The Law Society of Saskatchewan Library's online newsletter
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R v P.R., 2018 SKCA 27

Richards Herauf Schwann, April 6, 2018 (CA17138)

Criminal Law – Young Offender – Sentencing
Statutes – Interpretation – Youth Criminal Justice Act, Section 3, Section 38

The appellant was convicted after trial of sexually assaulting his 11-year-old niece contrary to s. 271 of the Criminal Code. He was 17 years old at the time of the offence and was sentenced as a youth under the Youth Criminal Justice Act (YCJA) to 12 months in secure custody followed by six months of community supervision. He appealed his conviction on the grounds that: 1) he received ineffective trial representation because his lawyer did not cross-examine the complainant at trial concerning her inconsistent statements; and 2) the trial judge made errors in assessing the credibility of the witnesses. He also appealed his sentence as: 3) unfit, as it contradicted the provisions of the YCJA. The trial judge based the custodial sentence on the paramountcy of denunciation and deterrence as considerations under the YCJA.
HELD: The appeal from conviction was dismissed and sentence appeal allowed. The sentence was varied to 12 months of probation. The court found with respect to each issue that: 1) the presumption of competent trial representation had not been displaced. The trial lawyer's decision not to cross-examine the complainant was a tactical one. She was very young and had difficulty expressing herself in the courtroom whereas she had

given clear, coherent statements to the police shortly after the offence. The lawyer determined that it was not beneficial to the appellant's position to highlight those statements by raising certain inconsistences between them and the complainant's testimony; 2) the trial judge's assessment of credibility was entitled to deference. He correctly identified R v W.(D.) as the guiding legal principle in the circumstances and his credibility findings were supportable on the evidence; and 3) the sentence was unfit because denunciation and deterrence are secondary factors in sentencing young offenders and are to be considered in a fashion consistent with the principle of "diminished moral blameworthiness" described in s. 3 the YCJA. The court acknowledged that this offence, committed against an 11-year-old and causing her serious psychological harm, might warrant a custodial sentence but for the appellant's exemplary conduct since the offence and the almost four years that had elapsed between the offence in 2012 and his sentencing in 2016. Under s. 3(1)(b)(iv) and (v) of the YCJA, the delay in this case offended the concept of timely justice. To impose a custodial sentence on the appellant in this case would be contrary to the purposes of the YCJA as it would impede the appellant's rehabilitation and reintegration into society. The court decided that a fit sentence in this case would be 12 months of probation.

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Herauf Ryan-Froslie Schwann, April 12, 2018 (CA17139)

Criminal Law – Evidence – Admissibility – Hearsay
Criminal Law – Assault – Aggravated Assault – Conviction – Appeal
Criminal Law – Assault – Aggravated Assault – Sentencing – Appeal

The appellant was convicted after trial of two counts of aggravated assault. He pled guilty to a number of other charges arising out of the same incident, including uttering death threats to the two complainants and willfully damaging property. He was designated a long-term offender as a result of his aggravated assault convictions and sentenced to six years, followed by a one-year consecutive sentence for uttering death threats, for a total sentence of seven years. He appealed his conviction for aggravated assault against one of the complainants, Thomson, on the ground that the trial judge erred in admitting into evidence Thomson's videotaped statement that

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identified the appellant as his assailant. The statement was recorded immediately following the offence but the K.G.B. warning was given at the end of his statement. Although the appellant conceded that it was necessary for the judge to admit the statement because Thomson would not adopt the statement at trial, claiming that he suffered memory loss and could not recall what happened at the time of the offence, the appellant asserted that the Crown had not established threshold reliability. The grounds for the appellant's appeal of sentence were that the judge erred by imposing consecutive sentences for the two aggravated assaults and for uttering threats, contrary to s. 718.3(4) of the Criminal Code, or by incorrectly apprehending that the totality principle could be used to increase the total sentence for concurrent terms. He also erred by only awarding 1.25 days for each day the appellant spent on remand.
HELD: The appeal regarding the conviction for aggravated assault against Thomson was allowed and a new trial was ordered. The appeal as to sentence was dismissed. The court found that the trial judge made several errors regarding the admission of Thomson's statement. It was not procedurally reliable because the warning was given after the statement had been made and because Thomson could not be cross-examined, the statement was taken outside the K.G.B. situation. The corroborative evidence relied upon by the judge did not rule out the possibility that Thomson lied about the identity of the person who assaulted him. The judge erred in applying the totality principle only to the sentences imposed for the aggravated assaults and he should have applied it after he had determined the appropriate sentence pertaining to all the convictions. However, the court did not disturb the sentence because the total length of incarceration was appropriate in the circumstances. As the conviction for one of the aggravated assaults was set aside, the remaining sentence of four years for the other assault conviction plus one year consecutive for the two uttering threat convictions was appropriate and the totality of it was not unfit. There was no basis upon which the court could interfere with the judge's decision to grant credit for remand at the 1.25 rate because he provided a reason for doing so, in accordance with s. 719(3.2) of the Code.

