The Law Society of Saskatchewan Library's online newsletter
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Criminal Law – Break and Enter Dwelling House with Intent to Commit Indictable Offence

The appellant and his co-accused broke into an occupied dwelling house to rob its occupants of drugs and money. All co-accused were charged with break and enter with intent to commit an indictable offence, disguise with intent and weapon charges. Each pled guilty, but to a different set of offences, as all weapons charges against the appellant had been stayed. The appellant's co-accused made joint submissions and were each sentenced to seven-year terms of imprisonment. The appellant was also sentenced to a seven-year term. He appealed his sentence.

HELD: The appeal was allowed. The sentence offended the fundamental principle of proportionality. The sentencing judge relied too heavily on the seven-year joint submission respecting the appellant's co-accused. Sentencing courts must seek to avoid parity in sentences where individual circumstances and the principles and objectives of sentencing may properly commend disparate sentences. Further, the appellant was sentenced as though he had been found guilty of a weapons-related crime, when in fact those charges were stayed. The sentencing court should have considered only those facts and aggravating factors that fell within the framework of the charges to which the

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appellant had pled guilty. The appellant's individual circumstances militated toward a fit sentence at the lower end of the range, in keeping with his near lack of criminal record, relative youth, cooperation with the police, voluntary disclosure of prior criminal behavior and positive post-offence conduct, including enrolment and participation in anti-gang programming requiring abstinence and disavowal of gang activity. The court varied his sentence to 5.5 years' imprisonment and recalculated his remand time.

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Caldwell Herauf Whitmore, January 7, 2018 (CA17113)

Municipal Law – Assessment Appeal

Five retail properties were assessed using the income approach. The assessor developed a rent model by estimating rents of retail properties outside the city's central business district, including the properties. The subject properties were all significantly larger than the others used in development of the model. The respondent taxpayers appealed the assessments to the Board of Revision. The Board confirmed the assessment. The Assessment Appeals Committee overturned the Board decision. It concluded that the rent model did not meet the equity requirement of The Cities Act because size thresholds did not reflect market behavior and the model did not reflect market conditions due to the fact that substantially smaller properties had been used to develop the base rent. The city appealed on grounds that : 1) the Committee erred in its interpretation of its general authority on assessment appeals; 2) the Committee erred in law by using the incorrect onus; 3) the Committee erred in law by overturning the assessment due to its conclusions that the assessment model failed to meet the requirements of the market valuation standard, and thereby failed to meet the test for equity; and 4) the Committee erred in law by not deferring to the discretion of the Assessor.
HELD: The appeal was dismissed. 1) The Committee found error by the assessor without relying on evidence outside the assessor's chosen time frame and, therefore, was entitled to act. Upon finding error, it could expand the time period that the assessor was required to consider, provided that the valuation period did not include data past the prescribed date and provided further that the change was necessary to fulfill the Committee's mandate as per s. 226(1)(c) of The Cities Act. The

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Committee was entitled to remit the matter to the assessor for reconsideration and to order him to consider using a power curve because the Committee felt it was necessary to ensure the assessment roll was correct and the assessment for the properties fair, accurate and equitable; 2) The Committee did not err by remitting the matter to the assessor to confirm or refute the validity of the original model. The Committee concluded that the assessor's failure to adhere to the statutory requirements for market valuation standard was a material error. The burden was on the assessor to show that equity was achieved and it was not possible for the Committee to speculate how equity was achieved in absence of explanation; 3) The Committee did not equate indications of questionable data with the assessor having made errors. Nor did it err by considering individual appraisals and actual market value of property in the process of mass appraisal. These may be considered along with the totality of the evidence to determine whether a model has assessed a property equitably, so long as the evidence is relevant to the applicable base date. Further, the Committee did not err in accepting evidence to show that the assessor's model did not contain a sufficiently similar rent sample. There cannot be equity if the market valuation standard is not achieved; 4) The Committee was not required to defer to the assessor's discretion where the exercise of that discretion was ill-founded. As the assessor made a material error, the Committee was correct in declining to defer to the assessor's discretion regarding methodology and time frames.

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Saskatchewan v Capitol Steel Corp., 2018 SKCA 3

Caldwell Ryan-Froslie Schwann, January 15, 2018 (CA17114)

Statute Interpretation – Arbitration Act

The applicant had sought review of an arbitral decision at the Court of Queen's Bench. When the chambers judge held that he did not have jurisdiction under s. 18(9) The Arbitration Act to entertain such application, the applicant appealed to the Court of Appeal. The respondent applied, in advance of the appeal hearing, to quash the appeal on the basis that the appeal disclosed no right of appeal.
HELD: The application was dismissed. The issue before the court was strictly whether the appeal should be quashed on the ground that the applicant had no right to appeal in light of s. 18(10) of the Act. The preliminary issue before the chambers

judge was whether ss. 18(8) and (9) of the Act, when read together, conferred jurisdiction on the Court of Queen's Bench to hear the application. To determine the preliminary issue, the chambers judge had to interpret the Act. As his decision related to jurisdiction, s. 7(2)(a) of The Court of Appeal Act, 2000 applied and provided a right of general appeal to the Court of Appeal.

