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University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner), 2018 SKCA 34

Richards Caldwell Schwann, May 16, 2018 (CA17145)

Statutes – Interpretation – Local Authority Freedom of Information and Privacy Act, Section 39, Section 43

The appellant, the University of Saskatchewan, appealed the decision of a Queen's Bench chambers judge that The Local Authority Freedom of Information and Protection of Privacy Act (LAFOIPPA) gave the Information and Privacy Commissioner the authority to require the production of records in relation to which the appellant had claimed solicitor-client privilege (see: 2017 SKQB 140). The appellant argued that: 1) LAFOIPPA did not empower the commissioner to require the production of records to which solicitor-client privilege had been claimed; and 2) if LAFOIPPA did so, the commissioner had erred by demanding production in the circumstances of this case. The commissioner had been conducting a review of the appellant's decision not to release records to an applicant who had filed an access to information request. The applicant had brought a number of legal proceedings against the appellant relating to his employment history with it.
HELD: The appeal was granted. The court found with respect to each issue that: 1) s. 43 of LAFOIPPA empowered the commissioner to require the production of records subject to, or said to be subject to, solicitor-client privilege; and 2) the Supreme Court had established that the statutory authority to abrogate

solicitor-client privilege must be exercised so as to interfere with the privilege only to the extent "absolutely necessary" to achieve the goals of the legislation. In this case, the commissioner could have fulfilled his obligations to conduct his review under s. 39 of LAFOIPPA by first asking the appellants for an index of the records or an affidavit of documents related to its claim of privilege before requesting the records themselves, thereby allowing him to review such information that might have answered whatever questions he had about the privilege claim and thereby affecting solicitor-client privilege only to the extent absolutely necessary.

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K.R. v J.K., 2018 SKCA 35

Jackson Whitmore Schwann, May 18, 2018 (CA17146)

Family Law – Custody and Access
Civil Procedure – Queen's Bench Rules, Rule 15-25

The parties, parents of a four-year-old child, had interim shared custody of her and equal access. The appellant mother had left Regina with the child to live in Denver in 2014 without informing the respondent. Since then the child had travelled between Denver and Regina fairly frequently, accompanied by one parent or the other. When the appellant exercised access in Regina, the respondent provided accommodation and he paid for all of the travel costs as he had considerably more financial resources than the appellant, as she had been unemployed since the birth of the child. When the matter came to trial, the parties agreed that the judge would have to decide the child's primary residence as well as access as the child would no longer be able to travel as she was approaching school age. The Queen's Bench judge found the parenting capacity of each party to be equal but the balance tipped in favour of the respondent, primarily on the basis that he was more likely to ensure maximum contact. The judge ordered that the parties should have joint custody but if the appellant did not return to Regina, the child's primary residence would be with the respondent because he would maximize contact and in which case, the child was to have generous access to the appellant. The appellant was to have at least one week of access outside of Regina over Christmas, February school break and in alternating years, Easter break, as well as five weeks during July and August. For the remaining months, the appellant was granted access to the child in Regina for two consecutive weeks each month. The judge further

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ordered that as of September 2018, the respondent was no longer obliged to assist with access costs and that the appellant should pay the respondent's draft bill of costs in the amount of $166,800. The appellant appealed the order. She argued that the trial judge erred in law in deciding the child's principal residence should be with the respondent because he had overemphasized her past conduct in leaving Regina without informing the respondent as evidence that she would breach future orders. He had also erred by failing to appreciate the maximum contact principle and by awarding costs against her in the circumstances.
HELD: The appeal was allowed in part. The court found that the trial judge had not erred in considering the appellant's past conduct because he had done so only insofar as it related to the appellant's ability to act as a parent of the child as permitted by s. 8(b) of The Children's Law Act, 1997 and s. 16(9) of the Divorce Act. The judge had erred though by ending the respondent's financial obligation to assist the appellant to exercise her access rights; the access order as given could not be fulfilled by the appellant. The court ordered that the father provide suitable accommodation for the appellant when she attended Regina to exercise access and to pay all necessary flight expenses for her and the child to travel between Regina and Denver. The judge's award of costs was set aside to account for the divided results, which displaced the presumption in Queen's Bench rule 15-25.

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Industrial Properties Regina Ltd. v Copper Sands Land Corp., 2018 SKCA 36

Herauf Ryan-Froslie Schwann, May 23, 2018 (CA17147)

Statutes – Interpretation – Companies Creditors Arrangement Act, Section 11.02, Section 11.2

The appellants, the secured creditors of one or more of the respondents, appealed the decision of a Queen's Bench chambers judge that granted the respondents an initial order, a sale approval and vesting order and access to interim financing pursuant to the Companies' Creditors Arrangement Act (CCAA). The respondents were six corporations all of which were owned and controlled by one individual. The respondents' assets consisted of a trailer park and an incomplete water treatment facility located on lands owned by the respondents. The trailer park was the respondents' only functioning business and it had two employees. The respondents owed the appellants

style from those endorsed by the *Citation Guide for the Courts of Saskatchewan*.

collectively in excess of $10,725,000. When the appellant Credit Union commenced foreclosure proceedings, the respondents applied pursuant to the CCAA and sought and obtained an initial order under s. 11.02 because the judge was satisfied that appropriate circumstances existed. The judge found that the respondents were acting in good faith and with due diligence. He gave an order authorizing the respondents to obtain interim financing under s. 11.2(1) to complete the treatment facility. The appellants appealed on the grounds that the judge erred in: 1) finding that the respondent had satisfied the appropriate circumstances and good faith requirements contained in s. 11.02 of the CCAA; and 2) authorizing the interim financing because he failed to consider the relevant factors pursuant to s. 11.2(4) of the CCAA.
HELD: The appeal was allowed in part. The standard of review of decisions made pursuant to the CCAA was highly deferential to the exercise of judicial discretion. The court found with respect to each ground that the judge: 1) had not erred in granting the initial order. He properly considered whether the baseline considerations in s. 11.02(3)(a) and (b) were satisfied; and 2) had erred in authorizing interim financing because he failed to consider the multiple factors set out in s. 11.2(4) of the CCAA. In particular, he did not examine whether the completion of the treatment facility would add to the overall net worth of the respondents to enhance the prospect of a viable compromise pursuant to s. 11.2(4)(d).

