The Law Society of Saskatchewan Library's online newsletter
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The appellants appealed the decision of a Queen's Bench judge that dismissed their claims against the defendants, Kramer and AGCO, under The Agricultural Implements Act. All of the claims related to the plaintiffs' 2010 purchase of a current-model sprayer. The plaintiffs sued the defendants for breach of warranty pursuant to s. 36(4) of the Act. Later they amended their claim to assert that they had exercised their option under s. 46 of the Act to void the contract. The trial judge decided that the plaintiffs had not proven that their statutory warranty, set out in s. 36(4), had been breached because the preponderance of the evidence showed that the sprayer worked well. He also found that Kramer's contractual documents had not offended s. 46, and further, the plaintiffs were estopped from relying on s. 46 because they had not invoked their right to void the contract within a reasonable time (see: 2017 SKQB 205). The appellants' grounds of appeal were that the trial judge erred in: 1) making his findings that, under s. 36(4), the test of whether an implement "performs well" was objective. They argued that the test was subjective because the judge's finding gave no effect to the word "well" in the statute; and 2) rejecting their claim under s. 46. The appellants argued that he erred in finding that a document described as the machine order, which

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contained clauses prohibited by s. 46, was a document internal to Kramer and therefore not caught by s. 46 and had not formed part of the contract between it and the plaintiffs.
HELD: The appeal was dismissed. The court found with respect to each ground that the trial judge had not erred: 1) in finding the test was objective. The court held that the purpose of the Act was to level the playing field between farmers and implement dealers so as to establish contractual fairness and that a subjective analysis of breach, whether subjective to the farmer or to the implement dealer, would be inconsistent with it. In this case, the trial judge had properly assessed the evidence and found that the sprayer worked well; and 2) because he had found that the machine order was part of the contract and although it had contained statutorily-prohibited terms that were not caught by s. 46(1), Kramer had cured its failings through the terms of the sales contract document. However, because of the illegal provisions in the order, the plaintiffs had the option to treat it as void under s. 46(2) of the Act. The judge correctly found that the appellants had elected to treat the contract as enforceable when they claimed under s. 36(4) and failed to raise any claim under s. 46(2) until years later when they amended their statement of claim.

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Olson v Skarsgard Estate, 2018 SKCA 64

Richards Caldwell Herauf, August 22, 2018 (CA17174)

Civil Procedure – Court of Appeal Rules, Rule 59
Wills and Estates – Testamentary Capacity – Appeal
Civil Procedure – Queen's Bench Rules, Rule 16-46

The appellant appealed from the decision of a Queen's Bench chambers judge that discharged a caveat registered by the appellant against title to certain lands owned by her deceased brother (the testator) and ordered the immediate issuance of letters probate in response to the testator's spouse's (the respondent's) application as his personal representative. The appellant also sought to have the respondent prove the testator's will in solemn form. The testator had married the respondent in March 2016 and two weeks later made a will under which he appointed the respondent as executor and sole beneficiary. He died in May 2016. Following his death, the respondent applied for letters probate and, under Queen's Bench rule 16-43, for a direction that the appellant had not provided a sufficient basis to have the will proven in solemn form. The appellant had argued in chambers that the respondent was in a caregiver relationship but not a spousal relationship with the testator and that the respondent's daughter was not the testator's biological child, regardless of his

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acknowledgement of her. She also alleged that the testator suffered from a cognitive impairment at the time he made his will. The respondent adduced evidence, such as affidavits of the lawyer who had drafted the will, averring that he had no concerns about the testator's capacity, and of the pastor, who deposed that he had performed the marriage ceremony. As a result, the chambers judge rejected the appellant's allegations. He found that the appellant did not have standing to challenge the will and that there was no credible evidence upon which to conclude that the appellant had raised a triable issue regarding testamentary capacity. The judge awarded costs to the respondent on a solicitor-client basis. The grounds of appeal were that the judge erred in: 1) ruling that the appellant lacked standing to register a caveat; 2) finding that there was no genuine issue to be tried as to the validity of the will; and 3) awarding solicitor-client costs. As a preliminary matter, the appellant applied to adduce fresh evidence on the appeal in support of the allegations she had made in Queen's Bench, which included a copy of an application to amend the birth certificate of the respondent's daughter by adding the testator as her birth father and copies of land titles searches and transfer documents executed by the testator shortly after he made his will.

HELD: The appeal was dismissed. The court set aside the award of solicitor-client costs against the appellant and awarded party and party costs. The application to adduce fresh evidence under Court of Appeal rule 59 was denied. All of the evidence was credible but could have been obtained prior to the chambers hearing. The court found that the judge had: 1) correctly decided that the appellant did not have standing based upon Queen's Bench rule 16-46. As the only surviving next-of-kin of the testator, the appellant would have had standing to challenge the will if he had died intestate without a spouse. In this case, the appellant's claim to be the only surviving next-of-kin was not accepted by the judge because he found both the testator's marriage and will to be valid; 2) not erred in law in his finding. He applied the appropriate legal test and found that there was no evidence that if accepted at trial, would disprove testamentary capacity or support a finding of undue influence; and 3) erred in awarding solicitor-client costs because there was no basis to do so. The appellant had not acted improperly, scandalously, outrageously or reprehensibly in pursuing her claim of an interest in the testator's estate. It substituted an award of party and party costs in favour of the respondent.