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Pederson v Saskatchewan (Minister of Social Services), 2018 SKCA 4

Herauf, January 23, 2018 (CA17115)

Class Action – Appeal – Class Definition

The applicants applied for leave to appeal a decision of the designated judge in class action proceedings. Specifically, they appealed the following rulings: 1) class definition should include those who were in custody and guardianship of the Minister of Social Services; 2) the respondents would not be required to post notice of certification on their respective websites; and 3) the applicants and respondents would split the cost of the notice program equally.
HELD: Leave to appeal was denied. 1) There are no restrictions on the ability of the designated judge to determine class definition. Further, the applicants' specific concern was the use of the word "guardianship" in the class definition. As the Minister maintains guardianship for all children, including those on apprehended status, temporary wards, long-term wards and permanent wards, use of this term did not diminish the class. 2) The notice requirement found in s. 21(4) of The Class Actions Act clearly implies that an order for notice is a discretionary order. 3) Similarly, orders as to costs of any notice are discretionary pursuant to s. 26(1) of the Act.

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R v Boyer, 2018 SKCA 6

Ottenbreit Herauf Whitmore, January 24, 2018 (CA17116)

Summary Conviction – Appeal
Wildlife Offences

The appellant was convicted of offences under The Wildlife Act

and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act. He owned and operated a licensed domestic game farm, stocked with elk, which was in a zone that did not have an open elk season. Regulations required that all elk be tagged. A taxidermist attended at the farm to shoot an elk. He shot two elk, one tagged and one untagged, which he later transported to BC. The appellant represented himself at trial. Contrary to the taxidermist's testimony, he denied any involvement in the taxidermist's decision to shoot the untagged elk, giving permission to shoot the untagged elk or helping process and transport the untagged elk. Testimony also differed as to what the markings on the bill of sale for the elk meant and whether the appellant charged for both elk. At the close of the Crown's case, he requested an adjournment because his witness was unavailable. He alleged that his witness would testify that he had not helped in processing the untagged elk. The Crown argued that if this was permitted, they would have to re-call the taxidermist, so he could be cross-examined by the appellant on that point. The judge arranged for the taxidermist to reattend court, but once back in court the appellant decided not to question him about processing the untagged elk. The trial judge refused the request for adjournment on the basis that the appellant refused to cross-examine the taxidermist on the issue in question and on the secondary basis that he was made aware at pre-trial to have his witnesses available and was aware from pre-trial disclosure of the general theory of the Crown's case. The trial judge rejected the appellant's evidence, which he did not find credible, and found him guilty of several offences. The Court of Queen's Bench dismissed his appeal. He appealed against that dismissal. HELD: The appeal was dismissed. On a summary conviction appeal, it is within an appeal judge's jurisdiction to review findings of fact made by a trial judge. The appeal judge correctly proceeded on the basis that the trial judge concluded that the untagged elk was not a game farm animal. There was no error in this. There was no error in the appeal judge's conclusion on the issue of adjournment. While the trial judge erred in applying the rule in Browne v Dunn as a basis for not granting the appellant's requested adjournment, such error was not fatal as he had other reasons for not granting the adjournment, including that the appellant had been advised to have his witnesses ready, had been apprised of the Crown's general evidence, and there was no indication that the witness would be able to come to court to testify on the adjourned date in any event. The trial judge was entitled to assess the appellant's credibility. Such assessment is entitled to deference unless it is established that it cannot be supported on any reasonable view of the evidence. The trial judge did erroneously conflate the appellant's trial strategy and

conduct with factors informing credibility, but this error did not taint his finding of credibility such that appellate intervention was required. It was not reasonably possible that the verdict would have been different had the error not been made. Further, the court was satisfied that the trial judge did not simply choose between the evidence of the appellant and the other witnesses, but considered the evidence as a whole.

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Holt v Saskatchewan Government Insurance, 2018 SKCA 7

Richards Caldwell Schwann, January 26, 2018 (CA17117)

Automobile Accident Insurance Act - Income Replacement Benefits

The appellant was a passenger in a motor vehicle accident. She was a student at the time of the accident. She applied for and received benefits, including an income replacement benefit. Her income replacement benefit was adjusted using the industrial average wage (IAW). No appeal was taken from SGI's decision and the appellant continued to receive the income replacement benefit for several years. SGI adjusted her income replacement benefit using the consumer price index (CPI) in each of the years following its initial benefit calculation. The appellant took issue with the way in which adjustments were made and sought the difference between what she would have received if the annual adjustment had been made using the IAW instead of the CPI. Her request for payment of the difference was denied. She appealed to the Court of Queen's Bench by way of statement of claim. The trial judge dismissed her claim, concluding that an interpretation of s. 123(4) of The Automobile Accident Insurance Act in the manner suggested by her would lead to an absurd result in that it would treat students differently from other categories of insureds and would amount to double indexation. She appealed the trial decision. HELD: The appeal was dismissed. The trial judge interpreted s. 123(4) as prescribing how a student's initial yearly income is determined. The plain wording of the section supports such interpretation. Inflationary adjustments are covered in s. 185 with express reference to the CPI. This approach does not create an inequity between students and other categories of recipients, whereas to recalibrate income afresh each year using the IAW in addition to the CPI would lead to the absurd result of double indexation. While the structure of the legislation may lead to disparity of benefits among students depending on the date of their accident and the

relative pace of the IAW and CPI, there is no statutory authority authorizing SGI or the court to relieve against perceived unfairness where the legislation is constitutionally sound and has otherwise been properly applied.

