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R v J.F., 2018 SKCA 5

Caldwell Herauf Whitmore, January 25, 2018 (CA17127)

Criminal law – Young Offender – Sentencing – Appeal
Statutes – Interpretation – Youth Criminal Justice Act
Statutes – Interpretation – Young Offenders Act

The appellant appealed his sentence imposed under the Youth Criminal Justice Act (YCJA). He pled guilty to breaking and entering a house and committing robbery, committing an indictable offence with his face masked, trafficking in marijuana, using a firearm in the commission of an offence, two counts of failure to comply with probation conditions under the YCJA and possessing a firearm while prohibited. A number of other charges were stayed. He was in custody for three months prior to his sentencing. The Crown and defence counsel requested that sentencing proceed without a pre-sentence report and presented a joint submission that his sentence should be 34.5 months, composed of 15 months' secure custody, seven months of community supervision and 12 months of probation. The appellant argued that the sentencing judge had erred in law by: 1) sentencing him without a pre-sentence report; 2) failing to consider s. 88(c) of the YCJA, a section that had incorporated the factors set out in s. 24.1(4) of the Young Offenders Act (rep.), before determining the level of custody; 3) imposing an unfit sentence in light of s. 38 and s. 39 of the YCJA; and 4) failing to provide reasons why a non-custodial sentence was not adequate as required by s. 39 of the YCJA.

HELD: The appeal was dismissed. The court found with respect each issue that the sentencing judge had: 1) not erred because she found she was satisfied that the report was unnecessary under s. 39(7) of the YCJA, as both the Crown and defence consented and she noted that there was a judicial interim release report; 2) had erred in failing to consider the factors listed in s. 88(c) of the YCJA. The joint submission was silent regarding whether custody should be open or secure and the judge merely accepted the Crown's submission and the defence's acquiescence on the level of custody; 3) had not erred. The sentence was based upon the joint submission. As the appellant had not pointed to anything that demonstrated that the public interest test was not met, there was nothing to suggest that the judge was wrong in accepting it; 4) had not erred. The requirements of s. 39 and s. 48 were met, given the joint submission; and 5) had imposed an appropriate sentence regarding secure custody despite her error. Based upon its review of the gravity of the offences, the programming available to the appellant in custody and that he had been assessed at high risk to the safety of staff and students if he were allowed to return to school, the court found that secure custody was appropriate.

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Firkola v Firkola, 2018 SKCA 10

Caldwell, February 15, 2018 (CA17120)

Civil Procedure – Court of Appeal Rules, Rule 15
Civil Procedure – Appeal – Stay of Execution – Application to Lift

The applicant appellant applied for an order partially lifting the stay of execution imposed when he served and filed his notice of appeal for the purpose of allowing the parties to proceed to a pre-trial conference. The matter arose as a result of the respondent's successful application to the Court of Queen's Bench to vary an existing child support order. The chambers judge varied the order regarding the ongoing child support payable and directed the action proceed to pre-trial on the issue of retroactive child support. The appellant filed a notice of appeal against the variation of s. 7 expenses and s. 3 child support under the Guidelines. The parties' counsel then inquired of another Queen's Bench judge whether the issue of retroactive child support could proceed to pre-trial conference, given the pending appeal and the effect of Court of Appeal rule 15(4). The judge issued a fiat stating that only the Court of Appeal could lift the stay of proceedings imposed by the rule.

Firkola v Firkola

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Sacher v Canadian Hot Rods Inc.

Skjerven v Fauser Energy Inc.

Sugarman v Sugarman

HELD: The application was dismissed. The order under appeal was not subject to the automatic stay of execution under Court of Appeal rule 15(1) and consequently, further proceedings in the action were not stayed by rule 15(4).

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ADAG Corp. Canada Ltd. v SaskEnergy Inc., 2018 SKCA 14

Jackson Ottenbreit Caldwell, February 23, 2018 (CA17124)

Statutes – Interpretation – The Partnership Act, Section 7, Section 8, Section 10
Partnerships – Limited Partnerships

The appellants were a partnership comprised of a general partner (ADAG) and 1200 limited partners (GGG No. 10), all of whom were German residents. The limited partners acquired an interest in a limited partnership (LP) as an investment tool. The appellants had purchased the SaskOil Building during the 1990s. The building was the LP's only asset. The LP's articles (the LP Agreement) provided that a two-thirds majority vote of the limited partners present at any partnership meeting was required to permit the sale of real property. In 2000, ADAG granted a ten-year lease with a right of renewal to the respondent (SaskEnergy). As part of the deal, ADAG executed a document (the Options Agreement) as a schedule to the lease. The lease and the Options Agreement created five possible purchase options, three of which were said to be unconditional and for which the limited partners' approval had not been obtained and would not be sought if the options were exercised. In 2010, SaskEnergy renewed the lease and attempted to exercise one of the unconditional options to purchase the property and tendered the funds. ADAG refused to comply, relying on the LP Agreement to insist that all of the options, including the unconditional ones, required limited partner approval. SaskEnergy commenced an action for breach of contract, seeking specific performance and monetary amounts to compensate it for loss of income and its continuing obligation to pay rent. The trial judge applied The Partnership Act to the facts as he found them and concluded that the unconditional options created by the Options Agreement were enforceable against the LP without the approval of the limited partners and that they were binding on the firm, and consequently, both the general and the limited partners were in breach of contract to transfer the property to SaskEnergy. He determined that damages were not an acceptable remedy and granted SaskEnergy specific performance

databases may differ in style from those endorsed by the *Citation Guide for the Courts of Saskatchewan*.

(see: 2015 SKQB 143). In a separate fiat, the judge adjusted the purchase price to be paid by SaskEnergy including amounts for rent paid since the attempt to exercise the option to purchase and compensation for other losses. The appellants appealed on the grounds that the trial judge erred: 1) by failing to apply the mandatory protections under the Act in favour of the limited partners; 2) by awarding specific performance; and 3) by concluding that the time passage benefits should be calculated based on SaskEnergy's borrowing rates with respect to the adjustments to the purchase price. SaskEnergy submitted that if the judge erred in any respect regarding the enforceability of the Options Agreement, the matter must be remitted to him to consider whether the appellants were estopped from asserting that the limited partners' approval must be obtained before the unconditional options could be enforced because of matters arising after the execution of the Options Agreement. The appellants agreed with this submission. This point had been raised by the defendant during trial, but the judge had not dealt with it because of his findings regarding the application of the Act.