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R v Hayter, 2018 SKCA 65

Caldwell Whitmore Schwann, August 23, 2018 (CA17175)

Criminal Law – Conduct of Trial – Close of Prosecution Case – Right to Make Full Answer and Defence
Criminal Law – Procedure – Powers of the Court of Appeal – Miscarriage of Justice

The appellant appealed his conviction for fraud over $5,000 contrary to s. 380(1)(a) of the Criminal Code. The trial judge found that he had defrauded the Saskatchewan Workers' Compensation Board of $137,400. Before the trial began, the appellant's counsel had requested an adjournment because his wife had been hospitalized and he was under stress. The appellant was willing to waive delay if the adjournment was granted. The Crown opposed the request because the charge had been laid three years previously, the preliminary hearing had been rescheduled three times (although twice at the Crown's request) and it had scheduled ten out-of-town witnesses to testify. The judge determined that the next available trial date either at that judicial centre or elsewhere was almost a year away and denied the request. After the Crown had led its first witness, the appellant's counsel advised the court that she was seeking leave to withdraw as the appellant had expressed concerns about her ability to represent him fairly because she was employed by Legal Aid and his alleged offence was against another government agency. His concerns arose at that time because she had raised with him whether he should accept a plea bargain following the Crown's opening statement and examination of the first witness. The judge informed the appellant that he should apologize to his counsel and request that she continue to represent him. He said that he would not adjourn the trial because of her withdrawal. The appellant stated that he did not know enough to defend himself and that he would ask his counsel to continue to represent him. His lawyer advised the court that because the case was complex, she didn't want to leave her client in the lurch but she felt that she could not represent him. The trial resumed with the appellant representing himself and he was convicted and sentenced to two and a half years in prison. He requested another adjournment before he was sentenced that was also denied. The appellant argued that the trial judge's denial of his requests for an adjournment, particularly the second one, deprived him of his rights to make full answer and defence and to a fair trial under s. 650(3) of the Criminal Code. He framed his claim for relief under error of law and miscarriage of justice under ss. 686(1)(a)(ii) and 686(1)(a)(iii) of the Code respectively. HELD: The appeal was allowed and a new trial ordered. In this case, the court found that the judge had not erred in his decisions regarding the first and the third requests for adjournment, but had in the second request by failing to provide sufficient reasons for his denial. Amongst many factors it considered, the court found that most importantly, the appellant had not caused his counsel to withdraw for the purpose of delaying trial. It concluded that the error resulted in a miscarriage of justice based upon the appellant's poor conduct of his own defence and lack of understanding of trial process.

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Ottenbreit Herauf Ryan-Froslie, August 23, 2018 (CA17176)

Debtor and Creditor – Preservation Order – Application to Extend Statutes – Interpretation – Enforcement of Money Judgments Act, Section 5, Section 8

The plaintiffs and the defendant each appealed the decision of a Queen's Bench judge wherein the plaintiffs had obtained an extension of a preservation order granted to them under s. 8 of The Enforcement of Money Judgments Act (EMJA). The plaintiffs had first sued the defendant, asserting that it, their landlord, had breached the restrictive covenant in their lease by renting space in its mall to another dollar store. When the plaintiff learned that the defendant was going to sell the mall, they brought an ex parte application for a preservation order under s. 5 of the EMJA because the sale would jeopardize their ability to enforce a damages award if they were successful at trial. The ex parte application was granted for a period of 21 days. They then sought to extend the order beyond that period until the end of trial pursuant to s. 8 of the EMJA. The chambers judge granted the application but reduced the amount to be held in trust from $659,600 to $292,000 (see: 2017 SKQB 117). The plaintiffs appealed on the ground that the judge erred in reducing the quantum. The defendant appealed on the ground that the judge erred in law when he failed to require the plaintiffs to provide security pursuant to s. 5(7) of the EMJA. The judge accepted the plaintiffs' undertaking as to damages as a viable form of security.
HELD: The plaintiffs' appeal was dismissed. The defendant's appeal was allowed and the matter was remitted to the chambers judge to determine the amount of security. The court found regarding the plaintiffs' ground of appeal that the chambers judge had not erred. If a court found that a preservation order under the EMJA should be made, it is within its discretion to determine the quantum. In this case, the chambers judge had correctly identified the principles he needed to consider in the exercise of his discretion. Regarding the defendant's ground of appeal, the court found that an undertaking did not meet the security requirements of s. 5(7) of the EMJA and it was an error of law for the judge not to order the plaintiffs to provide security on granting the extension and, alternatively, it was an error of law for him not to provide reasons as to why no security order was made. The plaintiffs had a duty to make submissions relating to security. It was necessary to remit the matter to the chambers judge to determine the quantum of security.

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Canadian Natural Resources Ltd. v Campbell, 2018 SKCA 67

Richards Whitmore Schwann, August 24, 2018 (CA17177)

Statutes – Interpretation – Surface Rights Acquisition and Compensation Act, Section 10, Section 28, Section 29

The appellant appealed from an order made by the Saskatchewan Surface Rights Board of Arbitration. The appellant had approached the respondents, who owned and farmed land, regarding a surface lease for a new wellsite on a portion of the respondents' land. The negotiations were not successful and led the appellant to seek and obtain a right of entry order. The appellants then drilled five wells on the land in question. The respondents applied to the board under the Act to obtain compensation from the appellant. After the board rendered its decision, the appellant appealed from it, arguing that it had committed a number of errors of law. The issues were primarily regarding the board's handling of the evidence.
HELD: The appeal was allowed. The court referred the matter of compensation back to the board for reconsideration. The court found variously that the board had overlooked or ignored relevant evidence and improperly rejected evidence. Contrary to s. 10(3) of the Act, the board failed to provide reasons about compensation it awarded to the respondents for additional wells.

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Kequahtooway v Saskatchewan (Government), 2018 SKCA 68

Jackson Ottenbreit Whitmore, August 24, 2018 (CA17178)

Civil Procedure – Class Actions – Certification – Appeal

The appellant plaintiff appealed from the decision of a Queen's Bench judge that refused to certify a class action alleging systemic abuse at an institution for the intellectually challenged. The institution was operating under the name of Valley View Centre. The appellant, represented by her litigation guardian, resided at the centre from 1968 to 1971. The respondent, the Government of Saskatchewan, had operated the centre since 1955. The appellant alleged that she was the victim of physical, psychological and sexual abuse while she resided there. She sought to have a class action certified on behalf of all residents of the centre from 1955 to the date at which she commenced her claim, in 2010. The claim asserted systemic negligence and breach

of fiduciary duty for which the appellant sought damages from the respondent. The chambers judge refused to certify the class action, holding first that the common issues were not appropriate nor useful, and second, that a class action was not the preferable procedure for individual claimants to pursue their claims (see: 2015 SKQB 183 and 2014 SKQB 260).
HELD: The appeal was allowed. The court remitted the matter back to the Court of Queen's Bench for another certification hearing. It found that the judge erred because he had not completed his common issues analysis under s. 6(1)(c) of The Class Actions Act before considering whether a class proceeding would be the preferable approach to resolving the disputes under s. 6(1)(d). He failed to situate his analysis in the case law where institutional abuse claims have been certified and did not consider the effect of Fischer as to whether a class proceeding should be certified in this case.