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Ottenbreit Whitmore Schwann, February 12, 2018 (CA17119)

Family Law – Child Support – Arrears – Enforcement
Family Law – Spousal Support – Arrears – Enforcement
Statutes – Interpretation – The Enforcement of Maintenance Orders Act, 1997, Section 28

The appellant appealed from the decision of a Queen's Bench judge in chambers dismissing his application to stay the enforcement of child and spousal maintenance arrears payable to the respondent. The maintenance order was made in 1992 and was in arrears of $345,400 by October 2015. In July 2016, the appellant applied to vary the order by terminating spousal support and expunging all arrears that had accrued from January 2011 to November 2015. The parties filed a consent order in August 2016 regarding the variation application that terminated spousal and child support. The determination of the amount of arrears, application for cancellation and terms of payment were to be set for a trial. The appellant continued to make some payments on the arrears after the consent order issued. The matter did not proceed to trial and in March 2017, the respondent issued and served the appellant's employer with a notice of continuing seizure and notice of arrears seeking to attach the sum of $344,900 in maintenance arrears. The appellant then made his application to stay the enforcement of arrears under s. 28 of The Enforcement of Maintenance Orders Act, 1997. The chambers judge found that the application had not been brought within s. 28 of Act because there was no evidence that the arrears had been paid or that there was no debt owing. Further, the consent order had not suspended enforcement. The appellant argued that the judge had erred in finding that there was a maintenance order as defined in s. 2(1) of the Act and, accordingly, there was no maintenance order that could be enforced for the purposes of s. 28(1)(a). The effect of the consent order was to make the maintenance order not enforceable within the meaning of the Act and therefore arrears could not be enforced by way of a notice of seizure.
HELD: The application was dismissed. The court found that the

maintenance order granted under the Act remained in force. The termination as to future support obligations did not retroactively change the nature of the order under which past maintenance accrued into an order that was no longer enforceable. The consent order had continued the proceedings which remained a live action. It said nothing about expungement of arrears or the suspension of enforcement of the arrears.

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S.F. v M.R.F., 2018 SKQB 21

Zuk, January 17, 2018 (QB17396)

Family Law – Custody and Access – Persons of Sufficient Interest – Grandparents

Maternal grandparents applied to be declared as persons of sufficient interest in relation to their teenage grandchildren. They also sought an order of specified access, a Voices of the Children Report and an order directing that all parties undergo a minimum of four counselling sessions together. The children's father opposed the application. The children's mother was deceased. The father took the position that the children no longer wanted to visit their grandparents and experienced anxiety and distress prior to the visits. The grandparents contended that the father was never supportive of the visits and engaged in alienating behavior.
HELD: The court directed a Voices report, ordered the parties to participate in no fewer than four counselling sessions, and adjourned the application for access sine die on seven days' notice. The grandparents were persons of sufficient interest in relation to the children, but further evidence was required to determine whether it was in the best interests of the children to have access with their grandparents.

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Intact Insurance Co. v R.J. Tulik Excavating Inc., 2018 SKQB 23

Barrington-Foote, January 17, 2018 (QB17405)

Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 7-9(2)

The plaintiff, Intact Insurance Company, brought an action to recover amounts paid pursuant to performance bonds relating to

two construction contracts between the defendant, Tulik, and the third party, City of Regina. The City applied for summary judgment in relation to Tulik's third-party claim. It asserted that Tulik's claim, which alleged a breach of contract, was barred by the limitation period specified in s. 307(1) of The Cities Act and that, in any event, it had no merit. Tulik responded by applying to amend its third-party claim to add a claim in negligence, and for contribution. The City argued that the amendment should be refused, and that if granted, the City should have summary judgment in any event. Tulik said that the City had not paid it for work done and if it had, it would have had the funds to pay its employees to complete its contracts with the City as the basis of its claim for breach of contract. In its application to amend its statement of claim, Tulik alleged that the City owed a duty of care and breached it by not making payments on time or at all, and by adding additional work to the contracts. Affidavits provided by the City indicated that Tulik had been paid.
HELD: The City's applications were granted in part, as were Tulik's. The court dismissed Tulik's application to amend the third-party claim to add a claim for the negligent failure to pay on time because under Queen's Bench rule 7-9(2)(b), it could not succeed. Tulik knew after the work was done that it was entitled to payment in June 2014, which was when the damages were sustained. As there was no evidence that Tulik had invoiced the City or demanded payment from the City until November 2015, the claim was not brought nor served within the one-year limitation period prescribed by the Act. Therefore the City's application for summary judgment was granted in relation to Tulik's claim for damages based on the City's failure to pay pursuant to the contracts. The court dismissed the City's application for summary judgment regarding Tulik's other proposed amendments. It allowed Tulik's application to amend the third-party claim to add a claim that the City breached a duty of care by negligently adding additional work and to add a claim for contribution. The City had not filed evidence to the contrary with respect to Tulik's allegations made regarding these claims.