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Abrametz v Law Society of Saskatchewan, 2018 SKCA 37

Richards Herauf Schwann, May 23, 2018 (CA17148)

Professions and Occupations – Barristers and Solicitors – Discipline – Conduct Unbecoming – Appeal

The appellant had been found guilty of three charges of conduct unbecoming a lawyer by a hearing committee (HC) of the respondent, the Law Society of Saskatchewan, constituted pursuant to The Legal Profession Act, 1990. Following a penalty hearing the appellant was sentenced by the discipline committee (DC) of the respondent to a two-month suspension, payment of $14,000 in restitution, ethics training and costs of $29,700. The DC decision was based on the HC's finding that the appellant had been the friend of and the lawyer for a couple who wanted to sell an acreage as quickly as possible. The couple had separated and were not speaking. The wife arranged for the

property to be purchased for $30,000 but the appellant advised her that the price was too low. He offered to find a purchaser who would offer a better price and then contacted another friend advising him of the opportunity. The friend purchased the land for $33,000. Shortly thereafter the purchaser decided he did not want the property for his personal use and he and the appellant decided to incorporate, with each owning a 50 percent share in the company, and purchased the property. The land was sold about four months later for $80,000. The involvement of the appellant in the purchase was not disclosed by him to the original vendors to enable them to obtain independent legal advice or to consent to the possible conflict of interest. When the original purchaser discovered the sale, he lodged a complaint with the Law Society. With respect to each of the counts, the HC found that the appellant had: 1) breached his duty of loyalty to his client; 2) not preferred his own interests or the interests of the company over the interests of his clients; 3) failed to ensure that the transaction was fair and reasonable and that its terms were fully disclosed to the clients in writing; and 4) used information obtained during his representation of his clients to obtain a benefit for himself and his company. The committee characterized the appellant's actions as a series of well-intended actions designed to help his friends but eventually his judgment became impaired and his loyalty divided giving rise to the conflict of interest. The hearing had been preceded by a judicial review application brought by the appellant to stay the proceedings. The application had been dismissed but the judge denied costs to the Law Society because it had failed to provide proper affidavits. The appellant's grounds of appeal from the DC's decision were: 1) that it had acted unreasonably in ordering the two-month suspension from practice. The committee failed to consider Saskatchewan cases where only a reprimand had been imposed for simple conflict and failed to give effect to the absence of any finding of dishonesty, particularly in light of its finding on the second count; and 2) that it had acted unreasonably in the exercise of its discretion by ordering him to pay costs of $29,700. The award did not reflect the fact that the outcome before the HC was divided and since the respondent had been denied costs in the judicial review application, it should not be entitled to indemnification for those costs in the context of the disciplinary hearings.

HELD: The appeal was allowed in part. The court found with respect to each ground that: 1) the DC's sentence was not unreasonable and within the range of acceptable outcomes. It considered and distinguished the cases where only a reprimand had been imposed because the appellant had shown a lack of integrity and insight into a lawyer's obligation to safeguard client interests, the loss incurred by the client and the personal

gain by the appellant and his lack of remorse. The HC's findings related only to the appellant's initial actions and not to his subsequent purchase of the property through his company; and 2) the costs award was unreasonable. Under s. 55(2)(a)(v) of the Act (now repealed) and Rule 490 of the Rules of the Law Society of Saskatchewan (prior to June 2010), costs were at the discretion of the DC and such discretion was to be exercised judicially. In this case, the DC failed to give any weight to the mixed results in the hearing decision and to consider the rationale for the judge's decision in the judicial review application to deny costs to the respondent when it had been the successful party.

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R v Shercom Industries Inc., 2018 SKPC 3

Gray, January 11, 2018 (PC17121)

Public Welfare Offences – Occupational Health and Safety – Death of a Worker – Sentencing

The defendant employer pled guilty to one count of violating s. 12(a) of The Occupational Health and Safety Regulations, 1996 that resulted in the 2015 death of a worker, contrary to ss. 3-78(g) and 3-79 of The Saskatchewan Employment Act. Since 1993 the defendant operated a tire recycling facility in Saskatoon that had been approved until 2021 as an industrial waste works facility pursuant to The Environmental Management and Protection Act, 2010. At the time of the accident, the defendant employed 76 people. At the time of the hearing, it had 46 employees and had operated at a loss in 2015 and 2016 but it did not provide any other financial information. On the night of the incident, the employee was working on a processing line where his job was to ensure that the system did not get blocked with improperly shredded tires. The employee's arm was caught between a tail pulley and a conveyor belt behind a large safety guard. Employees had been instructed not to reach into the equipment after an employee had been slightly injured in the same fashion only 10 days earlier. The employees were instructed to address lock-out procedures. The defendant had been issued with notices of contravention prior to this accident and they were generally remedied within 24 hours. However, the former plant manager testified that the owner wanted safety features to be efficient and that safety was not a priority. Neither he nor any member of the management team had any Occupational Health and Safety (OH&S) training. After the employee's death the defendant had engaged consultants and sent staff to safety training seminars.

Weekly OH&S meetings were now held and a safety consultant certified that the defendant had met a minimum standard for a safety program. The shredder was replaced at a cost of $550,000 and additional emergency stops were installed at work stations at a cost of $2,500. Another fail-safe metal detector system costing $39,000 had been installed and lighting in the work area had been upgraded. The defendant had hired an engineer with experience in safety and ad operations specific to tire recycling and a full-time safety officer. It made donations of $25,000 to the Saskatchewan Safety Council's early safety training program and $50,000 to an organization that supported victims and families of workplace accidents. The Crown argued that since the legislation had been amended to increase the maximum fine for corporations to $1.5 million to promote general deterrence and because the aggravating circumstances here outweighed the mitigating factors, the court should impose a fine of $750,000 inclusive of surcharge. Defence counsel submitted that a smaller fine of $150,000 plus surcharge was appropriate because the defendant was a small family-owned business and a higher fine would have a significant impact on the business.
HELD: The defendant was fined $300,000 plus the victim surcharge of $120,000. The sentence was appropriate because the legislative intent behind increasing in the maximum penalties set by the Act indicated that fines should act as a deterrent. The court reviewed the factors set out in R v Westfair and noted some of the aggravating ones in this case were that: the defendant was a mid-sized company with some organizational sophistication and that it had demonstrated that safety concerns were secondary to profit; the offence was grave; the degree of risk was high and very readily foreseeable; the defendant relied upon young, unskilled male labourers, a group recognized as notorious for their propensity to assume risks; the defendant had made no concerted effort to improve general safety in spite of numerous injuries at the workplace in the past; and the degree of fault was high.

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R v John, 2018 SKPC 23

Klause, March 14, 2018 (PC17126)

Criminal Law – Assault – Aggravated Assault – Sentencing – Dangerous Offender

he accused was convicted of: two counts of aggravated assault, contrary to s. 268 of the Criminal Code; and carrying a weapon

for the purpose of committing an offence, contrary to s. 88 of the Code. After the Crown advised that it would seek to have the accused remanded for an assessment pursuant to s. 752.1 of the Code and the assessment was completed, a Dangerous Offender (DO) hearing was held. The Crown argued that the accused should be designated a DO and be given an indeterminate sentence whilst the defence submitted that if the accused was so designated, he should be granted a determinate sentence followed by a 10-year supervision order. The accused, an Aboriginal man, about 40 years of age, was raised by his parents in chaotic circumstances. His mother was violent and began physically abusing him when he was six. He began drinking at 10 and dropped out of school in grade six. When he was 12 he became involved in the criminal justice system by committing a break and entry to steal cigarettes and candy. Throughout his life, the accused had lived off robberies and break and entries to support his drug habit. He had committed 85 Criminal Code offences, 17 of which were for interpersonal violence and the possession and use of weapons. Since 1998, the violent offences became more frequent and more severe in nature. In the opinion of the psychiatrist who assessed him, the accused showed no understanding that his crimes violated the rights of others. He had received rehabilitative programming, including Aboriginal-centred programs and resources, during his periods of incarceration, apparently without effect. The accused was assessed at high risk for future acts of violence and based upon the stabbing he committed in the predicate offence, the outcome for a future victim could be severe. The accused's treatment prospects were not promising and it would be necessary for him to be monitored and supervised for the longest possible period. The issues were: 1) whether the index offence, aggravated assault, was a serious personal injury offence as defined by s. 752 of the Code; 2) if so, did the accused meet the definition of dangerous offender pursuant to s. 753(1)(a)(i) or (ii) of the Code; and 3) if the accused was so designated, what was the appropriate sentence.

