also a respondent, or another shareholder. The documentation was forwarded to S. for four years and two months after he expressed his intentions. He had changed his mind and argued that since his intentions were not acted upon, they were ineffectual. The company, relying on s. 5 of The Limitations Act, commenced an Originating Application for a Declaratory Order respecting the bar of any claim that might be made by S. The application also sought a declaratory order determining whether or not S. was in fact a director and shareholder of the applicant. The company's

application was discontinued in February 2017. S. then commenced a Notice of Application that included requests for orders pursuant to s. 234 of The Business Corporations Act and The Securities Transfer Act. The issues were as follows: 1) whether the court should proceed to determine S.'s status with the company summarily in chambers; and 2) if so, should the court issue a declaration that S. continued to be a director and shareholder of the company.
HELD: The court was concerned with the contradictory positions taken by the parties. In the Originating Application, a shareholder of the company deposed that S. was a shareholder of the company from August 2010 to May 2011. However, in response to S.'s application, the company's solicitor indicated that S. was never a shareholder; a share certificate was signed but never released or entered onto the minute book. The solicitor indicated that S. needed to sign a share subscription agreement for his shares to be fully vested or validly issued. There was no evidence that S. was ever made aware of the requirement. The court concluded that it could not determine S.'s status as director or shareholder of the company from the materials filed. A vive voce hearing would be required to determine the issue.

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R v Pierone, 2017 SKQB 171

Zarzeczny, June 13, 2017 (QB17161)

Regulatory Offence – Wildlife Act – Appeal
Regulatory Offence – Wildlife Act – Unlawful Hunting – Treaty Rights

The accused, a status Indian, shot and killed a moose 70 meters off the roadway. On a scouting trip the day before, the accused ensured that there were no signs prohibiting hunting, no buildings in the area, or any fences. The accused did not have a licence to hunt moose, nor did he have permission from the land owner where the moose was located. The accused argued that he was exercising his Aboriginal treaty rights. The accused was charged with unlawfully hunting, contrary to ss. 25(1)(a) of The Wildlife Act, 1998. At trial in the Provincial Court of Saskatchewan, the accused was found not guilty and the charges against him were dismissed. The Crown appealed, arguing that the trial judge erred in law concluding that the accused had a treaty right to hunt on privately owned land and there was a misapplication of the leading case by the trial judge. The accused testified that he did not know that anyone owned the slough

where the moose was located, but he did know that there were farms around and they were using the land for agricultural use. HELD: The court found that the trial judge was correct in concluding that the Crown's position with respect to a geographic limitation of the accused's hunting rights was incorrect. The Crown argued that because the accused was a Treaty 5 Indian and was hunting on Treaty 4 land, he did not have the right to claim treaty hunting rights on Treaty 4 lands. The Badger case from the Supreme Court of Canada gave the accused the right to hunt anywhere in Saskatchewan that a treaty Indian is entitled to hunt. The court disagreed with the trial judge's conclusion that the evidence supported his conclusion based upon a proper analysis of the principles established in Badger. The court found that there was no evidentiary basis to support a conclusion that the land where the slough was located was not visibly put to a use incompatible with hunting as a matter of status Indian hunting rights. The land surrounding the slough was cropped and was clearly being farmed. The use of the land was incompatible with the scope of treaty Indian rights as limited by the proper application of the visibly incompatible use principle. The failure to properly apply the principle to the evidence was a reversible error. The accused was guilty of unlawfully hunting, contrary to ss. 25(1)(a) of the Act. The acquittal was set aside and a guilty verdict was substituted.

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Holland v Saskatchewan (Minister of Agriculture, Food and Rural Revitalization), 2017 SKQB 172

Smith, June 14, 2017 (QB17162)

Civil Procedure – Queen's Bench Rules, Rule 7-2
Civil Procedure – Summary Judgment
Torts – Negligent Implementation of a Judicial Decree

The Ministry of Agriculture developed regulations to deal with the problem of Chronic Wasting Disease (CWD) in Saskatchewan's deer and elk (cervid) game farm population. The plaintiff and others were successful in their application for a determination that the Ministry's indemnification from cervid producers was ultra vires the legislative authority. A class action was started to recover damages the plaintiff and certain producers argued they suffered as a result of the Ministry's actions. The issue was whether there was a tort of negligent implementation of a judicial decree and if so, whether the tort had been committed by the Ministry. The parties sought to have

the issue resolved by way of summary judgment application under rule 7-2 of The Queen's Bench Rules. In the Queen's Bench decision that determined the indemnification form was ultra vires, it was also determined that the "surveillance" designation to herds was wrongly assigned to respective herds of the applicants. The Ministry was concerned with this finding because, between the time of that application and the decision, the Ministry no longer made the designations because it was being made by the Canadian Food Inspection Agency (CFIA) under the Canadian Chronic Wasting Disease Voluntary Herd Certification Program (VHCP). The Ministry could not change the herd status designation. The plaintiff commenced the class action against the Ministry and unnamed employees of the Ministry seeking damages on behalf of those cervid producers that refused to sign the indemnification form that provided indemnity to the Ministry and, as a result, had their herd status downgraded, wrongly, to "surveillance". The downgrade to "surveillance" negatively affected the value of the herds of the plaintiff and those in his proposed class. The Ministry was successful in having most of the claim struck, but paragraphs alleging negligence in the implementation of the declaratory order made under the judge in the previous application were allowed to proceed. The Ministry appealed. The Court of Appeal struck the remaining paragraphs. The Supreme Court of Canada found that the Court of Appeal erred in striking that portion of the claim that argued the Ministry was negligent in the implementation of the court's decree, and as a result, the plaintiff and the class sustained damages. The plaintiff's action was certified.

