The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 20, No. 16 **August 15, 2018**

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The Crown appealed from the decision of a Queen's Bench judge in a summary conviction appeal that set aside the trial judge's conviction of the respondent and entered an acquittal. The respondent had been charged with driving while his blood alcohol content exceeded the legal limit contrary to s. 253(1)(b) of the Criminal Code. The respondent had been followed by two RCMP officers a few minutes after they had seen him leave a bar. Because they noticed a few irregularities in his driving, they stopped him. The officer noticed that the respondent's speech was slurred, he smelled of alcohol and he fumbled with his registration. When asked if he had had anything to drink, the respondent said that he had had three drinks. Believing that he had alcohol in his system, the officer took the respondent to the cruiser for an ASD test. The other officer, an ASD instructor and approved user and calibrator, took over the investigation. He noticed that the respondent walked with an unsteady gait, had alcohol on his breath and his speech was slurred. The officer administered the ASD test within five minutes of

stopping the respondent. When the respondent failed the test, the officer arrested him and made a breath demand. The respondent was taken to the detachment, spoke with a lawyer and then while waiting, during the 15-minute observation period, was asked by the first officer when he had consumed his last drink. The respondent said about five minutes before being stopped. He provided breath samples showing 120 and 110 milligrams and he was charged under s. 253(1)(b). The first officer, a qualified breath technician who had operated the instrument into which the respondent had provided breath samples, testified that it was in proper working order and that the samples were obtained from the respondent's breath. The defence argued at trial that the officers were obligated to inquire about the timing of the respondent's last drink or delay the administration of the ASD to eliminate the possible effects of mouth alcohol and the failure to do so negated the reliability of the result, and therefore the fail result could not be relied upon to form the reasonable and probable grounds that he had committed an offence. Without reliance upon the fail, the defence argued that the officer lacked the requisite reasonable and probable grounds to lawfully arrest and administer the breath sample. The trial judge concluded that the officer was under no obligation to delay the ASD test and therefore acted bona fide in administering the test. The judge accepted the officer's evidence that he proceeded with the test as he had no concern about mouth alcohol. He concluded on the whole of the circumstances known to the officer, including the respondent's irregular driving, the symptoms of impairment and the failed ASD test, there were reasonable and probable grounds to make a breath demand. The officer had honestly believed that the respondent had committed an offence under s. 253 and it was objectively reasonable. Consequently, no Charter breaches had occurred. The trial judge also rejected the defence argument that there was insufficient evidence to establish the breath samples were received directly into the Breathalyzer instrument pursuant to s. 258(1)(c)(iii) because the presumption was satisfied based on the officer's evidence. On appeal, the summary conviction appeal judge found that the circumstances of the case reached the threshold of "sufficient likelihood" and that the officer was required to either ascertain the time of the respondent's last drink or delay the ASD test. His failure to do either negated his reliance on the ASD fail to form the requisite reasonable and probable grounds needed to lawfully arrest the respondent and make the breath demand and thus there was a breach of s. 8 and s. 9 of the Charter. The respondent raised a new ground at the appeal and argued the effect of the statement he made at the police station that he had consumed alcohol about five minutes prior to being stopped meant the officer

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could not rely on the roadside ASD fail to form reasonable and probable grounds. The appeal judge accepted the argument and concluded that the officer's failure to consider the information meant that the Crown failed to establish reasonable and probable grounds to administer the Breathalyzer, constituting a further breach of the respondent's Charter rights, and excluded the Certificate of Analysis. The appeal judge also set aside the trial judge's conclusion that the requirement in s. 258(1)(c)(iii) of the Code was satisfied. The appeal judge found that because there was "no direct evidence that the appellant blew directly into the approved instrument", the presumption proving the respondent's blood alcohol level at the time of the offence could not be invoked. The issues were whether: 1) the reasonable and probable grounds test was satisfied without reliance on the ASD result; 2) the ASD could be relied upon to establish reasonable and probable grounds; 3) the post-ASD information regarding the respondent's last drink impacted the reasonable and probable grounds; and 4) the evidence was reasonably capable of supporting the trial judge's conclusion that s. 258(1)(c)(iii) was satisfied.

HELD: The appeal was allowed. The appeal judge's acquittal was set aside and the trial judge's conviction and sentence were restored. The court found with respect to each issue that: 1) based on the evidence given by the second officer, the court agreed with both the trial and appeal judge that he lacked the requisite subjective belief as to the respondent's impairment prior to the ASD test; 2) the appeal judge erred in his interpretation of the law relating to the police duty to delay or inquire about residual mouth alcohol and therefore erred in concluding in this case that a delay or further inquiry was needed. His decision that the respondent's Charter rights were violated was set aside. There is no police duty to obtain information from a suspect as to the timing of their last drink, and furthermore, a failure to delay the ASD test does not negate the officer's reliance on the result when the officer is found to be acting bona fide in administering the test. If the officer has no actual knowledge of residual mouth alcohol, his honestly held belief that the ASD fail was accurate meets the test for the officer's subjective belief. An officer's reliance on the ASD fail will be objectively reasonable unless there is credible evidence to indicate that the suspect has recently consumed alcohol, possibly jeopardizing the ASD result. The mere possibility that the suspect consumed alcohol is not sufficient. In this case, the trial judge correctly concluded that the evidence given supported the finding that the officer honestly believed the ASD fail result indicated that the respondent had committed an offence and on the information known to him, it was reasonable for him to have relied on the ASD to form his belief. The fact

that the officers had observed the respondent leaving the parking lot of a bar immediately before stopping him was not sufficient to impose an obligation on the officer to either delay the test or make further inquiries; 3) the appeal judge erred in finding a Charter breach due to the impact of the post-ASD evidence. Although post-ASD evidence regarding the timing of a driver's last drink may potentially impact the reasonableness of an officer's reliance on an ASD fail, there was nothing in the record to substantiate the respondent's argument in this case. There was no evidence that the second officer even heard the respondent's statement; and 4) the appeal judge failed to apply the standard of review of deference to the trial judge's finding of fact that the respondent provided his breath samples directly into the approved instrument in accordance with s. 258(1)(c)(iii) and erred in overturning the trial judge's decision.

