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R v Bouvier, 2018 SKCA 89

Caldwell, November 19, 2018 (CA18088)

Criminal Law – Judicial Interim Release

The applicant applied for judicial interim release pursuant to s. 679 of the Criminal Code and for a stay of his driving prohibition pursuant to s. 261 of the Code and s. 143 of The Traffic Safety Act. The applicant pled guilty in Provincial Court to impaired driving contrary to s. 253(1)(a) of the Code and then applied under s. 730 for a curative conditional discharge which would have allowed him to seek treatment for his alcoholism. The Provincial Court judge denied the application, entered the conviction under s. 253(1)(a) and sentenced the applicant to 10 months' incarceration and ordered a three-year driving prohibition under s. 259 of the Code. The applicant appealed on the grounds that the judge erred in dismissing the curative discharge application and then made this application.
HELD: The application was dismissed. The court found that it was unable to grant judicial interim release under s. 679(3) on the basis that impaired driving was a serious offence and the appellant's continued detention was in the public interest in the circumstances. The court would not grant a stay of the s. 259(1)(c) driving prohibition, either: it would also undermine public confidence if the applicant were permitted to drive pending his appeal, as he would continue to be subject to a three-year driving prohibition regardless of the outcome of the appeal.

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Cameron v Saskatchewan Institute of Agrologists, 2018 SKCA 91

Jackson Herauf Schwann, November 21, 2018 (CA18090)

Statutes – Interpretation – Constitutional Questions Act, 2012, Section 15
Statutes – Interpretation – Agrologists Act, 1994, Section 28
Professions and Occupations – Agrologist – Professional Misconduct

The appellant appealed the decision of a Queen's Bench judge that confirmed the decision of the Discipline Committee (DC) of the Saskatchewan Institute of Agrologists (Institute). The DC found the appellant guilty of professional misconduct and ordered that he be reprimanded, fined $2,000 and pay costs of $15,000 to the Institute. The DC had held a hearing because a fellow member of the Institute complained to it regarding the content of various email editions of a bimonthly newsletter created and written by the appellant. He distributed the newsletter to between 700 and 800 people, most of whom were members of the Institute. The DC found that the appellant had breached the standards expected of agrologists as set out in their Code of Practice because the newsletter contained unsubstantiated questions regarding the integrity and honesty of other agrologists and demonstrated his disregard for his professional responsibility to abstain from making misleading public communication about other members. Although this finding of professional misconduct would infringe the appellant's s. 2(b) Charter rights, the DC concluded that it was justified under s. 1 of the Charter. In its decision regarding the penalty, the DC found that the newsletters should be regarded as public communication rather than private and the appellant should have acted with greater sensitivity to others. The appellant appealed the finding of professional misconduct by the DC and the penalty. With respect to the finding, the chambers judge found the appropriate standard of review was reasonableness and determined that the appellant had had a fair hearing. The DC's findings that his communication was public and that his comments constituted professional misconduct were reasonable. The issues on this appeal were: 1) had the judge erred in deciding that the DC's findings were reasonable in the following ways: a) that the appellant was guilty of professional misconduct; and b) the penalty decision as to costs; and 2) whether the appellant should be permitted to argue the Code unjustifiably infringed his s. 2(b) Charter right. HELD: The appeal was dismissed. The court found with respect to each issue that: 1) the chambers judge: a) had erred in his application of the reasonableness test because he dealt only with the factor of justification. It then reviewed the DC's decision itself to determine whether it was reasonable to have found: a) professional misconduct and found that it was because there was justification and the decision was transparent and intelligible and fell within the range of acceptable outcomes. The DC was entitled to a degree of deference with regard to its

interpretation and application of its home statute which would include findings of professional misconduct as set out in s. 28 of the Act; and b) had not erred in finding the DC's decision as to costs was reasonable. The costs incurred by the Institute were $62,600.The DC's reasons were in accordance with the principles outlined in Abrametz; and 2) the appellant had not made this argument before either the DC or the chambers judge. It was a new issue and the appellant had not given notice under The Constitutional Questions Act, 2012. The court declined to depart from the general rule against raising constitutional arguments for the first time in the Court of Appeal.

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Hilmoe v Hilmoe, 2018 SKCA 92

Herauf Schwann Ottenbreit, November 23, 2018 (CA18091)

Wills and Estates – Gifts – Inter Vivos
Statutes – Interpretation – Land Titles Act, 2000, Section 90
Trusts – Resulting Trusts

The appellants appealed the decision of a Queen's Bench judge that granted a declaration that the respondent was the legal and beneficial owner of five parcels of farmland (see 2017 SKQB 312). The farmland had originally been owned by the respondent's deceased husband. In 2005 the deceased made his will and in it provided the respondent with a life interest in the land and after her death, it was to be given to the appellants, his children by his first marriage. Testimony was given that the deceased confirmed the terms of his will in conversation with the appellants. Shortly before he died in 2006, the deceased transferred title to the land into joint names with right of survivorship with the respondent. The appellants opposed the respondent's application and argued the farmland was subject to a resulting trust in their favour or alternatively, if the transfer was a valid inter vivos gift, it was the product of undue influence exerted by the respondent and should be set aside. The trial judge found in favour of the respondent. The appellants argued on the appeal that the trial judge had erred: 1) by failing to correctly identify the law in relation to gifts of deceased donors. He had not regarded the respondent's evidence with the care or suspicion, nor had he required her to adduce corroborative evidence as required of a donee in these circumstances; 2) in law with respect to his treatment of the evidence of donative intent; 3) in his analysis of undue influence; and 4) in his application of The Family Property Act (FPA). HELD: The majority of the court (Herauf and Schwann JJ.A.) dismissed the appeal. The appeal was restricted to errors of law. They found with respect to each issue that the trial judge had not erred: 1) in failing to view the respondent's evidence with suspicion or requiring corroborating evidence from her. He correctly identified the law with

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respect to the inter vivos transfers of land into joint title with right of survivorship and followed Dunnison Estate that held that the burden of proof will be on the person challenging the title to establish on a balance of probabilities that the transferor lacked donative intent based on s. 90(1) of The Land Titles Act, 2000. The judge considered the post-transfer evidence and its significance to the appellants but chose to assign it limited weight; 2) in his treatment or weighing of the evidence in drawing an inference that the deceased transferor knew what he was doing with the farmland based upon how he had dealt with his other assets, as such acts illustrated that he understood the concept of joint tenancy with right of survivorship, regardless of the fact that the deceased had only a grade 8 education and had not received legal advice. The appellants had not identified an error of law arising from the evidence; 3) regarding his application of the law to the facts in finding that there was no evidence of undue influence in that the deceased was not mentally infirm. The existence of a spousal relationship itself did give rise to a presumption of it following Thorsteinson; and 4) in finding that s. 50 of the FPA was inapplicable, again because the onus rested on the appellants to demonstrate that the deceased intended to create a life interest as opposed to an outright gift. In his dissenting decision, Ottenbreit J.A. allowed the appeal. He found that the trial judge erred in law because he misapprehended the evidence and failed to consider evidence of the deceased's intent. The appellants had discharged the burden of proving on a balance of probabilities that the deceased did not intend, by the transfer of the farmland to the respondent, to gift her the beneficial interest in it. Therefore, the respondent held the farmland subject to a resulting trust in favour of the estate of the deceased pursuant to the terms of his will.