HELD: The court agreed with the parties that a summary judgment proceeding under rule 7-2 was appropriate. The plaintiff had to overcome s. 18.1 of The Animal Products Act to be successful. The section is a "good faith" provision indicating that no action lies against the Crown provided the Ministry was acting in good faith. The plaintiff argued that the Ministry was not afforded the protection of s. 18.1 of The Animal Products Act because they forfeited it by not acting as legislator, but rather merely as the administrator of the CFIA. The court disagreed. The Ministry did not lose the protection simply by being the provincial administrator of the CFIA program. The court did not find any of the badges of bad faith by the Ministry as set out in the Deren judgment. The badges of bad faith canvassed were: an intention to do harm; a lack of a bone fide belief in facts that, if true, would stand as a justification for the defendant's behaviour; dishonesty of intention; knowledge of circumstances that ought to put the defendant with that knowledge on inquiry; and behaviour that is so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that it

was demonstrated in good faith. No rational review of the conduct of the Ministry could lead to a conclusion of bad faith as defined in case law. The court granted the summary judgment application by the Ministry for a dismissal of the claim. The plaintiff's application for summary judgment was dismissed. No costs were awarded.

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Mosiuk v Nagel's Debt Review Inc., 2017 SKQB 173

Schwann, June 14, 2017 (QB17172)

Real Property – Beneficial Interest
Real Property – Land Titles Act – Defeasibility of Title
Statutes – Interpretation – Statute of Frauds
Trusts – Express Oral Trust – Partial Performance
Trusts – Express Oral Trust – Statute of Frauds

In 2007, the plaintiff received an order to remedy from the town regarding a 100-year-old building he owned and used for storage. In February 2009, the town sent a letter to the plaintiff indicating that the building was going to be demolished and that all contents had to be removed by March 5, 2009. Days before March 5, 2009, the plaintiff voluntarily transferred the title of the property the building was on to the defendant. On August 4, 2013, the building was destroyed by fire. The defendant had the building insured for fire. The insurance claim was settled for $37,000, which was paid into court pending resolution of the action. The plaintiff indicated that it was the defendant who conceived the plan to transfer the title to defeat the town's bylaw enforcement measures. The plaintiff said that the defendant was aware of the February 2009 letter. The purchase price was $30,000 with $10,000 being paid as a down payment and $4,000 being paid in annual interest-free installments. The building would be leased back to the plaintiff for $500 per month plus $125 in property taxes. The defendant would insure the building and the plaintiff would pay an amount equal to the insurance premium. The plaintiff's spouse lent the defendant the down payment, and the plaintiff described the transaction as a wash. The plaintiff said that the defendant was to hold the title on his behalf for a short period of time and then transfer it back. There was nothing registered against the title and the details of the transfer back were not worked out. The parties honoured the mutual payment obligations until March 2013. After the fire on August 4, 2013, the defendant paid the property taxes and $5,460 to clear away rubble and subsequently informed the plaintiff that

he was going to claim the fire insurance proceeds on his own. The defendant denied having any knowledge of the town's proposed demolition of the building when he purchased the property. The issues were: 1) did the defendant hold the land in trust for the plaintiff either intentionally or by operation of law; 2) if so, was the trust enforceable; 3) did the alternate claims advanced by the plaintiff have merit; and 4) what was the appropriate remedy.

HELD: The issues were determined as follows: 1) the court accepted the plaintiff's evidence over the defendant's, where it differed. The court accepted that the plaintiff sought advice from the defendant regarding the demolition and the defendant came up with the plan. The court accepted that the parties intended for the plaintiff to hold the land in trust for the plaintiff in order to buy some time. There was a promise to re-convey the land to the plaintiff, which was never honoured by the defendant. There was an express trust; 2) the oral trust was unenforceable pursuant to s. 7 of the Statute of Frauds. The court did, however, find ample evidence of part performance of the trust. Because of the partial performance, the court held that the Statute of Frauds did not prevent enforcement of the express trust. The defendant argued that the principle of indefeasibility and conclusiveness of title defeated the unregistered interest of the plaintiff.

The court did not agree. Section 35 of The Land Titles Act, 2000 prevents the registration of a trust instrument against title, but it does not do away with trusts. An unregistered equitable interest can exist and be enforced against an owner; 3) the court did not address the alternate claims because it found an enforceable express trust; and 4) the court made a declaration that the defendant did not have any beneficial interest in the property and that the plaintiff was the beneficial owner. The court ordered that the defendant transfer the title back to the plaintiff or his designate. There was no evidence of the value of the building, so the court used the 2009 value of $30,000 for the purposes of determining damages. The court accepted the plaintiff's estimate of the present value of the bare land of $500. The court ordered that the plaintiff receive the full value of the building and land in 2009, which was $30,000, minus: $500 for the bare land; $5,460 for remediation after the fire; and the property tax the defendant paid since the fire. The plaintiff also received one set of costs under the Queen's Bench Tariff. The defendant was ordered to pay for the costs of transfer and registration.