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R.I.K. v S.F. and T.F., 2018 SKQB 31

McIntyre, January 25, 2018 (QB17411)

Family Law – Custody

The petitioner mother applied to regain custody of her nine-year-old daughter. Pursuant to a custody agreement made

between the petitioner and the respondent in 2011, the child was to have her primary residence with the latter on a temporary basis and subject to revocation on 60 days' advance notice. The petitioner was 16 when her daughter was born and after placing her in the respondent's care, she had had problems with alcohol and drug abuse. In 2013, she gave birth to another daughter and began to take parenting courses. The petitioner obtained steady employment and through Legal Aid was able to obtain access to her first daughter every second Sunday. In 2014, the petitioner claimed custody of her daughter and obtained an access order permitting her to pick up the child every second Friday in Yorkton and return her on Sunday from Regina where the petitioner was living with her mother and second daughter. Although the petitioner did not own a vehicle, she managed to borrow or rent one and drive to the respondent's home in Yorkton in order to see her daughter regularly. The court ordered a custody and access assessment. The assessor reported that the child was well-cared for by both the petitioner and the respondent and that she expressed an interest in living with both of them. The petitioner was described as having demonstrated: insight into her past dangerous behaviours; an ability to seek professional support; and stability by acquiring regular employment. The assessor recommended that the petitioner be granted custody.
HELD: The application was granted. The petitioner was granted custody of her daughter and the respondent was given access on certain weekends and during holidays.

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J.L.W. v T.S., 2018 SKQB 35

McIntyre, January 26, 2018 (QB17414)

Family Law – Declaration of Paternity
Statues – Interpretation – Children's Law Act, 1997, Section 43, Section 45, Section 48

The applicant sought a declaration that he be recognized in law as being the father of the child born to the respondent pursuant to s. 43(2)(a) of The Children's Law Act, 1997. In the alternative he sought leave to obtain blood or other genetic tests to determine whether he was in fact the father of the child pursuant to s. 48(1) of the Act. The parties began cohabiting in May 2015. The child was born in March 2016, indicating that the child was conceived in June 2015. In the applicant's affidavit he deposed that the respondent moved out in October 2015; he did not assert

that they had had sexual intercourse at the time of conception, only that they were cohabiting. In her affidavit the respondent stated that the parties separated in June 2015.
HELD: The application for the declaration of paternity was dismissed, but the order for genetic testing was granted under s. 48(1)(a) of the Act. The court could not determine on the basis of the conflicting evidence that there was a presumption of paternity based on cohabitation at the time of conception under s. 45(1)(a) of the Act, but it could exercise its discretion to order testing because the applicant's case was not based on mere speculation.

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Boguski v Boguski, 2018 SKQB 38

Currie, January 29, 2018 (QB17426)

Civil Procedure – Queen's Bench Rules, Rule 3-46

The plaintiff applied for judgment in the amount of $50,000 on the basis that the defendant had admitted in his statement of defence that he owed the money to her. However, the defendant advised that he intended to apply for leave to assert a counterclaim against the plaintiff and the amount could exceed the amount claimed by the plaintiff. The plaintiff argued that the proposed counterclaim had no relevance to her claim.
HELD: The application was dismissed with leave to bring it back before the court if the defendant did not receive leave or decide to proceed. The court found that a counterclaim is not required to relate to the claim of the plaintiff. Under Queen's Bench rules 3-46(5) and (7), the claim and counterclaim are to be resolved concurrently and if both parties are successful, the amounts are set off against each other.

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Ingram v Ingram, 2018 SKQB 40

Megaw, January 29, 2018 (QB17427)

Wills and Estates – Wills – Formalities
Wills and Estates – Testamentary Document
Statutes – Interpretation – The Wills Act, 1996, Section 7, Section 37

The applicant sought an order appointing him administrator of his deceased mother's estate and an order admitting certain documents to probate as evidence of testamentary intention of the deceased. The deceased's husband had died in the spring of 2015 and by the terms of his will, all his property passed to her. She died in November 2015 before she had dealt with the estate. The respondents, the deceased's other children, objected to the applicant being appointed administrator because of concerns regarding his dealing with estate assets and the influence he may have exerted over their mother. They consented to two of the documents being declared admissible but disputed the effect of the others. The documents in issue included: 1) a set of transfers prepared by a town administrator at the behest of the deceased. The deceased had attended at the town office to pay land taxes. She advised the administrator that she wanted to transfer three quarter sections to specific children. The administrator wrote this information on the tax notice. The administrator prepared applications for the deceased as the surviving joint tenant for three of the quarter sections as well as three blank transfer of land forms and all of these were signed by the deceased. The administrator discovered she was unable to complete the transactions and the deceased died before the matter was resolved; 2) another tax notice for 2015 respecting three other quarters of land owned by the deceased on which she had written each son's name below each description; 3) a signed and witnessed document purporting to dispose of farm equipment owned by the deceased; and 4) a last will and testament submitted by the law firm that prepared it. It was executed by the deceased but not dated, but accepted as being executed around 2000. In it, the deceased indicated that her property was to be divided equally amongst all of her children. The law firm also submitted a draft will prepared in November 2015, but not signed by the deceased. It provided that the property be divided equally between the children.

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HELD: The application for an order appointing the applicant as administrator of the estate was denied. The court found evidence that the applicant would be in a conflict of interest because of his use of the deceased's home since her death. The court ordered that the document relating to the disposition of the deceased's farm machinery and the signed will be admitted to probate. The court found that they appeared testamentary in nature and expressed a fixed intention to deal with the property. The tax notices and accompanying transfer documents were not admitted. The court found them to be planning documents showing what the deceased considered doing, but did not represent the deceased's final wishes.