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R v Ector, 2018 SKCA 46

Richards Caldwell Schwann, June 12, 2018 (CA17157)

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

The appellant had been charged with driving while his blood alcohol content exceeded the legal limit pursuant to s. 253(1)(b) of the Criminal Code and with impaired driving under s. 253(1)(a). The defence brought an application alleging a breach of the appellant's s. 10(b) Charter rights and a voir dire was held. After failing an ASD test, the appellant had been arrested and given the police warning, informed of his right to counsel and told that Legal Aid counsel was available. As the appellant wanted to consult with a lawyer, the officer placed him in the phone room at the detachment and asked him the name of the one he wanted to contact. When the appellant replied that he wanted to speak with his parents to obtain the name of their lawyer, the officer refused the request because he was an adult but offered to call them on his behalf. The officer telephoned from another room and reached the appellant's mother. The officer testified that the mother provided the name of the law firm she used. In the mother's testimony, she said that she gave the officer the name of the lawyer who worked for them on property transactions and suggested the name of another lawyer she had used in the same firm. She was not cross-examined on her testimony. The officer provided only the law

firm name to the appellant and advised him that he could call the law firm and select one of the lawyers, select another lawyer altogether or speak with Legal Aid counsel. The appellant elected the first option. The officer placed the call but reached an automated answering machine message that recited the lawyers in the firm, he hung up. The appellant was informed and he again asked the officer if he could speak to his parents. The officer refused his request and told him to select the name of specific lawyer from the law firm's directory. He then called the law firm again and the appellant randomly selected a lawyer from the list provided and left a message. The lawyer did not return the call and the appellant then spoke with Legal Aid duty counsel. After the conversation the appellant asked to speak with another lawyer to obtain a second opinion because he wanted to know if there were other options, but the officer denied his request. The officer did not ask him why he wanted a second opinion and the appellant did not express any dissatisfaction with the duty counsel. The appellant testified that he could not think of anything else he could have done to obtain the name of his parents' lawyer. The trial judge concluded that the appellant had been given more than a reasonable opportunity to contact counsel of choice and was not concerned with the discrepancy in the evidence between the testimony of the officer and the appellant's mother regarding the appellant's Charter application and found no infringement of his s. 10(b) right. The summary conviction appeal judge sustained the trial decision. The appellant appealed the summary appeal judge's decision regarding whether a Charter breach occurred on the grounds that he erred in: 1) failing to order a new trial in spite of having found that the trial judge erred by not resolving an evidentiary conflict on a factual issue that was relevant to his Charter application. The judge understood the appeal hinged on whether the appellant's mother had provided the officer with the names of specific lawyers; and 2) applying speculative factual findings to his assessment of whether the trial judge's error made any difference to the bottom-line outcome. He examined the legal import of the error from hypothetical fact scenarios, including whether it would have made any legal difference if the appellant had been given the specific names of the two lawyers that his mother testified that she provided to the officer. He dismissed the appeal and upheld the trial decision on the basis that the failure to resolve the evidentiary conflict had not constituted an error of law requiring correction because the failure had not affected the outcome of the matter and there was no Charter breach regardless of the determination of the circumstances of the case.

HELD: The appeal was allowed. The conviction was set aside

and a new trial was ordered. The court found with respect to each issue that the summary appeal judge erred: 1) in failing to order a new trial. Where an officer acting as an intermediary deprives an accused of his counsel of choice by misinformation, a s. 10(b) breach occurs. Here, the appellant sought counsel of choice through an intermediary, his mother, before he spoke with duty counsel. If the mother had conveyed the names of specific lawyers to the officer, then the appellant was denied his right to consult with counsel of choice. Accordingly, resolution of the discrepancy in the evidence between the officer and the mother was essential to determining whether a Charter breach occurred; and 2) by failing to focus on whether the trial judge should have asked himself if the officer, knowing that the appellant wanted to retain and instruct counsel, discharged her duty to facilitate reasonable access to his counsel of choice. Assessing the reasonableness of the officer's actions could only be undertaken on the basis of the known facts. Instead, the summary appeal judge redirected the focus of inquiry into what the appellant would have done had he been given the correct information and bypassed the examination and overlooked the constitutional obligation placed upon the police.

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R v Lemaigre, 2018 SKCA 47

Jackson Heraug Whitmore, April 5, 2018 (CA17158)

Criminal Law – Assault – Sexual Assault – Sentence – Appeal
Criminal Law – Sentencing – Aboriginal Offender

The Crown appealed the decision of a Queen's Bench judge to sentence the respondent to two years less a day plus 24 months' probation after finding him guilty of sexual assault contrary to s. 271 of the Criminal Code. The sentencing judge subtracted 282 days from the custodial sentence in order to give enhanced credit for 188 days spent in pre-sentence custody to arrive at an effective sentence of one year and 82 days. The complainant, the mother of two young children who was expecting her third child at the time of the assault in 2012, had been sleeping when the respondent, the brother of her former spouse, entered her home while intoxicated. He forced himself upon her while she resisted. The police charged the respondent, but he could not be located and was not arrested until 15 months later. He was released on a promise to appear in court when he could not be transported back to Buffalo Narrows because of bad weather. He failed to appear and was unlawfully at large until he was

arrested in March 2015. At trial, the respondent denied that anything of a sexual nature had occurred. In her victim impact statement, the complainant described that after the offence, the respondent had pressured her to drop the charges and threatened to commit suicide if she didn't. In addition, his brother and others in the community put pressure on her to drop the charge and blamed her. She said that she had become suicidal after the assault and angry because she had been blamed. The trial judge convicted the respondent. The Crown submitted that a penitentiary sentence of three and one half to four years was appropriate. The defence, relying upon R v Chanalquay, submitted that two years less a day was proper, followed by probation. When sentencing, the judge followed Chanalquay. He determined that Gladue factors were relevant in the circumstances.