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Jackson Whitmore Ryan-Froslie, August 31, 2018 (CA17181)

Charter of Rights – Section 8, Section 11(b)
Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Leave to Appeal
Criminal Law – Self-represented Party – Assistance from Trial Judge
Courts – Judges – Duties
Statutes – Interpretation – Customs Act

The appellants appealed the dismissal of their summary conviction appeal. They were convicted of making false or deceptive statements to a Canada Border Services officer contrary to s. 153(a) of The Customs Act. One of the appellants was also convicted of attempting to evade payment contrary to s. 153(c). The appellants attempted to drive a motorhome registered in the United States from the United States into Canada. They advised officers that the motorhome was owned by their son and that they did not purchase anything in the 10 days they were in the United States. A search of the motorhome and its contents revealed communication: regarding the purchase of the motorhome; regarding the purchase of some bikes; and a bank draft that was possibly for the purchase of the motorhome. The motorhome was searched for a second time and a journal with an entry about buying the motorhome and additional emails regarding the purchase of the motorhome and bikes were located. Neither the appellants nor their two different lawyers leading up to trial ever raised possible Charter breaches. The appellants were self-represented at trial and at the summary conviction appeal. The appellants' grounds of appeal to the Court of Appeal were that: 1) the trial judge erred by failing to

assist the self-represented appellants to "adjudicate" their ss. 8 and 11(b) Charter rights; 2) the appeal judge erred by failing to determine whether the self-represented appellants' ss. 8 and 11(b) Charter rights were violated; and 3) the appeal judge erred by failing to find a s. 8 Charter violation on the record before him.
HELD: The court did not grant leave to appeal on issues two and three of the appellants' appeal because they were not "compellingly meritorious" nor significant generally to the administration of justice. Leave was granted with respect to their first ground because it raised issues of trial fairness and miscarriage of justice. The appeal court concluded that the lack of Charter notice was not fatal to the appeal. The appeal court found the issue to be whether admissible uncontradicted evidence of a Charter breach was disclosed in the record. The appeal court concluded that the trial judge did not breach his obligation to the self-represented appellants by failing to assist them to bring forward their s. 8 Charter rights or by failing to bring breaches up on his own. There was no uncontradicted evidence of a s. 8 Charter breach. There was evidence that the appellants' computer and cellphones were searched without a warrant, but there was also evidence that the searches were conducted pursuant to s. 99 of the Act, which authorizes the search of electronic devices. Obiter, the appeal court noted that it would not have excluded the emails and texts if there had been a breach of the appellants' s. 8 Charter rights because the officers reasonably believed the searches were authorized by s. 99 of the Act. The appellants argued that the trial judge should have provided instructions to them as to their right to be tried within a reasonable time, pursuant to s. 11(b) of the Charter, because the time to trial was 23 months. The appeal court concluded that there was no admissible uncontradicted evidence of a breach of the appellants' s. 11(b) Charter rights. The appellants did not challenge the Crown's statement at trial that much of the delay was attributable to them. The summary conviction appeal judge was found to have properly considered Jordan, which was released after the trial. The issues of trial fairness and miscarriage of justice were not addressed because of the former conclusions regarding the Charter issues. The appeal was dismissed.

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Kovatch, May 10, 2018 (PC17136)

Torts – Conversion
Landlord and Tenant – Lease – Tenancy at Will

The plaintiff brought an action against the defendants, claiming that

they had wrongfully converted hay bales, a durum crop and other chattels to their own use and sold them. The defendants counterclaimed that the plaintiff had trespassed upon their lands and they suffered damages. They also issued a third party notice to Vansa Farmland, who thereby became a defendant to a third party claim. The Reids alleged that Vansa had breached their sales agreement with them. The dispute arose after the plaintiff sold three quarter sections of farmland to Vansa in 2012. After the sale, the plaintiff remained on the lands pursuant to an alleged verbal lease agreement on a year-to-year basis. He testified that in 2012 there was a shared farming arrangement. In 2013, he agreed to rent the land for $10 per seeded acre and agreed to pay Vansa $.01 per pound for standing hay to be paid after the hay was harvested, and he then paid $1,300 rent for the lands to Vansa. In 2014, he was unwell and had not seeded any of the lands and thus made no rental payments. In 2015, he seeded 125 acres to durum and harvested 223 hay bales, each weighing 1,400 pounds. During the summer of 2015 Vansa sold the lands to the defendants. When informed of the sale by Vansa, the plaintiff testified that he agreed to be out of the house by October 1. There was no discussion of the hay bales, durum crop or his equipment on the land. In October 2015, the defendants told him that under the contract of purchase, they got the crop and bales and anything on the land and the plaintiff would not be allowed to remove his machinery. The plaintiff got the impression that he was not allowed to remove the bales or durum. Before the sale occurred, the plaintiff had sold 34 bales at 7.5 cents per pound and calculated that the value of the remaining 189 bales at $19,800. He estimated that the durum crop had 10 bushels to the acre and thus estimated his total harvest at 1,250 bushels worth $8.50, so that his damages for loss of this crop was $10,600. He also claimed that under his agreement for sale to Vansa he retained ownership of a water filter that he had installed in the house. As the defendants refused to allow him to remove it, he also claimed $2,000 for its value. The realtor who acted for the defendants testified that they were concerned about when the plaintiff would vacate the land. She pointed out that in a schedule to the agreement for sale between the defendants and Vansa, the latter warranted there were no leases on the land, although she acknowledged that the defendants knew that there was a tenant. She agreed that the plaintiff's equipment was not sold with land but believed that if he did not get it off the land, it was forfeited. The defendants called a local farmer as a witness who testified that the durum crop was not worth harvesting and he would have paid only $40 per ton for the hay bales because of their quality. The defendant testified that he sold 120 bales at $70 per bale but had to refund $1,260 because the purchasers complained about their poor quality. He sold or gave away approximately 50 bales. He seeded on top of the existing durum crop. The defendants claimed against Vansa for the cost of removing garbage and junk left on the land. However, the agreement contained a term that the house and yard were sold as