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R v Peequaquat, 2018 SKPC 16

Rybchuk, March 29, 2018 (PC17108)

Criminal Law – Motor Vehicle Offences – Impaired Driving –

Driving/Care or Control with Excessive Alcohol
Constitutional Law – Charter of Rights, Section 8

The accused was charged with having care or control of a motor vehicle while impaired and while his blood level exceeded .08. A voir dire was held because the accused alleged that his s. 8 Charter rights had been violated and he sought exclusion of the evidence of impairment under s. 24(2) of the Charter. A police officer had been dispatched to a report of a possible impaired driver in a specific location. The officer was unable to find the vehicle, but because she had been given the licence plate number, she obtained the residential address for the registered owner. The officer then drove to the residence and, not seeing the vehicle in the front of the house, she drove down the back alley where she located it inside the backyard, near the house. She could not see anyone in the vehicle and it was not running. When another officer arrived, they entered through the back entrance of the property onto the driveway. As they approached the vehicle they could see two people in the front seat. The accused was seen taking a sip of beer. The officer asked him to get out of the vehicle and detained him for an impaired investigation. He was searched, handcuffed and arrested.
HELD: The Charter application was granted. The court found that the accused's s. 8 Charter rights had been breached and after performing a Grant analysis, all of the evidence flowing from the search was excluded under s. 24(2). The accused was found to have had a subjective expectation of privacy because the vehicle was on his property and the officers were not invited to enter onto it. His subjective expectation of privacy was objectively reasonable because although vehicles and those parked on driveways do not carry as high an expectation of privacy as a home, the accused was in his vehicle parked on his property. Access to that part of the property was a restricted back entrance with the vehicle located near to his dwelling and was not in full street view. The officers had not approached the front entrance of the house and did not knock on any door or have any intention of doing so. Their purpose was not to communicate with persons at the property but to secure evidence against the accused, thereby exceeding the authority of the implied licence to knock. They were therefore trespassing and conducting a search for the purposes of s. 8. The search was without warrant and the Crown had not sought to rebut the presumption that it was unreasonable, and thus s. 8 was violated. The conduct of the police in this case was serious and had a large impact on the accused's privacy expectations. The admission of the evidence would bring the administration of justice into disrepute and it was excluded.

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R v Sutherland-Kayseas, 2018 SKPC 17

Scott, March 7, 2018 (PC17109)

Criminal Law – Motor Vehicle Offences – Dangerous Driving

The accused was charged with operating a vehicle in a dangerous manner contrary to s. 249.1(1) of the Criminal Code, operating a vehicle in order to evade a police officer contrary to s. 249.1(1) of the Code, and a number of other charges. The vehicle in question was being covertly surveilled by the police. On the day that the offences were committed, the surveillance team asked a constable on patrol to conduct a traffic stop of it. When the constable did so, the driver of the vehicle ignored the constable's emergency lights and siren and drove off at very high speed on city streets. The constable did not see the driver or the occupant of the vehicle during his pursuit. Two other constables saw the vehicle as it passed them at different times and different locations. Each of them testified that the driver was an Aboriginal woman and the passenger was a man. The vehicle was abandoned at some point and the occupants were picked up by another vehicle. When a traffic stop was made of it, two passengers, the accused and a man, gave the officer false names. The man tried to run away, but was captured. While detained, he informed the police that the accused had been driving the vehicle and agreed to show them where it had been abandoned. He testified for the Crown at trial and was not shaken on cross-examination. He denied implicating the accused to avoid being charged because he knew that his fingerprints were not on the steering wheel.
HELD: The accused was found guilty of all charges. The court accepted the evidence of the man after applying the Vetrovec warning regarding his testimony. It found that his evidence was corroborated by the general eyewitness accounts given by the constables and other evidence presented by the Crown.

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R v Asapace, 2018 SKPC 18

Henning, March 2, 2018 (PC17105)

Criminal law – Assault
Criminal Law – Assault – Assault with a Weapon

The accused was charged with one count of assault contrary to s. 266 of the Criminal Code; one count of unlawful confinement contrary to s. 279(2) of the Code; one count of assault using a weapon contrary to s. 267(a) of the Code; and a breach of recognizance prohibiting contact with the complainant. The complainant testified that she and the accused had been in a relationship but that she had ended it because the accused emotionally abused her. She alleged that the accused came to her house on two occasions following their break-up and committed the two sets of offences against her. The complainant had difficulty expressing herself and was emotionally distraught when she gave her testimony. The accused gave defence evidence that the incidents never occurred and that the complainant had fabricated them. He admitted that he had gone to her house and that he had broken the complainant's phone and had yelled at her, but denied hitting her or threatening her with a knife on the date of the second incident.
HELD: The accused was found guilty of all of the offences. The court accepted the evidence of the complainant.

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Gallais v McIvor, 2018 SKPC 19

Cardinal, March 19, 2018 (PC17106)

Contract – Breach – Damages

The plaintiff rented a commercial building to the defendant and by verbal agreement the latter agreed to pay rent in the amount of $800 per month beginning in July 2014. The defendant moved out of the building without notifying the plaintiff in February 2017. The parties agreed that the defendant owed the plaintiff outstanding rent of $1,000 and outstanding bills for energy and power that totaled approximately $2,300. The defendant disputed that the plaintiff was entitled to $800 for the damage deposit because that sum had been paid by her as the first month's rent. The defendant also contested the amount of expenses that the plaintiff submitted in six invoices for expenses incurred by her for such things as various repairs and the mileage costs of driving to the premises.
HELD: The plaintiff was given judgment in the amount of $3,760 but the court allowed the $800 paid by the defendant to be set-off against that amount. The court reviewed the invoices submitted by the plaintiff and disallowed some of the expenses she claimed.

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R v Masiowski, 2018 SKPC 20

Robinson, March 16, 2018 (PC17110)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 8, Section 9