HELD: The accused was declared a DO and an indeterminate sentence was imposed upon him. The court found with respect to each issue that: 1) the aggravated assault with a knife, the predicate offence, was a serious personal injury offence under s. 752(i) and (ii) of the Code; 2) the accused should be declared a DO. The Crown had demonstrated that the accused had committed similar violent crimes in the past and that there was a repetitive pattern showing that the accused could not restrain himself and that he had a substantial degree of indifference to the reasonably foreseeable consequences of his acts. The assessments of the accused's behaviour had been consistent over time: he demonstrated little remorse or ability to make

significant changes in his life. He used his knowledge and experience with the courts to his advantage; and 3) the accused should be given an indeterminate sentence. The court found that the presumption had not been rebutted. There was no reasonable expectation of control within the community. The court took into account the Gladue factors. Although the accused had advised the court that he was not influenced by Aboriginal spirituality, the court considered and dismissed the possibility that there were any available programs offered at his home community of One Arrow First Nation that would mitigate the risk that the accused posed.

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R v Boyd, 2018 SKPC 25

Jackson, April 17, 2018 (PC17122)

Regulatory Offences – Environmental Management and Protection Act, 2010 – Quantum of Fine

The accused, a former Cabinet Minister in the Saskatchewan government, was charged with and pled guilty to: one count of altering wildlife habitat by cultivating an area of native grassland thereby violating s. 7(1) of The Wildlife Habitat Protection Act (WHPA); committing an offence under s. 8 of WHPA; and one count of causing the alteration of the bank of the South Saskatchewan River in violation of s. 38(4) of The Environmental Management and Protection Act, 2010 (EMPA) thereby committing an offence under s. 84(2) of it. The Crown and the defence entered a joint submission for a fine of $5,000 plus the surcharge on the first count. With regard to the second count, the Crown argued that a fine of $25,000 to $30,000 plus the surcharge was warranted to address general deterrence. Defence counsel submitted that a fine of $5,000 was appropriate. The offences involved a parcel of Crown-owned land containing native grasslands protected by statute. The charges against the accused dealt with his accidental cultivation of roughly six acres of the protected grasslands (count one) and the construction of irrigation infrastructure into the South Saskatchewan River without obtaining the proper licencing permits required according to governing legislation (count two). There was evidence that showed that the accused was informed by the Water Security Agency (WSA), concerning his irrigation project proposal, that he would need to obtain two permits and the WSA's approval before construction commenced but the accused proceeded with construction and the work was not done in

accordance with his application documentation. After the construction was discovered, the WSA issued an immediate environmental protection order outlining remediation steps to be taken as a result of the improper work done.
HELD: The accused was fined $5,000 on the first count and $25,000 on the second, plus the appropriate surcharges. The court reviewed and applied the factors set out in R v Terroco Industries regarding sentencing for environmental regulatory offences and determined that: the accused's culpability was high; he had no previous record; he had accepted responsibility only after extensive negotiations; the harm could not be considered insignificant; and there was a need to deter individuals and corporations from believing that they could expedite or circumvent the licencing process and pay later as a cost of doing business. Here, the value to the farmland was greatly enhanced by the irrigation project.

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R v R.D.F., 2018 SKPC 28

McIvor, February 23, 2018 (PC17125)

Criminal Law – Young Offender – Sentencing – Adult
Statutes – Interpretation – Youth Criminal Justice Act, Section 72

The accused pled guilty to two counts of first degree murder, two counts of second degree murder and seven counts of attempted murder resulting from the La Loche School shooting. The counts pertained respectively to: the deaths of a teacher and a teacher's aide who both worked at the school attended by the accused; the deaths of the accused's two first cousins, aged 13 and 17; and injuries caused to school teachers and students at the school. The accused was almost 18 years old when he committed the offences. The Crown gave notice of intention to apply for an adult sentence that was opposed by the defence. The court ordered a pre-sentence report (PSR), psychological and psychiatric assessments for the required hearing pursuant to s. 71 of the Youth Criminal Justice Act (YCJA). The accused was raised in La Loche, Saskatchewan by his aunt, his birth mother's sister. He had a good relationship with her and with her parents, his grandparents, who lived across the street and with whom he spent a great deal of time. His first cousins lived with his grandparents and the accused had a very close relationship with them and attended school with them. His family members were supportive of him and he was given everything he needed. The accused provided his recollection of how he had committed the

offences in the PSR and through assessment interviews. Prior to the day he shot his victims, he had searched for information on the Internet about school shootings and firearms and planned his actions for a few months. He knew that his grandparents and his cousins' mother would be away from their home on the day on which he put his plan into operation. He went into his grandparents' residence and took a number of rifles and then ambushed and killed his cousins in the house and then drove to the school. As he didn't want to be seen carrying his weapon, he parked close to the front entrance of the school. He then began shooting students and teachers randomly although he decided to spare the life of one teacher. Although he had struggled academically all of his life, the accused said that he liked school because he could be with his friends there and that he had not suffered any bullying and had not been depressed or angry. He did not have a criminal record. He used marijuana twice daily but did not abuse alcohol. The psychiatric and psychological assessments were conflicting but there was agreement the accused was not psychotic, nor hallucinating on the day of the shootings and knew what he was doing. He expressed sadness about killing his cousins but did not appear upset or uncomfortable when he described how he killed the other victims. After administering many different tests, there was some consensus that the accused possessed a lower than average IQ. The psychologist recommended that he receive counselling and forensic treatment to address his emotional control, inability to show empathy and understanding of his crimes but that the process would take a long time. On the whole, the assessors concluded that the accused was not suffering from any mental illness that could be diagnosed although the psychiatrist retained by the defence submitted that the accused had Intellectual Developmental Disorder, Conduct Disorder, Major Depressive Disorder, Cannabis Use Disorder, Post-Traumatic Stress Disorder and parent-child relationship problems. He and a neuropsychologist, who had also interviewed the accused, suspected that he might have Fetal Alcohol Syndrome Disorder. Various opinions were given regarding the level of his risk to reoffend, ranging from medium to high. The provincial coordinator for the Intensive Rehabilitative Custody and Supervision (IRCS) Program advised the court that it had been difficult to determine the availability of programming in the province to help the accused for treatment specific to violence because of the problems with assessing him. It had been decided that the IRCS sentence was not appropriate.

