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

Volume 21, No. 13 **July 1, 2019**

Subject Index

Groshok v R, 2019 SKCA 39

Ottenbreit Caldwell Schwann, May 3, 2019 (CA19038)

Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Unreasonable Verdict
Criminal Law – Controlled Drugs and Substances Act – Possession for the Purposes of trafficking – Hydromorphone
Criminal Law – Evidence – Circumstantial Evidence
Criminal Law – Evidence – Credibility
Criminal Law – Possession of Property Obtained by Crime

The appellant appealed convictions of possession of hydromorphone for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act (CDSA) and possession of property obtained by crime, contrary to ss. 354(1) and 355(b) of the Criminal Code. The appellant's husband was jointly tried with her and was also found guilty. When the appellant's residence was searched, $2,610 and 360 hydromorphone pills were located inside a box in a safe in the master bedroom closet. Another $1,700 was found on the master bedroom bed. The appellant admitted that the bedroom belonged to her and her husband and she was aware of the safe; however, she said that it belonged to her husband's friend. According to the appellant, she did not know what was in the safe. The friend testified and admitted ownership of the safe and its contents. He indicated that only he had the combination for the safe and that neither the appellant nor her husband were aware of its contents. The appellant indicated that the money on the bed was from her husband for rent. The trial judge did not believe the friend's evidence and found him not to be credible. The trial judge also rejected the appellant's evidence due to internal inconsistencies,

Weapon – Conviction – Appeal

Criminal Law – Conspiring to Commit Murder

Criminal Law – Manslaughter – Sentencing

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

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

Family Law – Affidavit – Notice of Objection – Costs

Family Law – Child in Need of Protection

Personal Property – Security Interest

Privacy – Access to Information

Torts – Negligence – Appeal

Cases by Name

A.S., Re

Argue v Argue (Meier)

Eaton v University of Regina

Groshok v R

Heiser's Health and Fitness Ltd. v Saskatchewan Government Insurance

Hydrodig Canada Inc. v 101202529 Saskatchewan Ltd.

Peepeetch v R

Quiring v R

R v Campbell-Ball

R v Herman

R v Highway

R v Sand

inconsistencies with the evidence of the friend, and because she was evasive. The issues on appeal were: 1) whether the trial judge misapplied D.W.; and 2) whether the trial judge's finding that the appellant possessed or was jointly in possession of hydromorphone was reasonable.
HELD: The appeal was dismissed. The issues were dealt with as follows: 1) the trial judge did not err by considering the friend's evidence first. The trial judge inferred that the friend would have needed regular access to the safe because he only had a one-day supply of hydromorphone with him, yet the appellant indicated that she had never seen the friend access the safe. The trial judge found that the implausibility of the story raised credibility concerns as did other inconsistencies and her evasiveness. The appeal court did not see any error with the trial judge's application of the first part of the D.W. analysis. The trial judge then combined the second and third steps. The appeal court found that there was sufficient circumstantial evidence to infer possession. The trial judge did not err in his application of the D.W. test; and 2) the appellant argued that, at most, all that had been proven was that she was in possession of a locked safe. The trial judge rejected the appellant's evidence that she did not know what was in the safe for a number of reasons. It was not an unreasonable inference that the friend would have needed access to the safe and that the appellant would have been in a good position to see him attend at the safe. The appeal court did not see any error in the trial judge's process of analysis and inferences drawn. The rejection of the friend's evidence was also within the trial judge's purview. The appellant's argument of unreasonable verdict was not successful. The appeal court found that the circumstantial evidence of knowledge and control was compelling. There were no other reasonable inferences to be drawn from the evidence remaining once the appellant's evidence and the friend's evidence were rejected. The verdict was not unreasonable based on the standard of review.