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R v Potter, 2018 SKPC 60

Gray, November 9, 2018 (PC18062)

Criminal Law – Assault – Sexual Assault
Criminal Law – Dangerous Offender Application
Criminal Law -Sentencing – Dangerous Offender – Indeterminate Sentence

The accused pled guilty to two Criminal Code offences: sexual assault on a person under the age of 16 years, contrary to s. 271 of the Criminal Code, and exposing his genitals to the same person under 16 years of age, contrary to s. 173(2). The complainant was nine years old when he met the accused. The complainant said the accused masturbated in front of him. Additionally, the accused touched the complainant's genitals once and attempted to masturbate him. The accused admitted that he took six naked pictures of the complainant. He indicated that he

knew the actions were illegal, but he did not see them as harmful. The accused was 40 years old at the hearing. He was removed from his mother's home at a young age and adopted. His birth mother drank heavily during pregnancy and the accused was affected. The accused was considered to be of average intelligence. He was removed from his adoptive family at about the age of 12 due to reports of him sexual offending against young children in the neighbourhood. In 1993, he was convicted of three counts of sexual assault against residents in a group home he was living in. He was sentenced to 15 months' secure custody. The accused had frequent subsequent charges and sentences. Many of the charges related to breaches of court orders. He eventually started to receive federal incarceration time for his offences. The offence that was most recent to the sexual assault relating to the dangerous offender application was a charge in 2005 when the accused rode his bike past a school ground. The accused's probation officer indicated that he was a high risk to re-offend, which was increased by the accused's increased use of marijuana. The probation officer doubted that the accused had internalized information from group treatment even though he could repeat the information. The accused's institutional parole officer at a federal institution was concerned about his risk level because he told her he would re-offend if he was released. Dr. T., the doctor appointed to assess the accused, was concerned that the accused had an inability to self-manage his risk to sexually offend even with community treatment and volunteer supports in place. The accused's pedophilic disorder was suggested to be at a severe level by Dr. T. Dr. T. was also concerned with the accused's reluctance to take medications to alter his sex drive. The accused indicated that Dr. L., the doctor testifying for the accused, had convinced him to take a high intensity treatment program and take anti-androgen medication to help manage his risk. Dr. L. concluded that the accused should be supervised as long as possible. The court considered the following issues: 1) was the accused convicted of a serious personal injury offence as defined by s. 752 of the Criminal Code; 2) was the accused a dangerous offender on the basis of any of the grounds set out in s. 753(1)(a)(i), (ii), or (b) of the Criminal Code; and 3) if the accused did not meet the criteria for designation as a dangerous offender, what was the appropriate sentence?

HELD: The issues were determined as follows: 1) the sexual assault the accused committed was found to be a serious personal injury offence as defined in s. 752 of the Criminal Code; 2) the court was satisfied that the accused's conduct demonstrated a pattern of behaviour that showed a persistent failure to restrain harmful conduct, particularly toward children, and a likelihood of continued failure to do so in the future, as outlined in s. 753(1)(a)(a) of the Criminal Code. The accused started offending in a sexual nature when he was 12 years old and he had multiple victims. The court found that it would be unlikely that the accused would make the personal commitment necessary to ensure that he did not offend in the future. Further, there was concern that the

accused did not truly appreciate the harmful impact of his offending; and 3) the court found that a determinative sentence of imprisonment could not reasonably protect the public against future sexual assaults against children or other serious personal injury offences by the accused. Similarly, the court found that a determinate custodial sentence in conjunction with a long-term supervision order of a maximum of ten years would inadequately protect the public against future sexual assaults and other serious personal injury offences. The accused had to be monitored beyond ten years to ensure that he would not re-offend. Therefore, the accused had to be sentenced to an indeterminate sentence of imprisonment pursuant to s. 753(4)(a). The accused was also sentenced to two years' incarceration, time served, for the offence contrary to s. 173(2) of the Criminal Code.

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R v Pontes, 2018 SKPC 69

Baniak, November 8, 2018 (PC18064)

Criminal Law – Assault – Sexual Assault
Criminal Law – Evidence – Credibility
Criminal Law – Inducing Sexual Contact

The accused was charged with two Criminal Code offences, namely: sexual assault, contrary to s. 271; and inducing or attempting to induce the complainant by threats to have sexual contact with her, contrary to s. 346(1.1)(b). According to the complainant, she was living in a motel and only had half the rent one month. The complainant said that the accused, the owner of the motel, took her to a back room where he felt her breasts and then asked her to go to his room around 10:00 to have sex. The complainant said that the accused promised her a minimum wage job. In the accused's room, the complainant did take her clothes off, but then changed her mind about sleeping with the accused. She said that the accused then got on top of her and she could not get away. The accused did eventually let the complainant leave. She went to the hospital the next day and the police attended to her there. The complainant was advised about a week later that she had gonorrhea and HIV, which she believes she got from the accused. In cross examination, the complainant admitted that she drank alcohol every day because she was an alcoholic, but that she was sober in court and on the day she was sexually assaulted. She agreed that she was angry when she was evicted and told the accused in front of people that she was going to charge him. The accused also testified. He indicated that the complainant was upset when she was evicted. The accused indicated that the complainant was evicted because of the company she had in her room. He also said that he did not have HIV and had never had gonorrhea. The accused was not sure if the complainant had ever

been in his personal suite.
HELD: The court analyzed the two alleged sexual assaults separately. The first allegation was when the complainant indicated that the accused felt her breasts in the back room. The court found that the complainant gave very detailed descriptions of the surroundings and the alleged assault. The court believed the complainant, as her testimony was both credible and reliable. The Crown proved its case beyond a reasonable doubt with respect to the sexual assault occurring in the back room. The complainant's testimony was found to be less straightforward and more difficult to follow regarding the alleged assault in the accused's room. The complainant admitted to using drugs and alcohol in between the occurrences. There was no medical evidence provided. The court was not convinced beyond a reasonable doubt that the accused was guilty of the second sexual assault, so he was found not guilty. The evidence was also found to fall short of establishing an offence contrary to s. 346 of the Criminal Code.

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Leisure North and Co. Holdings Ltd. v Kowal, 2018 SKPC 74

Schiefner, November 16, 2018 (PC18065)

Contracts – Breach of Contract – Non-payment
Contracts – Guarantee – Enforceability
Contracts – Guarantee – Validity
Small Claims – Breach of Contract

The plaintiff was a company selling building products. The plaintiff sued the defendant, T., for recovery of $29,456.67, which was the balance due and owing for goods sold to T.'s sole proprietorship. The other defendant, K., was alleged to be the guarantor of T.'s invoice. T. did not attend the proceedings. K. acknowledged that she personally guaranteed the payment of the goods and materials purchased by T.; however, she alleged that she limited her responsibility to $6,000. The defendants were in a common-law relationship. T. obtained a credit application from the plaintiff and K. described herself as the bookkeeper and guarantor on it. She inserted $6,000 where the form asked "monthly credit desired". K. indicated that T. was authorized to purchase for the proprietorship. A document entitled "Guarantee" was attached to the Application for Credit. K. completed and signed both the Guarantee and Application for Credit in her own handwriting. Monthly statements were sent, and K. acknowledged that she saw them and was aware that the balance owing exceeded $6,000. She said that she thought T. would be responsible for paying any amounts over $6,000. In October 2015, T. negotiated an increase in credit with the plaintiff. The plaintiff's claim against T. was for breach of contract for failing to pay for the items he purchased. The claim against K. was for

breach of contract due to her failure to fulfill her obligations pursuant to a personal guarantee.
HELD: The court found in favour of the plaintiff. The plaintiff was entitled to judgment against T. in the amount $28,312.83 together with prejudgment interest and costs of $100. The court had to consider three questions to determine the claim against K.: 1) was the Guarantee valid; 2) was the Guarantee enforceable; and 3) did K.'s obligations under the Guarantee extend to the total outstanding balance of the account or was it limited to $6,000 or some other amount? The court determined the questions as follows: 1) the court was satisfied that the document executed by K. was a valid personal guarantee; 2) there was no evidence that K. entered into the Guarantee under duress. The court went on to consider whether there was undue influence. The court concluded that there was no evidence that T. exercised overpowering influence over K. or that her decision to help T. and his business was exercised by anything other than free will. Even if there had been undue influence, the court determined that the plaintiff did not know nor ought to have known of the influence. The Guarantee was enforceable; and 3) the court did not find that the Guarantee was limited to $6,000. The reference to $6,000 in the credit application was to the amount of monthly credit sought, not the limit of a guarantor's financial liability under the Guarantee. K.'s Guarantee fell into the class of accommodation surety because she did not expect remuneration. The court found that the negotiations by the plaintiff and T., wherein he was provided credit of $24,000 up from $6,000, was a material alteration. In Saskatchewan, a material alteration to a contract of debt negotiated without the consent of the surety does not presumptively discharge the surety. The surety only has a defense to the extent that the surety has been prejudiced by the actions of the principal and the creditor. The additional credit was a significant change in the account being guaranteed. K. was prejudiced by the extension of credit. The court found that K.'s obligations under the Guarantee were limited to the amount of the outstanding balance as of October 16, 2015 when T. negotiated the first substantial increase in the credit being extended by the plaintiff. K.'s prejudice within the meaning of s. 69(2) of The Queen's Bench Act, 1998 only provided a defence to the additional debt incurred by T. after October 16, 2015. The court had insufficient evidence to determine the amount of the account at that time.