is. The principal of Vansa testified that the plaintiff had continued to live on the land after Vansa had purchased it. Although the agreement for sale contained the warranty that there were no leases on the land, he said that he did not believe that Vansa's verbal agreement with the plaintiff constituted a lease. He confirmed that the plaintiff had offered to pay $10 per seeded acre. At issue was the nature of the agreement between the plaintiff and Vansa that existed between 2013 and 2015 and how it had affected the purchase agreement between Vansa and the defendants.
HELD: The plaintiff was given judgment for $8,200. The defendants' counterclaim and third party claim were dismissed. The court found that there was a landlord and tenant arrangement between the plaintiff and Vansa under The Landlord and Tenant Act, resulting in a tenancy at will. It also found that there was a lease as defined in s. 1(d) of The Agricultural Leaseholds Act. Under such an agreement, Vansa as the landlord could terminate the agreement with reasonable notice, which it had. The tenancy at will concluded at the end of September 2015. The crops and chattels remaining on the property when the defendants took possession on October 1, 2015 remained the property of the plaintiff. The warranty relied upon by the defendants was meaningless as they conceded they knew there was a tenant and as Vansa did not own the crops or the chattels, it could not legally transfer such property to the defendants. The court valued the hay bales at $7,200 and the durum crop at $1,000 and awarded the sum to the plaintiff in damages. The plaintiff's claim for the water filter was dismissed as it was a fixture in the house.

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Gossen v Weninger, 2018 SKPC 40

Jackson, July 31, 2018 (PC17135)

Contract Law – Breach

The plaintiff claimed two sums outstanding from the defendant, a cash loan of $1,800 and an unauthorized Visa charge of $629. The defendant denied that the loan had been advanced and claimed that the Visa transaction had been authorized by the plaintiff but he arranged with the credit card company to reverse the charge, so that there was no claim. Further, she argued that the plaintiff was statute-barred from pursuing any indebtedness against her by virtue of The Limitations Act.
HELD: The action was dismissed. The court found that although the plaintiff had proven that the loan had been advanced, the claim was issued beyond the two-year limitation period set out in the Act. As there was evidence from the merchant that she had not received the

benefit of any Visa payment by the plaintiff, no liability attached to the defendant in the circumstances. The court awarded costs to the plaintiff pursuant to s. 36(3)(e) of The Small Claims Act, 2016 because the defendant provided patently false evidence respecting the transaction. The amount awarded was $249, being 10 percent of the total amount claimed, as prescribed under s. 6(3)(b) of The Small Claims Regulations.

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R v Burke, 2018 SKPC 43

Rybchuk, July 26, 2018 (PC17139)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purposes of Trafficking – Cocaine – Sentencing
Criminal Law – Sentencing – Aboriginal Offender

The accused was found guilty after trial of trafficking cocaine, contrary to s. 5(1) of the Controlled Drugs and Substances Act, and possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the Act. The accused was staying with family in Yorkton when his cousin, whom he knew to be a drug dealer, asked him to drive him to his home in Regina. The police had had his cousin's house under surveillance and watched the cousin carry a bag from the vehicle to the house. A search warrant was issued for the house and the police found 181 grams of cocaine and 16 grams of marijuana. After arrest, the accused spent eight days in jail and was released on strict conditions, including that he spend the first six and one half months on electronic monitoring. He had complied successfully for two years with all his conditions. At trial, the accused was found to have had actual knowledge of, or to have been willfully blind to, the fact that his cousin had travelled to Regina to pick up drugs, although he was unaware of the kind or quantity and was not involved in commercial trafficking. The Crown submitted that the accused should receive a 20-month sentence as the range for Schedule I drugs is between 18 months and four years' imprisonment. The defence argued that the sentencing principles could be met by a suspended sentence and probation. The accused spent his childhood on his mother's reserve, the Keeseekoose First Nation, after she left her abusive spouse when the accused was five. Her parents and siblings helped to raise the accused. Both his grandparents and mother had attended residential schools but the family was strong and supportive. Another branch of the family, such as the cousin who was a drug dealer, lived close by and were involved in crime. The accused's father had kidnapped him and his brother when he was six and kept him for 12 months in Toronto. Eventually he was returned to his mother's care. His mother

died in 2013 and he became very close to his aunt with whom he was staying at the time of his arrest. The accused, 34, completed high school and one year at the University of Saskatchewan. He quit to find a position in the oilfields when his father needed support and he had worked his way up to being the senior Aboriginal pipeline construction monitor for his employer. When he was laid off, he returned to live with his aunt while he looked for work. As an adult, he provided financial support and personal assistance to his father, his grandfather, his younger brother and niece. The accused had no alcohol or drug issues. During the two years of his release he worked in Alberta and in Moose Jaw and thus was not able to help his extended family during that time.

HELD: The accused was sentenced to 10 months' imprisonment followed by a period of probation for 15 months concurrent on each offence. The court found that this was not a typical drug trafficking case. The circumstances of it and of the accused were unprecedented and justified a departure from the usual sentencing range. A period of incarceration was necessary to meet the objectives of denunciation and deterrence but a lengthy term would be counter-productive to the protection of the public as well as to the rehabilitation and reintegration of the accused into the community. The court took into account: 1) that the accused's pre-sentence release conditions were mitigating factors when considering his sentencing because the conditions, such as electronic monitoring, constituted significant hardship on him and impacted his ability to carry on normal caring relationships and provide assistance and support to his family; 2) that the Gladue factors were relevant. The accused grew up on the reserve with his extended family, some of whom were involved in the criminal justice system. His grandparents and mother attended residential schools. The accused had suffered racism while he worked in the oil industry. He had been the caregiver for his family and because he was the only member who owned a car, often gave rides to medical appointments. If he hadn't helped his cousin, he wouldn't have been in his present situation; 3) the mitigating factors. The accused was young and had a supportive, pro-social family. He had been employed since arrest and wanted to continue to work. He had complied with his release conditions for two years. He was not involved in drug use or the drug trade and had only a limited and unrelated criminal record. The accused expressed remorse; and 4) the aggravating factor was that the offence involved a substantial amount of a hard drug.