HELD: The Crown's application was granted. It ordered that an adult sentence be imposed upon the accused. The court found that pursuant to s. 72 of the YCJA, the Crown had satisfied it that such a sentence was necessary because the Crown had rebutted

the presumption of diminished moral blameworthiness. The accused's actions were not impulsive nor the product of lower mental maturity. The accused was the sole architect of the deliberate planning and execution of the murders, the most serious of crimes. A youth sentence would not be of sufficient length to hold the accused accountable under s. 72(1)(b) of the YCJA.

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R v Arnett, 2018 SKPC 37

Green, June 1, 2018 (PC17127)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 Constitutional Law – Charter of Rights, Section 9, Section 24(2)

The accused was charged with driving while impaired and with driving while her blood alcohol content exceeded the legal limit. The defence brought a Charter application alleging that the accused was arbitrarily detained by the police officer for purposes of taking an ASD test, contrary to s. 9 of the Charter, and requested that the court exclude all of the evidence from the point that the accused got out of her vehicle, pursuant to s. 24(2) of the Charter. A voir dire was held and it was agreed that evidence would be applied to the trial. On the day in question, the officer was patrolling the highway in the morning when a motorist stopped him to complain that he had almost been run off the road by a dark-coloured SUV. After receiving a similar complaint by a dispatch call, the officer drove west to Yorkton and then retraced his route looking for the SUV. When he saw the black jeep being driven by the accused he followed her and signaled her to stop, which she did. She was driving properly and at a normal speed at the time. The officer informed her of the report of erratic driving and asked her if she had been drinking or texting. The accused said that she hadn't. The officer did not smell alcohol coming from her or the vehicle. He testified that he asked her if she wanted to give a sample of her breath voluntarily. She agreed and because she did not object or express any confusion, he assumed that she understood what he was asking of her. He admitted that he did not have a reasonable suspicion that the accused had alcohol in her body when he asked her to come back to the police vehicle for an ASD test. He advised that he had made the request in similar circumstances in the past and some people agreed and others who did not, he sent on their way. In the police vehicle the accused told him that she

drank alcohol the night before and was intoxicated. The accused testified that she felt that she had no choice but to accompany the officer. She did not recall that he said the test was voluntary and did not object because she did not know that she had the right to. The accused said that she became emotional when she got into the police vehicle and admitted that she had been intoxicated the night before and was still feeling the effects of alcohol when she awoke. The passenger in the accused's vehicle testified that the officer had not given the accused any option about taking the test and had not mentioned it being voluntary or requested that the accused give her consent.
HELD: The application was granted. The court found that the accused's s. 9 Charter rights had been violated and excluded the evidence after the point at which the accused left her vehicle, under s. 24(2) of the Charter. The accused was found not guilty of both charges. The officer did not have a legal basis under s. 254(2) of the Criminal Code to make the ASD demand. The court was satisfied that the accused had not waived her rights because she had not voluntarily consented to take the test and was not aware of her right to refuse the officer's request or of the consequences of giving consent. The accused was arbitrarily detained as soon as she got out of her vehicle. The court found that a reasonable person in the accused's position would have concluded because of the officer's conduct that she had no choice but to comply. After applying the Grant analysis of whether the evidence should be excluded, the court held that to not do so would bring the administration of justice into disrepute. The officer was aware that he had no lawful basis to detain the accused for the ASD or for any other reason and proceeded on a hunch.

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Lichtenwald v R, 2018 SKQB 114

Smith, April 16, 2018 (QB17506)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking Constitutional Law – Charter of Rights, Section 10(b)

The accused was charged with multiple counts relating to possession for the purpose of trafficking, trafficking unlawful drugs and sundry firearm offences. He brought a Charter application alleging that his s. 7, s. 8, s. 9, s. 10(b) and s. 11(c) rights had been violated and sought to have the evidence gathered by the police at the time of his arrest and the

subsequent search of his home under a search warrant excluded pursuant to s. 24(2) of the Charter. A voir dire was held. The arrest had occurred after two police officers, members of the Integrated Drug Unit, observed a known drug dealer driving into a self-serve car wash. As they watched him, another man approached him as he vacuumed the interior of his vehicle. The two men then drove their vehicles so that they were nose-to-nose in one of the bays of the car wash, which interfered with the officers' visual surveillance. The drug dealer then got into the accused's vehicle, where the police observed them speaking to each other and then looking down at their laps. One of the officers who had been involved in many drug crime investigations testified that drug transactions often occur in car washes. On the basis of all of the foregoing, the officer decided to effect an arrest. When the accused got out of his vehicle, the officer arrested him and found drugs, a large amount of cash, a zip gun and a driver's licence on the accused's person. The accused was asked if the address on his licence was his current address and he answered affirmatively. He was then informed that he was under arrest for possession for the purpose of trafficking and given the Charter police warning and his right to counsel. The accused said that he want to speak to a lawyer. The arrest occurred at approximately 3 p.m. The accused was taken to the police station and held there while the police obtained a search warrant for his home that was executed at 7:30 p.m. Although the accused was not questioned during that period, he was not allowed to contact a lawyer. The officers testified that they had not permitted him to do so because they were concerned that information would get out to the accused's accomplices who might dispose of evidence at the home, and to protect officer safety during the search. The accused argued that: 1) his arrest and detention was unlawful; 2) the information that he provided regarding his home address was inadmissible because he had not spoken to a lawyer; and 3) he was not afforded a reasonable opportunity to contact his lawyer upon detention and arrest. HELD: The Charter application was granted. The court found with respect to each issue that: 1) the accused's arrest was not unlawful. Based upon the officer's experience with the drug trade, it found that he had reasonable grounds to arrest the accused and that the grounds were justifiable from an objective point of view because the standard of objective reasonableness is conducted through the lens of a reasonable person standing the shoes of a police officer; 2) the confirmation by the accused of his address before he had a chance to speak to counsel was admissible. The question asked by the officer was incidental to arrest and had not breached any Charter right; and 3) the accused's s. 10(b) Charter rights had been breached. The court noted that the accused's remedy in this

case might be to bring an application for a stay under s. 24(1) of the Charter. The court did not accept the officers' explanation as justifying the holding of the accused incommunicado for seven hours after arrest.

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B.S.P. v C.M., 2018 SKQB 125

Dufour, April 26, 2018 (QB17514)

Family Law – Custody and Access – Hague Convention - Costs

The petitioner applied for costs in respect of his application under the Hague Convention on the Civil Aspects of International Child Abduction to have four children returned to his home in North Dakota (see: 2017 SKQB 179). He filed an affidavit setting out his legal fees in the amount of $7,500 and travel costs in the amount of $260. The court found that both of these expenses were reasonable and that the applicant had incurred necessary expenses as defined in Article 26 of the Hague Convention in the amount of $7,420. The issue was whether the applicant should be awarded some or none of the costs. The respondent argued that the application should be dismissed because she barely had the financial capability to support herself and the one child who continued to reside with her. HELD: The application was granted. The court fixed costs in the amount of $2,000 to be paid by the respondent in monthly installments of $100. The court took into consideration that there was a presumption that a successful party is entitled to costs of a family law proceeding and one of the purposes of the Hague Convention is to deter parents from taking children out of the jurisdiction of the courts in their place of habitual residence. The applicant had been almost completely successful. However, an award of costs should not be so high as to deprive a parent of resources to care for a child at issue in the litigation. The court found it was not an appropriate case in which to award costs on a solicitor-client basis.