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R v St. Cyr, 2018 SKQB 295

Chow, November 2, 2018 (QB18284)

Criminal Law – Break and Enter with Intent to Commit Indictable Offence – Sentencing – Dangerous Offender – Indeterminate Sentence

The Crown applied under Part XXIV of the Criminal Code to have the accused designated a dangerous offender and to impose upon him an indeterminate sentence of imprisonment in accordance with ss. 753(1) and 753(4) respectively. The accused had been charged with 18 separate violations of the Code, pled guilty to two charges under ss. 348(1)(b) and 334(b) and was found guilty of committing nine offences. In the context of this application, the predicate offence was the indictable offence of breaking and entering a dwelling house and committing the indictable offence of robbery with a restricted or prohibited firearm contrary to ss. 348(1)(b) and 344(1)(a). The circumstances were summarized in the trial judgment (see: 2017 SKQB 279): the accused broke into a house while masked and pointed a loaded 9-millimetre semi-automatic handgun at one of the occupants and stole various items of property. While fleeing the scene, the accused fired at least one round of ammunition from the handgun. The defence conceded that the predicate offence met the statutory definition required under s. 752 of the Code, but denied that the accused represented a threat to the life or safety of others or that the evidence proved the necessary pattern of repetitive aggressive behaviour establishing the accused's failure to restrain himself. There was no evidence that the accused's behaviour had resulted in death, physical injury or severe psychological damage as required by s. 753(1)(a)(i). The defence argued that the Crown's application should be dismissed and the accused given a traditional sentence of imprisonment. At the time of sentencing the accused was 39 years old and his criminal record included 40 youth and 37 adult convictions between 1992 and 2016. Many of the offences involved robbery with a weapon. The accused often committed offences shortly after being released from prison. He frequently failed to comply with conditions. The accused had participated in and completed numerous programs and counselling while imprisoned but continued to reoffend. The psychiatrist who authored the assessment report stated that the accused suffered from anti-social personality disorder with moderate psychopathic personality features and substance abuse disorders (cocaine, opioids and alcohol). His risk of future violence in the community was estimated as high. The psychiatrist's opinion was that it was possible that the risk could be managed in the community under a long-term supervision order (LTSO), but that he had reservations in light of the accused's history of failing to comply with conditions in the community. The accused testified that he had changed and he did not want to spend the rest of his life in prison. He had come to understand that although he did not physically harm his victims, his robberies caused them psychological trauma. HELD: The accused was designated a dangerous offender and sentenced to an indefinite term of imprisonment pursuant to s. 753(4) of the Code. The court found that the accused's commission of the predicate offence in the context of his offending behaviour showed a clear and undeniable pattern contemplated by ss. 753(1)(a)(i) and 753(1)(a)(ii). The accused posed a high likelihood of harmful recidivism, despite his assurances to the

contrary, based upon his cycle of violently reoffending despite repeated programming and treatment and the psychiatrist's assessment of his risk to reoffend. In this case, the court was not convinced that a significant determinate sentence followed by an LTSO would adequately and effectively serve to reduce the threat posed to the public by the accused.

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R v Cramer, 2018 SKQB 298

Barrington-Foote (ex officio), November 5, 2018 (QB18287)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Conviction – Appeal

The appellant appealed his conviction of operating a vehicle while his ability to do so was impaired by alcohol contrary to ss. 255 and 253(1) of the Criminal Code. At trial, a police officer testified that he observed a vehicle driven by the appellant travelling 120 to 130 km/hr in a residential area where the limit was 50 km/hr. The officer asked the appellant for his licence and noted that he fumbled while looking for it. As the officer could smell alcohol coming from the vehicle, he asked the appellant if he had been drinking and he admitted that he had. When he asked the appellant to step out of the vehicle, the officer could smell beverage alcohol coming from him and arrested him for impaired driving. The appellant did not have bloodshot eyes or slurred speech, nor did he demonstrate any problems with his balance. The accused appeared nervous but was otherwise polite and cooperative. The trial judge accepted the officer's evidence and found that based on the evidence as a whole, the Crown had proven beyond a reasonable doubt that the appellant was impaired by alcohol. The grounds of appeal were whether: 1) the trial judge erred in that holding; and 2) he had misconstrued or misapplied the evidence. HELD: The appeal was allowed. The conviction was quashed and the appellant acquitted. The court found with respect to each ground that: 1) it was not reasonable for the trial judge to conclude that the evidence as a whole excluded all reasonable alternatives to a finding that the appellant was impaired. The evidence as a whole left open the plausible alternative that the accused fumbled because he was nervous and exuded a strong smell of alcohol due to recent consumption. Speeding was not necessarily an indication of impairment; and 2) it was unnecessary to consider the second ground.

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Uddin v Tubello Stoneworks Ltd., 2018 SKQB 301

Barrington-Foote (ex officio), November 14, 2018 (QB18292)

Builders' Lien – Commencement of Action – Builders' Lien Act, Section 86(1)
Builders' Lien – Limitation Period
Builders' Lien – Payment of Money in Court – Builders' Lien Act, Section 56(4)

The applicant and respondent both applied pursuant to s. 56(4) of The Builders' Lien Act for payment out of money paid into court pursuant to an ex parte order. The applicant contracted a home builder to construct a residence. The builder subcontracted a company to complete the kitchen. The kitchen contractor subcontracted the respondent to supply and install the countertops. The builder paid the kitchen contractor, but the kitchen contractor did not pay the respondent. In April 2016, the respondent filed a lien in the amount $9,929. The holdback was paid by the applicant in May 2016. The applicant applied for payment of the amount in court in June 2018. The respondent had not applied for payment out pursuant to s. 56(4) of the Act or commenced an action in accordance with s. 86(1). The respondent filed its application for payment twenty days after the applicant's application.
HELD: The applicant's application was granted. The limitation period relating to the commencement of an action provided by s. 86(1) of the Act expired before the application. In Kasa, the court determined that an application under s. 56(4) for a determination of who is entitled to the funds in court does not revive the right to commence a proceeding in respect of a claim that is already statute barred. The court agreed and found that the respondent's underlying claim did not survive the expiration of the limitation period. The applicant was, therefore, entitled to the money paid into court.

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Lussier v Meabry, 2018 SKQB 302

Megaw, November 8, 2018 (QB18290)

Civil Procedure – Queen's Bench Rules, Rule 10-13, Rule 13-7

The respondent applied for leave to file an answer and counter-petition and to set aside the petitioner's noting for default. The petitioner had applied for judgment. The respondent had first been noted for default in March 2018. The petitioner had then filed an amended petition in June 2018 that included a claim for child support pursuant to The Family Maintenance Act, 1997 and served the notice of application for judgment and child support on the respondent. The respondent appeared by telephone, the issue of retroactive support was adjourned and the respondent was ordered to provide income tax information and

to pay ongoing child support as of July 2018. As he did not have sufficient information, the judge did not determine the property issues and directed that the petitioner obtain an appraisal. The judge provided the respondent the opportunity to have the noting for default set aside and to file an answer and counter-petition within 30 days of the order. The respondent did not comply. In this application, he deposed that the reason for his initial default was because he became very ill in the fall of 2017. He was hospitalized in November through December at the time of the petitioner's first application and then spent the winter recuperating and was unable to deal with the court proceedings. He could not attend court for the June 2018 hearing because his vehicle had been impounded. He had just arranged for counsel to represent him after that hearing when he was arrested and charged with a series of criminal offences and had not yet been released. At this point he was able to communicate with his counsel and move matters along. He proposed that with respect to the family property he would seek an unequal division with reasons provided. Although the petitioner had arranged for the appraisal, materials filed showed that foreclosure proceedings were underway regarding the family home. HELD: The application was granted. The court set aside the noting for default and permitted the respondent to file an answer and counter-petition within 10 days of the order. It did so pursuant to Queen's Bench rule 13-7, reflecting the inherent jurisdiction of the court to enlarge time fixed by an order, and rule 10-13, to set aside a default judgment. The respondent had offered some explanation for his failure to comply with the previous court order and may have a meritorious position opposing the petitioner's proposed judgment. The delay, inconvenience and expense caused to the petitioner by granting the respondent's application could be compensated by an award of costs in the amount of $3,000.