HELD: The appeal was allowed. The sentencing judge's decision was set aside except for the ancillary orders and a sentence of three and one half years was substituted. The court found that the judge had erred in his interpretation of Chanalquay by applying s. 718.2(e) of the Criminal Code as if it were a directive to shorten jail terms imposed upon Aboriginal offenders. The respondent committed a serious sexual assault on the facts of this case. The judge correctly considered s. 718.2(e) of the Code as part of his analysis, noting the suicide of the respondent's sister, the disruption of his family caused by alcoholism and the abuse he had suffered. However, Chanalquay emphasized that s. 718.2(e) is not to be applied so as to result in an automatic reduction of sentence and a court must be able to find that the offender's moral culpability in the commission of the offence was affected by systemic and other background Gladue factors so as to tailor a sentence having regard to them. In this case, the respondent's failure to accept responsibility for his offence after committing it, upon arrest, at trial and after being convicted, made the judge's imposition of a restorative sentence on him to give effect to s. 718.2(e) contrary to Ipelee and Chanalquay. A fit sentence should have given greater weight to the gravity of the offence and the principles of denunciation and deterrence. The judge also erred in his calculation of the respondent's pre-sentence custody and the court corrected the amount to 153 days.

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Saskatchewan General Employees' Union v Saskatchewan (Environment), 2018 SKCA 48

Jackson Herauf Whitmore, June 15, 2018 (CA17159)

Administrative Law – Arbitration – Judicial Review – Appeal
Labour Law – Arbitration – Judicial Review – Appeal

The appellant, the Saskatchewan Government and General Employees Union, appealed the decision of a Queen's Bench chambers judge to quash an arbitrator's decision. The appellant had grieved the use of a new fitness test, "WFX-Fit" (test), instituted by the respondent, the Government of Saskatchewan's Ministry of the Environment, on the ground that it contravened The Saskatchewan Human Rights Code and the collective agreement. The test was used to assess all existing and new Type 1 wildland firefighters in 2012. The respondent imposed a cut score of 17:15 on all of its firefighters. The score represented a minimum time within which prospective and present employees would have to complete a series of physical tests designed to simulate wildland firefighting tasks. An inability to complete it within that time determined whether a person could work as a Type 1 firefighter. The Canadian Interagency Forest Fire Centre determined that if the pass rate for a protected group was 80 percent or more of the majority, the test was not considered to be discriminatory. The appellant grieved the test as being discriminatory against female and older male employees. The arbitrator did not find any actual adverse effect discrimination on the basis of the female or older male witnesses who testified before him but found that the use of the 80 percent rule alone could not avert a finding of adverse effect discrimination. He concluded that the test was prima facie discriminatory because of its potential impact on females and older males and that although it was a bona fide occupational requirement the test itself contained an arbitrary element by using the 80 percent rule to set the cut score rate for females and older males which meant that there would be a future issue where, if an employee did not succeed in the test, it could be attributed to their status as a female or older male employee. The chambers judge interpreted the arbitrator's decision as finding prima facie discrimination on the basis that the test was potentially discriminatory relying on the added requirement of arbitrariness and that the decision was unreasonable. Regarding that the fixing of the cut score was a bona fide occupational requirement, the judge found again that the arbitrator's decision depended on the added factor of arbitrariness and therefore review on the basis of correctness was justified. He found that aspect of the arbitrator's decision to be incorrect and unreasonable and quashed it.
HELD: The appeal was allowed. The award decision was restored and the decision of the Queen's Bench judge set aside. The court found that the chambers judge erred by applying a standard of review of correctness to the issues and the

arbitrator applied the correct tests. The arbitrator applied settled principles to arrive at his conclusion and his decision was reasonable. Similarly, his findings regarding the bona fide occupational requirement followed the correct legal analysis and his conclusions were reasonable.

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Hrycyna v Hood, 2018 SKCA 49

Richards Whitmore Schwann, June 19, 2018 (CA17160)

Power of Attorney – Capacity – Appeal
Civil Procedure – Appeal – Application to Strike

A number of applications were heard together. The appellant, Vera Hrycyna, applied to amend her notice of appeal and it was consented to by the respondent, Anna Hood, and not opposed by the appellant, Peter Hrycyna. The respondent applied for an order requiring Peter to perfect his appeal. He advised the court that he was ready to file his factum and appeal book. Consequently, the court stated that should he fail to file both within a specified period, the respondent could apply to strike his appeal for want to prosecution. The respondent also applied to strike Vera's appeal because in light of the decision under appeal, she required a guardian and was not able to instruct counsel (see: 2018 SKQB 63). However, s. 69 of The Adult Guardianship and Co-decision-making Act provides that a person such as Vera may appeal the order of made by the chambers judge. The issue was whether the chambers judge's finding of incompetency should be found by the court to stand in the way of her being able to prosecute an appeal in which she instructs counsel.
HELD: The application to strike the appeal of Vera Hrycyna was denied. The court found that it would not be appropriate for the court to find her incapable of instructing counsel as it would be a predetermination that her appeal would fail. The matter raised the ethical consideration dealt with under Rule 3.2-9 of The Code of Professional Conduct wherein if counsel believes that a person is incapable of giving instructions, they should decline to act. In this case, the court suggested that a litigation guardian be appointed for the specific purpose of prosecuting Vera's appeal on the basis that the appointment would be without prejudice to her ability to argue that the chambers judge erred by finding her in need of a guardian.