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CORRIGENDUM dated August 21, 2017: [93] It has been brought to my attention that there is a typographical error in para. 92(6) wherein it refers to para. "4(a)" when it should have referenced para. "5(a)". Therefore para. 92(6) should read as follows:

>>> 6. The parties have leave to return to court if they cannot

agree upon the amount of property taxes paid by the defendants for purposes of para. 5(a);

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R v Dustyhorn, 2017 SKQB 174

Chicoine, June 14, 2017 (QB17157)

Criminal Law – Arson – Sentencing
Criminal Law – Assault – Assault Causing Bodily Harm – Sentencing
Criminal Law – Uttering Threats – Sentencing

The accused was found guilty of committing nine offences that were committed by him over the course of two days. The accused had been charged with the following: two counts of assaulting his common law spouse on two consecutive days, contrary to s. 266 of the Criminal Code; one count of assault causing bodily harm to a friend of his spouse, contrary to s. 267(b); four counts of uttering threats to cause death to his common law spouse, her children and to his spouse's friend, contrary to s. 264(1)(a) of the Code; breach of a condition of his recognizance to refrain from consuming alcohol, contrary to s. 145(3) of the Code; and arson, contrary to s. 433(a). There was insufficient evidence to prove the last offence, but the accused was convicted of the lesser included offence of arson against property under s. 434 of the Code. The accused had intentionally caused damages by fire to the rental house in which his spouse and her children resided but set the fire after he knew that that all of them had fled the premises because of their fear of him. The offences had been committed while the accused was intoxicated. The background of the 27-year-old Aboriginal accused was that he was raised in a stable home although his parents separated when he was 14. Until he was 15, the accused excelled at school and sports. When he was 16 his girlfriend died in a car accident and he started drinking, doing drugs and quit playing sports. He then became involved with the criminal justice system when he was charged with robbery with violence. Other charges followed but the most serious crime committed by the accused occurred when he was 21. He pled guilty to a charge of manslaughter for his participation in the beating death of a fellow Native Syndicate gang member. The accused admitted his alcoholism but had never attended a treatment program. The aggravating factors in the accused's case included the fact that the assaults were against his spouse and while in the presence of her young children. He had a criminal record involving serious

offences and had just completed his sentence for homicide. The fire had caused his spouse and her children to lose their residence and their personal possessions. The accused expressed his willingness to rehabilitate himself and become a productive member of society.
HELD: The accused was sentenced to six years and four months' incarceration. The court imposed the following: 1) a three-month sentence for the first assault on his spouse and three months consecutive for the second assault on her; 2) six months for uttering threats to his spouse consecutive to all sentences; 3) six months for uttering threats to his spouse's friend, concurrent to all other sentences; 4) six months for one count of uttering threats to his spouse, her children and her friend concurrent to all other sentences; 5) six months for the second count of uttering threats to his spouse, her children and her friend concurrent to all other sentences; 6) nine months for assault causing bodily harm consecutive to all other sentences; 7) one month for breach of recognizance consecutive to all other sentences; and 8) four years for intentionally causing damage by fire to property not owned by him, consecutive to all other sentences. The accused was given credit of 1.5 to 1 for time spent on remand of 27 months which reduced his sentence to four years and one month to be served in a federal penitentiary.

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R v Walsh, 2017 SKQB 175

Brown, June 15, 2017 (QB17158)

Criminal Law – Defence Counsel – Application to Remove

In October 2016, a search warrant was executed at the house of the accused, W. He gave a warned statement indicating that other accused, E., told him that he had a marihuana licence and that W. could grow E.'s marihuana at his own house under E.'s licence. In December 2016, a search was executed at E.'s house and he gave a warned statement indicating that W. would not have thought he could grow marihuana under his licence. The defence counsel initially represented both accused but then withdrew as counsel for E., while continuing to represent W. E. did not oppose the counsel representing W. The Crown applied to have the defence counsel removed. The Crown argued that the defence counsel continued to be in a conflict position because they intended to call each accused at the other's trial. The Crown indicated that their primary concern was with the disclosure to the defence counsel with respect to her former client.

HELD: The court did not find a disqualifying conflict of interest, so the defence counsel was not recused from representing W. There had been disclosure, but it was not established that anything in the disclosure was confidential information that would not have been available to the defence counsel for W. independently of her representation of E. The court noted that it could not be overlooked that this was not the case of two accused being represented by one lawyer. The court also found that there was no negative impact on the criminal justice system relating to public perception. When there is only one accused being represented, the primary issue is whether confidential information was garnered prior to the withdrawal by counsel of the second accused. The applicable factors were found to weigh in favour of not recusing the defence counsel's representation of W.