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Chaplin Grain Co. v Antelope Creek Enterprises Ltd., 2018 SKQB 304

Leurer (ex officio), November 9, 2018 (QB18291)

Statute – Interpretation – Canada Grain Act, Section 83 Contract Law – Breach

The plaintiff brought an action for breach of contract and claimed damages for the amount of its loss. The defendant counterclaimed, alleging it relied on a representation made by the plaintiff that it was a licensed grain dealer. The plaintiff operated a grain cleaning plant and part of its business involved the resale of grain purchased from producers. It conceded that it was not licensed as a grain dealer pursuant to the Canada Grain Act at the relevant time. The defendant, a farming corporation with large land holdings was operated by its

principal, a farmer who was experienced in the marketing of lentils. The defendant's principal had contacted the plaintiff to determine whether it was interested in purchasing the lentils in early September and advised that he wanted $0.34 per pound. He also alleged that at that time he asked the plaintiff's representative if the plaintiff was licensed under the Act and the representative said that licensure was in progress. After identifying a buyer for the lentils who was prepared to pay $0.35 per pound, the plaintiff contacted the defendant. He testified that he advised the plaintiff that he needed to have the lentils delivered and paid for by November 10, 2015. The plaintiff conceded that it understood this, but only promised that it would try to achieve it as its ability to receive grain on at a particular date was outside of its control. The contract was written and delivered to the defendant who detected errors in the first and second versions which he corrected. In October 2015, the plaintiff and the defendant executed the contract whereby the defendant agreed to sell 475 metric tonnes of eston lentils to the plaintiff including the term that the defendant would ship the lentils in November 2015 and be paid within 14 business days thereafter. Relying on the contract, the plaintiff sold the lentils to a third party on October 6. Thereafter the price of lentils increased dramatically. On November 3, the defendant's principal contacted the plaintiff and asked when it planned to take the lentils because he needed the money by November 10. Nothing was resolved until the plaintiff informed him that it was calling for delivery beginning November 16. Shortly thereafter, the principal said that he had been in contact with the Canadian Grain Commission and claimed they asked him not to deliver because the plaintiff was not licensed. Eventually, on November 26, the defendant refused to deliver the lentils, advising the plaintiff that the lentils had been resold. It asserted it had been promised that delivery would occur in early November and it would be paid by November 10, 2015. The defendant sold the lentils at $0.46 per pound and thus received proceeds of $120,000 above what it would have received had it sold under the contract to the plaintiff. As there was a critical market shortage, the plaintiff had to buy the lentils from the third party for the same price, thereby suffering a loss equal to the profit made by the defendant. The issues were: 1) whether the contract was contrary to s. 83 of the Act. The plaintiff conceded that if the contract did not fall within the scope of one of the exceptions to the licensing requirement under s. 83(1) of the Act, it was unenforceable. It argued that s. 83(2)(a) was applicable, setting out two preconditions to the operation of the exception of the licensure requirement: the contract must be for the purchase of grain without reference to any grade name; and the consideration payable under the contract was to be paid in full at the time of the making of the contract or the delivery of the grain; 2) whether the agreement required the plaintiff to take delivery of the lentils and pay for them prior to November 10; and 3) whether the defendant had relied on a representation by the plaintiff that it was licensed. HELD: The plaintiff's action and the defendant's counterclaim

were dismissed. The court found with respect to each issue that: 1) the contract was unenforceable. It did not provide for the purchase of the lentils at the time of delivery. Therefore, the exception in s. 83(2)(a) was inapplicable and the plaintiff was in breach of s. 83(1) of the Act. The mutual understanding of the parties was that the plaintiff would only be in breach of the contract if it failed to pay by the fourteenth day following the delivery of the lentils; 2) although it was unnecessary to decide this issue, the delivery date was open and not specific which made commercial sense in this context. It did not accept the evidence of the defendant's principal that the plaintiff made representations otherwise. The defendant would have been found in breach of contract and damages assessed against it, but for the finding that the plaintiff was in non-compliance with the Act; and 3) nothing in the evidence suggested that the defendant's principal was told that the plaintiff was licensed and there was no evidence the defendant relied on such purported misrepresentation.

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Johnson v Equifax Inc., 2018 SKQB 305

Keene, November 13, 2018 (QB18293)

Civil Procedure – Class Action – Application to Stay – Abuse of Process

The defendants applied for an order staying the proposed class action in Saskatchewan as an abuse of process. The proposed action was related to the breach of its database composed of individuals' financial Information used principally in connection with the evaluation of their credit. The proposed plaintiff's law firm, Merchant Law Group (MLG), brought the proposed class action along with three others in other provinces. In the information that MLG provided to the Ontario court in that proposed class action, it stated that the only reason a Saskatchewan action was issued was to avoid difficulties with the time limitation. The defendant argued that this action was commenced without any genuine intention that the court in Saskatchewan would adjudicate the claims of the plaintiff and the putative class members and it was commenced for the tactical and strategic benefit of MLG. HELD: The order for a permanent stay of proceedings was granted under s. 37(1) of The Queen's Bench Act. The court was entitled to exercise its discretion under that provision in cases of abuse of process. In this case, the commencement of the action without any genuine intention that the court would adjudicate it but so as to avoid difficulties with the limitation period was an abuse of process.

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Hill v Saskatchewan Government Insurance, 2018 SKQB 306

Megaw, November 14, 2018 (QB18294)

Insurance – Motor Vehicle Insurance – Compensation

The plaintiff sought to recover compensation from Saskatchewan Government Insurance (SGI) as a result of injuries suffered in a motor vehicle accident in January 2011. SGI denied that the plaintiff's ongoing physical difficulties resulted from the accident. After the accident, the defendant accepted at that time that the plaintiff's neck, lower back and shoulder injuries were caused by it. Prior to the accident, the plaintiff did not suffer from any of these injuries or symptoms. The plaintiff was the owner/operator of a general construction business and worked as a journeyman carpenter. He was unable to work for six months after the accident and was treated by his family physician and a physiotherapist. In June, he indicated that his back pain was continuous, but in July 2011, the physiotherapist determined that the plaintiff was meeting the functional job demands that existed prior to the injuries and discharged him from the treatment program, although he continued to experience pain and to take pain relief medication. The plaintiff did not approach SGI again until March 2015. At that point, his physician directed that he should no longer work as a carpenter and provided a report to SGI that he was suffering significant pain as a result of the 2011 accident. SGI disputed this diagnosis and referred the matter to the SGI Medical Director, who opined that the plaintiff's pain could not be attributed to his accident since he had worked in a physically demanding job for three years after his recovery. The physiotherapist consulted by SGI suggested that the pain was related to the plaintiff's occupation since he had returned to work after the accident and recommended that the plaintiff see a psychiatrist. The plaintiff then met with a psychiatrist who concluded that his symptoms originated from the accident and recommended that the plaintiff be assessed. The assessment was conducted by a team of health professionals but beforehand, the team met with the SGI representative handling the plaintiff's file and there was no explanation offered as to why this occurred. The assessors decided that the plaintiff was not functionally disabled from performing his occupation and said that his condition was not due to the accident. As part of this litigation, the parties consented to the plaintiff undergoing an independent medical examination that was completed by a psychiatrist. After reviewing the medical information and examining the plaintiff, the examiner concluded that the plaintiff was suffering chronic pain as a result of the accident. The plaintiff testified at trial that he experienced ongoing extreme pain requiring him to take medication. He said that he had been unable to work since 2015 and had not fully recovered when his treatment program was terminated in 2011. The plaintiff claimed solicitor-client costs under s. 192 of The Automobile Accident Insurance Act. The parties agreed to a trial to determine whether the plaintiff's present physical difficulties

were caused by the 2011 accident. The plaintiff argued that SGI's position that a trial was necessary warranted an award of solicitor-client costs. HELD: The court awarded judgment to the plaintiff and remained seized with the matter in the event the parties were unable to agree on the amount of compensation. The court found the plaintiff to be a credible witness and accepted his evidence regarding his ongoing pain and that he had returned to work in 2011 before he had recovered. It also accepted the examiner's opinion that the accident was the cause of the pain. The plaintiff was awarded party and party costs on column 2 of the Tariff of Costs, but an award of solicitor-client costs was not warranted on the facts of this case.