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Agrium Vanscoy Potash Operations v United Steel Workers, Local 7552, 2018 SKCA 50

Jackson Caldwell Whitmore, June 20, 2018 (CA17161)

Labour Law – Arbitration – Judicial Review – Appeal

The appellant employer appealed to set aside the decision of the Queen's Bench chambers judge that dismissed its application for judicial review of the arbitration award (see: 2017 SKQB 143). The award was made following a grievance by the respondent union challenging the appellant's use of third party workers at one of its mines. The appellant argued that the chambers judge erred in her application of the standard of reasonableness in this case. The award was not reasonable because the arbitrator had failed to explain her conclusion and the decision lacked justification, transparency and intelligibility. HELD: The appeal was dismissed. The court found that the chambers judge chose the correct standard of review to apply to the arbitrator's decision and that the standard was reasonableness. After reviewing the arbitrator's reasons, the court found no reversible error in the chambers judge's application of the chosen standard of reasonableness and correctly concluded the arbitrator's award was reasonable.

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McNabb v Cyr, 2018 SKCA 51

Jackson Caldwell Whitmore, June 21, 2018 (CA17162)

Statutes – Interpretation – First Nations Elections Act – Costs
Civil Procedure - Costs

The parties in the appeal had all been involved in the general election for the Chief and Councillors of the George Gordon First Nation (Gordon FN). The election results were challenged by the respondent Cyr in an application to set aside the election results pursuant to s. 31 of the First Nations Elections Act. The Queen's Bench chambers judge set aside the entire election (see: 2016 SKQB 357). The judge noted that the Act was silent as to how costs were to be awarded in an election challenge. She found that since there was no finding of fraud or misconduct in the case, the only fair result was to make no order as to costs. On appeal, the court dismissed the appeal of the order annulling the election of the chief and allowed the appeal from

the order annulling the election of the councilors (see: 2017 SKCA 27). A separate costs hearing was held.
HELD: The appeal as to costs in the Court of Queen's Bench was dismissed. There was no basis to intervene and the judge's determination was fair and reasonable. The court found that it was not appropriate to award costs of any of the parties against Gordon FN. To do so would not achieve the goals set out in Knebush. The parties should bear their own costs. The respondent Cyr's law firm's request for costs against the chief electoral officer was devoid of merit as he had made no allegations impugning the integrity of the law firm. The court considered whether to assess costs against the lawyer personally because of his persistence in alleging that the officer had acted fraudulently. Although the lawyer's conduct was close to the line, it found that it was not such a serious dereliction of duty to warrant such an award.

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Skowronski v Berger, 2018 SKPC 36

Stang, May 23, 2018 (PC17128)

Contracts – Breach – Faulty Workmanship – Small Claims

The plaintiffs claimed $14,900 for partial replacement cost of deficient kitchen cabinets and for plumbing repairs against the defendant's execution of his obligation to renovate their kitchen as a professional contractor with whom they had contracted. The estimate provided by the defendant and accepted by the plaintiffs formed the basis of the contract. No further detailed written agreement was prepared, nor agreed upon, following the plaintiffs' acceptance of the written estimate. The plaintiffs argued that: the kitchen cabinets supplied by the defendant were not the correct size nor dimension as required by the contract; the defendant breached the common law implied warranty that the cabinets would be built and installed in a good and workmanlike fashion; and the defendant breached the common law implied warranty that the plumbing would be done is a good and workmanlike fashion.
HELD: The plaintiffs were given judgment in the amount of $3,500. Upon the evidence presented at trial the plaintiffs were unable to prove that the cabinets were not the correct size. They had proven that they were not completed in a good and workman-like manner and they were entitled to recover a portion of the amount already paid to the defendant. Further, the defendant had not complied with the current building codes

when he plumbed the drains and therefore had breached the common law implied warranty.

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Campbell v Glenlloyd Farms Inc., 2018 SKQB 155

Megaw, May 17, 2018 (QB17543)

Statutes – Interpretation – Queen's Bench Act, 1998, Section 38(a)

The defendants applied pursuant to s. 38(a) of The Queen's Bench Act, 1998 for leave to appeal the consent order granted that allowed a writ of possession to issue. The plaintiffs had commenced an action against the defendants regarding their alleged breach of a lease. Pursuant to The Landlord and Tenant Act, the plaintiffs demanded possession of the farmland and provided notice to the defendants that they intended to apply for a writ of possession. When the defendants did not deliver up possession, they applied for the writ. The writ was filed and it contained the consent to the issuance by the lawyer for the defendants. Based upon that, the chambers judge ordered the issuance of the writ. After the defendants' appeal of the granting of the writ to the Court of Appeal was dismissed due to a lack of jurisdiction, their lawyer withdrew and the defendants then filed their notice of application that sought leave to appeal from the consent order. In support, one defendant filed his affidavit deposing that their then lawyer had not properly acted on his instructions and therefore was without authority to enter into a consent writ of possession on his behalf. As well, he was mentally incapacitated at the time the lease was negotiated and when the writ was being discussed with his lawyer. He submitted that there was more to the story regarding the lease that would require him to supply more evidence regarding it.
HELD: The application was dismissed. In accordance with s. 38(a), the matter was heard by the judge who had made the consent order. He found that it was not an appropriate case in which to grant leave to appeal the consent order because of the evidence presented at the time the writ was granted and because the application did not raise new or uncertain points of law. The defendant had the option to commence a separate action to set aside the writ of possession. This judgment corrected an earlier judgment.

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R v Kurek, 2018 SKQB 168

Dawson, June 1, 2018 (QB17561)