HELD: The appeal was allowed in part. The court decided that a new trial was not necessary and remitted the matter to the trial judge to consider the outstanding issue regarding estoppel. With respect to each ground of appeal the court found that the trial judge had: 1) erred in his interpretation and application of the Act. He found that SaskEnergy had reasonably believed ADAG had the authority to enter into the commitments in the lease and Option Agreement based upon SaskEnergy's characterization of the facts. The findings did not concern ADAG's actual or implied authority to bind the firm according to s. 7 and s. 8, or whether SE had notice within the meaning of s. 10 of the Act. The court held that, based on the parties' arguments, the judge was required to address: a) whether ADAG had actual authority within the meaning of s. 7 and s. 8 of the Act to grant unconditional options to purchase as part of the lease and Options Agreement; b) whether ADAG had implied authority to grant such options within the meaning of s. 7 of the Act, as an "act for carrying on in the usual way business of the kind carried on by the firm"; and c) whether SaskEnergy knew that ADAG had no actual authority to act for the firm in accordance with to s. 7 and s. 10 of the Act, such that ADAG could not be taken to have acted with implied authority in any event. The court concluded that according to the LP Agreement, ADAG did not have actual authority to bind the firm to any future sale of the property without the limited partners' approval. There was no implied authority under s. 7 either, because the sale of the property would bring the partnership to an end and therefore could not be considered part of its usual or ordinary course of

business. On the evidence, it was clear that SaskEnergy had notice under s. 10 of the Act that ADAG's actual authority to grant an unconditional option to purchase was restricted; 2) not erred in concluding that damages would be inadequate and ordering specific performance. The standard of review was correctness. The court agreed with the conclusion of the trial judge. Although the remedy might not be just or equitable because the sale of the building would contravene the LP Agreement, if the trial judge ultimately determined that the appellants were estopped from asserting the unconditional options were unenforceable, it would render the limited partners' approval unnecessary; and 3) his decision regarding the calculation of the time passage benefits was owed deference. The judge made no palpable or overriding error with respect to the evidence he accepted.

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R v Pavlik, 2018 SKPC 4

Schiefner, January 24, 2018 (PC17093)

Criminal Law – Defences – Charter of Rights Section 8, Section 9 Constitutional Law – Charter of Rights, Section 10 – Voluntary Statements

The police received a tip from a confidential informant and arrested the accused and his girlfriend for possession for the purpose of trafficking. Upon arrest, the police searched the girlfriend's car and found a loaded sawed-off shotgun. The accused was charged by indictment with weapons offences and possession of a controlled substance. On voir dire, the issues before the court were: 1) whether the arrest was contrary to s. 9 of the Charter; 2) whether the search violated s. 8 of the Charter; and 3) whether the accused's admission to owning the shotgun was voluntary.
HELD: The court dismissed the Charter application. 1) The police had reasonable grounds to arrest the accused. The tip received by the police was precise as to time, location and persons and was sufficiently detailed to be credible. The source information was received by one officer and communicated to others who, as was their practice to maintain confidentiality of another officer's sources, did not ask the name, history or possible motive of the source. The police corroborated all neutral aspects of the tip and those were sufficient to establish that the source was acquainted with the target and created a reasonable inference that he was privy to the criminal activity being

reported. It was reasonable and operationally necessary for police to rely upon information provided by fellow officers during the exigencies of an active investigation. 2) There was no evidence that the accused had a reasonable expectation of privacy in relation to his girlfriend's car. 3) The accused's statements were voluntary. There was no evidence of threats or promises made by the officer and no police trickery was used. The interview was not oppressive, and the accused had a clear operating mind when he made the statements.

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Reliable Truck & Trailer Ltd. v Super Save Disposal (Saskatchewan) Inc., 2018 SKPC 6

Demong, January 30, 2018 (PC17094)

Contracts – Oral Agreement – Implied Terms

The plaintiff was a mobile vehicle and equipment repair company. Pursuant to an oral agreement, the plaintiff provided repair services, supplies and parts to the defendant. After November 2015, the defendant ceased paying the plaintiff's invoices. Some of the invoices were negotiated, reduced and paid. Others were left unpaid. When the plaintiff demanded payment, the defendant offered a small sum in satisfaction of the accounts. The plaintiff sued to recover the amount. The defendant argued that the amount sought was unreasonable and that in the absence of an express term in the agreement as to the amount that could be charged for the goods and services, the plaintiff was not free to charge whatever it chose. The plaintiff argued that a convention had developed whereby the defendant agreed to certain billing practices. The court heard expert testimony on behalf of both parties.
HELD: On the basis of the evidence presented by the parties' experts and in the absence of an express term in the contract, the court read in an implied term that the parties agreed to pay a fair and reasonable price and awarded the plaintiff such portion of the amount sought as was fair and reasonable. The plaintiff did not provide a sufficient evidentiary foundation to establish estoppel by convention as it did not tender the invoices that were paid. Even if such evidence had been led, there was no convincing evidence of detrimental reliance as the plaintiff presented no evidence that it would have turned to alternative and more lucrative work.

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R v Carrier Forest Products Ltd., 2018 SKPC 7

Lane, January 26, 2018 (PC17101)

Regulatory Offence – Occupational Health and Safety – Sentencing

The accused pled guilty to the charge of failing to provide an effective safeguard where a worker made contact with a dangerous moving part as required by s. 137(1) of The Occupational Health and Safety Regulations, 1996, resulting in the death of a worker contrary to s. 3-78(g) and s. 3-79 of The Saskatchewan Employment Act. The court had to determine the appropriate sentence under s. 3-79(7) and s. 3-79(9) of the Act. The victim was working for the accused as an unlicensed millwright. He was attempting to repair a wood chipper. The accused's written safety policy and workplace training and testing that the victim had undergone required employees to "lock out" the machine during repairs, meaning that all power sources to it were to be shut off. The victim did not turn off the power sources to the machine and while he was attempting to secure a guard onto the chipper, the guard struck a rotating piece of machinery whereupon it broke off and struck the victim, killing him. The accused had no prior convictions, nor were there any notices of previous contraventions. After the accident, it installed a safety device that would prevent the same kind of accident arising from human error to occur again. It was a small company that employed 136 people. The Crown suggested a fine in the amount of $700,000.
HELD: The court imposed a fine of $62,500 plus a victim surcharge of 40 percent, resulting in a global penalty of $87,500. The court specified that this fine was not to be regarded as a precedent except in a similar case. The Crown's proposed fine was highly excessive and might well have had a fatal impact on the financial capacity of the accused to continue operating and thus would affect the economic basis of the small community.