 Back to top

Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40

Richards Jackson Ottenbreit Caldwell Schwann, May 3, 2019 (CA19039)

Constitutional Law – Constitution Act, 1867 – Constitution Act, 1982
Constitutional Law – Constitution Act, 1867 – Criminal Law
Constitutional Law – Constitution Act, 1867 – Peace, Order, and Good Government (POGG) – National Concern
Constitutional Law – Constitution Act, 1867 – Trade and Commerce
Constitutional Law – Constitution Act, 1867 – Treaty Rights
Constitutional Law – Constitutional Questions Act – Greenhouse Gas Pollution Pricing Act

R v Sanderson

Reference re Greenhouse Gas Pollution Pricing Act

Trithardt v Kingsley Conservation and Development Area Authority

Trotchie v R

University of Regina v Biletski

University of Regina v HTC Purenergy Inc.

Vey v R

Constitutional Law – Federalism
Constitutional Law – Tax versus Regulatory Scheme

The Lieutenant Governor in Council asked the court for an advisory opinion pursuant to s. 2 of The Constitutional Questions Act regarding whether The Greenhouse Gas Pollution Pricing Act (Act) would be unconstitutional in whole or in part if it were enacted. In Part 1 of the Act, Greenhouse Gas (GHG) producing fuels and combustible waste have a charge imposed on them. In Part 2, large industrial facilities are required to pay compensation if their GHG emissions exceed applicable limits. The Act only applies in provinces where the GHG emissions are not priced at an appropriate level. All of Part 1 applies in Saskatchewan and Part 2 only partially applies. The issues were: 1) whether the principle of federalism renders the Act unconstitutional; 2) whether the Act imposes taxes in contravention of s. 53 of the Constitution Act, 1867; 3) whether the Act is sustainable under the national concern branch of POGG; and 4) whether the Act can be upheld under heads of jurisdiction identified by the intervenors.
HELD: The three-judge majority of the appeal court held that the Act was not unconstitutional in whole or in part. The two-judge minority held that the Act was wholly unconstitutional. The majority of the appeal court dealt with the issues as follows: 1) Saskatchewan argued that Parliament cannot enact laws that have applicability that depends on how provinces have chosen to exercise their own legislative jurisdiction. There is no requirement that laws enacted by Parliament must apply uniformly across all of Canada, as conceded to by Saskatchewan. Whether or not laws apply to a particular province based on its legislative inaction is not relevant to the determination; 2) Saskatchewan argued that the Act was unconstitutional because it imposes taxes and because it offends s. 52 of The Constitutional Questions Act, which requires taxes to be authorized by legislative bodies, not by executive government. After applying the Westbank factors, Part 1 of the Act was determined to be a regulatory scheme. The majority of the appeal court found further support for their conclusion from the fact that all monies raised would be distributed back to the province of their origin and the Act could result in no charges for a province if they had appropriate legislation. A taxing statute is one that is designed and intended to raise revenue for general purposes, which was not found to be the case with Part 1. The court applied the Westbank factors to the Part 2 charge and concluded that the compensation collected is tightly integrated into a regulatory scheme. The compensation also was not intended to raise revenues for general purposes. Even though it was not necessary because Part 1 and Part 2 were found not to impose taxes, the court considered whether s. 53 of the Constitution Act was offended. Saskatchewan argued that the Act was non-compliant with s. 53 because the Act gives the Governor in Council authority to determine the provinces and areas of applicability of the Act. The appeal court did not agree. The Governor in Council does not impose a tax on its own accord.