The accused was charged with having the care or control of a vehicle while impaired by alcohol and having care and control of a vehicle while his blood alcohol content exceeded .08 contrary to s. 253 and s. 255 of the Criminal Code. The defence alleged that violations of the accused's Charter rights had occurred and a blended voir dire and trial was held. The accused had been stopped by a police officer in a stop check. There was nothing untoward in his manner of driving, but when asked if he had been drinking, the accused said that he had had a couple. The officer noted that he smelled alcohol on the accused's breath, that his eyes were glassy and that he had trouble finding his licence in his wallet. The officer, suspecting that the accused's ability to operate a vehicle might be impaired, asked the accused to exit his vehicle whereupon he noticed that the accused was swaying and staggering. After making an ASD demand, a few minutes elapsed before the test was administered because the officer had to wait until another officer could bring the machine. The accused failed the test and the officer made a breath demand. He was taken to the police station. The officer testified that the accused swayed and staggered as he walked through the station. The video recording taken of the accused's movements at the station showed that he walked normally. The defence argued that as there had been a delay of 10 to 12 minutes between the time that the accused's vehicle was stopped and the making of the ASD demand, the latter was not made forthwith and therefore did not comply with s. 254(2)(b) of the Code. Further, the ASD test caused unwarranted delay, since the officer had concluded that the accused was impaired and therefore the demand for breath tests pursuant to s. 254(3) of the Code was not made as soon as practicable. Finally, the defence argued that the Crown had not proven that notice of its intention to tender the certificate of a qualified technician had been served on the accused as required by s. 258(7) of the Code.
HELD: The accused was found not guilty. The court found that the accused's rights under s. 8 and s. 9 of the Charter had not been infringed. The ASD test was administered forthwith in the circumstances and the demand did not cause unwarranted delay. However, the court was not satisfied that the officer's

testimony clearly established that he had signed the notice of intention to produce and the affidavit of service at the same time. The court was not convinced that the officer had signed the notice of intention to produce as a valid notice when the accused was served with his various documents because the officer's credibility had been negatively affected by his failure to testify in a fair manner regarding the accused's physical condition at the station. The court ruled that the certificate of qualified technician was inadmissible pursuant to s. 258(1)(g) of the Code.

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R v Maier, 2018 SKPC 21

Morgan, March 23, 2018 (PC17111)

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

The accused was charged, along with one or more co-accused, as a result of a police investigation of drug trafficking in Saskatoon. The charges were that the accused conspired with two others to commit the indictable offence of trafficking cocaine and of trafficking marijuana, contrary to s. 465(1)(c) of the Criminal Code and possession of cocaine and marijuana for the purposes of trafficking. The Crown submitted evidence of numerous text messages and meetings between the accused and the two co-accused that showed a clear agreement that they were selling drugs and that the accused was in either joint or constructive possession of the drugs that were found in the residence of one of the co-accused. The search of the residence revealed 16,500 grams of marijuana and 1,050 grams of cocaine clearly packaged for further distribution as well as a large drum containing a cutting agent and a large hydraulic press and weights. Although the drugs and press were not in plain view, they were easily accessible. The accused had a key to the residence and the surveillance videos showed that he had entered the house numerous times. He testified that he had access to the house so that he could let out the co-accused's dog. In his testimony, the accused acknowledged that he was a drug user and purchased drugs from one of the co-accused, but said that he had not known of any drugs being stored at the residence.
HELD: The accused was found guilty of all charges. The court did not accept the accused's evidence and it was not left with any doubt about his guilt beyond a reasonable doubt regarding his participation in a conspiracy to traffic drugs and that he was

in possession of the drugs located in the residence of his co-accused.

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Scharfstein Gibbings Walen Fisher LLP v Pataki, 2018 SKPC 22

Agnew, March 7, 2018 (PC17107)

Small Claims – Practice and Procedure

The plaintiff law firm commenced this action in 2015 but advised the court clerk's office that a payment arrangement had been entered into with the defendant and that an adjournment was therefore requested. However, the defendant failed to make the payments and the plaintiff contacted the court ex parte and requested judgment on the basis of a signed consent Certificate of Judgment. The request was refused because the Certificate contained terms that could not be issued by the court. Once again, the parties arranged payments and once again, the matter was adjourned, but the defendant failed to make payment. The plaintiff filed the original Certificate and a new one that also failed to comply with the court's form. The plaintiff also filed a settlement agreement.
HELD: The court refused to grant judgment based on the documents filed. The plaintiff was ordered to obtain a date when the matter could be heard. The practice of obtaining a consent judgment as part of settlement process was problematic in the context of an unrepresented defendant. The agreement contained terms to which a solicitor would not consent.

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R v Henderson, 2018 SKPC 27

Anand, April 6, 2018 (PC17112)

Criminal Law – Young Offender – Second Degree Murder – Sentencing
Statutes – Interpretation – Youth Criminal Justice Act, Section 3, Section 72

The accused was sixteen at the time that she was charged with second degree murder. She had beaten a four-month-old baby to death. The accused had escaped an open custody youth facility and met another young woman who took her to stay at her

family's home until she could find another place to live. Shortly after arriving at this home, she committed the offence. The accused could not explain why she had killed the child except that she was angry about her life. She pled guilty to the charge. The Crown applied under s. 64(1) of the Youth Criminal Justice Act (YCJA) to have the accused sentenced as an adult. A Pre-Sentence Report, a Gladue report and an Intensive Rehabilitative Custody and Supervision Order Sentence (IRCS) report were prepared and the accused was assessed by a number of psychologists. The accused had had a troubled childhood. Her mother used alcohol during her pregnancy and rejected the accused when she was born. She was consequently raised on the Montreal Lake Cree Nation reserve by her aunt and uncle, who both suffered from substance abuse problems. A number of people in the accused's family had attended residential schools. Allegations were made during the accused's childhood that she was sexually abused by family members. The accused was placed in a foster home and in various group homes. She displayed disturbing behaviours such as engaging in violence towards animals, giving morphine pills to a young cousin, assaulting youths at school and in group homes and threatening staff. The accused was assessed as suffering from FASD. She lacked problem-solving skills and impulse control. Since being held in custody at a youth centre after the offence, the accused was reported as displaying problematic behaviour. The Crown argued that the accused should be sentenced as an adult under s. 72 of the YCJA because her actions showed that she was operating at the maturity level of an adult. The defence suggested that those same actions could be interpreted to mean that the accused lacked maturity and that the psychological reports supported that interpretation. The Crown responded that the presumption of diminished moral blameworthiness of the accused under s. 72(1)(a) of the YCJA could be rebutted by advancing evidence that her lack of adult maturity and moral sophistication implicated in the offending behavior were due to factors other than age.