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R v Uffelman, 2018 SKPC 8

Baniak, February 12, 2018 (PC17102)

Criminal Law – Motor Vehicle Offences –Impaired Driving – Driving/Care or Control with Excessive Alcohol – Roadside Screening Devices

Constitutional Law – Charter of Rights, Section 8, Section 9

The accused was charged with having care or control of a vehicle while his ability to operate it was impaired by alcohol contrary to s. 255(1) and s. 253(1)(a) of the Criminal Code and with having care or control of a vehicle while his blood alcohol content exceeded the legal limit contrary to s. 253(1)(b) and s. 255(1) of the Code. The defence made a Charter application alleging that the accused's s. 8 and s. 9 rights had been infringed. It argued that the results of the ASD test could not be relied upon to create the reasonable grounds for a breath test pursuant to s. 254(3) of the Code because the ASD machine had not been maintained as its annual maintenance had not been conducted. The officer's pat-down search of the accused prior to the administration of the ASD test violated his s. 8 Charter rights. The officer responded to a call late at night made from a rural farmstead. The owners reported that a parked vehicle with its engine running was in one of their fields. They said that they could not see anyone inside the vehicle. When the officer found the vehicle, the accused was in it. She spoke to him and noticed that he had alcohol on his breath. The accused said that he had had his last drink two hours earlier. The officer asked the accused to get out of his vehicle to take an ASD test. The accused had trouble opening the vehicle's door and the officer saw an open bottle of liquor on the seat. The officer testified that because she was alone and in a remote location and she was concerned for her safety, she searched the accused for weapons and alcohol before putting him in the police cruiser. With regard to the ASD machine, the officer testified that it was within the current accuracy date which led her to believe that it was within the annual maintenance check date. The accused failed the test. Later it was found that the annual check date was two weeks before the ASD test was given to the accused.

HELD: The court found that there had been no breach of the accused's Charter rights. The court found that s. 8 had not been breached because the search was reasonable, as the officer was credible, she had an honest belief about her safety, and her belief was objectively reasonable in the circumstances. Alternatively, had the court determined a breach had occurred, it would admit the ASD test results after applying the Grant analysis. Regarding whether the officer had reasonable and probable grounds to make the breathalyzer demand despite the fact that the ASD had not had its annual maintenance performed, the court noted that the device was new in 2014. Its annual maintenance check had been due just two weeks before it was used to test the accused's breath. The monthly calibration was performed as required, and the officer using the device was aware of the maintenance and calibration requirements, although she was not aware that the annual maintenance had not been done until after the test. There

was no expert evidence called, and there was no evidence that the device was faulty or less reliable because its annual maintenance check was overdue by two weeks.

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Sacher v Canadian Hot Rods Inc., 2018 SKPC 9

Agnew, February 7, 2018 (PC17096)

Statutes – Interpretation – Small Claims Act, Section 36

The defendant was served with the plaintiff's claim on September 26, 2017. The defendant filed no materials in response. On January 29, 2018, a principal of the defendant requested via email that the case management conference (CMC) set for February 5, 2018 be adjourned. The plaintiff did not consent and the court refused the adjournment. A lawyer retained by the defendant on February 1, 2018 attended at the CMC. He had not seen any of the documents served on the defendant and requested an adjournment.
HELD: The court granted the adjournment and ordered the defendant pay costs of $500 to the plaintiff within 30 days. The Small Claims Act, 2016 requires the defendant to appear in person at the CMC, not simply by counsel, and that the person appearing must have authority to settle. The defendant defaulted in these obligations. He also failed to comply with a court order to file a defence and relevant documents. A costs order was a proper balancing of the parties' rights. Each of ss. 36(1) and (2) of the Act applied and ss. 36(2) specifically states that where a party fails to attend or prepare for a stage of the proceedings without reasonable excuse, costs up to $500 may be awarded. The court further ordered that in default of payment of costs within 30 days, there would be judgment for the plaintiff in the amounts set out in the claim.

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R v Khan, 2018 SKPC 11

Scott, January 26, 2018 (PC17097)

Controlled Drugs and Substances Act – Possession for Trafficking – Sentencing

The accused was found guilty after trial of possession of cocaine

for the purposes of trafficking, possession of methamphetamine for the purposes of trafficking, and possession of proceeds exceeding $5000. While in Saskatoon over a period of three to four months, the accused rented several vehicles, signed a one-year lease on a residence only 1.5 months before returning to B.C. and left the residence and a rented vehicle behind for use by others involved in a commercial dial-a-dope operation. Two of those individuals pled guilty to charges related to the operation. HELD: The court sentenced the accused to a global sentence of 42 months' incarceration, less remand credit. The offences of trafficking in cocaine and methamphetamine are grave and their consequences on the community are severe and tragic. The commercial operation was relatively sophisticated, involving numerous people with various levels of participation and more than one location of operation. The accused's degree of participation was high, as he rented the residence and vehicle, thereby providing a place to store drugs and cash and move the drugs around. He was integral to the operation. His record included three drug-related convictions in the three preceding years. Denunciation and deterrence were the primary sentencing objectives.

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R v D.P., 2018 SKPC 12

Jackson, March 2, 2018 (PC17100)

Constitutional Law – Charter of Rights, Section 8, Section 24(2)
Criminal Law – Evidence – Search Warrant - Sufficiency

The accused young offender was charged with causing the death of one victim and bodily harm to two others by the operation of his vehicle while impaired by alcohol or over .08 and in a manner dangerous to the public. The accused drove home from a party. Witnesses stated that they had seen him there with a drink in his hand. He undertook to drive a friend home. This person later made a statement that he didn't believe that the accused's driving showed impairment. After dropping off his friend, the accused continued travelling on a grid road that was unknown to him. He entered an unmarked intersection of the road with a highway and collided with another vehicle, resulting in the death of its driver and injuries to the passengers. The accused suffered serious head injuries and was taken by ambulance to a hospital in Saskatoon. The officers who first attended at the accident noted that there was an open box of beer on the floor and a strong odour of liquor inside the vehicle.