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Stick v Onion Lake Cree Nation, 2017 SKQB 176

Barrington-Foote, June 15, 2017 June 20, 2017 (corrigendum) (QB17159)

Civil Procedure – Stay of Proceedings
Civil Procedure – Order for Disclosure
Statutes – Interpretation – First Nations Financial Transparency Act

The applicant, C., was a member of the respondent First Nations band and the other applicant was a non-profit corporation with a mandate of promoting the responsible and efficient use of tax money. The applicants applied pursuant to the First Nations Financial Transparency Act for an order requiring the respondent to comply with the financial disclosure obligations. Alternatively, they applied for the relief at common law or based on the duty imposed by s. 8(2) of the Indian Bands Revenue Moneys Regulations. The respondent applied for a stay of the application, arguing that the issues were already raised in other Federal Court proceedings. The respondent did not make constitutional arguments in response to the application like they did in the Federal Court proceedings. The respondent refused to comply with ss. 7 and 8 of the Act requiring financial disclosure. The respondent did offer the applicant an opportunity to read the consolidated financial statements at the band office. The respondent commenced a Federal Court action (OL action) in response to enforcement taken by Canada pursuant to the Act. Canada also applied (Disclosure Application) seeking the same

relief as the applicants. The Disclosure Application did not remain active, but the OL action did.
HELD: The applicants were granted the relief sought and the respondent's application was dismissed. This application and the OL action were between different parties, and in different courts. The respondent argued that the matter should be stayed because the constitutional issues were before the Federal Court in the OL action. The applicants should have, according to the respondents, applied for intervenor status in the Federal Court. The court found, however, that there was no duplication because this action concerned ss. 10 and 11 of the Act, it did not concern constitutional issues like the OL action because those issues were not even raised. The court disagreed with the respondent that it was improper for the applicants to commence the application rather than seeking intervenor status in the OL action. The applicants were entitled to pursue this application, regardless of the Federal Court's jurisdiction. The court also determined that the respondent's argument that the application should be stayed because of the federal application that was stayed, was without merit. The facts and parties of this matter were different. Further, an order that disclosure be made in favour of these applicants did not raise the same concerns as an order in favour of Canada. The court ordered that the respondent comply with the duties imposed by ss. 7 and 8 of the Act within 30 days of the date of the fiat.
CORRIGENDUM dated June 15, 2017: [1] Pursuant to Rule 10-10(a) of The Queen's Bench Rules, para. 42 of the judgment of June 15, 2017 shall be amended by adding the words "and s. 8" after the words "s. 7".

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R v Kishayinew, 2017 SKQB 177

Turcotte, June 14, 2017 (QB17173)

Criminal Law – Assault – Sexual Assault – Consent – Intoxication
Criminal Law – Assault – Sexual Assault – Wilful Blindness or Recklessness
Criminal Law – Evidence – Credibility

The accused was charged with sexual assault, contrary to s. 271 of the Criminal Code, and breach of an undertaking to keep the peace and be of good behaviour, contrary to s. 145 of the Criminal Code. The sperm sample taken from the complainant matched the DNA of the accused. The accused testified that the complainant was a willing participant in the sexual intercourse

and that she initiated it. The complainant and a friend met in a schoolyard and drank alcohol before relocating to a pub to continue drinking. The friend testified that they went outside to get his bike where they encountered the accused. The accused invited them to a house party. The friend said he left the house party to ask his aunt if the complainant could sleep over, but when he returned to the house party no one was there, so he went back to his aunt's house. The complainant testified that her friend and she left the house party together and headed back towards the pub. She said that when they were behind the pub, the friend said he had to do something so he left. The complainant said that she started walking, then blacked out. She said that, when she came to, she was farther down the alley and the accused was there. The complainant said that the accused pulled her along by her arm. She said that she was crying the whole time. They went to the accused's sister's house. The complainant said that the accused forced her downstairs to his bedroom where he touched her above her clothes and started pulling down her pants against her will. The complainant then blacked out. When she came to, the complainant said that her pants and underwear were pulled down a bit and the accused was sitting on the mattress beside her. The accused would not let her leave, so she ran out of the house when she said she had to go to the bathroom. A witness came across her and offered to help and called the police. The accused testified that he found the complainant crying on the curb outside of the pub. He said that the complainant told him that she was looking for her friend who had left. The accused said that he just wanted to help the complainant so asked if she wanted to go to his house. He said that he did not ask the complainant to lie down on his bed, but that she just did. She also started kissing him, the accused said, and he kissed her back. The accused said that the complainant started taking off her jeans after asking if he had a condom. The accused said that the complainant left his house at 11:00 pm while his sister testified that they did not arrive at her house until 2:00 or 3:00 am.

HELD: The court did not believe the accused's testimony that it was the complainant who initiated the sexual activity between them. The court said that the evidence did not even raise a reasonable doubt. The court did believe the accused when he said he found the complainant drunk and crying on the curb by the pub. The court noted that the accused contradicted various aspects of his earlier testimony and the statement he gave police. The court found that the contradictions in the accused's evidence were directed towards his self-serving attempt to justify his forced sexual activity on the complainant. The court did believe the complainant. She gave her evidence in a credible, forthright, honest, and consistent manner. The complainant's evidence

corroborated that she did not consent to sexual activity with the accused. The court found that the complainant's level of intoxication was such that she did not have the necessary operating mind to be able to freely and consciously grant, revoke, or withhold her consent to engaging in sexual activity with the accused. The accused was found to be reckless or willfully blind to the complainant's level of intoxication and her inability to consent to engage in sexual activity with him. The accused failed to take reasonable steps in the circumstances known to him at the time to determine whether the complainant was consenting. The accused was found guilty of both charges.