HELD: The accused was sentenced as an adult to life imprisonment with no eligibility for parole for a period of seven years. The court recommended that the accused serve as much of her incarceration as possible at the Regional Psychiatric Centre. In considering the Crown's application, the court decided that the onus of proof under s. 72(2) of the YCJA was the standard of beyond a reasonable doubt in order to prevent violating s. 7 of the Charter. Under s. 72(1), the court was required to engage in a two-pronged inquiry into moral blameworthiness and accountability in making the assessment as to whether an adult sentence was warranted. In this case, the Crown had rebutted the presumption of diminished moral blameworthiness and

culpability under s. 72(1)(a) through the evidence that showed that the age of the accused was not a crucial element of the impulsivity implicated in the accused's offending behavior. The diagnosis of FASD indicated that the accused would not outgrow her impulsivity and immaturity. The court found that the Crown had satisfied it that a youth sentence would not be of sufficient length to hold the accused accountable for her offending behavior under s. 72(1)(b) of the YCJA.

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R v Pinacie-Littlechief, 2018 SKQB 56

Kalmakoff, February 16, 2018 (QB17487)

Criminal Law – Evidence – Admissibility - Hearsay

The accused was charged with second degree murder. She was alleged to have stabbed the victim during an altercation. The accused intended to raise a defence under s. 34 of the Criminal Code that what she did was for the purpose of defending herself or another person from an assault by the victim and that her actions were reasonable in the circumstances. She alleged that that the victim had sexually assaulted her 16-year-old cousin. The cousin had been found suffering significant injuries including head trauma. While the police were investigating the death of the victim, they interviewed the cousin. She gave two audio-recorded statements to them while she was in the hospital and said that she was highly intoxicated on the night of the victim's death and had no recollection of how she suffered her injuries or who may have caused them. Two months later, when the police were investigating the possibility that she had been sexually assaulted, they interviewed the cousin again. The interview was audio and video-recorded and in it, she informed the police that she remembered that the victim had attacked her and slammed her head against the ground. The accused sought to have this out-of-court statement ruled admissible under the principled exception to the hearsay rule. The cousin was unable to testify at the accused's trial because she had died shortly after being interviewed by the police.
HELD: The statement was ruled admissible. The court found that in the interests of trial fairness it was necessary to exercise its discretion to permit the statement to be adduced. In the circumstances, the statement met the requirement for necessity. Although cross-examination of the cousin could not take place, the jury would be able to assess all of her statements because they were recorded and that would establish threshold

reliability.

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Underhill v Central Aircraft Maintenance Ltd., 2018 SKQB 89

Mills, March 16, 2018 (QB17473)

Civil Procedure – Queen's Bench Rules, Rule 5-19

The plaintiff applied under Queen's Bench rule 5-19(6) requesting that the court appoint a certain employee of the defendant, Central Aircraft Maintenance Ltd. (CAML), as its proper officer for questioning. The defendant opposed the application and offered another individual as the proper officer. The action had been commenced against CAML after an aircraft piloted by the plaintiff's husband crashed. At the time of the crash, the employee selected by CAML as the proper officer for this application had been appointed an officer of the corporation and held the position of project manager in charge of its day-to-day operation. By 2013 he had been elected as a director and appointed as the chief operating officer. In his affidavit he stated that since the litigation began he had been the officer speaking on behalf of CAML and was familiar with the issues, the facts and expert reports. He was not a licensed aircraft maintenance engineer. The employee selected by the plaintiff was a director of maintenance at the time of the accident and continued in the position. He had never been a director or officer of CAML. In the alternative, the plaintiff sought to examine him as an employee of the corporation whose answers would not bind the corporation in the proceedings pursuant to Rule 519(1).
HELD: The plaintiff's application was dismissed. CAML's director of maintenance was not qualified to be a proper officer of the corporation as he did not have any real authority on behalf of it at the time of questioning. The court designated the director and chief operating officer as the proper officer under Queen's Bench rule 15-19(6) to attend for questioning, whose answers would bind the corporation in the action. The court found that rule 5-19(2) qualified both rule 5-19(1) and rule 5-19(5). The purpose of the rule as set out in Sagon is to provide for a single examination of an officer or employee of the corporation without order. The questioning party can choose to question under Rule 519(1), in which case the answers will not be binding on the corporation, or examine an officer of the corporation whose answers will be binding. But once it does one, it cannot do the other without a court order.

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Empire Life Insurance Co. v Agricultural Credit Corp. of Saskatchewan, 2018 SKQB 90

Scherman, March 16, 2018 (QB17474)

Civil Procedure – Queen's Bench Rules, Rule 6-75

The applicant insurance company sought an order for interpleader pursuant to Queen's Bench rule 6-75 regarding premium surpluses it held in the amount of $3,550,800 that were generated between 1990, when it issued a group life insurance policy to the respondent, Agricultural Credit Corporation (Ag Credit), and 2015, when Ag Credit terminated the policy. The applicant requested that the monies be paid into court and that directions be provided as to how the determination of ownership would be decided. Ag Credit took the position that the funds paid as premiums were Crown funds and thus any surpluses were the property of the Crown and properly payable to Ag Credit as its agent. It argued that the interpleader order was unnecessary. The purpose of the group life insurance was to ensure that outstanding loans made by Ag Credit to borrowers were paid in the event of the borrowers' deaths. Individual borrowers paid the premiums applicable to them by paying those amounts to Ag Credit, who remitted the payments to the applicant. There was no clear direction regarding the surpluses in the policy or in the Superintendent of Insurance Guidelines or applicable legislation.