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Brown, May 1, 2018 (QB17520)

Family Law – Spousal Support Family Law – Family Property –

Evaluation

The parties began living together in August 2003. The petitioner moved to the dairy farm operated by the respondent. He asked her to leave in May 2009 and the petitioner initiated this action in June, requesting occupational rent, division of family property and spousal support. When the parties met, the petitioner was 38 years of age and working as a bartender. She had held different jobs previously but had never pursued a career prior to her relationship with the respondent. She did not own any property, nor did she have any savings or other assets. While living with the respondent she helped look after his two children, the house and yard, and worked in the dairy barn. She testified that she received no pay for her chores, but the respondent deposited $1,000 per month into her bank account to cover the cost of household items, the children's activities and similar expenses. After leaving the family home, she returned to it and removed the majority of the furniture from it. The petitioner lived successively with her mother in 2009, with a friend for two years to whom she paid rent, and then she moved in with her new partner in 2012. She received sporadic spousal support from the respondent totaling $3,500, but did not record the dates of payment. The respondent had also made monthly car payments of $460 on her behalf from July 2009 to June 2012. The respondent had purchased the dairy farm in partnership with his uncle in 1998 and incurred significant debt in 1999 when he bought his uncle's interest for $400,000. He paid off the debt in 2007 with the proceeds of a loan of $600,000 from Farm Credit Corporation. The loan was still outstanding as at June 2009. In 1999, the respondent's brother joined him and they formed a 50-50 partnership. Each of them had his own house on the farm property. They both took monthly income of $1,000 to $1,500 from the farm and the partnership paid all of their household utilities and services. The respondent argued that the family property should be valued as at the date of petition. He also claimed exemption under s. 23 of The Family Property Act for his interest in the dairy operation as at August 2005, when the parties became spouses, and for the family home, arguing that it was just a part of the partnership assets. The parties each presented appraisal evidence regarding the value of the milk quota as part of respondent's interest in the dairy operation. The issues were: 1) whether occupational rent was owed to the petitioner; 2) what was the appropriate family property division; and 3) whether spousal support should be ordered. HELD: The court ordered that the petitioner should receive $156,900 as her share of the family property. Respecting each issue, it found that: 1) the petitioner was not entitled to occupational rent because there were no exceptional circumstances here that warranted awarding it; 2) it valued the family home at $100,000 in 2005 and

at $160,000 in 2009. The value of the family home was not exempt from family property because it was held within a partnership. The value of the milk quota established by taking an average of the sale price of used and unused quota for the 12 months preceding August 2005 and June 2009 respectively as being $1,775,400 and $1,600,600. The increase in the value of the partnership between the relevant dates, including the two residences, was determined to be $192,500. The respondent's debt of $22,700 at the date of the petition was then deducted; and 3) the petitioner was entitled to spousal support for 24 months after the separation at the rate of $300 per month based upon the parties' respective incomes at that time and taking into account the spousal support the respondent had paid. The court did not order ongoing support. The respondent had not established that her employment opportunities were curtailed during the relationship, which was of relatively short duration.

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B.A.B.-E. v K.N.C., 2018 SKQB 135

McCreary, May 2, 2018 (QB17521)

Family Law – Custody and Access – Supervised Access

The petitioner and respondent were parents of a seven-year-old child. After separating, they shared parenting until 2015. At that time, Social Services required that the child live exclusively with the petitioner and the respondent was to exercise access only on a supervised basis. The court confirmed this arrangement pursuant to a number of interim orders until the matter came to trial. The petitioner sought a final order for sole custody of the child. He argued that the respondent should either not have access or should have only supervised access because of her conduct. After the separation, the respondent began dating an individual. The parties were notified by Social Services that there were allegations that this individual had sexually assaulted their child and in addition was facing child pornography charges for which he was eventually convicted. The respondent did not believe the allegations and as a result, the court granted an order in 2015 giving the petitioner interim sole custody and only supervised access to the respondent. The court ordered that her boyfriend was not to have any contact with her child and the respondent's decision to continue her relationship with him made it difficult for her to have parenting time. The respondent initially participated in the supervised access arrangement, but was warned about her behaviour towards the program

supervisors and then stopped participating in the program. She did not take steps to arrange for other supervised parenting time and had not seen her child for more than eight months, which was not in his best interests. The respondent had also created a high-conflict situation with the petitioner that made it impossible for them to communicate about necessary decisions for their child. After her first inappropriate relationship had ended, the respondent and her second partner had harassed and demeaned both the petitioner and other people. The petitioner also requested future and retroactive child support. The respondent was self-represented and withdrew during the trial because she was not assured that she would be granted shared parenting or unsupervised access. HELD: The petitioner was granted an order giving him sole custody of the child who was to have his primary residence with him. The respondent would only be able to have supervised access because of her conduct. The court stipulated that the respondent could exercise supervised access on the condition that she could apply to the court after undergoing a mental health assessment and filing a report from a psychologist or psychiatrist beforehand. Based upon the respective incomes of the parties, the court ordered the respondent to pay child support pursuant to s. 3 of the Guidelines of $359 per month and 50 percent of s. 7 of child care expenses for a total payment of $455 per month. The petitioner's request for retroactive child support was declined because the respondent was expecting another child and making such an award would cause her undue hardship. The court also made a restraining order pursuant to s. 100 of The Queen's Bench Act, 1998 and/or s. 23 of The Children's Law Act that the respondent not have contact with the petitioner except through counsel and was prohibited from attending at his residence until June 2020. To control the respondent's use of social media to denigrate the petitioner, the court ordered that neither party could publish any information about the child on the internet. The petitioner was awarded costs of $24,200 based on Column 2 of the Tariff as he was successful and the matter was complex.

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Hamilton v Turner, 2018 SKQB 140

Popescul, May 4, 2018 (QB17532)

Wills and Estates – Gifts – Inter Vivos

The deceased testator's will left the residue of her estate to three of her children in equal shares. Her assets at death included two

joint bank accounts with rights of survivorship with one of her daughters and one of her granddaughters respectively. The accounts contained substantial sums of money. Two of the beneficiaries under the will commenced an action that sought a declaration that the joint accounts be characterized as a resulting trust and considered part of the estate. The daughter and granddaughter, the joint account holders with the deceased, applied for summary judgment dismissing the plaintiffs' statement of claim and a declaration that the accounts were not part of the estate and should not be distributed in accordance with the will. They argued that the deceased's intention was to benefit them by way of gift. The accounts had been opened at two different financial institutions in two different locations on different dates. The applicants submitted affidavits sworn by employees of each institution in which they described their standard practice of establishing with account holders whether they wanted to establish the joint account with or without right of survivorship. One employee knew the testator personally and deposed that she was very aware of the specifics of her various accounts and very sure of exactly what she wanted to do with them.
HELD: The application for summary judgment was granted and the court made an order declaring that the applicants were exclusive owners of the respective joint bank accounts. The court found that they had established on a balance of probabilities that at the time that the deceased opened the joint bank accounts, her intention was gift to the applicants the monies remaining in them at her death and they had rebutted the presumption of resulting trust.