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Gourlay v Wallace, 2018 SKQB 307

Zuk, November 13, 2018 (QB18295)

Torts – Defamation

The plaintiff sued the defendant for slander. The parties owned cabins on a lake and became involved in a disagreement in 2007 regarding the removal of a tree. Shortly afterward, the defendant received a visit from a public health inspector who was following up on a report that the holes had been punched in her septic tank. No holes were found, but the defendant believed that the inspection was caused by the plaintiff reporting the alleged damage. In 2015 the defendant's cabin was visited again by an inspector who asked why she did not have her septic tank pumped more often. The defendant reported this visit to a neighbour and spoke of the 2007 visit and then suggested that the plaintiff had caused the most recent visit from the inspector and that he had put holes in the septic tank. The plaintiff had been the original owner of the defendant's cabin and had installed the septic tank. The neighbour, a friend of the plaintiff's, was shocked by the comment. She told the defendant that the plaintiff would never do such a thing as he was an environmentalist and a member of the local Water Board. The neighbour then informed the plaintiff of the accusation and he demanded an apology from the defendant. When she did not provide one, he brought this action. At the trial, the plaintiff's friends, the neighbours of the defendant, testified regarding the statements made by the defendant. The plaintiff testified that there would be severe consequences caused by anyone puncturing a hole in a septic tank at the lake because it had no public water system and the residents of the resort community surrounding it drew water from the underground water table. He had helped to form the local watershed authority and had been elected to the board in 2008. The plaintiff argued that the defendant's statement imputed a previous crime under s. 8 of The Environmental Management and Protection Act, 2010 that penalizes

any person found guilty of discharging a substance into the environment. When the defendant testified, she admitted that she accused the plaintiff of reporting her in 2007 but denied that she told her neighbour that he had put holes in the tank. The issues were: 1) whether the defendant made defamatory statements which were untrue and were directed at the plaintiff and if the statements were communicated to at least one person other than the plaintiff; 2) if the statements were defamatory, had the plaintiff proved actual damages; 3) if not, had the plaintiff established that the statements imputed a previous crime or that they were intended to disparage him in any office, profession or business carried on by him at the time the words were spoken. HELD: The plaintiff's action was dismissed. The court found with respect to each issue that: 1) the defendant made the statement that she suspected that the plaintiff of reporting her to the health authorities but that it was not defamatory because it would not lower the plaintiff's reputation in the eyes of a reasonable person. The defendant made a second statement that the plaintiff had punched a hole in the septic tank and it was defamatory and not true. The allegation would have the effect of lowering the plaintiff's reputation. The statement was uttered to another person by the defendant and directed to the plaintiff; 2) the plaintiff had not provided evidence of financial loss and thus had not proven actual damages; 3) the plaintiff had not proven that even if the defendant had suggested that he breached provincial regulatory legislation by puncturing the tank, such an offence was not a serious criminal offence; and 4) the plaintiff had not established that the defendant was intending to disparage him in his professional or other capacity by making the statement.

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Horse v R, 2018 SKQB 308

Zuk, November 13, 2018 (QB18296)

Criminal Law – Appeal – Conviction
Criminal Law – Defence – Colour of Right
Criminal Law – Evidence – Credibility
Criminal Law – Theft

The applicant appealed his conviction of theft of cell phone of a value of less than $5,000, contrary to s. 334(b) of the Criminal Code. The grounds of appeal were: 1) whether the trial judge erred in law by drawing an adverse inference from the appellant's silence when detained and arrested by the police and by referring to the appellant's silence as a "significant" factor in her determination of guilt; 2) whether the trial judge erred by ignoring or disregarding relevant evidence regarding the appellant's intent, including: a) the corroborative evidence of a witness in its entirety; and b) the evidence from the appellant, the

complainant, and the appellant's girlfriend that the appellant placed a call to his girlfriend using the complainant's cell phone immediately prior to the alleged theft of the complainant's cell phone; 3) whether the trial judge misapplied or misconstrued the legal analysis of mens rea for theft, particularly as it related to the legal concept of colour of right; and 4) whether the trial judge failed to properly conduct the analysis required in D.W. by accepting the evidence of one witness in its entirety over the evidence of the accused. The complainant testified that the appellant stole his cell phone after asking to borrow it to make a call. The appellant was located shortly after and the complainant found his phone the next day 50 to 75 feet from the location that he lent the appellant his phone. The complainant said that the appellant returned to his residence two weeks later to apologize for the theft of the phone. The appellant testified that he ran from the complainant's and apologized as he did so because he dropped the cell phone to run when he heard what he thought was his lost dog's bark. According to the appellant, he did not return to the complainant's residence to apologize for stealing the phone, but to apologize for disrupting the harmony and balance of the complainant's household. On cross-examination, the appellant indicated that he not only heard his dog, he also saw his dog chasing another dog. He says that he was hungover at the time, but not intoxicated. The trial judge accepted the testimony of the complainant and the arresting officer. She accepted that the appellant was intoxicated and that he stopped momentarily when the complainant told him that he worked for the police and they would find him. The trial judge did not accept much of the appellant's testimony after conducting the analysis required in D.W. She concluded that the appellant took the phone intending to deprive the complainant of it and convicted him of the theft even though the deprivation was temporary. HELD: The issues were analyzed as follows: 1) the discussion regarding the appellant's silence at trial was between the appellant's counsel and the trial judge regarding why the appellant was not charged with mischief instead of theft. After reviewing the trial judge's decision as a whole, the appeal court concluded that she did not draw any inference from the appellant having remained silent after arrest as a basis for finding him guilty; 2) the girlfriend's evidence did corroborate a lot of the appellant's; however, it did not assist regarding the actus reus or mens rea of the offence. The court also did not agree with the appellant's argument that because he placed a call with the cell phone just prior to running away it showed that he must have intended to merely throw the cell phone away rather than steal it; 3) the appeal court determined that the appellant had the onus of showing there was an "air of reality" to his asserted defence, and only once that was met did the burden fall to the Crown to disprove the defence beyond a reasonable doubt. The trial judge did make specific reference to a colour of right defence to the charge. She concluded that the appellant initially had the phone with the complainant's consent, and therefore had a colour of right to the cell phone. The trial judge found that the colour of

right defence was lost when the accused walked off the driveway and ran with the phone. There was no evidence that the accused honestly, but mistakenly, believed he had the right to possess the cell phone outside of the immediate presence of the complainant. The trial judge made no error regarding a colour of right defence; and 4) the appeal court found that it was clear that the trial judge considered each stage of the D.W. test even though she did not specifically comment on each. The trial judge was found to have properly applied the test and to have provided adequate reasons within her decision. The appeal was dismissed.

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Regina (City) v Westgate Properties Ltd., 2018 SKQB 309

Keene, November 13, 2018 (QB18297)

Statutes – Interpretation – Uniform Building and Accessibility Standards Act, Section 2, Section 17, Section 18 Administrative Law – Judicial Review – Certiorari Statutes – Interpretation – Uniform Building and Accessibility Standards Act, Section 2, Section 18

The applicant, the City of Regina, applied for an order in the nature of certiorari quashing the decision of the Saskatchewan Building and Accessibility Standards Appeal Board (board). The respondent owned property in Regina that it began to develop in January 2017 by excavating the site, subject to engineering oversight and monitoring by the applicant's employees. Construction stopped in July 2017 and the applicant became concerned about the excavation at the site. In April 2018, it issued an order pursuant to The Uniform Building and Accessibility Standards Act that upon finding the property was in an unsafe condition under s. 17 of the Act, the respondent was required to backfill the site. The respondent appealed the order to the board under s. 18 of the Act, disputing that the site was unsafe. The board retained its own expert to assist with their technical analysis. The parties each called their own engineering experts as witnesses and many engineering reports were filed. The board decided not to record the oral testimony given at the hearing. The board found that the site was not unsafe at the time the order was issued nor was it currently unsafe. It decided that sufficient cause was established to vary the order under s. 18(5)(c) of the Act and that the site could not remain in its current state indefinitely. It ordered that by certain dates, the respondent should either: commence construction and complete the project; or construct permanent shoring; or decommission and backfill. The issues were whether: 1) the board erred in deciding that the property was not unsafe; 2) the board erred in varying the City's order by designing the choices for the respondent and by delegating decision-making to it; and 3) whether it had offended the principles of natural justice by

embarking on this type of order without letting any of the parties know that it was going to take this approach, depriving the parties from having the opportunity to argue the merits or contest whether the approach was feasible. HELD: The application was granted. The court quashed the board's decision but directed that the board was not to conduct a complete rehearing but only to rehear the issue of the conditions of the variation order. It found with respect to each issue that: 1) the standard of review regarding the board's decision concerning whether the property was in an unsafe condition was reasonableness. The board's decision was reasonable and was supported by the reasons and therefore fell within the range of acceptable outcomes; 2) the standard of review regarding the board's decision relating to the variation of the order was correctness. The board had not erred in designing the choices for selection by the respondent. It did not exceed its jurisdiction because it set out in its conditions that the respondent had to comply with the all of the City's requirements for permits. By prescribing the courses of action that the respondent had to take, the board had not delegated its decision-making to the respondent; and 3) the standard of review was correctness. The board erred when it imposed this type of variation order. It offended natural justice or procedural fairness.