Criminal Law – Manslaughter – Sentencing
Aboriginal Offender – Sentencing

The accused pled guilty to committing the offence of manslaughter contrary to s. 236(b) of the Criminal Code. She had gone to the Muskowekwan First Nation in an attempt to withdraw from her alcohol and drug addictions. After experiencing extreme withdrawal, she became paranoid. She started drinking again and on the night in question was very intoxicated. She and others were drinking in the home of the victim and without provocation, the accused took a kitchen knife and stabbed him in the back. The victim died of the wound. The accused tried to leave the house but the others kept her there. The RCMP described her condition as grossly intoxicated and because of her behaviour at the scene, thought that she might be schizophrenic. The accused had little memory of the circumstances and was unable to explain why she committed the offence. Of First Nations heritage, the 29-year-old accused had been raised in a stable, supportive family. She graduated from high school. She began dating a man in her late teens with whom she was involved for the next seven years. During the course of the relationship she suffered physical, emotional and sexual abuse from him. With her partner, she began to abuse drugs and developed a severe narcotic addiction. In order to feed her habit, she worked the streets to pay for drugs. Her addictions caused her to lose custody of her three children who were placed with her mother. The accused's subsequent relationship continued to involve severe alcohol and drug addiction. A psychiatric assessment of the accused indicated that she suffered from post-traumatic stress disorder and anxiety due to the abuse she suffered and the loss of her children. She was diagnosed as having alcohol use, marijuana use, stimulant use and opiate use disorders as well. When she committed the offence, the accused was suffering paranoia and hallucinations caused by withdrawal. The accused was recovering from her disorders since she had been in custody and she had conducted herself appropriately on remand. She had no criminal record and her family remained very supportive. The Crown argued for a custodial sentence of seven years less credit at the rate of 1:1.5. It considered the mitigating factors should not include alcohol abuse as it had been considered when the plea of guilty to manslaughter had been accepted. Otherwise, the accused's guilty plea, lack of criminal

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record and her attempt to detoxify at the time of the offence were mitigating factors. The defence submitted that an appropriate sentence would be between five and six years with the same credit given and that it should be served at Maple Creek Healing Lodge. It argued that the court take into account Gladue factors. Although they were not typical Gladue factors, the accused had developed alcohol and drug addicitions during the course of her abusive relationship and was suffering from multiple disorders at the time of the offence.
HELD: The accused was sentenced to six years' imprisonment. The court accepted that remand credit at the rate of 1:1.5 should be given that would result in the accused serving two years and nine months and recommended that she serve it at Maple Creek Healing Lodge. The court noted that the offence was serious and committed without warning or provocation. Stabbing the victim in a self-induced state of intoxication made the accused willfully blind to the bodily injury that it would cause. The accused's moral responsibility was high although affected by the Gladue factors. The aggravating factors included that the victim was in his own home and unarmed. The mitigating factors included that the accused had no previous criminal record and was trying to resolve her addictions. The sentence imposed upon her was consistent with similar cases and took into account that the least restrictive sanctions should be imposed having regard to her Aboriginal status and Gladue factors.

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Hrappsted v Ash, 2018 SKQB 172

Brown, June 1, 2018 (QB17563)

Family Law – Child Support – Arrears – Cancellation

The respondent father sought an order that his child support arrears of $15,500, that had accumulated since 2006, be cancelled. He argued that his disability, diagnosed as possibly being Fetal Alcohol Spectrum Disorder, limited his capacity to earn a living. The petitioner, relying on the evidence that the respondent had acquired a university degree and was currently holding paid employment, suggested that his disability was not so debilitating that he could not earn sufficient income to pay the small amount of child support he had been obliged to pay of $125 per month since his last variation application in 2006. At that time, his support payment was reduced from $280 per month to $125 with $100 dedicated to the then-new ongoing

amount and $25 going toward the arrears of $8,000. His outstanding arrears at that time had been reduced by $7,500. The respondent was currently earning $60,500 as an instructor at a First Nation School where he had been employed since 2017. His salary was tax-free because of his First Nation status and would be closer to $80,000.
HELD: The court declined to cancel the respondent's arrears and ordered that he pay $15,500 to the petitioner in the amount of $150 per month in addition to his ongoing child support obligation. The court found that he had the ability to pay the arrears.

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Canadian Western Bank Leasing Inc. v Blue Hill Excavating Inc., 2018 SKQB 173

Keene, June 8, 2018 (QB17557)

Civil Procedure – Queen's Bench Rules, Rule 7-5
Statutes – Interpretation – Personal Property Security Act, 1993, Section 65

The plaintiff, Canadian Western Bank Leasing Inc., brought an application for summary judgment for default under a lease agreement between it and the defendant, Blue Hill Excavating Inc., regarding the leasing of portable jaw crusher plant. The plaintiff also applied for summary judgment against the defendant individuals, the Hardennes, as guarantors of the lease. The Hardennes did not dispute that Blue Hill defaulted on the lease, their resulting liability under it and the guarantee. However, they argued that the plaintiff made an improvident sale of the crusher and was not entitled to the amount claimed. They submitted the issue of improvident sale required a trial and should not be decided on an application for summary judgment. The plaintiff argued that the personal guarantee provided by the Hardennes precluded them from making the claim of improvident sale because the guarantee contained a waiver provision. The Hardennes submitted that the waiver provision was void under s. 65(3) and s. 65(10) of The Personal Property Security Act, 1993 (PPSA). The issues were: 1) whether summary judgment was appropriate in this case within which there were two sub-issues: i) was there no genuine issue requiring trial because the improvident realization issue was not live because of the terms of the guarantee contract; and ii) was there no genuine issue requiring trial because the improvident realization issues could be properly decided on the

basis of the evidence before the court?
HELD: The application was granted and the plaintiff was granted judgment. The court found that it was an appropriate case for summary judgment pursuant to Queen's Bench rule 7-5. With respect to the first sub-issue, the court first examined the lease and the guarantee within the context of the PPSA. The court found that the waiver provision in the guarantee was void under the PPSA. It determined that the lease that created the debt at the centre of the guarantee was a security agreement under s. 2(1)(pp) and s. 3 and that under s. 2(1)(m), the Hardennes as guarantors were debtors under the PPSA. As guarantors they were entitled to provisions afforded by Part V and s. 65(3) of the PPSA. Therefore, in accordance with s. 65(10), the waiver provision was void insofar as it purported to waive the right to claim improvident realization. This finding was not determinative of whether there was no genuine issue requiring trial. Regarding the second issue, the court reviewed the test for improvident realization in light of the evidence provided in the affidavits sworn by the plaintiff's employees and the Hardennes. Under Queen's Bench rule 7-5(2)(b), the court held that it could make a fair and just determination of the case based upon the evidence. It found that the plaintiff had taken all reasonable steps to obtain the best price for the collateral.