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R v Lalonde, 2017 SKQB 178

Labach, June 16, 2017 (QB17174)

Criminal Law – Motor Vehicle Offences – Dangerous Driving Causing Bodily Harm – Sentencing

The accused pled guilty to dangerous driving causing bodily harm, contrary to s. 249(3) of the Criminal Code. He had driven his truck on a city street at midnight at speeds between 120 and 139 km/h and then rear-ended a vehicle at a red light at a speed of 113 km/h. The occupants of that vehicle each suffered injuries that still affected them. A number of other vehicles were damaged as a result of the collision. The accused showed signs of impairment, and the police arrested him for drinking and driving and made a blood demand on him when he was in the ambulance. Initially the accused was indicted on 11 separate offences, and he elected trial by judge and jury. He re-elected to trial by judge alone, and the Crown filed a new indictment charging him with the one count. At the sentencing hearing, no evidence was provided regarding whether the accused had given a blood sample and the degree of his intoxication. The accused, 29 years of age, had no criminal record but had nine previous convictions for summary offence tickets, including speeding and driving without due care. His last conviction was in 2014. The accused had had steady employment for six years and his employer provided a letter of reference and continued to employ him despite that it was difficult to accommodate him without a license. The Crown argued that the accused should receive a 12-month jail sentence and a driving prohibition. The defence suggested that an intermittent sentence of up to 90 days followed by a period of probation would be more appropriate. As the accused had not had a license since November 2015, a

further license suspension was unnecessary.
HELD: The accused was sentenced to six months' imprisonment. A period of incarceration was necessary to meet the requirements for denunciation and deterrence. The court exercised its discretion under s. 259(2) of the Code and did not impose a further driving suspension since the accused had been prohibited from driving for over a year and a half before he had been convicted.

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Pchelnyk v Carson, 2017 SKQB 181

Meschishnick, June 20, 2017 (QB17164)

Civil Procedure – Settlement Agreement – Multiple Defendants – Pierringer Agreement
Statutes – Interpretation – Contributory Negligence Act

The plaintiffs applied for approval of the Proportionate Share Settlement Agreement entered into between them and the defendant, R.M., and for consequential relief that included amending the statement of claim. Two defendants, the realtors, brought an applicant to authorize the issuance of a cross-claim or alternatively, a third-party claim, against the R.M. The realtors argued that the settlement agreement exposed them to the payment of damages beyond what might occur if the R.M. remained a defendant in the action. The plaintiffs' action alleged flaws in the construction of homes that they purchased from two other defendants. The realtors acted for the plaintiffs in purchasing the homes and the R.M. was responsible for periodic inspection of the homes. The realtors argued that if the R.M. was released from liability prior to trial and the home builder defendants go bankrupt, the realtors would have to pay more than their proportionate share under the joint and several liability principle set out in s. 3(2) of The Contributory Negligence Act. The realtors argued that the plaintiffs should agree in the settlement agreement that the liability of the remaining defendants should be several. The plaintiffs and the R.M. argued that s. 3.1 of the Act could be interpreted to allow for the assessment of responsibility of a party like the R.M. for the insolvency of one of the remaining defendants. The realtors also raised three additional objections: they must be protected from the possibility of double recovery of the plaintiffs; there would be procedural matters such as disclosure of documents by the R.M. and who would call the R.M.'s personnel as witnesses and use the transcripts from questioning of the R.M. that already

took place; the plaintiffs' application to amend the statement of claim requested that any reference to the R.M. and allegations against it be deleted as if they were not a party.
HELD: The court declined to interpret s. 3.1 of the Act in a hypothetical scenario. The court agreed with an approach from the Novagas case where the effect of the settlement agreement was that the remaining defendants would only be liable for the amounts that they would not be able to pass on to the settling defendants regardless of whether they remained a party to the action or not. The double recovery objection could be addressed with a clause in settlement agreements where the plaintiffs undertake to disclose to the trial judge the amount of the settlement so the trial judge could determine if double recovery was real. With respect to the second objection, the court could not see any procedural prejudice to the realtors that could not be remedied by reference to The Queen's Bench Rules or by application to the court. The pleadings had closed and trial dates were already set. The court determined it would not be proper to simply delete all references to the R.M. in the statement of claim. That amendment would not reflect the terms of the settlement agreement and would not make it known to the trial judge and remaining parties that the plaintiffs claim against the non-settling defendants was limited. The court would approve the settlement agreement if it was amended, as follows: 1) the plaintiffs provided the realtors with an undertaking not to pursue them for a greater amount than if the R.M. remained a defendant; and 2) to amend the statement of claim alerting the court to the fact that a Pierringer Agreement was entered into limiting liability of the settling and non-settling defendants and containing the additions and deletions in a draft.