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R v Knox-Moffatt, 2018 SKQB 142

Elson, May 4, 2018 (QB17531)

Criminal Law – Assault – Sexual Assault

The accused was charged with sexual assault contrary to s. 271 of the Criminal Code. He was 24 and the complainant was 16 at the time of the assault. The complainant testified that after she had met the accused through a mutual friend, they exchanged messages on social media before arranging to meet in his apartment. At the meeting, the accused made sexual overtures to the complainant and despite her objections, he sexually assaulted her. Afterward, she told a friend and her stepfather that she had been sexually assaulted and they took her to the hospital where a

sexual assault kit examination was performed. The only other Crown witness was a police officer who had been dispatched to the hospital to attend with the complainant there and later interviewed her at the station. She stated that the complainant was not upset but did seem uncomfortable. The officer later interviewed the accused after his arrest and found him to be compliant and cooperative. The accused testified on his behalf. He stated the social media platform used by the parties was one used for the purposes of setting up sexual encounters and that the complainant had used phrases in her messages that indicated that was her intention. The complainant had not protested the sexual activity but afterwards expressed remorse that she had cheated on her boyfriend. The issue was whether the Crown had met its burden of proving beyond a reasonable doubt that the complainant consented to the sexual activity.
HELD: The accused was acquitted. The court found that the Crown had not met the burden of proof. The court found that both witnesses had testified in a credible manner and that police officer's evidence was neutral. The absence of compelling or otherwise independent evidence left the court with only the respective testimonies of the complainant and the accused to assess. Applying the test set out in R v W.(D.), the court decided that the accused was not guilty. The court commented that none of the social media messages that passed between the parties had been presented in evidence nor were any of the photographs the complainant said she took with her cell phone in the accused's apartment. Further, neither the complainant's friend nor her stepfather were called to testify and finally, the court did not receive any evidence resulting from the examination with the sexual assault kit.

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R v T.A.S., 2018 SKQB 143

Barrington-Foote, May 4, 2018 (QB17529)

Criminal Law – Assault – Sexual Assault – Sentencing

The accused was charged with sexual assault, sexual touching and invitation to sexual touching, contrary to ss. 271, 151 and 152 respectively of the Criminal Code. At the time of the offence he was 22 and the victim was 14. As he was more than five years older than the victim, she was unable to consent. The accused challenged the constitutionality of the close-in-age exception in s. 150.1 of the Code and a voir dire was held. The only evidence led at the hearing was led by the accused who was the primary

witness. He described his relationship with the victim, the events and communication leading to the sexual encounters forming the basis of the charges. He testified that the victim initiated their sexual contacts. Although the court believed the accused's evidence, the constitutional challenge was dismissed and the court convicted the accused of sexual assault and sexual touching on the basis of his evidence at the voir dire. He was found not guilty of the invitation charge (see: 2017 SKQB 339). Later, the court concluded that there had been no agreement that the evidence on the voir dire would be evidence on the trial. The matter was reviewed with Crown and defence counsel and they each advised that they had not intended to call further evidence and agreed that the evidence on the voir dire should be evidence on the trial. The court then confirmed the accused's convictions. At the subsequent sentencing hearing the Crown sought to call evidence from the victim to prove certain aggravating circumstances. The evidence would be intended to prove such facts that the accused had: been the victim's bus driver for four years leading up to the sexual encounters and was in a position of trust; been the aggressor in several of the encounters, rather than a passive participant; and groomed the victim. The offender did not admit the disputed facts. He argued that the evidence was inadmissible. The disputed facts were dealt with in the evidence at trial and were the subject of the findings of facts in the decision. If the Crown took issue with the accused's evidence about the disputed facts, it was obliged to call evidence at trial. As it had not done so, it could not now lead evidence at the sentencing hearing to prove a different version of those facts. The Crown then submitted that it was obliged by s. 724(3) of the Code to call evidence to prove them beyond a reasonable doubt. Alternatively, if the Crown was not permitted to lead evidence from the victim regarding disputed facts, it applied for a mistrial due to the irregularities that occurred when the accused was convicted based on his voir dire evidence.

HELD: The court held that the Crown could not adduce the evidence and refused its application for a mistrial. The Crown was not entitled to lead evidence to prove the disputed fact as it would have been contrary to the trial evidence and the court's findings of fact on the voir dire and at trial. As the Crown had expressly agreed that the voir dire evidence would be evidence on the trial and that it had not intended to call further evidence, there was no basis for the application for a mistrial.

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Piett v Global Learning Group Inc., 2018 SKQB 144

Barrington-Foote, May 8, 2018 (QB17530)

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

The plaintiff commenced his proposed class action in March 2016 and applied for certification in April 2018 and for a hearing schedule to be set. He claimed restitution, damages and other relief from defendants that designed, implemented and promoted a tax shelter known as the Global Learning Group Gifting Initiative donation program. He also claimed against various contractors and professional advisors who provided services related to those activities. Seven of the 30 defendants applied for summary judgment or to strike the statement of claim and they sought to have their applications heard in advance of the certification hearing. The plaintiff submitted that the applications should be dismissed or adjourned. Three proposed defendants, law firms, advanced common arguments that they had had only peripheral involvement in the matter and were accordingly not involved in the alleged wrongful conduct. One defendant submitted that she was both a person who bought the tax shelter and who was compensated as a result of the way that the product was promoted and delivered. Therefore the claim could not proceed against her because she could not be both a plaintiff and a defendant.
HELD: The applications were adjourned. The court found that the general rule applied that the certification application should be heard first. The decision as to sequencing should be deferred until the respondents had responded to the certification application. At that time, the court and the parties would be in a better position to understand what would be most likely to advance fairness, efficiency and judicial economy. Although the defendant law firms had identified factors that were relevant, they were not sufficient in the context to justify departure from the rule. The other defendant's application should not be considered prior to the certification hearing because it would result in substantial delays and raise issues that were at the heart of the certification process.