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Merchant Law Group LLP v Maddess, 2018 SKQB 44

Rothery, January 31, 2018 (QB17428)

Professions and Occupations – Lawyers – Fees – Assessment
Barristers and Solicitors – Compensation – Taxation – Limitation Period

The applicant law firm sought an order pursuant to s. 67(1) of The Legal Profession Act, 1990 for the assessment of its bill of fees in the amount of $40,000 rendered to the respondent for the period December 2016 to June 2017. The applicant had represented the respondent in family law matters and during the course of 2016, had billed him $36,000 for legal fees, and he had paid them. In response to this application, the respondent filed an affidavit in support of an order that all the bills of fees be assessed, including those paid in 2016. The law firm objected on the ground that the respondent had not applied pursuant to s. 67(1)(a)(iii) of the Act within the 30-day limit.
HELD: The law firm's application was granted and the court ordered that its bill of fees for 2017 be assessed under s. 67 of the Act. The respondent's application was dismissed. The court decided that it was not in the interests of justice to extend the time for the respondent to apply for an assessment of the 2016 bill of fees.

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R v Pelletier, 2018 SKQB 45

Rothery, February 1, 2018 (QB17420)

Criminal Law – Assault – Conviction – Appeal

The appellant appealed his conviction of assault under s. 266 of the Criminal Code and sought a verdict of not guilty. He appealed on the ground that the Crown failed to prove beyond a reasonable doubt that the complainant had not consented to the assault, one of the essential elements of the offence. At trial, two police officers were the only witnesses, as neither the appellant nor the complainant testified. The trial judge found that the officers were credible witnesses and noted the officers' testimony that they saw the appellant deliver kicks to the complainant's body while the two parties were grasping each other's arms or shoulders. From that, the trial judge inferred that the complainant was not consenting to the application of force, but

regardless, the assault provisions of the Criminal Code included an attempt.
HELD: The appeal was dismissed. The court reviewed the evidence before the trial judge and found it reasonably capable of supporting the conclusion that the appellant committed an assault as defined by s. 265(1)(b) of the Code.

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Barbour v Ituna (Town), 2018 SKQB 50

Elson, February 6, 2018 (QB17423)

Municipal Law
Statutes – Interpretation – The Municipalities Act, Section 136
Municipal Law – Resolution – Application to Quash

The applicant applied for an order pursuant to s. 358(1)(a) of The Municipalities Act quashing a resolution (163/2016) passed by the respondent, the council of the Town of Ituna. The applicant asserted that the resolution was illegal. The respondent purchased the formerly government-owned liquor store in March 2015. In July 2015, it passed a resolution to invite the board of the Ituna branch of the Parkland Regional Library (PRL) to discuss the feasibility of relocating the library to the store, and then passed another resolution in August 2015 advising the PRL to move the library to the store. A group of electors collected signatures for a petition to request a referendum on the matter. The petitioners requested that the question to be put in the referendum be: "Should the Ituna Town Council rescind its motion to relocate the Ituna Local Library and tender the former Ituna Liquor Store for sale?" The respondent was advised by the town administrator that the petition was sufficient to proceed. The respondent passed resolutions providing for the referendum to be held and set out the wording of it as: "Do you want the Town of Ituna to retain ownership of the former liquor store and move the Ituna local library branch to that location?" The electors voted 114 for the no answer and 101 for the yes answer. The respondent passed a resolution by which it moved to tender the liquor store. The call for tenders was advertised and three were received. The respondent decided that all of the bids were too low. It passed another resolution, 163/2016, in July 2016 rejecting all tenders received and followed by another resolution instructing the library to move to the store as soon as possible.
HELD: The application was granted. The court quashed only resolution 163/2016. The court found that s. 136(1) of the Act applied in this case and in interpreting the portion of the section

that required a council to submit a resolution that was "in accordance with the request of the petitioners", the resolution must reflect what the petitioners proposed. The petitioners clearly requested that the respondent rescind resolution 189/2015 and tender the property in question. The respondent submitted a resolution that differed from that requested, and in so doing, it effectively preserved the impact of resolution 189/2015 irrespective of the referendum result. Thus, the respondent failed to meet its obligations under s. 136(1) and acted unlawfully. The failure was more than a technical breach.

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Mercedes-Benz Financial Services Canada v Hipkin, 2018 SKQB 52

Megaw, February 7, 2018 (QB17430)

Civil Procedure – Applications – Applications without Notice
Civil Procedure – Queen's Bench Rules, Rule 6-4

The applicant made an application without notice to seek an order pursuant to s. 63 of The Personal Property Security Act, 1993 (PPSA) compelling the respondent either to voluntarily give up possession of a leased vehicle or, alternatively, to provide disclosure of the location of the vehicle. The applicant relied upon Queen's Bench rule 6-4 as providing the court with the ability to make the order on an ex parte basis. It argued that, as s. 63 of the PPSA is silent as to whether applications must proceed on a with notice basis, it was taking this course of action because making such an application would cause delay which would increase the risk to it. The respondent had failed to make the lease payments, the bailiff could not locate the vehicle, and the applicant had learned that the vehicle was not properly insured. HELD: The application was dismissed. The applicant had not established on the evidence that the vehicle was without any insurance coverage. Therefore, there was no sufficient reason to compel the court to exercise its jurisdiction to allow the ex parte application to proceed. The respondent had a right to notice and nothing in the circumstances suggested that right should be denied.