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R v Lichtenwald, 2018 SKQB 174

Smith, June 8, 2018 (QB17564)

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

The accused was convicted of two charges of possession for the purpose of trafficking controlled substances including hydromorphone, methamphetamine, cocaine, fentanyl, gamma-hydroxybutyric acid contrary to s. 5(1) and s. 5(2) of the Controlled Drugs and Substances Act and to possession of proceeds from trafficking contrary to s. 354(1) and s. 355(b) of the Criminal Code. He was also charged with 10 counts related to firearms offences. The defendant's criminal record began in 1998 and contained eight convictions for trafficking as well as other offences. The street value of the drugs seized was between $7,000 and $22,000. The Pre-Sentence Report indicated that the accused was not remorseful and was at high risk to reoffend. The Crown submitted that the accused should be sentenced to a

global sentence of 12 years' imprisonment and the defence argued that that the accused should receive a six-year sentence as the accused was not part of a larger, more sophisticated organization. He trafficked in order to feed his own habit. His criminal record had stopped in 2005 until these charges arose. HELD: The accused was sentenced to 10 years' imprisonment and given credit for two years' time served.

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Janvier v Saskatchewan (Workers' Compensation Board), 2018 SKQB 175

Barrington-Foote, June 7, 2018 (QB17565)

Administrative Law – Judicial Review – Workers' Compensation Board

The applicants, workers who were injured in an explosion at the Co-op Refinery in 2011 and certain of their dependants, commenced an action against the respondent employers claiming general, aggravated and punitive damages resulting from the incident. In response, one respondent applied to the Workers' Compensation Board pursuant to s. 169 of The Workers' Compensation Act for a ruling that the claims were barred by s. 4, s. 168 and s. 181 of the Act, the provisions related to civil immunity. The board found that the action was barred by s. 43. The applicant then applied for judicial review of the decision. The board answered affirmatively the four required questions set out in Pasiechnyk to determine whether the statutory bar applied to an action. The applicants also argued that regardless of that finding, the board should have gone on to consider whether in cases of bad faith conduct by employers or where the system incentivized employers to sacrifice personal safety for profits, the actual purpose of the Act to protect workers would be subverted. A negative incentive made workplaces dangerous and thereby endangered workers' physical and psychological security, contrary to s. 7 of the Charter. Further, if the board found the Act barred civil actions even in cases of bad faith, it would violate s. 96 of the Constitution Act by defeating the plaintiffs' constitutional guarantee of access to justice. The Act did not supplant the inherent jurisdiction of the court and constitutional questions should be decided by them. The board decided that it had the jurisdiction to determine the constitutional questions raised by the application and that the barring provisions of the Act did not violate s. 97 of the Constitution Act because its authority to

determine question of law arising under the Act did not make it a s. 96 court. It also rejected the argument that s. 43 of the Act infringed s. 96 by blocking access to the Court of Queen's Bench as the barring provision did not deny access to justice because the civil remedy had been replaced by different remedies afforded to workers as part of the historical trade-off embodied by the legislation. The board disposed of the s. 7 Charter claim by finding that the actual purpose of the Act was to provide guaranteed benefits to workers suffering from workplace injuries and to provide protection from civil action for employers in industries covered by the Act within a structure that ensured the costs of the scheme were fully funded through employer-paid premiums. The civil immunity provisions were an essential element in achieving the purpose of the Act. The civil immunity provisions barred all claims by an injured worker without exception, otherwise the entire scheme would be undermined. Further, the applicants had not proven a sufficient causal connection between the civil immunity provisions and deprivation of their security of the person. After the hearing, the board sought submissions from the Attorney General of Saskatchewan (AG). The applicants argued that notice to the AG under The Constitutional Questions Act, 2012 (CQA) was not required because it was relevant only in constitutional challenges raised in a court and the board was not a court. The board proceeded with the notice and gave all the parties the opportunity to file additional written submissions. Despite another objection by the applicants that it had not given the proper notice, the board took the position that it had jurisdiction to determine its own procedure. When the AG's reply supported the constitutional validity of the civil immunity provisions, the parties were invited to respond but the applicant declined the invitation. The applicants' position was that consulting the AG after the hearing raised a reasonable apprehension of bias or constituted a denial of natural justice. The grounds for judicial review were: 1) whether the board's decision to seek submissions from the AG gave rise to reasonable apprehension of bias; 2) whether the board's decision that the Act barred claims against employers who caused injuries through bad faith conduct was in excess of its jurisdiction, or alternatively was unreasonable; 3) if the civil immunity claim provisions barred bad faith claims, whether they were inconsistent with s. 7 of the Charter; and 4) whether they were inconsistent with s. 96 of the Constitution Act, 1867 (UK).

HELD: The application was dismissed. The court established that the standard of review that applied to the board's decision regarding whether the civil immunity provisions barred all civil actions and whether bad faith invalidated civil immunity was

reasonableness. The board's decisions in relation to both the Charter and s. 96 constitutional questions were reviewable on a correctness standard. With respect to each ground the court found: 1) that in applying the test for reasonable apprehension of bias, the board's decision did not give rise to it. The board was entitled to determine how it would conduct its own hearings, regardless of whether it did so in accordance with the CQA. It was obliged by the duty of fairness to provide the parties with an opportunity to respond to the AG's submission, which it did. The applicants chose to refuse the board's invitation; 2) that under the applicable standard of review, the board's decision was a possible, acceptable and defensible outcome. In accordance with statutory interpretation, the court determined that the civil immunity provisions were unambiguous read within the context of scheme and purpose of the Act; 3) that it was reasonable for the board to decide that the applicant had not met the burden of establishing a sufficient causal connection between the civil immunity provisions and deprivation of security of the person. There was no evidence presented regarding the applicants' contention that workplace safety was compromised by the provisions; and 4) the board correctly decided that the legislature had the authority to grant to the board the jurisdiction to decide whether a claim is barred by civil immunity provisions.