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Nelson v Regina Police Service, 2017 SKQB 192

Kalmakoff, June 27, 2017 (QB17180)

Administrative Law – Judicial Review
Statutes – Interpretation – Saskatchewan Human Rights Code, Section 3, Section 27

The applicant applied for judicial review of a decision of the chief commissioner of the Saskatchewan Human Rights Commission (SHRC) that denied the applicant's application to extend the time for filing a complaint outside the limitation period set out in The Saskatchewan Human Rights Code. The subject matter of the complaint had arisen in March 2015 when

two officers of the Regina Police Service arrested the applicant in the course of enforcing an eviction order against him. The applicant informed the officers that the eviction was being contested, that a hearing before a Residential Tenancies officer was pending and that the officers had no authority to arrest him, but they persisted. The applicant alleged that the officers used excessive force and mocked him, calling him "Mr. Lawyer" and a "retard". The applicant said that the mocking was because of the noticeable effects of an acquired brain injury. The applicant filed a complaint with the Saskatchewan Public Complaints Commission (SPCC) in March 2015. It investigated the complaint and issued a response in May 2016. The response indicated that there was little dispute of the applicant's version of the events and that the officers had assisted in improperly evicting the applicant from his residence and were mistaken in their understanding of the authority to arrest him in the circumstances. However, the improper actions by the officers did not support formal discipline. The applicant then filed his complaint with the SHRC in August 2016. When it was noted that the complaint was outside the limitation period, the applicant provided a letter from his psychologist that explained that the applicant's brain injury caused functional impairments. The applicant was invited to provide further information for the SHRC to consider in determining whether to extend the limitation period. He explained that he thought that he had needed to await the decision of the SPCC before proceeding with the SHRC complaint. His psychologist provided another letter that advised that because of the effects of his brain injury the applicant felt that he could not manage two concurrent legal review processes and the psychologist supported that decision at the time, not being aware of the limitation period. Further, there was no reason to assume that the SPCC would take as long as it did in rendering its decision and the applicant was unfairly disadvantaged by his brain injury from making use of the SHRC complaints process in a timely manner. The chief commissioner's letter declining to exercise his discretion to extend the time limit referred to the fact that the SPCC's decision had not corroborated the complaint that the officers had discriminated against the complainant on the basis of the disability, and that the complainant was acting upon erroneous assumptions regarding the SHRC's procedures and should have made further inquiries. The applicant argued that the chief commissioner's decision was unreasonable because it ignored a relevant factor, his brain injury, and because the exercise of the chief commissioner's discretion was contrary to the Code's purpose.
HELD: The application was granted and the chief commissioner's decision was set aside. The commission was directed to accept the applicant's complaint as having been filed

under s. 27 of the Code. The court found that the chief commissioner's decision was unreasonable. His conclusion was not defensible on the facts and the law when considered in light of the record and the objectives of the Code. The discretion conferred by the Code must be exercised in way that was consistent with the purposes and policies underlying its grant. When the exercise of discretion frustrated the very legislative scheme under which the power was conferred, it was unreasonable. The chief commissioner's decision appeared to recognize that the applicant's brain injury had an impact on the way he processed information and conducted himself in the pursuit of the complaint but then noted that it was the applicant's erroneous assumptions and failure to make proper inquiries regarding how to proceed that led to the conclusion that the evidence was insufficient to demonstrate that the applicant was unable to file the complaint within one year. His reasons had the effect of using the applicant's disability against him.

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R v Whitehawk, 2017 SKQB 194

Megaw, April 24, 2017 (QB17181)

Criminal Law – Second Degree Murder
Criminal Law – Defences – Provocation

The accused was charged with committing second degree murder, contrary to s. 235(1) of the Criminal Code. The accused admitted the elements of the offence but raised the defence of provocation under s. 232 of the Code that reduced the charge to manslaughter. The accused did not testify at his trial. On the night in question, the accused told the RCMP officer to whom he gave his statement that the accused knocked on his door at 10:30 pm. The accused and the victim lived on a remote reserve. The accused did not know the victim well. Shortly before the victim arrived, the accused had witnessed an altercation between him and his spouse on the street. When the victim came to his house, the accused did not want to admit him but the victim inserted his body into the doorway so that the door could not be closed. The accused said that after breaking into his house, the victim tried to rape him and threatened him by saying that he was going to become a gang member and be a hooker. Following these threats, the victim allegedly kissed the accused on the shoulder and the latter concluded that the victim was going to try and rape him. The accused kicked the victim in the head

repeatedly, stabbed him numerous times and hit him in the head with a tire rotor. The accused called 911 following his assault on the victim. The victim's spouse testified that he was not a member of a gang. The issues were as follows: 1) had the Crown proven the absence of conduct of the victim that would constitute an indictable offence punishable by five or more years of imprisonment; and 2) was the victim's conduct sufficient to deprive an ordinary person of the power of self-control.
HELD: The accused was found guilty of second degree murder. The court found the following with respect to the issues related to the defence of provocation: 1) the Crown had failed to prove that the victim did not commit a sexual assault; and 2) the victim's alleged conduct did not result in provocation considering the current Canadian norms of behaviour.