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Yashcheshen v University of Saskatchewan, 2018 SKQB 57

Meschishnick, February 20, 2018 (QB17437)

Constitutional Law – Charter of Rights, Section 15

The applicant made a Charter application alleging that her s. 15 rights had been violated by the respondent College of Law of the University of Saskatchewan. She argued that its policy requiring an applicant to the College to provide their LSAT score discriminated against her as she had disabilities that made taking the LSAT too difficult. She requested a remedy under s. 24 of the Charter that the court direct the College to consider her application without an LSAT score.
HELD: The application was dismissed. The court found that the College's entrance requirement policy was not governmental in nature and the Charter did not apply.

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Wanner v Abed, 2018 SKQB 59

Megaw, February 21, 2018 (QB17438)

Tort – Negligence – Personal Injury – Duty of Care
Occupations and Professions – Physicians and Surgeons – Negligence

The plaintiff alleged that the defendant physician was negligent in the manner in which he provided surgical care to her. She had consulted him regarding a tubal ligation. After the defendant had described the procedure, the plaintiff signed a form confirming she had received information regarding the potential complications which could result. She acknowledged that damage to the internal organs was an accepted risk of the procedure. The plaintiff underwent the laparoscopic tubal ligation. She was suffering from pain but was discharged from the hospital, although the staff did not inform the defendant of this and he assumed that the plaintiff's recovery was proceeding. As her pain worsened, the plaintiff was readmitted to the hospital the following day. Following a CT scan, emergency surgery was performed by a general surgeon to repair a perforation of the plaintiff's sigmoid colon. An ostomy bag was installed approximately 60 hours after the laparoscopic surgery. Another surgery was performed to resection the plaintiff's colon and remove the ostomy bag after five months. The plaintiff claimed damages, describing pain and suffering, inability to perform household duties and the long-term effect on her employment. It was acknowledged that the perforation had occurred during the tubal ligation. The defendant could not

remember the specific surgery but testified that it was his standard procedure to check for injury following the tubal ligation procedure. He had not mentioned it in his operation report because he would make a record only if something was found. The plaintiff argued that a competent surgeon gynaecologist would have discovered the injury and that would have allowed earlier surgical intervention by the general surgeon. There was no evidence to indicate that the bowel surgery would have been any different had an earlier intervention occurred, nor that it would have reduced the difficulty experienced by the plaintiff following the repair surgery. The opinion evidence provided by the expert retained by the plaintiff indicated that perforation of the bowel would have been noticed had the defendant looked for it. The defendant's expert testified that when bowel perforation occurred in surgeries, it was only observed in 50 percent of the cases. There were various reasons why the injury was not always visible to the surgeon. The issues were whether the plaintiff had established that: 1) the defendant's alleged failure to achieve the standard of care caused her damage; and 2) the defendant failed to achieve the required standard of care in completing the procedure.
HELD: The action was dismissed. The court found with respect to the issues that: 1) the plaintiff failed to establish any alleged breach of the standard of care by the defendant had resulted in any damages to her. There was no basis to determine the subsequent surgery would have been any different had the defendant observed the injury at the time the laparoscopic surgery was performed. It would not be possible to make an inference of causation had the defendant observed the injury initially; and 2) it accepted the defendant's testimony that he had looked for an injury and there was no evidence visible to him to show that one had occurred.

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Weisbeck v Regina (City), 2018 SKQB 60

Kalmakoff, February 21, 2018 (QB17439)

Civil Procedure – Queen's Bench Rules, Rule 7-1
Statutes – Interpretation – The Fatal Accidents Act, Section 4(1)
Statutes – Interpretation – The Survival of Actions Act, Section 3, Section 6(3)
Statutes – Interpretation – The Automobile Accident Insurance Act, Section 40.1, Section 103(1), Section 104

The defendant applied under Queen's Bench rule 7-1 to have a

question of law determined before the trial of the action. The plaintiff, the executor of the estate of Barbara Supynuk, brought an action on behalf of her son and her parents, claiming benefits under the provisions of The Fatal Accidents Act (FAA) and on behalf of the estate itself pursuant to The Survival of Actions Act (SAA). The action arose as a result of injuries that resulted in Supynuk's death. While she was waiting at a bus stop, a bus operated by the defendant was unable to stop and hit a sign post as a result of its brakes locking. The post fell and struck Supynuk. She died from those injuries in 2013. Maintenance records obtained through SGI audits revealed that the bus had experienced brake problems which had been brought to the attention of the defendant's maintenance department on several occasions in the days prior to the accident, but the brakes had not been adequately repaired. The plaintiffs alleged that Supynuk's death was caused by the defendant and its employees for such things as their failure to properly repair or replace the brakes on the bus and their continuing to use it. The plaintiffs sought general damages for non-pecuniary loss including special, aggravated, exemplary and punitive damages. The defendant denied failing to properly maintain the brakes of the bus and pled s. 40.1 of the Automobile Accident Insurance Act (AAIA), stating that any claim under the FAA was barred by the operation of the AAIA. It also pled that the plaintiff's recovery was limited to that permitted by s. 103(1)(a)(ii) and s. 104(2) of the AAIA as at February 2013 and therefore any claim for punitive damages was barred by statute. The plaintiffs objected to the application as being too late, as the trial was in less than two months and the application might delay it, which in turn would affect the ability of the plaintiff's out-of-province expert witnesses to attend. If the question was determined before trial, the issues were: 1) whether the provisions of the FAA and or the SAA permit the recovery of punitive damages; 2) if yes, were the provisions subject to limits imposed by s. 40.1 of the AAIA as at February 2013; and 3) if yes, were punitive damages recoverable as non-economic loss under s. 104 of the AAIA?