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HELD: The application was granted subject to the court hearing further submissions from both parties regarding such things as whether the surplus should be paid into court or left to be administered by the applicant during the proceedings. The court found that the insurance company was entitled to some form of interpleader relief and dismissed Ag Credit's claim to the surplus. It ordered that a representative be appointed to represent the class of insured clients in the proceedings in order to determine who was entitled to the surplus.

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Cicansky v Beggs, 2018 SKQB 91

Leurer, March 21, 2018 (QB17475)

Civil Procedure – Queen's Bench Rules, Rule 7-2

The defendant physician applied for summary judgment pursuant to Queen's Bench rules 7-2 and 7-5, dismissing the claim made by the plaintiffs. The plaintiff wife alleged negligence and breach of contract on the part of the defendant after she was treated by him at the Regina General Hospital. She sought damages against the defendant as well as the operator of the hospital and other unidentified nurses. The defendant's application occurred after disclosure of documents but before questioning. The defendant swore his own affidavit in support of his application and in it, reviewed his history of treating the plaintiff including the time she was hospitalized. His notice of application referred to a statement of expertise and opinion letter from another physician. The statement of expertise indicated the defendant's intention to tender the physician as an expert witness, to provide opinion evidence that the applicable standard of care had been met in the circumstances of this case. The physician expert had not sworn an affidavit bringing his opinion in as evidence in the proceedings. The defendant argued that as the plaintiffs had failed to lead evidence of an expert opining that he failed to meet the applicable professional standard of care, there was no genuine issue for trial. The plaintiffs advised that they were in the process of obtaining an expert opinion but that were anticipating that information obtained at questioning would have an impact of securing an expert and the defendant's application was premature.
HELD: The application was dismissed. The court found that where there is a dispute on facts and not law, the evidentiary burden shifts to the plaintiff only after the defendant has presented evidence that there is no genuine issue for trial. Here the defendant failed to produce any evidence at all respecting either the applicable standard of care or its application to the facts of this case. The court decided it was not an appropriate case in which to deal with the question of whether the timing of the application was premature.

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Prestige Commercial Interiors (1992) Ltd. v Prairie Green Restaurant (Southland) Holdings Ltd., 2018 SKQB 93

McMurtry, March 22, 2018 (QB17477)

Statutes – Interpretation – The Limitations Act, Section 20

The plaintiffs (All-Rite and Prestige) were two sub-contractors on the construction of a restaurant owned by the respondent corporation, Prairie Green. The defendant, Abacus Design Build

and Project Management (Abacus) became the project manager for the restaurant's construction. Abacus subcontracted with the plaintiffs. In January 2014 the plaintiffs and six other sub-contractors filed lien claims after substantial completion of the project. In June 2014, Prairie Green obtained an order to vacate the liens upon payment of $400,000 into court. In June 2015, the court ordered payment out of $174,000 to be distributed to 16 lienholders, amongst them the plaintiffs, who then brought actions against Prairie Green, Abacus and their principals for breach of trust and failure to pay for goods and services. Both plaintiffs added the remaining 14 lien claimants as defendants in their respective actions. A number of applications were made to the court, including: 1) one made by Raven, a representative of the lien claimants other than the plaintiffs, that sought a declaration in advance of trial that The Limitations Act (LA) did not bar the claims of lienholders who had not filed cross-claims. Raven argued that the plaintiffs' pleadings raised all the legal issues between the parties and additional cross-claims from the lien claimants would not raise new or different legal issues, and therefore Prairie Green and Abacus would not be surprised that the claimants were parties to the dispute and were maintaining claims in debt in addition to a lien on the interest of the owner. Alternatively, despite the fact that a claim or cross-claim was out of time under s. 3 and s. 5 of the LA, s. 20 applied to allow lienholders to file additional pleadings to clarify their claims. Prairie Green argued that the lien claimants were restricted to sharing in the holdback on a pro rata basis, that holdback had been exhausted and that Raven had not met its onus under s. 18 of the LA by establishing that it and the claimants were not out of time; and 2) the directors of Prairie Green applied for summary dismissal of the breach of trust allegations made against them in Prestige's action. They argued that there was no genuine issue for trial. There was no trust relationship between Prairie Green and Prestige, and Prestige had not adduced any evidence of a breach of trust.

HELD: The court granted: 1) Raven leave under s. 20 of the LA to file their cross-claim. Under the authority of the RGR decisions, the lien claimants were not required to bring a cross-claim against Prairie Green or Abacus but regardless, s. 20 permitted them to do so; and 2) the application by Prairie Green for dismissal of the breach of trust claims against its directors. The court found that there was no evidence adduced by Prestige. All-Rite agreed that its claim against the directors must be also be dismissed.

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R v Hefer, 2018 SKQB 98

Tholl, March 29, 2018 (QB17481)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purposes of Trafficking - Cocaine

The accused was charged with possession of MDMA contrary to s. 4 of the Controlled Drugs and Substances Act and possession of cocaine for the purposes of trafficking contrary to s. 5(2) of the Act. He pled guilty to the first charge and not guilty to the second charge, admitting that he possessed 10.6 grams of cocaine, but not for the purpose of trafficking. The RCMP had obtained a search warrant to search the accused's residence. They found the cocaine in a safe. It had been packaged in 16 individual grams. Each gram had been placed in the corner of a baggie that had been cut off and then twisted. Various items of drug paraphernalia were also located, such a scale, a grinder, packaging materials and five cell phones. The Crown called an expert witness, an RCMP officer, who provided opinion evidence regarding the methods related to the trafficking of cocaine. He testified that it was typical for dealers to hide the drug in a safe and that the quantity of cocaine found in this case was more than a typical user would usually buy and use. The method of packaging of the cocaine in baggy corners was also typical of trafficking for resale to users and the presence of the scale in the residence was also consistent with trafficking. The expert also testified as to the meaning of text messages found on one of the cell phones and stated that the conversations indicated that accused was being educated by his supplier as to how to traffic, what price to sell the drugs at, the profit, and other related matters. The accused had never been seen selling drugs, nor had any activity characteristic of drug dealing been noticed at his residence. Although the evidence was circumstantial, the Crown submitted that the whole of it should lead the court to conclude that the accused possessed the cocaine for the purposes of trafficking and that no other reasonable inference could be drawn.
HELD: The accused was found guilty of the charge. The court found that the text messages, viewed in the context of the other evidence, left no doubt that the only reasonable inference that could be drawn was that the cocaine was possessed by the accused for the purposes of trafficking.