There was a ruptured can of beer on the floor. Another officer who spoke to the accused at the hospital stated that he could smell liquor on the accused's breath and that he had red bloodshot eyes. A doctor advised the officer that he felt that the accused was drunk. The accused told the officer that he couldn't remember how much he had had to drink and then said that he couldn't remember if he had been drinking at all. Blood samples were taken from the accused at the hospital. The police accident reconstruction expert indicated that the drivers' views as they approached the intersection were obstructed, the speed of the accused's vehicle was 42 kilometres per hour and the other vehicle's was 107 kilometres per hour at the time of impact, and there was no evidence of pre-impact braking. The reconstruction expert noted that there were no stop nor yield signs posted at the intersection. The investigating officer provided sworn evidence to a Justice of the Peace to obtain a search warrant and production order to procure blood samples and records held by the hospital. The defence brought an application alleging a breach of s. 8 of the Charter challenging the sufficiency and quality of the Information and sought to exclude all evidence flowing from it pursuant to s. 24(2). The defence also requested that it be able to cross-examine the investigating officer regarding the ITO, which was granted by the court.
HELD: The application was granted. The court found the accused had established a breach of his s. 8 Charter rights and under s. 24(2), the evidence was excluded. After reviewing the ITO and the transcript of the cross-examination of the officer, the court found that had all of the information been properly provided before the Justice, he would not have issued the search warrant and production order. The officer deliberately misstated that there was nothing obstructing the view of the two drivers and failed to disclose information, such as: the accident reconstruction officer's conclusion that the absence of road signage might have been a factor in the collision; the evidence of the accused's passenger that he hadn't observed any problem with his driving; the impact speed of each vehicle and that there was no pre-impact braking; the ruptured can of beer found in the accused's vehicle that could have accounted for the smell of alcohol in his vehicle; that the accused had suffered serious head injuries which would affect his memory; and that any smell of alcohol coming from his breath might have been due to his diabetes.

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Business Development Bank of Canada v Naber, 2018 SKQB 26

Gabrielson, January 19, 2018 (QB17419)

Civil Procedure – Queen's Bench Rules – Summary Judgment

The plaintiff applied for an order of summary judgment against the defendant on account of a personal guarantee. The defendant made the personal guarantee in respect of a loan to a corporation with which he was associated. The plaintiff issued a formal demand against the corporation for its outstanding debt and concurrently demanded payment from the defendant pursuant to his personal guarantee. The plaintiff subsequently transferred all its debt security other than the personal guarantee to a third party and then commenced action against the defendant. The defendant acknowledged the guarantee but said that the plaintiff had failed to act in good faith by entering into the assignment of debt without his knowledge. He further stated that the plaintiff could and should have been paid in full for the debt of the corporation by virtue of the assignment.
HELD: The court ordered summary judgment in favor of the plaintiff. There was no triable issue. The facts were not in dispute. There was no evidence of bad faith on the part of the plaintiff. Further, the actions taken by the plaintiff were specifically provided for in the guarantee. Where the terms of a guarantee are clear, a bank can enforce the guarantee regardless of how it dealt with its security.

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Sugarman v Sugarman, 2018 SKQB 28

Brown, January 23, 2018 (QB17408)

Family Law –Spousal Support – Interim - Means and needs

The parties cohabited for 25 years and were married for 22 of those. Upon separation, the husband took possession of the family home and did not permit the wife to re-enter the home. He also retained the family vehicle. The couple's 24-year-old son lived in the family home rent-free. The wife applied for interim spousal support pursuant to s. 15.2 of the Divorce Act.
HELD: The wife was clearly entitled to spousal support. Considering the wife's needs and the property and expenses of each party, a sum in the mid-range of the Spousal Support Advisory Guidelines was appropriate. Both parties had shortfalls in their monthly and annual budgets. It was not reasonable that the wife live off of the generosity of friends while the husband had the family home, family vehicle and a much greater income. If the husband made changes to his situation, he

would have the ability to pay the ordered amount.

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L.G.D. v S.I.D., 2018 SKQB 36

Zuk, January 29, 2018 (QB17415)

Family Law – Custody and Access – Interim
Family Law – Child Support – Interim
Family Law – Spousal Support
Civil Procedure - Contempt

The parties separated in March 2016 and the petitioner wife issued a petition in April regarding spousal and child support. In May, the parties consented to an order that gave them joint custody of their three children, then aged 16, 14 and 6 respectively, with their primary residence to be with the petitioner mother. The respondent father was given parenting time two nights per week and every second weekend. In August, the petitioner filed an application requesting that the respondent's parenting time be suspended on the basis that he had failed to return the two youngest children at the end of his parenting times and that he was harassing her. The chambers judge dismissed it on the basis of the conflicting affidavit evidence and directed that the matter proceed to pre-trial. No further steps were taken until the petitioner filed this application that requested that the respondent pay retroactive and ongoing interim child support; retroactive and ongoing s. 7 expenses; and retroactive and ongoing spousal support. The petitioner also sought an order imputing income to the respondent. The applicant argued that during the course of the marriage, the respondent had earned $100,000 per year working as a journeyman carpenter or construction supervisor and that he was now intentionally under-employed. The respondent advised that he had suffered an injury that prevented him from working in the construction field, although he did not provide medical evidence to support his claim. The respondent applied for an order pursuant to Queen's Bench rule 11-26, citing the petitioner in contempt of the August 2015 court order on the grounds that she had prevented him from exercising access to the children. He further asked for compensatory access to the two youngest children under s. 26(1) of The Children's Law Act, 1997. The petitioner filed an affidavit reply to the contempt application that sought it be dismissed and sought an order granting her interim sole custody and for the respondent to have only specified supervised access with the children.