Further, the Governor in Council does not have unfettered discretion; 3) Saskatchewan argued that the Act was unconstitutional because it concerned property and civil rights or other matters in the exclusive jurisdiction of provinces. Canada argued that the Act was valid pursuant to the national concern branch of POGG. The pith and substance of the Act was the establishment of minimum standards of price stringency for GHG emissions. The majority of the appeal court did not find it possible to conclude that GHG emissions fell within federal jurisdiction by virtue of the national concern doctrine. The court then considered the alternative argument that the subject matter was to establish minimum standards of price contingency for GHG emissions. The appeal court applied Crown Zellerbach and found that establishing minimum national standards of price stringency for GHG emissions satisfied the "singleness, distinctiveness and indivisibility" requirement therein. Further, establishing minimum national standards of price stringency for GHG emissions did not have an impact on provincial jurisdiction that was irreconcilable with the fundamental distribution of legislative powers envisioned by the Constitution. The matter fell within federal jurisdiction by virtue of the national concern branch of POGG. The Act was constitutionally valid; and 4) the intervenors argued that the Act could be upheld on other various grounds: trade and commerce; treaty powers; criminal law; and emergency power. None of the intervenors' arguments were successful. The minority of the appeal court did not agree with the majority on the pith and substance of the Act. The purpose of the Act is to establish benchmark GHG emissions prices to modify behaviour and give industry incentive to mitigate anthropogenic GHG emissions. The fuel levy imposed under Part 1 of the Act was found to have all of the hallmarks of taxation and to lack the indicia of a regulatory charge. The main thrust of Part 1 was found to be taxation. The levy in Part 2 was found to be a regulatory charge. After applying the Westbank criterion, the minority maintained its conclusion that Part 1 was a tax and Part 2 a regulatory scheme. The minority next examined the Act for the purposes of classifying it. The purpose of the Act is a matter within Provincial jurisdiction; to regulate GHG emissions. They found the pith and substance of Part 2 to be to regulate industrial GHG emissions. The Act was found to implicate provincial subject matters and law-making powers under ss. 92(2), (5), (10), (13) and (16) and ss. 92A and 93 of the Constitution Act, 1867. The matter addressed by the Act, the regulation of GHG emissions, was classified by the minority as coming within the classes of subjects exclusively assigned under s. 92 of the Constitution Act, 1867. The minority's issues with the validity of the Act were: 1) Part 1 of the Act was found to be invalid because it lacks a clear and unambiguous statement of Parliament's intention to delegate its taxing authority as required by s. 53 of the Constitution Act, 1867; 2) the overbreadth of the delegation of legislative power; and 3) the so-called backstop provisions. The minority considered whether Parliament was exercising its authority under the national concern branch of POGG. The minority applied

the two-step test from Crown Zellerbach. The Act mirrors what Provinces can and have enacted regarding GHG emissions: therefore, the matter is not so significantly distinct as to "clearly distinguish" them from matters of provincial concern. Distinctiveness, as required in the first step of the analysis, was not met. Even though the minority concluded that there was nothing distinctive as required by the first step of the Crown Zellerbach test, they considered step two. The minority agreed with Saskatchewan that GHG emissions have a close linkage to almost everything in the Provincial economy such that allowing Canada to impose laws respecting GHG emissions would adversely impact Provincial authority like almost no other matter. According to the minority, the Act failed both parts of the Crown Zellerbach two-part test; it did not fall under the national concern branch of POGG and was thus not constitutional in whole or in part.

 Back to top

R v Campbell-Ball, 2019 SKCA 41

Ottenbreit Caldwell Barrington-Foote, May 7, 2019 (CA19040)

Criminal Law – Assault – Sexual Assault with a Weapon – Conviction – Appeal
Criminal Law – Assault – Sexual Assault – Sentencing – Appeal
Criminal Law – Evidence – Credibility

The appellant, Campbell-Ball (C-B), appealed against his convictions and the Crown appealed against the sentences imposed on him and his co-accused, Roble and Kahin. The three accused were charged under a joint indictment alleging they had committed sexual assault with a weapon contrary to s. 272(1)(a) of the Criminal Code, trafficking in persons contrary to s. 279.01(1)(a), procuring contrary to s. 286.3(1), unlawful confinement contrary to s. 279(2), sexual assault contrary to s. 271 and simple assault contrary to s. 266 of the Code, all in relation to the same complainant. After a joint trial, the judge found the three accused had subjected the complainant to physical and psychological abuse involving the offences of unlawful confinement, sexual assault, sexual assault with a weapon and assault. The complainant worked as an escort in order to support her addiction to crystal meth. She and C-B met in 2015 and began a romantic relationship. The complainant moved to Regina from Calgary so that C-B could provide her with security in her work and in exchange, she would divide her earnings with him 50/50. After arriving in Regina, C-B took her to two hotel rooms over a two-day period. The other accused were present and the alleged offences occurred. At trial, the complainant testified that during the commission of the offences, she was upset and crying, but the three co-accused continued in their conduct. Eventually the complainant contacted a friend in Calgary through Facebook and he called the