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Hurton v Lafayette, 2018 SKQB 99

Rothery, March 29, 2018 (QB17482)

Family Law – Division of Family Property Statutes – Interpretation – Family Property Act, Section 30

The petitioner petitioned for the division of property under The Family Property Act. The petitioner was the surviving common law spouse of Grace Lafayette, who died in 2015, and the deceased's executor was the respondent in the matter. The parties agreed that the petitioner and Lafayette were spouses as defined in s. 2(1) of the Act and that the house registered in Lafayette's name was the family home. The respondent sought disclosure of certain assets referred to in the petitioner's property statement, particularly his pensions, but the petitioner resisted on the ground that the information was irrelevant for the purposes of family property litigation because of s. 36 of the Act. The petitioner applied for summary judgment under Queen's Bench rule 7-2 for an order that the family home that was registered in the deceased's name alone be vested in the petitioner's name upon him paying the estate one-half of the equity and assuming the existing mortgage. Counsel for the petitioner submitted that in dealing with a family property application, the court must deal with the family home separately from the other family property under s. 22(1)(a), the other family property was subject to s. 36 of the Act, and therefore the estate was not entitled to receive any benefit from family property held in the petitioner's name. HELD: The application for summary judgment was dismissed. The court held that the law was settled that the value of the family home must be included in the totality of the family property for the purposes of an application pursuant to s. 30(1) of the Act. Once all disclosure of the petitioner's assets had been provided to the respondent, a summary judgment application pursuant to Queen's Bench rule 7-2 might be made to settle outstanding issues.

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Agmotion Trading Canada, Inc. v McDermit, 2018 SKQB 100

Popescul, March 29, 2018 (QB17488)

Contracts – Breach – Damages
Debtor and Creditor – Liability of Corporate Entity – Personal Liability

The plaintiff, an agricultural commodity trading company, brought a summary judgment application against the defendant, a farmer, for damages in the amount of $169,125. The plaintiff

purchased grain and other agricultural commodities to sell to third party purchasers. Johnston's Grain, a grain brokerage company, facilitated commodity contracts between entities such as the plaintiff and the defendant. Between 2010 and 2013, Johnston's acted as a broker on several contracts entered into by the defendant and producers. The defendant incorporated Standard Grain in February 2012. The defendant was the sole director and he deposed that his business plan was to purchase crops from farmers in his area by offering them a return which was better than they could normally receive and sell those crops for a profit. In January 2014 the plaintiff, through Johnston's, entered into a contract with Standard Grain whereby the latter agreed to sell a certain quantity of peas at a fixed price and in July 2014, the plaintiff entered into another contract with Standard Grain for a certain amount of wheat at a fixed price. Standard Grain breached both contracts and did not deliver any of the promised commodities to the plaintiff. The co-president of Johnston's deposed that he believed that the defendant had grown all of the crops that were the subject matter of the contracts. The defendant swore in an affidavit that he was unable to purchase any product in the fall of 2014 because the market price being paid to producers at that time was high and that, consequently, Standard Grain was not able to meet its commitments. Standard Grain was struck from the corporate registry at the end of July 2014 as a consequence of failing to file an annual return. The plaintiff was forced to mitigate its loss by purchasing replacement peas and wheat at a higher price totaling $169,125. The plaintiff alleged that the defendant was personally responsible for the breached contracts because Standard Grain was struck from the corporate registry. The plaintiff relied upon the affidavit provided by Johnston's co-president as evidence that the defendant's actions were fraudulent such that the court should pierce the corporate veil of Standard Grain.

HELD: The application for summary judgment was dismissed. The court found that this was an appropriate case for summary judgment under Queen's Bench rule 7-2. However, the court held that the defendant should not be held personally responsible for the breached contracts because Standard Grain had been struck from the corporate registry. The court found that the contracts were executed by Standard Grain during the time that it was a valid corporation and the defendant did not derive any benefit subsequent to the corporation being struck, unlike the defendant in Beckett v McCrimmon. It also refused to pierce the corporate veil. Although the defendant was the sole director of Standard Grain and its directing mind, there was insufficient evidence to support the plaintiff's claim that he had engaged in wrongful conduct when he caused Standard Grain to

enter into a contract without informing Johnston's that Standard Grain was not in the business of farming and would not be producing the peas or the wheat.

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"A" v R, 2018 SKQB 103

Danyliuk, April 3, 2018 (QB17489)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike
Civil Procedure – Queen's Bench Rules, Rule 7-5, Rule 7-9
Torts – Malicious Prosecution