HELD: The petitioner's application was granted in part and the respondent's application was dismissed. The court found with respect to the petitioner's application for retroactive child support, s. 7 expenses and spousal support that these matters should be left for pre-trial settlement conference and trial if necessary. Regarding her application for ongoing child and spousal support, the court found that the respondent had not established that he was unable to work due to injury and he did not fall within any of the exceptions contained in s. 19(1)(a) of the Guidelines. Therefore, the court imputed income to him of $65,000 per year based upon his income tax returns showing income from 2013 to 2015 in the range of $60,000 per year. The respondent was ordered to pay child support for the three children in the amount of $1,192 per month in accordance with the Guidelines. The applicant's claim for ongoing s. 7 expenses was granted and the respondent ordered to pay 60 percent. The petitioner's application for ongoing interim spousal support was dismissed with leave to pursue it at pre-trial or trial. Although the petitioner had established a need for spousal support given her monthly deficit, the court was not satisfied that the respondent had the ability to pay given the order made for interim child support. The court dismissed the respondent's contempt application because there was no evidence that the petitioner had denied him access except on some occasions when she was justified in doing so. The petitioner's request to vary the existing custody order was denied, but the court varied the existing access order so that the respondent's access would have to be supervised. Once suitable and willing supervisors had been found, the respondent could have parenting time with the two youngest children every second weekend. Costs of $1,000 were awarded to the petitioner in her application for child support and because the respondent had been unsuccessful in his contempt application, she was awarded a further $2,500.

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Skjerven v Fauser Energy Inc., 2018 SKQB 41

Barrington-Foote, January 31, 2018 (QB17417)

Civil Procedure – Queen's Bench Rules – Summary Judgment
Civil Procedure – Stay of Enforcement

The plaintiffs claimed a sum due and owing pursuant to a promissory note. The promissory note comprised part of the consideration paid by the defendant for certain shares pursuant to a share purchase agreement. The defendant counter-claimed,

alleging breach by the plaintiffs of a non-competition agreement provided for and attached to the share purchase agreement. The defendant claimed equitable set-off, damages and an injunction. Three issues lay before the court: 1) the plaintiffs' application for summary judgment in respect of their claim; 2) the plaintiffs' application for summary judgment in relation to the defendant's counter-claim; and 3) the defendant's application for a stay of enforcement pursuant to Rule 7-7.
HELD: 1) The court awarded summary judgment to the plaintiffs for the sum secured by the promissory note, plus interest pursuant to the promissory note to the date of judgment. There was no dispute as to the binding effect of the promissory note. Equitable set-off does not apply to bills of exchange, including promissory notes. 2) The plaintiffs' application for summary judgment in relation to the counter-claim was dismissed. The court was not convinced that the counterclaim was without merit. The issues were reasonably complex, there was a significant amount at issue, and the action had important implications for the parties which went beyond the specific relief sought in the case. Thus, there was a general issue for trial. 3) The defendant's application for a stay of enforcement was dismissed. Although there was a link between the claim on the promissory note and the alleged breach of the non-compete, there was no evidence as to the amount that might be awarded on the counterclaim. There was limited evidence as to the merits, no evidence as to the plaintiffs' ability to satisfy a judgment and the defendant did not immediately pursue the breach of the non-compete. These factors weighed against granting a stay.

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N.J.G. v K.L.G., 2018 SKQB 42

Wilkinson, January 31, 2018 (QB17435)

Family Law – Child Support – Arrears
Family Law – Child Support – Imputing Income

The parties had a split custody arrangement since 2015 whereby the youngest son (now 16) resided with the petitioner mother and the oldest son (now 18) with the respondent. They also agreed in 2015 by consent order that the respondent father would pay child support of $1,320 per month pursuant to s. 8 of the Guidelines based upon his income of $185,125 and the petitioner's of $25,800. The parties had agreed that the respondent would pay spousal support of $3,000 a month for a fixed term of five years commencing in December 2014. Shortly

after the making of the child support consent order, the respondent's position was terminated because of the downturn in the oil industry. He attempted to find comparable employment and, on the assumption that he would be successful, did not apply for Employment Insurance (EI) benefits. However, he was only able to obtain work as a carpenter for short periods. He continued to meet his child support obligations until the end of September 2016 by borrowing funds from his family and cashing in an RRSP in the amount of $40,000. His spousal support obligations were paid only partially, and arrears accrued. In October 2016, he notified the petitioner of his loss of employment. He then applied to expunge or reduce child and spousal support arrears and for a resolution of his future child support obligation based on his reduced income. The court held that the respondent's spousal support obligation was final due to the terms of the settlement. It found that he was not intentionally underemployed and suspended his child support obligation for a period of six months to enable him to provide evidence of his income for 2016 and 2017. Following the decision, the respondent made a payment of $15,000 to the Maintenance Enforcement Office (MEO) in April 2017, but did not specify how it should be applied. The parties then negotiated a settlement of spousal support by way of a lump sum payment of $60,000. The petitioner advised the MEO of the settlement and that she was withdrawing spousal support from enforcement. The MEO recorded the respondent's payment as going to child support. The petitioner took the view that the settlement had contemplated the respondent's payment as a reduction of spousal support arrears and filed an affidavit disclosing "without prejudice" correspondence between the parties' legal counsel as evidence of the terms of the settlement. The respondent objected to her filing the affidavit without leave of the court. The issues were: 1) had the child support arrears accumulated due to a change in circumstances that affected the respondent's ability to make child support payments when they came due; 2) if so, was retroactive variation appropriate having regard to the factors set out in D.B.S.; 3) should income be imputed to the respondent for unclaimed EI benefits or due to inadequate efforts to regain employment; 4) what was the respondent's past and present income for child support purposes; and 5) should the $15,000 payment to the MEO be deemed on account of spousal support arrears and could the court consider the "without prejudice" correspondence? HELD: The court found with respect to each issue that: 1) the respondent's change in circumstances was sudden, unpreventable and sustained; 2) there was no blameworthy conduct and that child support would be varied retroactively in

line with the respondent's reduction in income from October 2016 when he provided notice of his intent to vary; 3) it would not impute income to the respondent under s. 19 of the Guidelines either retrospectively or prospectively, but it would include EI benefits that were available to him as income; 4) the respondent's income for 2016 was calculated as $39,300 and $78,500 for 2017. The petitioner's income for 2016 and 2017 was $33,400. Based upon the split custody arrangement, the respondent's child support obligation in 2016 was $308 and the petitioner's was $257 and the net monthly amount payable by the respondent was varied to $51 per month for October through December 2016. As there was no evidence whether the oldest child remained a child for support purposes, the court determined that for the period January to July 2017, the respondent's s. 8 Guidelines obligation was $402 per month and for the remainder of the year, he should pay $659 per month for one child under s. 3 of the Guidelines and continue to pay that amount in the future; and 4) the payment to the MEO was found to have been made on account of spousal support arrears. The court found that settlement privilege did not apply in the circumstances as the correspondence was relevant and necessary to explain the settlement agreement.