HELD: The application was allowed. The court found that under Queen's Bench rule 7-1 this was an appropriate case to determine the issues raised in advance of the trial. It found with respect to each issue that: 1) recovery of punitive damages was permitted, as under s. 3 and s. 6(3) of the SAA an action for punitive damages against the defendant would survive for the benefit of the deceased's estate if the action existed at law at the time of her death. The court concluded that because s. 4(1) of the FAA was permissive, claims for punitive damages could be advanced under it; 2) the provisions of the SAA and FAA were subject to s. 40.1 of the AAIA. It was left for determination by the trial judge as to whether s. 40.1 of the AAIA applied in this case;

and 3) Supynuk's estate was an insured to whom Part VIII of the AAIA applied and had the ability to bring an action in tort. Under s. 104 of the AAIA, the other three plaintiffs were on the same footing as Supynuk would be, had she survived the accident, and therefore able to bring the tort action for non-economic loss under s. 104(2)(b) and 104(3)(d). The court found that punitive damages might be awarded for non-economic loss under s. 104: whether the plaintiffs were entitled to them in this case would be a matter for the trial judge to determine.

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R v McNab, 2018 SKQB 65

McMurtry, February 22, 2018 (QB17441)

Criminal Law – Assault – Aggravated Assault – Sentencing
Criminal Law – Sentencing – Aboriginal Offender

The accused pled guilty to aggravated assault contrary to s. 268(1) of the Criminal Code. He had been in custody since the offence date in July 2014 but was released in May 2016 on a recognizance containing a condition prohibiting him from consuming alcohol. He had twice breached that condition and was returned to custody in May 2017. He had pled guilty to the breaches and received a sentence of six months, time served. The assault occurred when the accused and the victim were both intoxicated. The accused struck the victim on the head with a hatchet and he suffered serious injuries to his skull. The Crown argued that the accused should receive a seven-year sentence for the charge of aggravated assault. The defence argued for a lower sentence and submitted that the court should consider Gladue factors because of the accused's childhood. He had been born and raised in Regina by his parents and grandparents. Both his father and grandmother had attended residential schools. His family was impoverished. When he was 13, his brother committed suicide. The family turned to alcohol and drugs as a coping strategy. The accused had begun drinking even before his brother's death and continued to do so. He was apprehended by Social Services at 14 because of his parents' substance abuse problems and lived in foster and group homes. He attempted suicide three times. His criminal record began at 15. He was now 26 years old and had been convicted 12 times as an adult. His record included two convictions for aggravated assaults committed while intoxicated. His most significant sentence to date was 15 months. The accused had never received nor sought treatment for his addiction. He had begun working for a moving

company in 2013 and it was prepared to rehire him after his release. His mother, sister and spouse were all supportive of the accused if he was willing to address his alcohol addiction. The accused had expressed remorse and accepted responsibility for the attack on the victim. In the pre-sentence report, the accused was assessed at being at high risk of reoffending due to the instability in his residence, his peers, his drug and alcohol use and other factors. The author recommended that the accused receive treatment for addiction and counselling for anger management.
HELD: The accused was sentenced to four years in prison less credit given for remand calculated at 1.5 days for three years, five months and 18 days. The court considered the accused's age and his motivation to change in constructing the sentence. It also found that taking the Gladue factors into account reduced his moral culpability.

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R v Peepeetch, 2018 SKQB 66

Kalmakoff, February 23, 2018 (QB17442)

Criminal Law – Evidence – Admissibility – Hearsay

The accused was charged with having committed a robbery while masked. During the initial investigation the police suspected another person, who was detained, interrogated and released. Later the accused was arrested and charged with the offence after the police received a tip from Crime Stoppers. The first suspect gave evidence at the preliminary inquiry as a witness and he was cross-examined by the accused's counsel. However, at the time of trial, the police were unable to locate him to serve a subpoena on him to give evidence. Despite having obtained a warrant for his arrest because he was a material witness, the Crown feared that the police would not find him and applied to introduce the transcript of his evidence given at the preliminary inquiry as his evidence at the trial.
HELD: The application was dismissed. The transcript of the witness's evidence given at the preliminary inquiry was hearsay and presumptively inadmissible unless it fell within the principled exception to the exclusionary hearsay rule. Although the Crown had proved the transcript met the criterion of necessity, the court found that it had not met the requirements of threshold reliability. The transcript indicated that the witness first implicated the accused but later admitted that he had told his spouse that it was he who had committed the robbery. In his

questioning, he offered the explanation that what he told his spouse was untrue and that he was jesting. The court concluded that the admission raised serious questions about the witness's trustworthiness and it would only be able to assess the witness's contradictory evidence if he were cross-examined in person at the trial.