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Tluchak v Bayer Inc., 2018 SKQB 311

Barrington-Foote (ex officio), November 14, 2018 (QB18298)

Civil Procedure – Affidavits – Admissibility
Civil Procedure – Amendment to Statement of Claim
Civil Procedure – Class Action – Certification
Civil Procedure – Expert Witness
Class Action – Certification – Common Issues
Class Action – Notification of Potential Class Members

The proposed multi-jurisdictional class action related to a prescription anticoagulant drug (drug). The defendants included the main drug company and three related companies. The plaintiffs alleged that the defendants breached their duty of care by marketing the drug at all, or by failing to indicate it was for fewer indications or a narrow population (marketing claim). They further claimed that the defendants negligently failed to provide a clear, current, or complete warning explaining the risk of bleeding, how to reduce the risk, and how to manage bleeding (negligence claim) along with general and punitive damages. The plaintiffs applied pursuant to s. 5 of The Class Actions Act (CAA) for certification of the action and the appointment of a representative plaintiff. The plaintiff filed numerus affidavits in support of their application, including affidavits from: the president of a

company that provided consulting services for forensic data analysis and electronic information; family members of people that had died after taking the drug; patients that had suffered adverse consequences after taking the drug; medicine and pharmacy professors; an IT manager indicating there were 58 people who had expressed an interest in becoming a class member; and a legal secretary indicating that there were other multi-jurisdictional drug class actions filed in Canada. The defendants also filed affidavits from numerous affiants, including: a hematology specialist; a law clerk appending the drug monographs and medical records of patients mentioned by the plaintiffs; and a professor. The plaintiffs objected to the law clerk's evidence, indicating that it was hearsay and that her sources of information relied on undisclosed sources. They also objected to the hematology specialist's evidence, arguing that he was not an independent expert. The defendants objected to a pharmacist affiant's opinion evidence relating to the product monographs arguing that it was inadmissible, because she lacked the necessary qualifications. They also objected to the opinion evidence of another professor who had been trained and practiced in the United States, arguing that he was not a properly qualified expert in relation to certain aspects of his opinion. The defendants also objected to a study emphasized by the plaintiffs that pooled data from other studies.

HELD: The defendants complied with Rule 13-30(3) of The Queen's Bench Rules that requires affidavits in interlocutory applications that are on the basis of information and belief to disclose the source of the information. The defendants did not, however, comply with Rule 3-93(7), requiring them to provide their best information on the number of members in the proposed class. When determining the objection to the hematology specialist's affidavit, the court indicated that a judge does not weigh conflicting evidence on a certification application. The court concluded that the plaintiff did not show, on a balance of probabilities, that the hematology specialist was unwilling or unable to comply with his duty under Rule 5-37 to assist the court and not be an advocate for any party. The pharmacist's affidavit opinion evidence was allowed because it was found to meet the threshold standards specified in the case law. The U.S.-trained and practicing professor's evidence was allowed; the fact he never trained or practiced in Canada may affect the weight given to his opinion, but it did not render his opinion inadmissible. There was no evidence that pooling data in the way the study emphasized by the plaintiffs did could be used to determine the proposed common issues. The criteria in s. 6(1) of the CAA must be met for an action to be certified. Section 6(1)(a) requires the court to be satisfied that there is a cause of action. The statement of claim was found to plead facts that would be sufficient, if true, to establish both the marketing and negligent warning claims against one defendant, the main drug company, but not the other three defendants. The plaintiffs were given leave to cure the defects in the pleadings against the other three defendants within 30 days. Section 6(1)(b)

requires that there be an identifiable class. The proposed class definition could include both those that were prescribed and used the drug and the family class. The class definition was found to have the necessary rational relationship between the class definition, the common issues relating to the duty to warn and the cause of action. The third requirement, section 6(1)(c), requires that there be a common issue. The court considered numerous questions to conclude that the common issues relating to the negligence claim could be certified in the form provided. The first question considered was whether the drug had a propensity to injure. The court found that there was clearly some basis in fact to conclude that the drug had a propensity to injure in ordinary use. The second question was whether the defendant knew of the risk. There was some evidence that they did. The court determined that a risk-benefit issue did not arise in the general causation stage of the analysis for the negligent claim, only for the marketing claim. The defendant had a duty to warn of the propensity to injure regardless of whether the risk was more or less than that associated with an alternative product. The third question was whether the warnings were reasonable. The expert opinions were different in this regard. The fact the risks are affected by complex variables does not change the fact that there must be a warning contemplating all of the risks and providing a reasonable warning based on the knowledge of those risks. The court concluded that there was a basis in fact to conclude that there was a common issue as to whether the defendant breached a duty of care by failing to provide a reasonable warning. The court went on to consider the marketing claim and concluded that the common issues could not be certified in the form presented. The plaintiffs were given the opportunity to file an amended statement of claim and amended application for certification within 60 days, otherwise the defendants could apply to have that portion of the application disposed of. The plaintiffs also proposed that punitive damages were a common issue and the court held that it met the third criterion. Section 6(1)(d) of the CAA requires that the preferable procedure for the resolution of the common issues is class action. The court found that a class action would reduce duplication to the benefit of the punitive class members, the defendants, and the court. There was also some basis in fact to conclude that a class action was the preferable procedure to resolve the duty to warn issue. The court did not have issue with the proposed representative plaintiff for the class. In conclusion, the certification requirements were satisfied in relation to the negligence claim. The plaintiffs were given leave to file an application to amend their statement of claim within 60 days in relation to the marketing claim. The notification plan for potential class members will be determined after the common issues are finally set.

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Ministry of Social Services v H.G., 2018 SKQB 314

Tholl, November 15, 2018 (QB18300)

Family Law – Child in Need of Protection – Trial – Adjournment – Appeal
Statutes – Interpretation – Child and Family Services Act

The applicant, the Ministry of Social Services, had apprehended the respondents' two children in February 2018 and filed an application for a protection hearing with the Provincial Court under The Child and Family Services Act (CFSA). After two adjournments followed by a pre-trial conference, the matter was set for trial in July. At the conclusion of the applicant's case, the respondents requested an adjournment. The judge adjourned the trial until October 30, over the applicant's objections. It filed an originating application in the Court of Queen's Bench seeking to appeal the judge's decision. The judge declined to make the order sought by the applicant without a full evidentiary basis. The applicant applied within the appeal period on October 18 for an order directing that the courts determine whether the child is need of protection and making such an order within 60 days from the day assigned for the protection hearing. The application was heard on October 29. The applicant no longer sought an order directing the trial judge to recommence the protection hearing but had amended the declaration sought to say that the day fixed for the protection hearing under s. 22 of CFSA constituted the same day as the day that the protection hearing commences as referred to in s. 33(1).
HELD: The application of October 18 was dismissed and the appeal commenced on August 24 was also dismissed. The court declined to make the declaration sought by the applicant. It found that the issue was moot as the protection hearing was recommencing the next day. The applicant's submission that the court should make the order sought in this application was also declined because the effect of it would have to mandate that no more than 99 days could elapse between the apprehension of a child and the date of the final decision of the trial judge subject to limited exceptions in the CFSA. The court found that the evidence presented was insufficient to consider the declaration and the applicant had not addressed many issues that could result in matters extending past the 99-day maximum it set out.