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S.B.T. v A.A.M., 2018 SKQB 43

Leurer, January 31, 2018 (QB17418)

Family Law – Child Custody and Access – Interim
Family Law – Paternity
Family Law – Affidavits

The father sought an order of joint custody of K., aged 3, and A., aged 2. The mother sought an order of sole custody of both children with supervised access to the father. The parties had both been drug and alcohol users. There was some dispute about whether they had ever been in a common-law relationship or ever been joint parents of the children. There was some uncertainty as to the paternity of K. The father was charged with assault against the mother. Since separation, the father had been attending anger management and parenting classes and two 30-day residences at substance abuse centers. He was residing with his parents in a residence that could accommodate the children. There was a non-contact order in place as between the parties. HELD: The court ordered joint custody on an interim basis subject to conditions that: 1) the mother be designated as the

final parental decision maker for six months following the order; 2) the children reside with the mother, subject to the father's rights of access; and 3) the father be entitled to information respecting the health, care and other arrangements for the children in a manner consistent with any non-contact order in place between the parents. The presumption that maximum contact is in the best interests of the children applied. Although K.'s paternity was not clear, the applicant had been the only father figure to the child and K.'s best interests were not to be analyzed on any starting basis different from the best interests of A. The court further ordered that for six months the father be provided with access two evenings per week, including not less than one overnight stay, and at least one day each weekend, with the exchange of the children to be facilitated by their grandmother for so long as the non-contact order remained in place. The court ordered that the father enter into a Supervised Access Undertaking and complete the parenting education required by s. 44.1 of the Queen's Bench Act within 30 days. The court's purpose for the directions in the judgment were to permit the father an opportunity to demonstrate that he had capacity and interest in having an expanded role in the lives of his children and to overcome his personal issues. The court further wished to minimize the need for the parties to return to court. The court struck certain paragraphs of a third-party affidavit, which contained double hearsay and offended Queen's Bench Rule 15-20(1).

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Forest v Saskatoon Correctional Centre, 2018 SKQB 49

Konkin, February 5, 2018 (QB17422)

Administrative Law – Procedural Fairness

The applicant sought judicial review of an appellate decision made by the director of a correctional center. The director upheld the decision of a disciplinary panel which found the applicant guilty of disobeying a lawful order of a staff member. HELD: The court quashed the decision of the director and ordered that he rehear the matter in accordance with the law. The Correctional Services Regulations require that a notice of charge contain a summary of evidence. The notice of charge against the applicant provided a description of the contravention but did not provide a sufficient summary of the evidence. This interfered with the applicant's ability to prepare his defence and amounted to a denial of procedural fairness.

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Hinds v Jacobs, 2018 SKQB 51

McMurtry, February 6, 2018 (QB17424)

Family Law – Custody and Access
Family Law – Child Support - Arrears

The parties separated in 2009 and since that time had shared parenting of their son on a week-on, week-off basis. They never reached agreement on child support specifically, but the respondent agreed that the petitioner could keep the full Canada Child Tax Benefit (CTB). The respondent made various contributions, such as paying childcare costs or putting funds into an RESP account, in lieu of child support. In 2014, the Canada Revenue Agency began clawing back the petitioner's benefits because she had been overpaid $6,000 between 2012 and 2014. In 2015, the petitioner filed her petition for custody, access, ongoing and retroactive child support. Because of the CRA clawbacks, the petitioner sought retroactive support back to 2012. An interim child support order was made shortly afterwards in which the respondent was ordered under s. 9 of the Guidelines to pay $474 per month, based upon his 2014 income of $84,500 and the petitioner's income of $31,175, and 73 percent of s. 7 expenses. The respondent was found to owe arrears in the amount of $2,370 from May to August 2015 and was ordered to pay $150 per month until the arrears were paid in full. Later in the same year, a judge ordered a custody access report to help determine the parenting arrangement. The assessor found that neither party was the primary caregiver and recommended that the shared parenting arrangement continue, but because the parties were in high conflict and unable to work together, he suggested that the respondent assume responsibility for the child's healthcare and education and the petitioner assume responsibility for extra-curricular activities and religious education. The petitioner objected to these proposals and argued that she had had primary responsibility for the child's health care. Since the 2015 interim child support order was made, the respondent's annual income had decreased to $33,000. The petitioner argued that the respondent was under-employed and that the court should impute income to him as he was able to limit his income because his spouse was earning a good salary that permitted him to stay at home to look after his two children from both relationships. The respondent argued that as the petitioner's spouse's income allowed her to remain at home, she was in no position to ask the court to impute income to him as

she had made the same decision that he had to arrange his employment around the needs of his family. He also claimed undue hardship in paying child support based on his income. He requested that the court consider s. 10 of the Guidelines to compare the household income in each home after taking into account their respective household debts. The respondent argued that he should not have to pay retroactive child support before May 2015, relying on the Supreme Court's decision in D.B.S. v S.R.G.

HELD: The court ordered that the shared parenting arrangement continue, but divided responsibility for decision-making regarding the child. The petitioner was granted the responsibility for the child's health care and spiritual education and the respondent would have responsibilities for education and extra-curricular activities. Regarding ongoing child support, the court agreed with the respondent that it would be improper to impute income to him. It decided that it would take s. 10 of the Guidelines into account because it would award child support based on the parties' current incomes, and straight set-off was appropriate in this case because there was no significant difference in the standard of living as between each household. The respondent was ordered to pay $59 per month and 56 percent of s. 7 expenses. Regarding the petitioner's claim for retroactive child support, the court found neither delay on the petitioner's part nor blameworthy conduct on the respondent's part. However, the respondent had benefitted from the petitioner receiving the CTB in lieu of child support. The court calculated his support obligation in arrears was $5,100 based upon the Guidelines using the parties' respective incomes between 2012 and 2014. The respondent was ordered to pay $200 per month until the arrears were paid in full.