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R v Probe, 2018 SKQB 176

Elson, June 7, 2018 (QB17558)

Criminal Law – Corruption and Disobedience – Breach of Trust by Public Officer

The accused, a former councillor of the Rural Municipality of Sherwood (RM), was charged with committing a breach of trust in connection with the duties of his office contrary to s. 122 of the Criminal Code and with accepting an advantage or benefit as consideration for his voting in favour of a measure contrary to s. 123(1)(c) of the Code. The charges arose as a result of a meeting in February 2016 between the accused, then still a councillor for the RM, and its recently elected reeve. The Crown contended that during the meeting the accused offered to trade votes on two unrelated matters that had been previously addressed by the RM's council. The accused submitted that he discussed the matters with the reeve in order to resolve animosities between the RM's councillors. The discussion

included references to a controversial decision of the councillors to pass a bylaw in 2014 allowing indemnification by the RM for legal expense incurred by the accused and two other councillors as a result of an inspection order and the subsequent Barclay Inquiry relating to the councillors having pecuniary interests in a development proposal for lands in the RM. The accused was disqualified from council in 2018 (see: 2018 SKQB 24). The other matter discussed by the accused and the reeve concerned another development project proposed by Suncor on property owned by the reeve's parents. The accused did not support the proposal. He testified that because he lived nearby, he knew that the proposed facility would create a hazardous traffic crossing. In January 2016, the accused and two other councillors voted against a required bylaw amendment while three councillors voted in favour. The proposed project could not proceed unless one of the councillors who voted against the project proposed a motion to reconsider. The evidence submitted by the Crown was an audio recording of the meeting, taped by the reeve. Much of the recording was inaudible and both the Crown and the defence had prepared transcripts that were entered as exhibits that confirmed large portions of the conversation were inaudible. The transcript showed that the conversation included the men agreeing that the Suncor project was important to the RM but that the traffic issue would have to be resolved. The accused talked about how he believed that the members of council should have been covered for their legal expenses and that he and other councillors were going to fight the RM's claim for reimbursed legal expenses. He said in reference to the two matters that he would not do one without the other. The reeve understood this comment to be a clear offer by the accused that he was prepared to trade his vote on the Suncor project in return for the reeve's vote on the collection of reimbursed legal expenses. The accused testified that he misspoke. His reference was to the matters being the most divisive issues before council and that he never promised to change his vote on the Suncor project unless his safety concerns were addressed in which case, he was prepared to reconsider. HELD: The accused was found not guilty of either charge. The court reviewed the five elements of the offence of breach of public trust under s. 122 of the Code, set out by the Supreme Court in Boulanger, and found on the evidence that that it was not satisfied that the accused offered to trade votes. The accused's comments indicated that he proposed an arrangement whereby he and the reeve might lobby councillors in regard to their prospective positions on the two divisive issues before council and that was what he meant when he said that he would not do one without the other. It also found that the accused's conduct was not a serious or marked departure

from that which would be expected from a reasonably prudent municipal councillor. Regarding the charge of municipal corruption under s. 123(1)(c) of the Code, the Crown had not proven either the second element of the offence, that the accused demanded or offered to accept a benefit in forbearance of a claim against him for legal expenses, or the third element of the offence. Based upon the court's finding under the breach of trust allegation, the accused had not agreed to change his vote on the Suncor project in its current form without significant changes to the traffic safety issue. Therefore, the accused had not promised consideration for any benefit he might have been expected to receive.

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S.B.R. v L.L.R., 2018 SKQB 177

Wilkinson, June 7, 2018 (QB17566)

Civil Procedure – Family Law Proceedings – Notice to Disclose
Civil Procedure – Queen's Bench Rules, Rule 15-33

The parties separated in November 2015. The petitioner petitioned for divorce and division of family property in January 2017. His initial property statement indicated there was approximately $253,700 in net family property for division, which represented the value of a residential construction corporation founded by the couple. The parties were equal participating shareholders, but the respondent's shares were non-voting. The petitioner retained exclusive control of the management of the corporation. The respondent began a nursing degree before the marital breakdown and she commenced employment in July 2017. Her annual income was $19,700. In his 2017 financial statement the petitioner declared an annual income of $106,500 with non-monetary benefits from the corporation of $15,000. He claimed annual expenditures of $206,699 creating an annual deficit of $122,500. The respondent applied to the court to order the petitioner to comply with her notice to disclose, served upon him in March 2018 pursuant to Queen's Bench rule 15-33(2). In the notice, she requested updated financial and property statements, the petitioner's 2016 and 2017 personal income information, three years of corporate financial statement and general ledgers, corporate tax returns for 2014 to 2017 and personal and corporate bank statements for the past three years. The petitioner did not reply within the 30 days provided by the rule and the respondent made this application on the basis that the information was required to

determine the petitioner's income for support purposes and to verify assets, debts and values related to the division of family property. The petitioner's reply was filed a month overdue. He provided an updated financial and property statement, a copy of his 2016 income tax return and assessment and supplied authorization permitting the respondent to obtain information directly from his bookkeeper, accountant, banks and life insurance company. The respondent submitted that this reply was not within the spirit and intent of the Queen's Bench rules regarding the disclosure obligation. The petitioner argued that as the respondent's notice contained a direction to provide the appropriate authorizations to any person or institution to obtain any of the information he had not provided, he was simply responding to that direction.

HELD: The application was granted. The court held that it was inappropriate and unfair to employ authorizations to the degree and extent that the petitioner had in this case. The primary disclosure obligation was on the petitioner given the disparity in the incomes of the parties and the financial burden it would impose on the respondent to obtain disclosure from non-parties. The closing direction with respect to authorizations in Form 15-33 is a clean-up provision, not a wholesale delegation of the disclosure obligation to others. The petitioner was obligated to provide his bank statements subsequent to the date of the petition. The court found that they were relevant to the respondent's spousal support claim and to the assessment of the petitioner's claims of having high annual expenses. The petitioner was also obligated to provide the 2014 income tax information for the corporation because it was relevant to its valuation and to gaining an understanding of changes made in the distribution of corporate income after separation. The court found that the respondent was entitled to costs in the amount of $3,000 as permitted by Queen's Bench rule 15-26(1)(e). Her notice to disclose expressly stated that if the requested documents were not provided within the allotted time, she would seek costs that compensated her for the costs incurred in the proceeding.