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A.B. v M.H., 2018 SKQB 317

McIntyre, November 19, 2018 (QB18301)

Family Law – Custody and Access
Family Law – Child Support

The parties could not agree on an appropriate parenting arrangement for their four-year-old son. They had never cohabited and the petitioner mother had been his primary caregiver since birth. The respondent practiced medicine and for a period, he split his time between Saskatchewan and Ontario. Conflict developed between the parties regarding when the respondent would parent the child because he often didn't know his schedule before he returned to Saskatchewan for three weeks. Between late 2015 and mid-2016, the situation worsened because the respondent kept the child in his care beyond the agreed-upon time, communicated with the petitioner in a derogatory manner and on one occasion, physically struggled with her to take their son with him. The petitioner obtained an interim order in May 2016 that she would have sole custody and a later order provided that the respondent would have parenting time each week whenever he was in Saskatchewan. When the respondent began residing in Saskatchewan full-time in June 2017, a further order gave him regular parenting time. When the petitioner, a nurse, was at work, her mother or other members of her family looked after the child. The respondent's mother lived with him and she cared for the child when he was in the care of the respondent. The petitioner sought an order for sole custody on the basis that the parties never lived together and she was the sole legal custodian pursuant to s. 3(2) of The Children's Law Act, 1997 (CLA). She argued that this would be in the child's best interest because of the respondent's behaviour in the past and the communication problems that she had had with him. She acknowledged that the respondent was a good parent. She took the position that she should be the child's primary caregiver and the respondent's parenting time be two days per week. The respondent expressed regret regarding his past conduct and proposed a shared parenting arrangement whereby, until the child attended school, he would parent him four days one week and three days the next. After the child commenced grade one, the parties would parent him on a week on/week off basis. The petitioner sought child support in accordance with the Guidelines retroactive to 2014. Pursuant to s. 18, she sought to have the pre-tax income of the respondent's professional corporation added to his line 150 income to determine his income for Guideline purposes.

HELD: The court found with respect to the petitioner's application that: 1) it was in the best interests of the child that the parties should have joint custody because there were no reasons to the contrary. Once the court had established a parenting plan, it was confident that the parties' communication problems would subside. There was evidence that the petitioner was the more involved parent and to ensure that the child's needs were met under s. 8 of the CLA, she should be his primary caregiver. The respondent would have parenting time during one week from Tuesday afternoon to Wednesday morning and Friday afternoon to Monday morning. In week two, the time would be from Wednesday afternoon to Friday morning. Provision was made for weekend and holiday access; and 2) the respondent had not provided evidence that

showed why the pre-tax income of his professional income was not available to him for child support purposes. The court ordered that it was appropriate to include all of it in his income and his monthly support obligations were established. The court ordered retroactive child support starting from 2014 when the petitioner first sought child support and income disclosure from the respondent. As the respondent had not shown he would suffer undue hardship, the court ordered the arrears to be paid monthly in the amount of $500. The respondent would receive credit for all child support paid by him since 2014.

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Silveira v McKay, 2018 SKQB 318

Wilkinson, November 20, 2018 (QB18305)

Statutes – Interpretation – The Family Maintenance Regulations, 1998, Section 21.33
Family Law – Child Support – Recalculation

The Manager of the Saskatchewan Child Support Recalculation Service (CSRS) applied to the court for directions regarding a number of issues arising from its receipt of the first recalculation application pursuant to amendments made to The Family Maintenance Regulations, 1998 which were proclaimed in force on March 15, 2018. Under the amended regulations, the CSRS is empowered, with some exceptions, to adjust child support orders made under the Federal Child Support Guidelines, The Family Maintenance Act, 1997 and The Inter-jurisdictional Support Orders Act made after May 1, 1997 by utilizing current income information supplied by the support payor. In this case, the order to be recalculated was a child support order made by the Court of Queen's Bench in March 2016 under the provisions of the Divorce Act wherein the respondent's income was determined to be $19,242. CSRS advised the respondent that an application had been submitted to it by the other parent for recalculation, served him with a notice to file income information and asked him to provide his 2017 income tax return and all sources of his 2018 income. The respondent failed to respond and was notified that his income would be recalculated under the "income-deeming" provisions of the amended regulations. He was then served notice by electronic transmission to his email address that this application was being made to deem income to him by increasing it by 15 percent since the time of the 2016 order, as prescribed by s. 21.33(2) of the amended regulations. The CSRS asked the court to advise it as to what notice was appropriate pursuant to s. 21.33(3). In this case, the CSRS gave the respondent more than 14 days' notice of the application but submitted that as it was not substantive in nature, Queen's Bench rule 15-19(4), which requires only three days' notice in procedural matters, should govern.

HELD: The court granted the application and deemed the income of the respondent to have increased by 15 percent from 2016 to 2018 to $22,128. The court found that three days' notice by email was adequate under s. 21.33(3).

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Ahmed v Canadian Light Source Inc., 2018 SKQB 320

Elson, November 21, 2018 (QB18302)

Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 7-5

The self-represented plaintiff brought an action for damages against the defendant, his former employer. The damages arose from multiple causes of action, amongst which was wrongful dismissal. He alleged that he had been hired for his position for a two-year term, but after commencing his employment, he had been told by his manager that his employment would extend beyond the term. However, the plaintiff's employment did end at the conclusion of the term. He brought an application for summary judgment on the causes of action. The defendant applied for: 1) an order pursuant to Queen's Bench rule 7-1(1) to determine the limitation period regarding the plaintiff's claim regarding wrongful dismissal and to dismiss the action based on the determination; or 2) an order for summary judgment pursuant to Queen's Bench rule 7-2 dismissing the action as there was no genuine issue to be tried; or 3) an order pursuant to Queen's Bench rule 7-9 striking the plaintiff's statement of claim in its entirety.
HELD: The defendant's application for summary judgment was granted. The court found that there was no genuine issue for trial. Although the court had advised the plaintiff when the hearing commenced that his application materials were deficient and asked him if he would prefer to adjourn in order to consider his position and seek further legal advice, the plaintiff indicated that he wanted to proceed. As he had not provided any evidence that supported his claim that he had been promised that his employment would continue after the fixed term expired, he had not met the burden of demonstrating that his employment was for other than a fixed term.

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Egware Homes Inc. v Regina (City), 2018 SKQB 321

Kalmakoff, November 21, 2018 (QB18303)

Administrative Law – Procedural Fairness

The applicants appealed the decision of the Regina Appeal Board (RAB)

under the provisions of s. 329 of The Cities Act. They had appealed to the RAB after the defendant, the City of Regina, had found that nuisance conditions existed at two of the applicants' properties contrary to s. 5 of the defendant's community standards bylaw and ordered them to be demolished. The appeal to the RAB was heard and it confirmed both orders. The written decision stated that: "the order to comply be confirmed". The applicants' arguments on appeal were that the RAB erred in law because it: 1) failed to observe the requirements of procedural fairness in that it did not provide reasons and thus it was impossible to determine the basis on which it made the decision and without detailed reasons, it did not permit meaningful appellate review. This RAB's decision was important and had a serious impact on the applicants as they were in the business of developing revenue properties; and 2) did not interpret the term "nuisance" properly in the community standards bylaw.
HELD: The appeal was dismissed. The RAB's decision was confirmed pursuant to s. 329(5)(a) of the Act. The court found that: 1) the first question was reviewable on the correctness standard. The RAB had not erred. In the context and nature of it as a municipal decision-making body, it was not required to give detailed reasons for its decision in order to comply with the duty of procedural fairness. The RAB's procedure is informal and meant to be expeditious. The public hearings take place before elected city councillors and the decision is made by a vote of the majority. The parties can submit evidence and make arguments; and 2) the second question was subject to review on a reasonableness standard. The RAB's decision to confirm the defendant's orders was reasonable as it fell within a range of possible acceptable outcomes. Under s. 3(g) of the bylaw, the applicants' properties met its definition of "nuisance".

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R v Johnson, 2018 SKQB 322

Tochor, November 23, 2018 (QB18306)

Criminal Law – Firearms Offences – Possession of a Firearm

The accused was charged with three offences involving possession of a firearm, a sawed-off .22 calibre rifle, contrary to ss. 92(2), 95(1) and 109 respectively of the Criminal Code. The police responded to a complaint that someone was being held hostage at gunpoint in an apartment suite. Once there, an officer testified that he saw the accused lying on a couch in the apartment, fidgeting with his hands on his right side. After he was ordered to move from the couch, a rifle was found protruding between the cushions and the right side of the couch. The accused testified that he was the person on the couch but did not have knowledge that the firearm was there. He said that he had arrived at

the apartment in the early morning and had blacked out on the couch, being both intoxicated and high on drugs.
HELD: The accused was found guilty on all three charges. The court did not believe the accused and accepted the police officer's testimony.