Regina police, who came to her assistance. The trial judge convicted C-B because he found that the complainant's evidence had established the facts necessary to satisfy the elements of the three offences beyond a reasonable doubt. C-B argued on appeal that the trial judge failed to: assess the reliability of the complainant's evidence; apply the criminal standard of proof; and give adequate reasons for the verdicts. During the trial, C-B had challenged the complainant's credibility, suggesting that she was lying and what had happened was a consensual orgy. The Crown argued in its appeals against the sentences that the judge had erred in failing to sentence each accused as a principal to every offence he committed and as a party to every offence committed by the other accused pursuant to s. 21(2) of the Code. The Crown submitted that the sentence each accused received was unfit. The accused C-B was sentenced to five years' incarceration on the sexual assault with a weapon charge with concurrent sentences of two-and-a-half years for unlawful confinement and 60 days for assault. Kahin received a sentence of five years' incarceration for the sexual assault with a weapon, with concurrent sentences of two-and-a-half-years for unlawful confinement and four years for sexual assault. Roble was acquitted of the sexual assault with a weapon charge. He was sentenced to four years' incarceration for sexual assault and two-and-a-half years concurrent for unlawful confinement. The Crown argued that these sentences did not reflect the gravity of the crimes nor the moral culpability of the accuseds.

HELD: C-B's appeal of his conviction was dismissed as was the Crown's appeal of the sentences. The court found with respect to C-B's grounds that the trial judge had not erred because he understood credibility and reliability were the core issues in the trial and understood the differences between the two. He found the complainant to be a credible witness, though he identified a concern with the reliability of her evidence because of her drug use at certain points during her unlawful confinement. He then weighed all of her evidence in accordance with his assessment of its reliability and found it was sufficiently reliable to find C-B guilty beyond a reasonable doubt of certain offences, but not reliable enough to convict him of other offences. The court found with respect to the Crown's appeal that the issue of criminal liability under s. 21(2) of the Code was not put to the trial judge and therefore he made no findings regarding it. Furthermore, the basic principles of sentencing require that an accused be sentenced for an offence of which he has been convicted. As the judge acquitted each accused of procurement and trafficking, he correctly did not regard them as aggravating factors. The court noted that the sentence that each accused received was at the low end of the range, but based on the judge's findings, none of the sentences constituted an unreasonable departure from the principle of proportionality.

 Back to top

Trithardt v Kingsley Conservation and Development Area Authority, 2019 SKCA 42

Jackson Caldwell Schwann, May 9, 2019 (CA19041)

Civil Procedure – Appeal – Stated Case
Statutes – Interpretation – Conservation and Development Act, Section 34