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Pillay v College of Physicians and Surgeons of Saskatchewan, 2018 SKQB 54

Currie, February 14, 2018 (QB17451)

Professions and Occupations – Physicians and Surgeons – Discipline - Appeal

The appellant appealed from a decision of the discipline committee of the College of Physicians and Surgeons that found him guilty of improper conduct. A patient alleged that during a medical appointment with the appellant, he hugged her and asked her if he could kiss her. The appellant denied the

allegations. The committee's decision was based upon its determination of the credibility of the appellant and the patient. It found that it was confident in the patient's testimony but not in that of the appellant and concluded that he had engaged in the conduct. He appealed on the basis that the committee's decision was unreasonable, asserting that errors were made in various aspects of the decision.
HELD: The appeal was dismissed. The standard of review was reasonableness. The court noted that although its review was of the committee's ultimate decision, it would examine the reasonableness of each element of the decision. It found that the committee had not made unreasonable decisions when assessing the points raised by the appellant, nor had it committed palpable and overriding errors. The ultimate decision fell within the realm of reasonableness.

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Potzus v Potzus, 2018 SKQB 55

Krogan, February 15, 2018 (QB17436)

Statutes – Enforcement of Maintenance Orders Act, 1997, Section 12.2

The Maintenance Enforcement Office (MEO) applied for an order to declare Potzus Paving & Road Maintenance Ltd. (PPRM) jointly and severally liable with the respondent payor for the support payments required pursuant to an interim order made in Queen's Bench chambers in December 2015. The application was made under s. 12.2 of The Enforcement of Maintenance Orders Act, 1997. The interim order for child and spousal support in the amount of $49,490 per month was based upon the respondent's annual employment income of $250,000. Under s. 18 of the Guidelines, the court also attributed further corporate pre-tax income available to him from PPRM of $1,150,000. The decision was upheld by the Court of Appeal (see: 2017 SKCA 15). The respondent payor had failed to follow the support order and had made payments based upon his annual income. The MEO served PPRM with a notice of continuing seizure. PRRM made payment pursuant to the seizure, but it had not met the obligations set out in the interim order and the MEO then made the application. PPRM acknowledged that the requirements of s. 12.2 of the Act had been met, but argued that the court's power to make the order was discretionary. In this case, it should decline the application because PPRM's interests must be protected and making it jointly and severally liable for

support obligations could force it to conduct its business differently.
HELD: The application was granted and PPRM was ordered jointly and severally liable with the respondent payor.

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Kennett v Diarco Farms Ltd., 2018 SKQB 61

Leurer, February 21, 2018 (QB17440)

Civil Procedure – Queen's Bench Rules, Rule 7-3, Rule 13-3, Rule 13-30

Prior to the trial between the parties, the Registrar was advised that a settlement had been reached and trial dates vacated. A dispute then arose as to whether a binding settlement had been achieved. The plaintiff applied for an order enforcing the alleged settlement or for summary judgment. The defendants applied to strike certain parts of affidavits filed in support of the plaintiff's application. Relying upon Queen's Bench rule 13-30, the defendants argued first that specific paragraphs of the plaintiff's affidavits contained hearsay as they contained numerous statements sworn on information and belief. The statements were a narrative of oral and written communications between the lawyers for each of the parties before and after the alleged settlement, and as the plaintiff was not privy to these communications, his evidence violated rule 13-30. The plaintiff argued that Queen's Bench rule 7-3(3) applied and evidence on information and belief in an application for final relief was permitted. Furthermore, as the plaintiff had submitted an affidavit from his lawyer affirming the accuracy of the information submitted by the plaintiff's affidavit, the hearsay concern was obviated. The defendants also objected to the affidavit on the grounds that it contained information that was not legally relevant to the issue of whether an enforceable settlement was achieved, contrary to Queen's Bench rule 13-30.
HELD: The court dealt only with the defendant's application. It found that the combined effect of Queen's Bench rules 13-30 and 7-3(3) allowed it to consider evidence sworn on information and belief on a summary judgment motion provided the source of the hearsay evidence was identified as required by rule 13-3(3). In this case, the accuracy of the plaintiff's affidavit was confirmed by his lawyer's affidavit. The court refused to strike portions of the plaintiff's affidavit as irrelevant because of the context of the issue which would require the court to consider the admission of extrinsic evidence relating to the formation of

an alleged contract. It was necessary for it to hear complete argument on the merits of the plaintiff's motion to enforce the alleged settlement before it would determine whether any aspect of its evidence was irrelevant. The court then dealt with the defendants' objections to specific statements in the plaintiff's and his lawyer's affidavits and struck various paragraphs on various grounds.

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McFarlane v McFarlane, 2018 SKQB 62

Megaw, February 22, 2018 (QB17452)

Real Property – Certificate of Pending Litigation – Discharge
Family Law – Family Property

The respondent applied for an order vacating a certificate of pending litigation (CPL) registered by the petitioner against a certain parcel of land. The petitioner argued that the applicant did not have standing to bring it and that the property was subject to division in their family property action. The parties were married in 2015. The respondent, the sole shareholder of a corporation, purchased the property in 2014. He deposed that the corporation sold the land in 2017 to a company owned by his mother who now wished to sell it.
HELD: The application was granted. The court vacated the CPL. The decisions in Mitchelson and MacEwen were authority that the property held by the respondent's corporation at the date of the issuance of the petition was not subject to division; only the value of the shares in the corporation constituted family property in these proceedings. The respondent had standing to vacate the CPL because the action had not entitled the petitioner to claim an interest in the title to the property and he was a party to the action. Although the respondent was successful and would be entitled to costs, the court fixed them at $250 because neither of the parties had brought the cases noted above to the attention of the court.