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R v Burnett, 2018 SKPC 46

Green, August 31, 2018 (PC17137)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08

The accused was charged with driving while over the legal limit, contrary to s. 253(1)(b) of the Criminal Code, and while his ability to do so was impaired by alcohol, contrary to s. 253(1)(a) of the Code. He was charged and pled guilty to driving an unregistered motorcycle contrary to The Traffic Safety Act. The accused testified that he was driving home on his motorcycle and ran out of gas. He called a friend who lived on a farm nearby for help and the friend arrived with a jerry can of gas. The friend testified that the accused did not appear to have been drinking. The accused proceeded to a gas station to fill up and called his wife to tell her that he was on his way home. She testified that he did not sound inebriated at that time. En route, he swerved to miss hitting a moose and went into the ditch and injured himself. He drank two beer from the dozen he was carrying in his knapsack. After a motorist stopped, the accused asked him to drive him home. The motorist testified that the accused appeared to have been drinking. Once at home, the accused asked his wife to give him two more beers. As his wife could not drive him to the hospital, she arranged to have another friend of the accused drive him. The friend testified that the accused drank three more beers in the car while they drove to the hospital. The police officer who responded to the report of an accident arrived at the hospital two hours after the accident. Believing that the accused had been operating a vehicle while impaired he demanded a blood sample. It contained a blood alcohol concentration of 211 mg percent. The defence raised the post-driving consumption defence to the charges under s. 258(1)(d.1) of the Code. The accused argued that his BAC was due to the alcohol he consumed after the accident, which was absorbed into his blood by the time the sample was taken, and therefore his BAC was not above 80 at the time he operated his motorcycle. The accused's weight of 125 pounds and empty stomach were factors. The Crown's expert witness regarding toxicology testified that after calculating backward from the sample taken at the hospital to the time of driving, she estimated that his BAC would then range well beyond the legal limit. The accused also called a toxicology expert. In her opinion, his BAC would have been between 0 and 19 at time of the accident if the accused consumed seven beer after it occurred, working backward from the time the sample was obtained.

HELD: The accused was found not guilty of both charges. The court accepted the evidence given by the accused, his wife and his friends about the amount and timing of his drinking and the evidence of his expert. The evidence tended to show that the accused was not over the legal limit at the time he was operating his motorcycle.

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R v Deng, 2018 SKPC 47

Martinez, June 22, 2018 (PC17132)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purposes of Trafficking – Cocaine
Constitutional Law – Charter of Rights, Section 9

The co-accused were jointly charged with possession for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. The charges resulted from an investigation by a specialized police unit, the Combined Forces Special Enforcement Unit (CFSEU), comprised of RCMP and Prince Albert Police Service officers, into criminal organizations and drug trafficking above street-level dealers. One of the officers in the unit received information from an officer in another unit, the Integrated Street Enforcement Unit (ISEU), devoted to street-level drug-trafficking investigations, that one of his confidential informants said that a Black male with the name K.J. was at a house in Prince Albert for the purpose of supplying others with cocaine and methamphetamine for distribution and sale. The informant had also advised that K.J. was driving a white Dodge Ram. The CFSEU officer ordered surveillance of the house after it was confirmed that a truck matching that description and bearing Alberta licence plates was parked in the driveway of the house identified by the informant. Later a team of police officers from both units followed three Black men and an Aboriginal woman after they left the residence and boarded the truck. The officers had a photograph of the accused K.J. and had been informed that the accused D.D. was the registered owner of the truck. Both men were in the truck. The team followed the truck until they reached the intersection to the only highway into Beauval where they stopped the truck on the instruction of the CFSEU officer. The officer had received more information from another confidential informant who said that three or four Black males, one of whom was named K.J., were on their way to Beauval for the purpose of supplying cocaine to the community. The CFSEU officer then believed that he had the necessary grounds to order the police to stop the truck and arrest its occupants. After the arrest, the police searched the truck and found 53 grams of rock cocaine separated into three chunks. One was in a sock in a bag in the back seat where K.J. had been seated. The other two chunks were inside plastic bags hidden in a rubber boot located in the box of the truck under a tonneau cover. The two accused alleged that their s. 9 Charter rights had been violated. They claimed their arrest was unlawful and therefore the search was unlawful and sought to have the evidence found subsequent to their arrest be excluded from trial.
HELD: The two accused were each found guilty. There had been no breach of their s. 9 Charter rights and the evidence obtained during

the warrantless search was admitted. The court found that their arrest was lawful as was the subsequent search of the truck. The CFSEU officer's grounds for arrest were reasonable when viewed objectively and supported his belief that the accused were about to commit a crime under s. 495(1)(a) of the Criminal Code. The court found that the officer had confirmed the information from the confidential informants had been reliable in the past and that neither of them had ever been charged with lying to the police. The court accepted the evidence of an RCMP officer qualified as an expert witness in the area of cocaine distribution and trafficking that the amount hidden in the truck was consistent with drug trafficking and the court concluded that the two accused had knowledge of and were in possession of the cocaine for the purpose of trafficking.

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R v Gariepy, 2018 SKPC 48

Kovatch, August 27, 2018 (PC17138)

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

The accused pled guilty to one charge laid in May 2017 of possession of cocaine for the purpose of trafficking and other charges, laid in June 2017, for possession of cocaine for the purpose of trafficking and possession of crystal meth. Other charges included breaches of undertaking, breach of curfew, failing to participate in drug treatment, and failure to appear. His total time spent on remand was 241 days. A Pre-Sentence Report was prepared, describing the accused and his father as Aboriginal and members of the Ahtahkakoop Cree Nation and his mother as Caucasian. As he looked Aboriginal, the accused suffered from racial taunts and assaults. His father attended residential school. After his mother left his father, she began a long and abusive relationship with another man at whose hands the accused suffered terrible physical and emotional injury. When he was 10 years of age, the accused's mother escaped the relationship and became involved with another man who treated the accused well and the accused considered him to be his father. Unfortunately, this man committed suicide in 2015. The accused had used drugs and alcohol as a teenager but it was only after his father's suicide that the accused began drinking heavily and using crystal meth. His relationship with this wife of 15 years and their four children began to deteriorate. Social Services required the accused to leave the home and his wife then committed suicide in January 2017. His children were placed in foster care with his mother. The accused began using crystal meth