The Saskatchewan Municipal Board brought a stated case in which it sought the opinion of the Court of Appeal on five questions that arose out of proceedings that took place before its Assessment Appeals Committee as it sat on ratepayer appeals under s. 74 of The Conservation and Development Act (CDA). The appeals were taken from decisions of the Court of Revision (COR) of the Kingsley Conservation and Development Area Authority (KCDAA) following its resolution of assessment complaints filed under s. 61 of the CDA. In addition to ratepayers' complaints concerning assessments and rates levied by the KCDAA between 2013 and 2015, they had concerns about the KCDAA's broader compliance with the CDA. The board's stated questions were whether: 1) the KCDAA has the power to add lands to the assessment or the committee incorrectly decided that the KCDAA could add the assessment of benefits to new lands; 2) the committee has the authority to consider what evidence is relevant or irrelevant; 3) the committee has the authority to consider issues of funds and accounts under s. 34(7) of the CDA; 4) anything in the CDA suggests the authority granted in ss. 34(4) and 34(5) of the CDA applies to the KCDAA; and 5) the intent of the CDA is that the authority in s. 34(5) be given to the Lieutenant Governor in Council.
HELD: The court's decision varied from the committee's conclusion. It directed the Registrar of the Court of Appeal to forward the opinion to the board. The board was to direct the KCDAA to amend its 2016 assessment roll. With respect to each of the board's questions, the court stated that: 1) the KCDAA had the power to add lands to the assessment under s. 34(4) of the CDA, but it must exercise that power in accordance with the CDA and the law. The KCDAA erred in law by failing to exercise its statutory powers under s. 34(4) with respect to the 2016 assessment in accordance with those requirements. The court agreed with the committee's conclusion that the COR had not provided sufficient or any reasons in respect of the 2016 assessments, but the committee then erred by conducting de novo hearings of the assessment complaints because it did not address the fundamental question of law put before it: namely, whether the KCDAA had assessed and levied lands in accordance with the constraints on its power to do so under the CDA. The court found ample evidence to conclude it had not; 2) the committee has the power to consider what evidence is relevant or irrelevant. However, the committee has no jurisdiction to hear, nor to determine, matters of fact and law outside a properly constituted assessment appeal pursuant to s. 16(1) of The Municipal Board Act (MBA) to determine assessment appeals brought pursuant to the

CDA. All rights of appeal are provided by the CDA. If a ratepayer does not exercise the right to appeal within 20 days from the date of the mailing of the notice of assessment, there is simply no complaint to be heard by the COR and no assessment appeal to be determined by the committee; 3) the committee does not have the authority to consider issues of funds and accounts under s. 34(7) of the CDA. The board's supervisory jurisdiction over financial affairs of conservation and development area authorities is specifically excluded under s. 19(2) of the MBA. The concerns of ratepayers regarding an authority's compliance with s. 34(7) of the CDA may be addressed to the minister responsible for the Saskatchewan Water Security Agency (SWSA) or by judicial review under Queen's Bench rule 3-56(1); 4) that the question regarding s. 34(4) was answered in question 1 and as it relates to s. 34(5), under question 5; and 5) the authority in s. 34(5) of the CDA is conferred on the Lieutenant Governor in Council, but the Lieutenant Governor in Council has assigned responsibility for the CDA to the minister responsible for the SWSA.

 Back to top

Trotchie v R, 2019 SKCA 43

Jackson Ottenbreit Whitmore, May 23, 2019 (CA19042)

Criminal Law – Assault – Sexual Assault – Conviction – Appeal
Criminal Law – Evidence – Credibility

The appellant appealed his conviction for sexual assault (see: 2018 SKQB 129). The trial judge accepted the evidence provided by the complainant that included her testimony at trial and the admission of her videotaped statement to the police pursuant to s. 715.1(1) of the Criminal Code as well as her spontaneous utterances that the appellant had raped her, made at the time of the incident. He did not believe the evidence of the appellant that although he was asleep in the same trailer where the offence occurred, he was unaware of it and had slept through the night. He had argued too that it was too dark in the trailer for the complainant to have known who her assailant was and pointed to inconsistencies between her testimony and her evidence on the videotape. The judge found no basis to conclude that she was being dishonest in her testimony about her ability to see the appellant's face despite the darkness and was satisfied beyond a reasonable doubt that the appellant was the person who had committed the sexual assault. The issues raised on appeal were whether the trial judge erred: 1) in using the complainant's videotaped statement to the police and her spontaneous utterances as prior consistent statements in support of her credibility and reliability regarding whether a sexual assault occurred; 2) in determining the complainant's identification evidence was credible and reliable; and 3) by allowing Crown

counsel to cross-examine the appellant regarding his failure to tell the police that there might have been another assailant. The defence submitted that the appellant's trial counsel's cross-examination of the complainant established that another man who was present the night of the incident had shown a lot of interest in her. In the cross-examination of the appellant, he acknowledged that on the morning after the incident, he sent a text to the complainant's boyfriend that referred to the man and suggested a DNA sample should be taken from him in relation to the assault. Crown counsel attempted to ask the appellant why he had not mentioned the man to the police. Defence counsel objected, but the judge permitted the questioning, ruling that it did not infringe upon his right to remain silent or against self-incrimination. The Crown admitted at the appeal that the questioning was improper and accepted that the judge had erred. The defence submitted that the error could not be cured but the Crown argued that it could, pursuant to s. 686(1)(b)(iii) of the Code.