The plaintiff (A) brought an action for damages against a number of defendants, including his former wife (B) and Saskatchewan. The claim was based on the tort of malicious prosecution. The plaintiff discontinued against B. The defendant Attorney General for Saskatchewan brought an application to strike the plaintiff's claim against it or, alternatively, summary judgment in its favour. A and B had been engaged in a lengthy, acrimonious custody battle following their separation in 2007. The alleged cause of action arose as a result of an allegation made by the then 11-year-old daughter of the plaintiff of sexual impropriety by him. The RCMP believed charges were warranted against the plaintiff and referred the matter to the Crown prosecutor for review. She determined that the charges would be in order. The RCMP then arrested the plaintiff and charged him with six offences under s. 151, s. 153(1), s. 172, s. 173(2), s. 271 and s. 279(2) of the Criminal Code. He was released on an undertaking. The plaintiff's lawyer informed another Crown prosecutor in the same office that the charges were ill-founded and were motivated by the child custody battle. When the Crown finally obtained disclosure of the investigation from the RCMP, another prosecutor was handling the file. As she acknowledged that she had a conflict of interest regarding the matter, she instructed that another prosecutor take over. The prosecutor who then took carriage of the file reviewed the file, determined that there was no reasonable likelihood of obtaining a conviction against A, and directed a stay of proceedings. The plaintiff's claim alleged malicious prosecution and a breach of his s. 9 Charter rights by the various prosecutors.
HELD: The court granted the application to strike the plaintiff's claim and gave summary judgment to Saskatchewan in dismissing the claim. With respect to striking the claim, the court found that the pleadings were deficient in that the claim had not

named any individual or prosecutor or the attorney-general. The claim was also struck because it disclosed no reasonable cause of action under Queen's Bench rule 7-9(2)(a) and because it was frivolous and vexatious under rule 7-9(2)(b) or (e), as the affidavits provided by the three prosecutors demonstrated that each of them had behaved properly. The court went on to find that this was an appropriate case for it to grant summary judgment under Queen's Bench rule 7-5. There was no genuine issue for trial as the claim had not named individuals as required in a malicious prosecution suit and there was no conflict in the evidence.

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Sylvestre v Sylvestre, 2018 SKQB 105

Brown, April 4, 2018 (QB17491)

Family Law – Custody and Access – Interim
Civil Procedure – Evidence – Electronic Records - Admissibility

The parties executed an interspousal agreement in 2013 that arranged for the custody and parenting of their seven-year-old daughter. They agreed that they would share both custody and parenting. The respondent father applied to the court to assist in enforcing the agreement because he claimed that the petitioner had imposed a restricted parenting schedule on him and would not agree to return to the arrangement to which they had agreed. The petitioner argued that the child's best interests required a revision to the shared parenting agreement because: 1) the respondent lived with his mother in a two-bedroom apartment. When their daughter resided there, she had to sleep with the respondent and his different routine disrupted her sleep; and 2) the respondent had not been fulfilling his obligations under the agreement which had resulted in her having more parenting time with their daughter and that was not due to her restricting the respondent's schedule. The issues were: 1) whether a purported printout of certain text messages to the petitioner from the respondent be admitted. The petitioner had downloaded the messages from her cell phone to her computer using the Decipher Text computer application. The respondent objected to the admissibility of the printout. The petitioner offered an unsworn explanation of how the computer application worked; and 2) whether the parenting arrangement should be strictly enforced or be varied by order to align with the existing status quo.
HELD: The court found with respect to each issue that: 1) the

computer printout was not admissible. The matter was governed by s. 55 to s. 59 of The Evidence Act. In order for the petitioner to meet the requirements of authenticity and integrity, she would have to provide evidence that she had compared and confirmed that the printout submitted as an attachment to her affidavit showed in printed form the electronic text messages sent to her from the respondent via her smartphone. To establish the integrity of the electronic records, the petitioner should provide evidence as to how the Decipher Text program works and why it should be considered a reliable way of accessing the original electronic document; and 2) the access and custody arrangement under the agreement was interim in nature. The principle enunciated in Guenther that such an arrangement that had been in place for some time should not be varied but should proceed to final order had been altered by the decision in Gebert v Wilson which permitted that access could be tweaked in order to address the best interests of children. The court determined that the existing status quo was that the petitioner had more parenting time than the respondent. There was some basis for minor alteration to the arrangement set out in the agreement. The respondent should acquire his own residence and provide his daughter with her own bedroom. The parenting schedule would change so that the respondent had the child three days a week.

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Davis v Shindle, 2018 SKQB 107

McCreary, April 5, 2018 (QB17493)

Contracts – Breach – Damages
Contracts - Agistment

The plaintiffs applied for an order for summary judgment against the defendants in the amount of $28,600 pursuant to Queen's Bench rule 7-2. The plaintiffs alleged that the defendants breached an agreement to lease 89 cows from them between December 2013 and November 2014 by failing to care for the cows in a husband-like manner. They sought damages for the loss of 27 cows that died while under the defendants' care during the term of the agreement. The parties all operated cow/calf cattle operations. When one of the plaintiffs learned that he would be unable to care for his herd during the winter, the defendants agreed to lease the cows. The parties negotiated the terms of the lease and the plaintiff drafted the agreement. The defendants agreed to maintain the cows in a husband-like

manner. The agreement contained a clause that stated if "a cow or calf dies, then no replacement is required, and no responsibility will be brought to bear on either party". Sometime during the term of the lease, 27 cows died. The defendants did not inform the plaintiffs until October 2014 when they were asked to return the herd. The defendants said that the cows had fallen through the ice and drowned in a slough, but they provided no evidence regarding the steps they took to care for the cows, when the cows died or the steps that they had taken to remove the bodies of the cattle from the water and how their carcasses were disposed of. The defendants argued that the agreement should be interpreted as expressly limiting liability for the death of any cow, not just one cow.
HELD: Summary judgment was granted and the court ordered that the defendants pay the plaintiffs the sum of $28,600 representing the value of the cows that had died. The court found that this was an appropriate case for summary judgment pursuant to Queen's Bench rule 7-2 as there was no genuine issue for trial. The agreement between the parties was a contract of agistment. The defendants had not met the onus of showing that the animals in question were not lost through their neglect to take reasonable and proper care of them because they failed to provide the required evidence. In interpreting the contract, the court decided that the purpose of it was for the defendants to take care of the plaintiffs' cows for a limited term and then return them. It would be inconsistent with that purpose to find that the agreement allowed for the loss of any number of cows without penalty and it was implicit that if multiple cows died due to the defendants' neglect, damages would flow from the loss.