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P.E.M.A. v S.L.A., 2018 SKQB 145

Dufour, May 8, 2018 (QB17533)

Family Law – Custody and Access
Family Law – Child Support

The parties separated in 2014 and shared the parenting of their three children. In early 2015, the oldest son, now 18, and his father had a disagreement and they have been estranged since. The son lived solely with his mother and attended university. In September 2015, the oldest daughter (now 15) decided that she would not return to her mother's home after they had a violent confrontation. Despite three court orders issued during the fall of 2015, the oldest daughter did not return to shared parenting until January 2017 when her father forced her to do so. However, during her periods of residence at her mother's house, the oldest daughter would not communicate with her. The youngest daughter, now 13, refused to return to her father's home after there was a confrontation and as a result, the father had not seen the youngest daughter for two years. They had recently been talking to each other through Facetime. The parties originally agreed before trial to resume shared parenting with their two daughters, although by the end of it, the mother asserted that she should have sole custody of them both immediately. The mother also requested that the court order enrollment in an intervention program, the Family Bridges program, at cost of $30,000 to $40,000. She asserted that the father had alienated their eldest daughter against her and that could only be rectified through participation in the program. The father denied that he had alienated their daughter and that the program was not warranted. The other issues were that each party claimed retroactive and ongoing child support for each of the children. The mother argued that the father's income was higher than he reported. Another issue related to the cost of the son's attendance at university. The parties agreed that they should contribute and had done so in the past. The parties had set up an RESP fund to help all of their children to pay for post-secondary education and they asked the court to determine how to distribute it to the son at this time.

HELD: The court ordered that the parties should continue to share parenting of the eldest daughter on a week-on, week-off basis and to resume shared parenting of the youngest daughter through a gradual increase in the amount of time she would spend with her father. The court found that the father had not alienated the eldest daughter against her mother and would not order that the family participate in the program requested by the mother. Both parties were responsible for creating the daughter's reluctance to see her mother. The son should continue to live with his mother and because of his age, it would not make an order regarding access. The income of the parties was established through their income tax returns and the court found that the father was not hiding income and therefore it would not impute it to him. Regarding the claims for retroactive and ongoing child support, the court assessed support for: 1) the

eldest son: as there was shared parenting for 2014, the mother and father were ordered to pay table amounts and apply a set-off for that year. The father should pay full table support for the son for all of 2015, 2016, and 2017. Regarding the costs of his education, the court decided that the son should make a reasonable contribution of $3,000 for 2017-2018. Because the RESP held by the parties had been created to help all of the children, the court ordered that a portion of it should be used to cover the son's expenses. Where there was a shortfall, the parents should contribute their proportionate shares to pay it. The court would not determine how the remaining RESP funds would be used for the daughters; 2) the eldest daughter: the mother was ordered to pay table support for her for 2015 and 2016. After 2017 when shared parenting resumed, the parties should set-off their table amounts for the year; and 3) the youngest daughter: the father to pay the table amount for her for 2016 and 2017 and the parties should set-off the table amounts for 2015.

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R v Jat, 2018 SKQB 146

Gabrielson, May 11, 2018 (QB17538)

Criminal Law – Evidence – Admissibility of Statement – Voluntariness
Constitutional Law – Charter of Rights, Section 10(b)

The accused was charged with four offences, all relating to child pornography. He pled not guilty and brought a Charter application alleging that his ss. 7, 8, 9 and 10(a) and (b) Charter rights had been breached. At the initial voir dire hearing, the judge dismissed the accused's application pertaining to s. 8 (see: 2018 SKQB 1). At the continuation of the hearing and trial, the defence abandoned the Charter application except for the arguments that the accused's statements were not given voluntarily or were provided based upon threats or promises made by the police as perceived by him. The accused also alleged that he was not sufficiently informed of his right to retain and instruct counsel or alternatively had not possessed the necessary operating mind to understand the jeopardy he faced. The accused testified that he thought that if he gave a statement the police would let him go. Although he was given advice by Legal Aid not to say anything to the police, he was scared of them and wanted to leave the station. He did not feel that he had an option. In cross-examination, the accused admitted that

although he was born in Pakistan, he had lived in Canada since 2008 and had received his high school education here without requiring an interpreter. He also admitted that the police were polite and respectful during his questioning and that they had not promised him anything or threatened him. He believed that he was told by an officer that if he told the truth he would be out of jail by tomorrow. The defence called a psychiatrist who gave his opinion that the accused suffered from a mild intellectual disability that could affect his ability to understand risk in social situations and could be manipulated. The diagnosis would explain why the accused was eager to get released and failed to understand his right to silence or appreciate the consequence of waiving that right. The Crown called the three police officers and each of them denied that during the taking of the accused's statement they told him if he accepted the charges, he would be released from jail the next day.
HELD: The court found that the statement was voluntary and there was no breach of the accused's Charter rights under s. 10(b). The statement was admissible in the trial proper. The court was satisfied that there was no evidence that the officer who took the accused's statement caused or contributed to his fear that he would be beaten up or that he would have to remain in jail unless he confessed. The accused was motivated to give the statement contrary to the advice he received from Legal Aid because of a cultural feeling and need to unburden himself. The court dismissed the arguments that there had been a change in the jeopardy faced by the accused that would have required that he be given a further opportunity to consult counsel or that the accused had not had an operating mind when he made the statement.

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Diewold, Re (Bankrupt), 2018 SKQB 149

Thompson, May 14, 2018 (QB17534)

Bankruptcy and Insolvency – Discharge – Income Tax Debt

The Canada Revenue Agency (CRA) opposed the bankrupt's application for discharge. It established that the bankrupt owed $263,800 for personal income tax. The debt was incurred in 2003 to 2008, 2010 to 2012 and 2016 and it made up over 99 percent of the unsecured proven claims. The bankrupt, a 64-year-old pensioner, had assets worth $425,250 composed of an unencumbered home valued at $250,000 and RRSP's valued at $129,000. The trustee estimated that only $5,100 was realizable

for the estate. The bankrupt had no available surplus income and was working part-time to make ends meet. The income tax debt arose because the bankrupt participated in a fictitious donation scheme that was designed to create inflated refunds and help its participants avoid paying income tax. The CRA submitted that the bankrupt knew or ought to have known that the scheme was fictitious and that she participated in it to avoid taxes. The scheme involved a tax payor making a cash payment to the Millenium Charitable Foundation (MCF). The payor would then apply to become a capital beneficiary of the Global Learning Trust and receive a distribution from it in the form of a licence to use courseware. The payor would then donate the courseware licence to the International Charity Association Network (ICAN). MCF and ICAN would then issue receipts representing the amount of the cash payment and ICAN for the value of the courseware licence. The taxpayer then claimed the amount of both receipts as support for a tax deduction that resulted in a positive return from 56 to 112 percent of what had been contributed. The bankrupt testified that she believed the tax shelter was lawful and until 2008, the CRA had not indicated otherwise. She made no donations after 2005 but she did carry forward contributions from those donations in the following years. When she was informed by the CRA in 2009 that the scheme was not legitimate she continued to claim carry forwards because the issue of the arrangement's legitimacy was proceeding through the courts. She also submitted that she believed that the fair market value of the licences explained the discrepancy between what she paid for each donation and the amount on the receipts she claimed with CRA.
HELD: The bankrupt's application was suspended for seven years before she would be eligible for discharge pursuant to s. 172.1 of the Bankruptcy and Insolvency Act. She was required to pay $35,000 to the trustee. The court found she was not an honest but unfortunate debtor and ought to have realized that there were issues with the legitimacy of the investment arrangement. She decided to declare carry overs even after she had been notified by CRA that of its concern.