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Andros Enterprises Ltd. v Fiesta Barbeques Ltd., 2018 SKQB 67

Kalmakoff, February 23, 2018 (QB17444)

Civil Procedure – Parties – Application to Add a Third-Party Defendant
Civil Procedure – Queen's Bench Rules, Rule 3-31
Statutes – Interpretation – Contributory Negligence Act, Section 7

The defendants brought applications pursuant to Queen's Bench rule 3-31 and rule 3-32 to have Vomar Industries (Vomar) added as a third party to the action brought against them by the plaintiffs. It The proposed claim was for contribution under s. 7 of The Contributory Negligence Act (CNA), which requires leave of the court to add a third party. The plaintiffs were respectively the owner of, and a tenant in, an apartment building. In 2012, the defendant Bennett started a fire while using his barbeque (BBQ) on the balcony of his suite while he was attempting to turn off the main valve of the propane cylinder. The plaintiffs suffered considerable property damage and claimed damages for their losses. The BBQ was manufactured and distributed by the defendants, Fiesta and Wolfedale. The plaintiffs framed their action in negligence against Fiesta and Wolfedale relating to the design, manufacture and assembly of the BBQ, among other grounds, and against Bennett, alleging he used the BBQ in an unsafe manner and improperly installed the propane tank, among other grounds. Bennett denied responsibility for the fire and cross-claimed against Fiesta and Wolfedale. They in turn denied negligence and cross-claimed against Bennett. The plaintiffs originally believed that the fire was caused by a defect in the hose connecting the propane cylinder to the BBQ, but later learned that the cause was the mechanical failure of the propane cylinder causing a leak just below the shut-off valve. The cylinder had been serviced and requalified for sale by Vomar in 2007 as part of its business of operating a propane cylinder exchange program. The plaintiffs then applied to amend their claim and to add Vomar as a defendant. The court dismissed the

application because adding Vomar was not necessary to determine the issues between the parties and being added would be highly prejudicial to Vomar because it would deprive it of a defence under The Limitations Act (LA). As well, the judge determined that the application brought by the plaintiff asserted a new claim against Vomar because its alleged liability had not arisen out of the same transaction as the original claim, and thus s. 20 of the LA did not permit the amendment (see: 2017 SKQB 234). In this application, the defendants alleged liability against Vomar on the basis that it had not properly inspected and certified the cylinder and on other grounds. The defendants argued that the third-party claim against Vomar should succeed because it: 1) disclosed a prima facie claim; 2) was causally connected to the main action; and 3) would not result in extreme prejudice for Vomar.
HELD: The application was dismissed. The court assessed the defendant's application in accordance with the principles governing whether to grant leave to add a third-party claim for contribution under Queen's Bench rule 3-31 and s. 7 of the CNA, as set out in Dunmac. It found that: 1) the proposed claim did disclose a prima facie cause of action against Vomar; 2) the judge's decision in the previous application that there was no causal connection between the original claim against Fiesta, Wolfedale and Bennett and the plaintiff's proposed claim against Vomar meant that the issue in this application was res judicata. Here the defendants had alleged exactly the same wrongful conduct by Vomar. The application failed on this basis; and 3) the application also failed because the claim would cause undue prejudice to Vomar. This finding as well had been made by the judge in the previous application.

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Moodie (Estate) v Lakeview United Church, 2018 SKQB 69

Elson, February 27, 2018 (QB17453)

Wills and Estates- Wills – Interpretation – Evidence

The executrix of the Moodie estate obtained letters probate after submitting the will executed by the testatrix in 1999 and two codicils executed in 2004 and 2012 respectively. The first two probate documents had been prepared by the deceased's lawyer and the third was written and signed by the testatrix before two witnesses. Aside from specific bequests, the estate, valued at $1.5 million was left to be divided equally between 13 charities, providing them each with $115,000. The executrix took the

position that the wording of the second codicil cancelled the gift to the respondent church. The deceased had written: "I want all donations as designated in my will be completed except the $5,000 donation to the church to be cancelled." The church objected and the executrix made this application. The executrix submitted an affidavit deposing that the deceased had been upset by the respondent's spending of funds. She was unsure but thought that the deceased's concerns pre-dated the 2012 codicil. Another affiant, a long-time friend of the deceased, also deposed that she wasn't sure, but she thought that the deceased had told her that she wasn't going leave the church anything in her will. The respondent's treasurer provided an affidavit that described the deceased's long relationship with the church and her annual contributions to it that continued until her death. He knew that the deceased objected to one particular project and the church ensured that her contribution was not allocated to it. Other than that objection, the treasurer was unaware of any other concerns that the deceased had with the respondent. The executrix took position that: 1) when the will and 2012 codicil were read together they indicated either a mistake or an equivocation; and 2) if so, then extrinsic evidence of the deceased's testamentary intention to cancel the gift to the respondent was admissible.

HELD: The application was dismissed. The court ordered that the executrix should determine the amount of the gift to each residual beneficiary under the terms of the will and then reduce the gift to the respondent by the sum of $5,000. The court interpreted the will and the 2012 codicil in light of the surrounding circumstances and found the gift to the respondent was not revoked but reduced by the testatrix to account for her opposition to the project. It found with respect to the executrix's positions that: 1) since probate had been granted, it had to hear the application as a court of construction. Due to its limited jurisdiction in that capacity, it could not rectify mistakes demonstrated in testamentary instruments; and 2) that the probated instruments were not evidence of equivocation. Therefore, it could not admit extrinsic evidence of the testatrix's direct intention and the affidavit of the friend was not admissible. Even if there was equivocation present and the affidavit admitted, the court was found that the evidence was not reliable.

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