daily and started selling drugs to support his habit and later to acquire enough money to reestablish his residence so that his children could be returned to him. In 2017, following his arrest on these charges, the accused applied for admission to the Moose Jaw Drug Treatment Court (DTC). He was released in October 2017 on DTC conditions. In November he was re-arrested and remanded to January 2018. On January 3, he was released for detox and treatment. He completed treatment in February and was making progress. He failed to appear in court in April and was arrested in June and kept in custody. The Crown argued that the accused's remand from November to January (49 days) was a sanction for breach of the DTC condition and credit of 1.5:1 should not be allowed. Further, the accused's failure in DTC should be considered an aggravating factor in sentencing. The Crown recommended that the accused receive a 30-month sentence comprised of 12 months for the May charge and 18 months consecutive for the June charges. Although the Crown conceded that there were Gladue factors present, it submitted that it would be an error to overemphasize the personal circumstances of the accused, following R v McIntyre. The defence suggested a sentence of 12 months followed by a period of probation as appropriate because of the Gladue factors. As well, the accused had been doing well until his father died. The suicide of his spouse led directly to the charges, but rehabilitation was still possible.

HELD: The accused was sentenced to 12 months on the May charge to be served concurrently to the sentence of 21 months for the June charge. The court calculated the remand time at the rate of 1:1.5, which left the accused to serve nine months on the June charge. The accused was placed on probation for two years with conditions. The court considered that there were extreme personal and mitigating factors here, including Gladue factors, justifying the departure from a sentence in the range of 30 months. The court followed the approach taken by Rybchuk J. in R v Burke. The court noted that it did not follow the Crown's recommendation to deny 1.5:1 credit for remand with respect to the accused and the DTC experience. The court stated that as part of entering the DTC, the accused undertook guilty pleas for the pre-existing drug charges. With those pleas having been entered, the court had the broad discretion pending sentencing to release or detain the accused. While the breach of the DTC conditions may have been the motivator for the court in detaining him in custody, the accused was still remanded on the drug charges. In addition, the court found that if it did not allow the 1.5:1 credit, the accused would spend more time in custody than if he had simply stayed on remand and been sentenced in the normal course. In order to help individuals fight their drug addictions, the court wants them to receive treatment and not to suffer negative consequence of additional time for failure at the DTC. Where an accused successfully completes the program, the court is entitled to depart substantially from the sentencing range provided by the Court of Appeal for

trafficking in Schedule I substances. However, in instances of a failed DTC experience, the court said that it should not be regarded as a significant mitigating factor resulting in a reduction of sentence. In this case, the court chose to disregard the DTC experience in sentencing the accused.

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R v Borowski, 2018 SKPC 49

Marquette, August 23, 2018 (PC17134)

Criminal Law – Assault – Assault Causing Bodily Harm

The accused was charged with assault causing bodily harm contrary to s. 267(b) of the Criminal Code. The accused and the victim had both served as councilors for the local municipality and had had a strained relationship. The victim testified that on the day of the alleged offence the accused had driven into his farm yard. After the victim asked him why he was there, the accused replied that he had heard the victim had been saying bad things about him. The accused then punched the victim in the face twice and again on the side of the head and neck as he fell to his knees. The accused left the property and the victim called his wife and asked her to call the police. He also called a neighbour and asked him to come to his aid. The neighbour and the officer both testified that the victim's face was bruised and bloody and he appeared shaken. Photographs of the injuries were submitted into evidence. During cross-examination by the defence counsel, the victim denied that he had initiated the altercation. The victim testified that he sustained a laceration to his cheek, bruising and swelling to his eye. He said that he had problems sleeping and couldn't concentrate after the alleged attack. The accused did not testify. He called as his witnesses one of his neighbours and two RCMP officers, but none of them provided any evidence regarding the allegation.
HELD: The accused was found guilty. The court believed the uncontroverted evidence of the victim. His testimony was corroborated by the photographs taken by the officer and his neighbour. It found that the assault had caused bodily harm to the victim because his injuries fell within the definition under s. 2 of the Code.

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R v Smoke, 2018 SKQB 212

McCreary, July 31, 2018 (QB17605)

Constitutional Law – Charter of Rights, Section 11(b) – Delay – Stay of Proceedings – Trial Within Reasonable Time
Criminal Law – Defences – Charter of Rights, Section 11(b) – Delay – Exceptional Discrete Event
Criminal Law – Judicial Stay

The applicant applied for a judicial stay of proceedings arguing that his s. 11(b) Charter rights were breached due to delay in the hearing of his criminal charges. The first charge was laid on November 19, 2014 and the anticipated end of the trial was October 19, 2018, which was 47 months between charge and end of trial. The applicant argued that only six weeks of the delay was waived; the Crown agreed. During the 47 months, the applicant pled guilty to a three-count indictment, but later successfully applied for the guilty pleas to be expunged as a result of having ineffective legal counsel. The issues were as follows: 1) what was the net period of delay; 2) did the process of expunging the applicant's guilty pleas constitute an exceptional discrete event that should be subtracted from the net delay; 3) if yes, what was the period of time encompassing the exceptional discrete event; and 4) was the remaining delay reasonable, keeping in mind that this was a transitional case.
HELD: The application for stay of proceedings was dismissed. The issues were determined as follows: 1) the delay as calculated pursuant to Jordan was expected to be 47 months, with a deduction of six weeks for defence delay bringing it down to 45.5 weeks. Because the period of delay was presumptively unreasonable, the Crown had the onus of establishing exceptional circumstances that justified the delay; 2) the court concluded that the expungement issue was not defence-caused delay because the applicant's invalid guilty pleas were a result of ineffective counsel. The delay was also not reasonably foreseeable by the Crown. The expungement hearing came about because of the unauthorized actions of the applicant's former counsel, which the court determined to be an exceptional circumstance. Neither the Crown nor the court administration could have remedied the time required to deal with the expungement. The delay was an exceptional discrete circumstance that must be subtracted from the net delay; 3) the court found the discrete event was for a total of 21 months and five days, which was the time from the guilty pleas to the start of the new trial. The resulting delay was 24.25 months, which is below the presumptive ceiling of 30 months for trials in superior courts; and 4) the charges were prior to the Jordan decision and therefore, because the delay was below the presumptive ceiling the applicant had the onus of establishing that it took meaningful steps, in the period following the release of Jordan, to demonstrate a sustained effort to expedite the proceedings. The applicant would also have to show that the case took markedly longer than it should have. The applicant moved his case forward in a manner consistent with acceptable practice for a case of similar complexity. Further, there was no

evidence that the delay actually prejudiced the applicant's ability to defend the charges. The court also determined that the delay did not exceed what was reasonable given the complexities of the case. The application for a stay of proceedings was dismissed.