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Carteri v Saskatchewan Mutual Insurance Co., 2018 SKQB 150

Elson, May 11, 2018 (QB17535)

Insurance – Actions on Policies
Insurance – Contract – Interpretation – Exclusion
Statutes – Interpretation – Saskatchewan Insurance Act, Section

125, Section 126, Section 131
Civil Procedure – Queen's Bench Rules, Rule 7-2

The plaintiffs brought an action against the defendant insurance company claiming under their $175,000 fire insurance policy they had entered into in 2000 and against the defendants, Hoffart and Cisek, who were tenants in the plaintiffs' rental property. During the tenancy a fire had severely damaged the house and it was eventually demolished. There was evidence from the scene that suggested the explosion and fire resulted from an attempt to produce cannabis resin. The insurer admitted the policy but denied coverage on the basis of a risk exclusion it introduced to the policy in 2003. The exclusion purported to deny coverage for loss or damage to property caused by the manufacturing of illicit drugs. The plaintiffs argued that the insurer's unilateral decision to insert the drug exclusion into the policy was unlawful under ss. 125 and 126 of The Saskatchewan Insurance Act (SIA) and it was inoperable because it was both unreasonable and unjust under s. 131 of the SIA in the circumstances of this case. In their action against the tenants, the plaintiffs sought damages on the grounds that they had violated the terms of the tenancy agreement by using the property for an unlawful purpose, resulting in the loss of the house. The insurer applied for summary judgment of the first action and the plaintiffs agreed that the matter could be decided under Queen's Bench rule 7-2 but contested the application on its merits. The plaintiffs also pursued their own summary judgment application against the tenants. The tenants opposed the propriety of either action being decided through summary judgment. The issues were whether: 1) it was appropriate to determine the actions by summary judgment under rule 7-2; 2) the plaintiff's property was used in a manner described in the drug exclusion; 3) the drug exclusion was properly inserted into the policy; 4) the operation of the drug exclusion was unjust or unreasonable in the circumstances; and 5) the tenants were liable to the plaintiffs for their loss. HELD: The insurer's application for summary judgment dismissing the plaintiffs' action was granted. The plaintiffs' application for summary judgment for damages against the tenants was granted, subject to the quantification of damages. The court found, with respect to each issue, that: 1) the affidavit evidence submitted by the plaintiffs and the insurers was reasonably complete to allow it to make its determination and grant summary judgment under Queen's Bench rule 7-2. The tenants' failure to put their best evidentiary foot forward did not prevent the court from making the necessary findings of fact based upon those that were undisputed; 2) the evidence pertaining to the origin and cause of the fire was contained in fire investigation reports prepared by the police and from a report from a fire protection engineer retained by the plaintiffs.

The authors all agreed that the fire had been caused by heating marijuana resin with a volatile substance and when it spilled, it resulted in the explosion and subsequent fire. One of the tenants was alone in the house at the time and was severely burned. The tenant offered nothing to contradict the evidence. He admitted to his injuries but did not expressly deny that he had been engaged in producing cannabis resin; 3) the exclusion was properly inserted into the policy. The plaintiffs failed to meet the burden of showing that the insurer had failed to take reasonable steps to point out the introduction of the drug exclusion clause in the policy; 4) the insurer had met the reasonable standard of disclosure under s. 126 by conveying in writing the particulars of the differences between the application and the policy change. The drug exclusion was identified on the first page of the 2005 renewal form in a prominent box entitled "Important Messages". The drug exclusion was not unjust or unreasonable under s. 131 of the SIA. The court agreed with the decision in Pietrangelo that the exclusion had a rational defensible basis. The fact that the plaintiff did not and probably could not have known of their tenants' criminal acts was not a reason for the insurer to pay for the losses; and 5) the tenants were liable for the plaintiffs' loss under ss. 49(5) and 49(6) of The Residential Tenancies Act as those statutory obligations were incorporated by reference into the tenancy agreement. The findings regarding the cause of the fire indicated that the tenants were in breach of the obligations and liable in damages for the resulting loss. The quantum of damages would be determined pending a reference under Queen's Bench rule 7-5(5) to provide further affidavit evidence.

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Mauri Gwyn Developments Ltd. v Larson Manufacturing Co. of South Dakota, Inc., 2018 SKQB 152

Elson, May 15, 2018 (QB17537)

Real Property – Certificate of Pending Litigation – Discharge
Civil Procedure – Certificate of Pending Litigation
Statutes – Interpretation – The Queen's Bench Act, 1998, Section 46, Section 47

The defendant applied for an order vacating the registration of a Certificate of Pending Litigation (CPL) that the plaintiff had had issued and registered against land to which the defendant held title. The applicant argued that the interest identified in the CPL was functionally identical to a miscellaneous interest that the plaintiff had earlier permitted to lapse after the applicant had applied under s. 46 of The Land Titles Regulations, 2001 to have

it discharged. After the 30-day notice to lapse had expired and the plaintiff had not taken any steps to extend the interest or prove it, the Registrar discharged it. The plaintiff then commenced an action by statement of claim that sought a number of declarations relating to funds owed to it by the defendant's predecessor in title as part of a development scheme pertaining to the land in question and then registered the CPL. The applicant submitted that the plaintiff was committing an abuse of the land titles registry system. The plaintiff responded that the interest represented by the CPL differed from that described in its earlier miscellaneous interest. The issues were: 1) whether the interest in the statement of claim and the corresponding CPL were different from that claimed in the lapsed miscellaneous interest; and 2) whether the CPL should be vacated.
HELD: The application was dismissed. The court found regarding each issue that: 1) the plaintiff commenced its action and a CPL issued from that action. That process was governed by s. 46 of The Queen's Bench Act, 1998 and superseded the application of the lapsing procedure contemplated by the Regulations. The CPL complied with s. 46 of the Act and was not otherwise vacated under s. 47, then it remained valid and was unaffected by the lapsing of the prior registered miscellaneous interest; and 2) it could find no basis under either ss. 46(1) or 47(1) of the Act to vacate the CPL.

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Peepeetch Sr. v Madsen, 2018 SKQB 165

Layh, May 29, 2018 (QB17552)

Civil Procedure – Queen's Bench Rules, Rule 3-72, Rule 5-20

The plaintiff applied to amend his statement of claim to add as defendants three nurses who had attended him at the hospital at which he had been treated for injuries received by him. The nurses were employees of the defendant in the action, the Saskatchewan Health Authority. The defendant authority accepted that it was vicariously liable for the actions of the nurses if they were negligent in the performance of their duties. The plaintiff brought the application so that the nurses could be questioned before the proper officer of the authority was questioned in order to avoid revealing to the authority the theory of his case against it.
HELD: The application was denied. The court found that the plaintiff had not explained why the nurses should be added at

this point in the litigation. Defendants should not be named in an action simply for the purposes of obtaining the right to question them. The court held that it could order the questioning of the nurses under Queen's Bench rule 5-20 only after it was satisfied that the plaintiff was unable to obtain information from the person whom the plaintiff was entitled to question, the authority's proper officer.

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