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Regina Housing Authority v Y.A., 2018 SKQB 70

Chow, February 28, 2018 (QB17454)

Landlord and Tenant – Residential Tenancies Act, 2006 - Appeal

The appellant, the Regina Housing Authority (RHA), appealed pursuant to s. 72(1) of The Residential Tenancies Act, 2006 from the decision of a Hearing Officer of the Office of Residential Tenancies (ORT). The respondents were tenants of the RHA and had filed individual tenant claims with ORT asserting that RHA had violated their right to quiet enjoyment as provided by s. 44 of the Act and that RHA had failed to maintain the premises in a good state of repair and fit for use and enjoyment contrary to s. 49 of the Act. The respondents had complained to the RHA about second-hand smoke infiltrating their rental units emanating from other units in the building where tenants smoked. The officer heard the respondents' individual complaints concurrently, found in their favour, and granted them each two-thirds rent abatement under s. 70(6) of the Act. The RHA appealed on numerous grounds that included that the officer had erred by: 1) imposing a rent abatement that was unjust, inequitable and excessive. The officer's decision lacked an evidentiary basis and his brief reasons were inadequate; 2) failing to consider the reasonable steps taken by RHA to address the respondents' individual complaints; and 3) failing to consider the respondents' duty and failure to reasonably mitigate their damage or loss.

HELD: The appeal was dismissed. The court found with respect to each ground of appeal that the officer had not erred: 1) in making the order for rent abatement under s. 70(6)(c) of the Act. He had the discretion to do so and his reasons, when viewed in the context of the decision as a whole, were adequate. He found that the respondents' right to quiet enjoyment was violated by the second-hand smoke and as it was a serious breach, it warranted the abatement. There was no formula to assess damages in the circumstances and the court found that the award was not excessive nor unreasonable; 2) because after concluding that the respondents were denied their right of quiet enjoyment contrary to s. 44 and s. 49 of the Act, it was immaterial whether the RHA had unsuccessfully attempted to remedy the situation; and 3) in the way he addressed the respondents' responsibility to minimize their damage or loss under s. 8(2) of the Act. The officer concluded that the mitigation efforts made by each of the respondents were reasonable and sufficient to discharge the onus upon them.

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Input Capital Corp. v Thomas, 2018 SKQB 72

Rothery, February 28, 2018 (QB17456)

Statutes – Interpretation – The Personal Property Security Act, Section 50(3)

The defendants, Robert Thomas (Robert) and Magnum Grain Handling Company Ltd. (Magnum Grain) served the plaintiff with a Demand pertaining to four financing statements that had been registered by it at the Personal Property Registry in 2013. They stated that they were named as debtors in the financing statements and demanded their names be removed. The plaintiff applied pursuant to s. 50(7) of the Personal Property Security Act (PPSA) for an order that the registrations be maintained on the basis that the collateral listed in the registrations pertained to collateral that had been transferred to Thomas by his son, Jeremy and Jeremy's corporation, Magnum Land Holdings Company Ltd. (Magnum Land) without the consent of the plaintiff. When the plaintiff learned of the transfers, it registered the four financing change statements under s. 51(2) of the PPSA. The application occurred in the context of a much larger dispute between the parties. The plaintiff commenced an action against Robert and Jeremy and their respective corporations for judgment for over $2.23 million for monies advanced by it to Jeremy and Magnum Land to produce canola for purchase. Jeremy and Magnum Land granted a security interest in all present and after-acquired property to secure their obligations under the contract. The canola was not delivered to the plaintiff. In their suit, the plaintiff alleged that Jeremy and Magnum Land had transferred certain personal property to Robert and Magnum Grain.
HELD: The application was granted. The court ordered that the registrations be maintained in the Personal Property Registry until the determination of the trial, pursuant to s. 50(7) of the PPSA. The court found that Robert and Magnum Grain were the debtor as referred to in s. 50(3)(d) of the PPSA and therefore did not have standing to give the Demand to the plaintiff.

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Regina Qu'Appelle Regional Health Authority v Saskatchewan Union of Nurses, 2018 SKQB 78

Kalmakoff, March 6, 2018 (QB17460)

Labour Law – Arbitration Board – Judicial Review

The Regina Qu'Appelle Regional Health Authority (RQRHA) applied for judicial review of a decision made by a Board of Arbitration, requesting that the decision be quashed and a re-hearing ordered. Under the terms of the collective agreement

between RQRHA and the Saskatchewan Union of Nurses (SUN), the former was required to add "charge pay" to a nurse's hourly wage in circumstances where that nurse was required to perform certain duties relating to coordinating a unit when the nursing supervisor was not on duty. In one of the facilities operated by RQHRA, a medical clinic open seven days per week from 9 am to 8 pm and handling patients on an appointment and walk-in basis, the primary care manager was not a registered nurse. Her role was managing staffing and physician support levels and other responsibilities, but she played no direct role in patient care. Her hours of work were Monday to Friday during the daytime. The clinic employed three full-time nurses and others on a casual basis, all of whom were SUN members. RQHRA did not designate any of its nurses at the clinic as a nursing supervisor or "in charge" nurse once the manager was hired and therefore no nurses were receiving charge pay. SUN filed a grievance and the board that heard it held that: where no nursing supervisor position existed in a health care unit, RQHRA was required by the agreement to designate a SUN member as "in charge". It found that nurses at the clinic were coordinating unit activities in a way that warranted charge pay. It then decided that the remedy for RQHRA's violation of the agreement was to order that charge pay be retroactively payable to the person who should have been designated "in charge". HELD: The application was granted in part. The board's decision was quashed with respect to the remedy and the matter was to be resubmitted to the board for consideration of further evidence. The court found that standard of review was reasonableness. The board's decision that the agreement required RQHRA to designate a SUN member "in charge" at the clinic, although there was no nursing supervisor, fell within the range of possible acceptable outcomes. The board had applied and followed persuasive and relevant jurisprudence related to the interpretation of contracts and collective agreements. However, the court regarded the portion of the board's decision relating to the appropriate remedy as unreasonable. The board failed, without providing adequate explanation, to follow a relevant line of arbitral jurisprudence that consistently held that determining who was entitled to charge pay required a finding as to whether a particular grievor actually coordinated unit activities and failed to set out any criteria for determining who should have been designated as in charge.

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