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Pobran Estate v Pobran, 2018 SKQB 218

Scherman, August 7, 2018 (QB17606)

Statutes – Interpretation – Administration of Estates Act
Statutes – Interpretation – Trustee Act, 2009
Wills and Estates – Estate Administration – Approval of Accounts

The executors of the applicant estate applied for final approval of accounts and fixing of executors' fees. The testator died in November 2008 and the four named executors obtained Alberta letters probate in August 2009. The Alberta letters were resealed in Saskatchewan in June 2010. A beneficiary and his family (collectively referred to as "beneficiary") applied to the court in 2012 and received an order to have farmland transferred to them. In 2014, a settlement agreement was made providing for the final resolution of the estate, however, disputes continued. In July 2015, the estate received an order indicating that the settlement agreement resolved all issues, but that the beneficiary could dispute the accounting. A consent order was signed that indicated all causes of action against the executors and estate had been settled by the settlement agreement. The remaining issue was the quantum of executor fees.
HELD: The court approved the final accounts as submitted by the executors with the adjustments consented to by all parties. The holograph will of the testator did not specifically indicate that the executors were trustees of his property, but the court found that the executor fees were nonetheless to be determined pursuant to The Trustee Act, 2009 because of the broad definition of "trust" therein. Section 51 of the Act indicates that remuneration of a trustee is to be a "reasonable allowance". The executors proposed that their fees be five percent of the $3,690,385 estate assets and income, or $184,519. The Administration of Estates Act provides the court with the jurisdiction to fix an executor's fee and it states the fees are payable to official administrators appointed under the Act. The fees payable to an official administrator would have been between $354,643 and $521,478, depending on the value of the estate used. The beneficiary was dissatisfied with the delay in the administration of the estate, however, the court found that the delay was largely due to the beneficiary's opposition and challenges. The executors did not act in bad faith in the performance of their duties. The court applied the considerations

stated in the Toronto General Trusts Corp. case and found that the fee requested by the executors was a reasonable allowance. The considerations were: 1) the magnitude of the trust was significant; 2) the care and responsibilities as a result of the bequests were significant; 3) the time required was significant; 4) the skill and ability were significant; and 5) the success of the administration was demonstrated by the maximum realization of the estate's assets. The fees sought by the executors were appropriate and the beneficiary was ordered to bear his own legal expenses for the application.

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R v Wolff, 2018 SKQB 220

Allbright, August 10, 2018 (QB17608)

Criminal Law – Evidence – Beyond a Reasonable Doubt
Criminal Law – Evidence – Circumstantial Evidence
Criminal Law – Evidence – Direct Evidence
Criminal Law – Murder – Second Degree Murder – Manslaughter

The accused was charged with second degree murder contrary to s. 235(1) of the Criminal Code. The victim had provided a statement to police in 2007 implicating the accused in trafficking drugs; the accused was charged with possession for the purpose of trafficking as a result. The essential elements of second degree murder are: 1) the accused caused the victim's death; 2) the accused caused the victim's death unlawfully; and 3) the accused had the state of mind required for murder, that he either meant to kill the victim or meant to cause the victim bodily harm that he knew was likely to cause the death and was reckless whether death ensued or not. An expert in bloodstain pattern analysis testified that there were blood stains in the victim's residence matching his DNA. Someone had attempted to clean-up the blood stains in the kitchen. The forensic firearms specialist concluded that both bullets located in the victim's residence were fired from a .22 caliber rimfire firearm. An expert regarding DNA probability testified that the accused's DNA was located on a roach in a vehicle, on a cigarette in the victim's residence, and on a cleaning solution bottle located in the victim's residence. A friend of the accused testified that the accused told her he would take care of the victim. An ex-girlfriend of the accused indicated that the accused told her he had dealt with the victim when the victim came at him with a sword. He told the ex-girlfriend that he then shot the victim and there was a lot of blood. There was some indication that the victim may have been placed in a well around the accused's parents' farm. The ex-girlfriend became a paid agent of the RCMP for the purposes of the investigation. She was paid a total of $2,819.43. The ex-girlfriend had a criminal record and

admitted to lying to the police in the past. She also admitted that she was a heavy drug user for a period of time and was using meth and other drugs at the time she met with the accused regarding the incident. Other witnesses testified to the accused purchasing gas for a vehicle similar to the victim's and to the accused unloading rocks from a vehicle similar to the victim's. The victim's friend testified that the victim had said that if something happened to him to look at the accused.

HELD: The court concluded that the victim's death was caused by an unlawful act. The court determined that the most significant evidence to consider was the direct evidence of the ex-girlfriend, which was found to be credible. The evidence of all the experts was accepted. The court concluded that the accused's friend and he had the conversation where he said he would take care of the victim. No probative value was given to the evidence of the gas purchase or rock incident because alternate inferences could be drawn from that evidence. The victim's friend's evidence regarding the victim's state of mind was admissible pursuant to Griffin. The court found the friend's evidence to be credible. The evidence went solely to the issues as defined by the Supreme Court in Griffin and not to any state of mind of the accused. The court did not draw any inference from the accused's DNA being found on the roach and cigarette because his culpability was not the only reasonable inference to be drawn from the established facts. With respect to the elements of second degree murder, the court held that: 1) the Crown proved beyond a reasonable doubt that the accused caused the victim's death as outlined by his ex-girlfriend; 2) the accused caused the death unlawfully; and 3) the Crown proved that the accused had the state of mind required because he intended to cause death. The Court next considered whether s. 232 of the Criminal Code would reduce the second-degree murder conviction to manslaughter due to provocation. The sword found at the victim's residence was in a sheath, so the blade was not exposed. The Court concluded that the victim could not have used a covered sword as sudden provocation resulting in the accused committing the death in the heat of passion. The defence of provocation was found not to apply. The accused was found guilty of second-degree murder.