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K.D.R. v T.M.K., 2018 SKQB 108

Leurer, April 5, 2018 (QB17494)

Family Law – Custody and Access – Interim
Family Law – Child Support – Interim
Family Law – Spousal Support - Interim

The petitioner separated from the respondent in 2017. Their only child, a seven-year-old daughter, remained with the respondent mother in the family home and the petitioner had had limited supervised parenting time with her since the separation. He applied for joint custody of the child and a determination of the parenting arrangement, proposing that the child live with each

parent for one week. He also requested child and spousal support. The respondent argued that she should be given interim sole custody until such time as the petitioner attended and completed an inpatient treatment program of one month's duration for alcoholism. For the present time, the petitioner should have only supervised access to their daughter two times each week for one hour. She also requested child support in accordance with the Guidelines and resisted paying spousal support to the petitioner. The respondent and numerous other affiants provided evidence of the petitioner's drinking habits and the impact they had on his ability to be in charge of young children. The petitioner denied that he had a drinking problem and claimed that after he received a conviction for impaired driving in 2015, and he had taken control of it, but admitted that he continued to drink. The petitioner had had intermittent employment and consequently stayed at home with the child while the respondent worked as a licenced practical nurse until the separation occurred. He was now employed at the Salvation Army where he earned $29,000. The respondent's income was $75,000.

HELD: The court made an interim order that the parties have joint custody of their child but that her primary residence remain with the respondent. The petitioner was to have parenting time of one afternoon/evening each week of up to three hours as well as one day on each weekend. Where the time exceeded three hours, the access would be supervised by the petitioner's mother or another person that the respondent approved. The petitioner was ordered not to consume alcohol or drugs for 24 hours before or during parenting times. The petitioner was to pay interim child support to the respondent in accordance with the Guidelines. The respondent was to pay interim spousal support in the amount of $400. The parties were encouraged to set a date for a pre-trial conference within four months of the date of this fiat and during that time the petitioner could demonstrate that his issues regarding alcohol were resolved.

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R v Big River First Nation, 2018 SKQB 109

Meschishnick, April 5, 2018 (QB17483)

Statutes – Interpretation – Canadian Environmental Protection Act, 1999, Section 272
Environmental Law – Canadian Environmental Protection Act, 1999, Section 238 – Sentencing – Appeal

The respondent, Big River First Nation, pled guilty to a summary offence charge of failing to comply with an Environmental Protection Compliance Order contrary to s. 238(1) of the Canadian Environmental Protection Act, 1999 (CEPA) and was sentenced by the Provincial Court judge to a fine of $10,000. The Crown appealed the sentence on the ground that the sentencing judge erred in interpreting s. 272 of CEPA when he categorized the respondent as an individual rather than a person.
HELD: The appeal was allowed. The respondent was sentenced as a person and ordered to pay a fine of $100,000. The sentencing judge erred in characterizing the respondent as an individual under CEPA because the respondent could not be imprisoned and the legislation provided that as one of the penalties that could be imposed upon an individual. As it was not a small revenue corporation under CEPA either, the respondent could only be a person and subject to the fine prescribed under s. 272(3)(b)(i). The Crown had taken the position that if the court made the determination that the respondent was an individual, it would not seek a penalty above the minimum of $100,000 prescribed by the section.

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Strom v Saskatchewan Registered Nurses' Assn., 2018 SKQB 110

Currie, April 11, 2018 (QB17495)

Professions and Occupations – Registered Nurses - Discipline

The appellant appealed the decision of the discipline committee of the Saskatchewan Registered Nurses' Association (SNRA). It ruled that she had engaged in professional misconduct and that she should be fined. It ordered her to pay costs of the proceedings and set them at $25,000. The matter arose because the appellant posted comments on her Facebook page that criticized the care that her grandfather received at a care home. At the time she posted the comments, the appellant was on maternity leave. After the hearing, the committee concluded that the appellant had violated s. 26(1) and s. 26(2)(l) of The Registered Nurses Act, 1988. Under s. 26(2)(l), the appellant was found to have engaged in professional misconduct because she failed to comply with six clauses set out in the provisions of the Code of Ethics for Registered Nurses. The court determined that the committee had made four decisions that it was to review: 1) that the appellant's off-duty conduct was subject to discipline; 2) that she engaged in professional misconduct; 2) that its decision infringed the appellant's right to freedom of expression but that

under s. 1 of the Charter, the infringement was justified; and 4) that the appellant should pay an award of costs.
HELD: The appeal was dismissed. The court found that the standard of review that applied to all four of the decisions made by the committee was reasonableness. It concluded that each of the committee's decisions fell within the range of reasonable outcomes in the circumstances and found with respect to them that: 1) whether the off-duty conduct of the appellant was subject to discipline was the kind of decision that the Legislature had in mind when it empowered the SNRA under the Act in acknowledgement of its knowledge and expertise; 2) there was evidence before the committee from which it could infer that the appellant's online comments harmed the reputation of the nursing staff of the care home and undermined public confidence in the staff. Further, the committee found that the appellant had made the comments without personal knowledge of the circumstances that she criticized and failed to follow the proper channels; 3) the committee considered the importance of the right to freedom of expression but balanced it with the need under the Act to address the appellant's professional misconduct. The committee's finding of professional misconduct was not because the appellant expressed her concerns, but because of how she went about it. The infringement of the right still left the appellant with other avenues of expressing those concerns without harming registered nurses and the nursing profession; and 4) s. 32(2)(a)(ii) of the Act permitted the award of costs. The evidence before the committee established that the expenses related to the proceedings totaled $142,800. The committee decided that since the fees paid by the members of the SRNA allowed it to fulfill its statutory mandate, the membership as a whole should bear all of the costs when a nurse was found to have engaged in professional misconduct.

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