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Leo v Global Transportation Hub Authority, 2018 SKQB 323

Kalmakoff, November 23, 2018 (QB18307)

Statutes – Interpretation – Freedom of Information and Protection of Privacy Act

The applicant, a journalist with the CBC, requested records from the head of the respondent, the Global Transportation Hub Authority (GTH). The records related to business transactions and some concerned GTH's communications regarding Brightenview Development International (Brightenview), an organization that brings investors to Saskatchewan to pursue business opportunities. As the applicant was dissatisfied with the head of GTH's response to his requests, he requested a review of the matter by the Information Privacy Commissioner (IPC) pursuant to The Freedom of Information and Protection of Privacy Act (FIPPA). The IPC made recommendations to the GTH and it then disclosed certain records to the applicant but redacted significant portions, claiming various exemptions under FIPPA permitted it do so. The applicant argued that the GTH had improperly disregarded the IPC's recommendations and applied exemptions that it was not entitled to apply. The GTH said that the court should dismiss the appeal outright without examining the unredacted records or alternatively, should conduct the examination in camera. Brightenview argued as a third party that the exemptions should be permitted because of damage that would be done to its interests by disclosure of the information.
HELD: The court decided under that it would examine the records in question in camera before making any substantive determination or giving further procedural direction. Under s. 58 of FIPPA, the appeal was a hearing de novo and the court was not bound by the recommendations of the IPC. It was necessary to review the full, unredacted records in question in order to properly determine whether the decision made by the head of the GTH to apply certain exemptions to them before permitting access was appropriate.

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Gray-Bellegarde v Kennedy, 2018 SKQB 324

Layh, November 23, 2018 (QB18308)

Statutes – Interpretation – First Nation Elections Act
Statutes – Interpretation – Cega-Kin Nakoda Oyate Custom Election Act

The applicants, members of the Carry-the-Kettle First Nation (First Nation), brought their application to set aside the results of the election held in April 2018. They had first appealed the results to the Cega-Kin Nakoda Oyate Tribunal (tribunal), a body established under the First Nation's community election code, the Cega-Kin Nakaoda Oyate Custom Election Act. The tribunal dismissed their appeal. In this application, the applicants requested the court to provide a hearing de novo and order a new election or alternatively, to determine whether the tribunal had breached the rules of natural justice in its conduct of their appeal and failed in its obligation to remain free of bias.
HELD: The court ordered that the matter be returned to the tribunal for a new hearing. It found that it had failed to conduct the appeal in accordance with the principles of natural justice. Although the Act permitted the court to conduct a hearing de novo, the affidavit evidence presented by the parties was conflicting and it could not make determinations of credibility. Returning the matter to the tribunal would permit it to develop procedures to ensure that this and future appeals would be conducted appropriately. The court found that the applicants had not been given a fair hearing. Of the 23 issues that they wanted to present concerning the election, the tribunal only permitted them to raise four. The tribunal held further hearings without informing the applicants. The affidavits of some members of the tribunal raised further irregularities, because they alleged that they had not participated in nor signed the decision regarding the appeal.

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Innes v Kotylak, 2018 SKQB 325

Leurer, November 26, 2018 (QB18309)

Statutes – interpretation – Landlord and Tenant Act, Section 9, Section 10
Real Property – Lease – Option to Purchase
Contract Law – Breach

The plaintiffs brought an action for breach of contract against the defendants. They owned 40 acres of land located in a rural municipality (RM) just outside Regina. They lived on a 13-acre yard site (acreage) and operated their landscaping and gravel pit business on the remaining 27 acres (business land). The zoning for the business land was agricultural. The RM's development restrictions did not allow subdivision of the parcel to create a separate title for the acreage. In order to overcome this obstacle, the plaintiffs decided to sell the entire

parcel and take back an option to purchase the business lands to be exercised when those lands could be successfully subdivided from the whole. They sold land to the defendants in 1996 on that basis. The purchase price for the sale of the acreage was $185,000 and the consideration did not include any payment for the business land as the parties intended it would eventually be subdivided and re-conveyed to the plaintiffs. The lease and option to purchase agreement provided that it was for a 25-year term and the tenant would retain the beneficial interest in the leased lands and on the understanding that the landlord and tenant would cooperate and do everything possible to subdivide the lease lands from the current title and transfer them to the tenant for nominal consideration. The agreement stated that if it was not possible to subdivide the land and transfer the leased lands within the term of the lease, the beneficial ownership interest would revert to the landlord. Another term provided that the plaintiffs' use of the business land was to be limited to the scale of the landscaping and gravel pit operation in existence in 1996. A number of disputes arose between the parties and after the defendants, on behalf of the plaintiffs, made an unsuccessful application to the RM for subdivision in 2002, they advised the plaintiffs they were in default of a number of terms of the lease and said that as the land was not capable of subdivision, the option to purchase was terminated. Negotiations followed and they entered into an addendum to the agreement in 2005 that stated that the landlord would cooperate with the tenant to effect the subdivision and all the provisions of the original lease were adopted and remained in full force and effect. The defendants cooperated unwillingly in another unsuccessful application for subdivision in 2008. In 2011 the RM passed a revised community plan and zoning bylaw that would permit some rezoning of the business land. The plaintiffs applied for subdivision in 2012 without consulting the defendants. When they learned of it, they indicated to the ministry that they would not support the application. The plaintiffs then forwarded another application to the defendants for them to submit to the ministry, but they refused to sign it. This action was then commenced by the plaintiffs, alleging that the defendants were in breach of their contractual obligation to cooperate in obtaining the necessary approvals to subdivide the parcel. They contended that because the business land was unique, they were entitled to an order for specific performance, directing the defendants to sign the application. The defendants responded that they were not obligated to consent and that the OTP expired when the 2009 application failed. They further claimed that breaches by the plaintiffs of the 1996 agreement entitled them to treat the entire agreement as being at an end. The defendants counterclaimed, alleging breach of contract and nuisance in connection with the operation of the plaintiffs' business. The issues were: 1) whether the OTP expired when subdivision approval was rejected in 2009; 2) whether the plaintiffs had breached the 1996 agreement; 3) if so, whether the defendants could treat the OTP as terminated; and 4) if the 1996 agreement was in effect, whether

the defendants had breached it by refusing to sign the 2012 subdivision application.
HELD: The plaintiffs were given judgment. They were entitled to specific performance and in this case, the court made an order directing the defendants to cooperate in a subdivision application and declaring that the business land be transferred if the application was successful in accordance with the terms of the 1996 agreement. The court found with respect to each issue that: 1) the OTP did not expire. The agreement allowed the plaintiffs to exercise it at any time prior to the end of the lease or its termination; 2) the plaintiffs had breached the lease term regarding permitted use. The court accepted the evidence that from 2012 to 2013 there was an increase in hours of operation and traffic and a change in the type of equipment used in the plaintiffs' business; 3) the defendants were not entitled to treat the lease at an end because they had not provided any notice of their intention to seek a termination of the lease after they entered into the 2005 addendum, as required by s. 9 of The Landlord and Tenant Act; 4) as the lease and OTP had not been terminated, the defendants had breached the agreement when they refused to sign the 2012 subdivision application.

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Renner v Regina (City), 2018 SKQB 326

Kalmakoff, November 26, 2018 (QB18310)

Administrative Law – Procedural Fairness

The appellant appealed from the decision of the Regina Appeal Board (RAB) pursuant to s. 329 of The Cities Act. In July 2018 an employee of the respondent city served the appellant with an order to comply because the employee's inspection of the property found that it did not comply with the respondent's community standard bylaw. The order alleged that the house did not meet the minimum standards and therefore the appellant was required to make significant repairs. The work was to be completed by September 2018. The appellant submitted that he could not afford to make the repairs in his appeal of the order to the RAB. In its written decision, it simply stated that it confirmed the order but modified the date to June 2019. The appellant's grounds were that the RAB's failure to give reasons for its decision was a denial of procedural fairness and that it erred in law by failing to properly consider and apply the bylaw provision in light of the evidence before it.
HELD: The appeal was allowed. The matter was returned to a different panel of the RAB for a new hearing. The court determined that the question of whether the RAB's failure to give reasons for its decision breached the duty of procedural fairness was reviewable on the standard of correctness and the question of whether it overlooked or

disregarded evidence in making findings of fact or erred in law in applying the law to those facts was reviewable on a reasonableness standard. It found that the RAB had not denied procedural fairness to the appellant. Its decision was made by members of the respondent's city council in a public forum in a procedural fashion which the respondent chose to implement and follow. The RAB's decision to confirm the entire order was unreasonable because a number of the allegations contained in it were not supported by the evidence found on the record. The only evidence before the RAB was the written submissions of the appellant and the photographs taken by the respondent's bylaw officer. The photographs did not show that the exterior of the property contravened the minimum standards set by the bylaw.

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