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R.A.D. v C.G.C., 2018 SKQB 178

Tholl, June 11, 2018 (QB17559)

Family Law – Child Support
Statutes – Interpretation – Family Maintenance Act, 1997, Section 3

The petitioner and the respondent had one child together, now aged 17. Their son has lived with the petitioner mother since he was born and had Duchenne muscular dystrophy, a degenerative muscle disease and needed significant assistance. According to expert opinion evidence, the child's disease would cause further deterioration in his physical and mental capabilities. The respondent had not had a close relationship with his son for some time and there was some evidence that he had refused to see the respondent. The petitioner brought her original petition in 2013 and a number of interim orders were made thereafter regarding custody and child support. At the time of trial, the respondent was paying interim child support in the amount of $903 per month pursuant to s. 3 of the Guidelines and 87 percent of all s. 7 expenses. The petitioner submitted that the support should continue past the child's approaching 18th birthday and that she should receive payment from the respondent of his share of s. 7 expenses, retroactively and on an ongoing basis. The respondent took the position that child support should cease after his son's birthday because he would receive monthly payments of $805 per month from the Saskatchewan Assured Income for Disability (SAID) program. The petitioner's 2017 income was $7200 consisting of social assistance payments. She had business revenue of $35,200 derived from an in-home daycare, with general expenses of $12,350. She claimed use of her home for business purposes in the amount of $22,800 to reduce her business income to zero. The respondent's employment income was $107,900. He was married and had two children and claimed his expenses exceeded his income. The issues were: 1) whether the child remained a child for whom support should be paid pursuant to The Family Maintenance Act, 1997 (FMA); 2) what amount of child support, if any should be paid by the respondent pursuant to s. 3 and s. 7 of the Guidelines; and 3) what amount, if any, the respondent owed to the petitioner for past expenses under s. 7.

HELD: The court found with respect to each issue that: 1) the preconditions from s. 3(7) of the FMA had been met so that the child remained a child for whom the respondent had an obligation to pay support. His relationship with his son did not come close to reaching the high threshold required to terminate child support; 2) the respondent's business income should not be set at zero for the purposes of child support and it set her annual income at half of her business revenue, or $17,600. Her household expenses and medical expenses for the child were established. With the SAID payment, the child's monthly deficit for his costs would be $1,340. The respondent's wife's income was taken into account and the court found that he had the means to continue to pay child support in the approximate

amount he had been paying. He was ordered to pay $924 per month indefinitely pursuant to s. 3 of the Guidelines but that he owed no further amount under s. 7 of the Guidelines because of the amount of s. 3 support and the SAID benefit was sufficient; and 3) the respondent's arrears of s. 7 expenses was limited to $437 because most of the expenses had been covered by government funding.

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Hailink Dent Removal Inc. v Kindersley Mainline Motor Products Ltd., 2018 SKQB 180

Smith, June 11, 2018 (QB17567)

Contract Law – Breach – Payment – Determination of Amount

The plaintiff's summary judgment application was granted. The court found that there was an enforceable contract between the parties that the defendant had hired the plaintiff to repair hail-damaged vehicles (see: 2018 SKQB 138). The court left the question of how much the defendant owed the plaintiff to be settled by agreement between the parties but if they failed to do so, the matter could be returned to the court for determination. The major issue concerned the fact that the agreement between the parties was that the plaintiff would receive the insurance proceeds paid to the defendant. The cost of repair was based upon estimates provided by another dent repair company that used the costs associated with regular auto body work. The plaintiff however could repair at a lower cost because it used paintless dent repair. The insurer's claim adjuster came to understand that regardless of the estimates, the repairs performed by the plaintiff were different and would cost less than the estimates. The insurer and the defendant agreed that the insurer would accept as its proven claim, a sum equal to 80 per cent of the estimates. The plaintiff sought payment based upon the original estimates.
HELD: The court determined that the plaintiff should receive payment based upon the original estimate as per the parties' original agreement. It was awarded prejudgment interest from the time that the defendant received the insurance funds in December 2016. The plaintiff was not entitled to solicitor-client costs but awarded party and party costs under column 2 of $40,000.

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Double K Excavating Ltd. v Aspen Village Properties Ltd., 2018 SKQB 181

Leurer, June 12, 2018 (QB17560)

Builders' Lien – Application to Extend Time for Trial

The plaintiff registered a lien pursuant to The Builders' Lien Act (BLA) and commenced an action by statement of claim on May 2, 2016. The claim asserted a cause of action based on breach of contract and sought to enforce the plaintiff's builders' lien. Under s. 55(1) of the BLA, a lien expires if the action is not set down for trial within two years of the day the action is commenced. Under s. 55(2), the plaintiff applied to the court to extend the time to have this matter set down for trial. The respondent applied to strike the lien claims.
HELD: The application was dismissed. Under s. 55(1) of the BLA, the plaintiff's lien expired and accordingly the portion of the action directed to the enforcement of the lien was dismissed. The plaintiff's claim based in alleged breach of contract remained. It was unnecessary to consider the respondent's request for relief under s. 60 of the BLA. The court found that the plaintiff had not provided an explanation for its delay to show that it was reasonable or justified.

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R v Mohamed, 2018 SKQB 186

Layh, June 21, 2018 (QB17572)

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

The accused was convicted for possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. At the time of arrest the accused 23 years old. He did not use drugs and trafficked for profit. He has considerable family and community support.
HELD: The accused was sentenced to 21 months' imprisonment. The aggravating factors consisted of the accused's motivation to sell cocaine was profit. The street value of the drugs in his possession was $450 to $6,500. The mitigating factors were the accused's youth and that he had the support of his family and had no prior criminal record.

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