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Stanford v Stanford, 2018 SKQB 221

Wilkinson, August 9, 2018 (QB17609)

Family Law – Division of Family Property – Exemptions
Family Law – Division of Family Property – Unequal Division – Express Trust
Family Law – Division of Family Property – Unequal Division –

Marriage of Short Duration

Family Law – Spousal Support – Compensatory – Non-compensatory

The parties began cohabiting in 1999, got married in 2001 and separated in 2003. The respondent owned seven quarters of land at the time of the marriage and the petitioner did not bring any assets into the marriage. When the parties started their relationship, the petitioner was living on social assistance and family allowance payments. The petitioner and her youngest three children moved to the respondent's farm. The parties lived in an old farmhouse on the respondent's home quarter from seeding to harvest and they lived in town in a property owned by M., the respondent's former common law spouse, in the winter. The respondent and M. had a relationship between 1980 and 1999. In 1985, M. borrowed $90,000 from her father to invest in the respondent's farming operation. The respondent and M. also signed a handwritten agreement in 1985 indicating that M. was paying the respondent $90,000 for half of the farm and they would share in any eventual sale proceeds. After their separation, M. and the respondent executed a document expressed as a mortgage in the seven quarters of land for $500,000 in M.'s favour with no money payable until a sale agreement for the land was entered into. The petitioner brought the action for divorce, spousal support, and equal division of family property 13 years after separation, when the respondent sold the seven quarters of farmland. At the time of their marriage, the home quarter was valued at $43,750 and the remaining six quarters of land had a value of $277,380. In 2016, the respondent sold five quarters for $512,304.83 and the remaining two quarters for net proceeds of $277,824.89. The issues at trial were: 1) whether M. had a valid interest in the sale proceeds and whether the respondent could exclude M.'s interest from the family property available for distribution with the petitioner; 2) whether M.'s unregistered interest was invalid by virtue of s. 25 of The Land Titles Act, 2000; 3) identification of the parties' family home; 4) whether there were "extraordinary circumstances" making it unfair and inequitable to order equal division of the home quarter if it was determined to be the family home; 5) the fair and equitable distribution of the family property; and 6) whether the petitioner was entitled to spousal support, and, if so, in what amount and for how long.

HELD: The court determined the issues as follows: 1) the court found that the matter of M.'s interest was resolved based on an intentional or express trust created by the 1985 document. M.'s interest was ratified in the loan agreement of 1999. Section 21(3)(a) of The Family Property Act (Act) allowed the court to consider the agreement between the respondent and M. so far as the agreement would make it unfair and inequitable to make an equal distribution between spouses; 2) unregistered interests with respect to land are enforceable between immediate parties or those claiming through such immediate parties. In this case, the court found that M.'s express trust was not in land, per se, her beneficial interest was in the sale proceeds. The court also

found that the petitioner was not in the same position as a bone fide purchaser and she did not rely on the register. The court concluded that M.'s interest was not invalid, but her interest was an equitable consideration by virtue of s. 21 of the Act. M's interest as a beneficiary under an express trust to half the sale proceeds was found to require full recognition; 3) the court concluded that the residence on the home quarter was the family home. The court noted that there was a possible argument (not argued in the case) that there may not have been a family home at all because the home quarter had been sold before the petitioner's application and the Act requires that the parties have an interest in or own the family home at the time of application; 4) the express trust in favour of M. was found to be an extraordinary circumstance making it unfair or inequitable to order equal division. The length of the parties' relationship and the 13-year delay before proceedings were also extraordinary circumstances warranting unequal division; 5) M.'s interest was given full recognition and her half share was excluded from the property available for distribution between the parties. The respondent was given a deduction for his exemption. The court determined that an appropriate award to the petitioner was one-third of the family home and one-fifth of the family property for a total of $58,608; and 6) the court held that the petitioner was not entitled to compensatory spousal support for reasons that included: she did not leave a career to move to the farm; she continued some upholstery work and retained the earned income for herself; and the respondent supported the petitioner and her three children for four years. The court also denied the petitioner's claim for non-compensatory spousal support. The petitioner had obtained some part-time work since separation and owned a home that was not taken into consideration in the property division. Further, the petitioner's application was not made until 13 years after separation.

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Rowley v Can-West Agencies Ltd., 2018 SKQB 224

Rothery, August 20, 2018 (QB17610)

Civil Procedure – Application to Strike Statement of Claim
Civil Procedure – Queen's Bench Rule 13-8
Statutes – Interpretation – Saskatchewan Employment Act

The plaintiffs sued the defendant employer for constructive dismissal from their employment based on discrimination. They sued the individual defendant, G.A., in his capacity as director of the employer for his joint and several liability for unpaid wages. The Worker's Compensation Board determined that the plaintiffs' original claims in tort were barred by the Worker's Compensation Act because they

were allegations of work injuries. The plaintiffs then amended their claim. The claims of constructive dismissal and breach of contract were not claims for work injury. The defendants applied to strike portions of the plaintiffs' amended claim, as follows: 1) the paragraphs that continued to plead tort allegations against the employer; 2) paragraphs that plead evidence rather than material facts, in contravention of rule 13-8; and 3) the claim against G.A. for disclosing no cause of action because the liability against him as director, pursuant to s. 2-68 of The Saskatchewan Employment Act, was not crystallized because no liability had been found against the employer. HELD: The court dealt with the defendants' claims as follows: 1) the paragraphs of the claim continuing to plead tort claims were struck; 2) the court found two paragraphs contained evidence that the plaintiffs intended to use to prove their material facts; and 3) G.A. was properly added as a defendant. The director was jointly and severally liable with the employer to the maximum amount of six months' wages. The court ordered that the costs would follow the cause because of the divided success on the application.

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