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Intl Brotherhood of Electrical Workers Local Union 2038 v BFI Constructors Inc., 2017 SKQB 196

Kalmakoff, June 29, 2017 (QB17183)

Administrative Law – Judicial Review
Labour Law – Arbitration – Judicial Review
Statutues – Interpretation – Occupational Health and Safety Regulations, Section 2(rr), Section 86, Section 87

The International Brotherhood of Electrical Workers (union) applied for judicial review of the decision of an arbitration board. The union was the certified bargaining agent for a group of employees who were employed by BFI Constructors Ltd. (BFI), and the parties were subject to a collective agreement. In 2015, the union filed a grievance on behalf of one of the members requesting that BFI reimburse him for the cost of metatarsal boots that he and the other members were required to wear while working for BFI at a worksite located at Mosaic's K2 mine. The requirement was put in place by Mosaic. BFI denied the grievance and the board was appointed to hear and determine the matter pursuant to the agreement. The board denied the grievance on the basis that neither the agreement nor the applicable legislation required BFI to supply metatarsal boots to the union's members who were sent to work at the Mosaic site, and in the circumstances, BFI was not required to reimburse members for the cost of the boots.
HELD: The application was dismissed. The standard of review was reasonableness. The court found that the board's decision met the requirements for justification, transparency and

intelligibility and fell within the range of possible acceptable outcomes.

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Lamontagne, Re (Bankrupt), 2017 SKQB 198

Thompson, June 30, 2017 (QB17185)

Bankruptcy and Insolvency – Discharge

The bankrupt made an assignment in bankruptcy in January 2016. Her Statement of Affairs disclosed that she held $3,100 in assets and $263,800 in liabilities. All of the latter was unsecured and $221,800 was tax debt. She stated that she had not sold or disposed of any property in the 12 months prior to the bankruptcy or within the previous five years. As she was a first-time bankrupt and not required to pay surplus income, the bankrupt was eligible for an automatic discharge up to the point when her trustee triggered a discharge hearing when he filed a notice of opposition to discharge. The trustee identified questions about the bankrupt's pre-bankruptcy conduct as well as her failure to disclose that she had disposed of property, contrary to her statement. The bankrupt explained that in 2008 her mother had suffered a stroke and she needed money to help with her mother's care. Although it was not clear how she hoped to acquire funds, it appeared that through the bankrupt's misguided attempt to help her brother's business, she might be able to do both. Her brother requested her to become the sole director and shareholder of one company and a shareholder of another company. The payments made to the bankrupt from those companies between 2008 and 2011 became the subject of the Canada Revenue Agency's reassessment and the finding that the bankrupt owed the taxes that were the reason for her bankruptcy. Other transactions that took place at her brother's behest included the bankrupt purchasing the property where her brother lived as a tenant and assuming its mortgage in 2008. In 2011, she transferred the title of the property to her brother's girlfriend without consideration to assist her in obtaining financing for her new business. In exchange, the bankrupt was to acquire an interest in the girlfriend's business, but shares were never issued and the business subsequently failed. During the same month that the bankrupt acquired the house, she became the registered owner of a half interest in a property that had previously been owned by her mother only, and registered a mortgage of $188,000 against it. The mortgage proceeds were to be used for the care and support of her mother, according to a

trust agreement. The bankrupt then loaned the mortgage proceeds to her brother's companies. The bankrupt believed that the payments she received from the companies were in fact repayment of the loans. In October 2014, the bankrupt transferred her interest in this property back to her mother because her brother's business was shut down and it was easier to do so than collapsing the trust.
HELD: The bankrupt was discharged as at October 2018, a two-year suspension. The bankrupt's assets were found to be not equal to fifty cents on the dollar on the amount of her unsecured liabilities under s. 172(a) of the Bankruptcy and Insolvency Act (BIA). She was found to be responsible for that fact. Although the bankrupt testified that she provided the mortgage proceeds to help her brother, her actions had not helped her mother and she incurred significant tax liability because of the transfer of funds and without ensuring there was proper documentation of the terms of the arrangement. Under s. 173(d) of the BIA, the bankrupt failed to meet her obligations set out s. 158(b) and (g) and failed to disclose to the trustee that she had disposed of the house within five years prior to the bankruptcy. Therefore, the bankrupt had contributed to the bankruptcy by her culpable neglect of her business affairs under s. 173(e) of the BIA. Her conduct was not so egregious as to be denied a discharge but the two-year suspension was imposed.

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Paton, Re (Bankrupt), 2017 SKQB 216

Thompson, July 14, 2017 (QB17198)

Bankruptcy – Discharge – Factors
Bankruptcy – Bankruptcy and Insolvency Act, Section 172.1 – Canada Revenue Agency Liability

The bankrupt filed an assignment in bankruptcy in March 2016. The proven claims of debt owing to the Canada Revenue Agency (CRA) for personal income taxes was $733,481.75. The provisions of s. 172.1 of the Bankruptcy and Insolvency Act (BIA) governed the bankruptcy because the CRA debt was more than $200,000 and was more than 75 percent of the unsecured proven claims. The Minister of National Revenue (MNR) opposed the bankrupt's absolute discharge because he was not an honest but unfortunate debtor. The bankrupt had a history of non-compliance with tax laws extending from the 1980s. The trustee did not oppose the bankrupt's discharge. The issues were as follows: 1) did the circumstances of the bankruptcy support an

order discharging the bankrupt's unsecured liabilities; and 2) if so, what terms were appropriate: a) how did the bankrupt conduct himself in relation to the bankruptcy; b) what were the circumstances of the bankrupt at the time the personal income tax debt was incurred; c) what efforts did the bankrupt make to pay the personal income tax debt; d) did the bankrupt make payments in respect of other debts while failing to make reasonable efforts to pay personal income tax debt; and e) what were the bankrupt's financial prospects for the future.
HELD: The issues were determined as follows: 1) the circumstances of the bankrupt were found to support an order discharging his unsecured liabilities; 2) a) the trustee reported that the bankrupt had been cooperative and completed all duties and counselling required by the BIA. The bankrupt did not have any surplus income; b) the bankrupt did not avoid his tax debt in the '80s. He sold the family farm to cover expenses and pay income tax debt. The bankrupt had a history of filing his tax returns late and also of incurring more liability when his returns were reassessed by CRA. The bankrupt also suffered some personal hardship when his father died and his son was convicted of an offence and placed in a maximum security penitentiary in the United States. The bankrupt always remitted his GST for his oil well servicing business. A lot of the arrears to CRA was comprised of penalties and interest. The bankrupt began to suffer from health issues in 1999. In 2004, the bankrupt pled guilty to charges of failing to file returns for 2001, 2002, and 2003. The bankrupt stopped working in 2014. There was no post-bankruptcy income tax owing; c) between 1989 and December 2015, the bankrupt paid $474,107 and possibly another $7,400 through garnishment of his CPP and OAS; d) there was evidence that the bankrupt purchased assets during the period that there was outstanding income tax debt; and e) the bankrupt was 73 and did not work. He lived on OAS and CPP ($1,400 to $1,600 per month). The bankrupt supported his wife, who also had health issues. The principal income tax liability was $213,460. The court found that there was no reasonable possibility that the bankrupt would be in a position to comply with a payment order. The bankrupt continued to make efforts to deal with the debt well beyond a time where he had the means to deal with this tax liability. The court found the bankrupt to be atypical for a s. 172.1 bankrupt. He paid 250 percent of the principle income tax debt, which was considerably more than most income tax debtors. An order was made suspending the bankrupt from discharge until October 19, 2017.

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Schneider v McMillan LLP, 2017 SKQB 222

Scherman, July 19, 2017 (QB17207)

Class Action – Costs – Class Actions Act, Section 40
Civil Procedure – Costs – Double Costs
Civil Procedure – Costs – Expert Witness Fees
Civil Procedure – Costs – Offer to Settle
Civil Procedure – Queen's Bench Rules, Part 11
Statutes – Interpretation – Class Actions Act, Section 40

The defendants were successful in defending the class action brought against them. The claim was certified when Saskatchewan was a "no costs" jurisdiction. The Class Actions Act was amended to be a costs jurisdiction in May 2015. The decision of the court indicated that even though the claim was certified before the costs change, s. 40 had retrospective and retroactive effect so that the costs provisions applied to all steps in the proceedings. The defendants brought an application to assess the costs. They filed a bill of costs that included double costs for all steps taken after service of a formal offer to settle in June 2015. The total bill of costs claimed was $629,837, which included $143,004 that was a .5 multiplier of tariff items of $286,008. The defendants indicated that the claimed costs were 40 percent of the total defence. The defendants requested that the court assess the costs on Column 3 of the tariff.
HELD: The defendants were ultimately requesting the costs be fixed under rule 11-1. Section 40(2) of the Act outlines factors to consider in awarding costs. The factors were considered by the court as follows: 1) the matter was not one of public interest; 2) the case did not involve a novel point of law so that it would make it appropriate to eliminate or reduce an award of costs to the defendants. The action was taken only for the potential financial benefit to the investors; 3) this case was not a test case; 4) the case did not raise access to justice concerns. The plaintiff proceeded with the claim notwithstanding the change to the rules regarding costs. The plaintiff and class members were investors in a speculative investment and thus should expect to bear the risks involved; and 5) the court concluded that the change from being a "no cost" to a "cost" jurisdiction partway through the action was one of the factors that could be considered in the exercise of the court's discretion. The court did not accept the defendants' argument that costs otherwise fixed should be doubled for those steps taken after the offer to settle in June 2015. Double costs are not automatically awarded because rule 4-31(3) of The Queen's Bench Rules states that the double-costs reward after an offer to settle does not apply if the costs are fixed pursuant to rule 11-1. The offer to settle was but one consideration. The court found four ways to distinguish the

present case from a case where the court did apply a multiplier of .5 to the Column 3 tariff of costs. The tariff was recently implemented. The claim was complex and lengthy so the court agreed that Column 3 of the tariff was the appropriate column. The court had difficulty with the defendants' assertion that 40 percent of their actual costs would be appropriate because all the court had was the statement that the costs were approximately $1.5 million, without any detail of the costs. The entitlement to solicitor-client costs was subject to its own criteria, and the court found that fixing costs as a function of solicitor-client costs was inappropriate. The risk of being sued for negligence when conducting business like the defendants should be factored into the business decision of what price to charge for services. The court did not award the full recovery of expert witness fees because the court agreed with previous decisions that to do so would be equivalent to awarding solicitor-client costs. The court fixed costs at $309,324.

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