HELD: The appeal was dismissed. The court found with respect to each issue that: 1) the appellant's position that the rule against prior consistent statements was applicable was incorrect. The rule was not engaged in this case when the complainant's videotaped statement was admitted pursuant to s. 715.1(1) of the Code, as it became part of her in-court testimony. Although a s. 715.1(1) statement cannot be used to bolster the truthfulness of a complainant's trial testimony simply because it is consistent with that testimony, the trial judge did not rely on consistencies between the videotaped statement and in-court testimony as a form of impermissible self-corroboration. He used the consistencies and inconsistencies between the complainant's testimony and statement to assess whether her evidence was credible and reliable and to assess it against the defence's position that it was exaggerated, inconsistent and false on the issue of whether an assault had occurred. The court also rejected the appellant's argument that that the judge had improperly used the complainant's spontaneous utterances that the appellant had raped her as a prior consistent statement in support of her credibility rather than for the restricted purpose of res gestae. The evidence was admissible and relevant to the complainant's demeanour immediately after the incident, and thus relevant to her credibility; 2) the trial judge had not misapprehended the evidence. He concluded that any inconsistency between the complainant's earlier statement and in-court testimony was not the result of dishonesty. His decision regarding the amount of light in the trailer was supported by the evidence; and 3) the trial judge's error could not justify an acquittal or a new trial. While some prejudice to the appellant might have occurred as a result of the error, the case against him based on the evidence taken as a whole was so overwhelming that his conviction was inevitable.

 Back to top

University of Regina v Biletski, 2019 SKCA 44

Richards Whitmore Leurer, May 23, 2019 (CA19043)

Torts – Negligence – Appeal
Civil Procedure – Trial – Jury – Verdict – Appeal

The appellant, the University of Regina, appealed from the verdict reached by a jury after a civil trial that it had been negligent and its negligence had caused or contributed to injuries suffered by the respondent as a result of diving into the appellant's swimming pool in June 2005. The jury found that the respondent was not contributorily negligent and neither was the third party, the Piranhas Swim Club. The jury awarded damages to the respondent in the amount of $9,160,600. The appellant applied unsuccessfully to the trial judge to set aside the jury's verdict, pursuant to Queen's Bench rule 9-29 (see: 2017 SKQB 386). In this appeal, the appellant submitted that: 1) the jury erred in finding that it failed to meet its duty of care or, alternatively, in failing to find that the respondent's negligence contributed to the accident; 2) the jury failed to find the third party in large part responsible for the respondent's injuries; 3) the jury committed errors with respect to three specific findings it made concerning damages; and 4) the respondent's counsel's closing submissions prejudiced its right to a fair trial.
HELD: The appeal was dismissed. The court noted the standard of review applicable to a jury's factual findings that it would not set aside a verdict unless it was plainly unreasonable. It also observed that in this case, the findings of fact related to the events were appropriately left to the jury and remained inscrutable in light of the general questions it was invited to answer. The questions had been agreed to by all parties and were not challenged on the appeal. The court suggested that it might have been preferable if the jury had been asked separate questions inquiring first as to whether negligence had occurred and second, if the negligence had caused or contributed to the accident. It found with respect to the issues that: 1) on the basis of the evidence, it had been open to the jury to make the findings that the appellant was negligent and that its negligence caused or contributed to the respondent's injuries and similarly to make the finding that the respondent was not negligent. The evidence established that the appellant was negligent in allowing the use of diving blocks at the pool's shallow end and in failing to properly maintain the starting blocks. There was no evidence that the respondent was negligent or contributorily negligent simply because she failed to execute the dive as she intended. It did not mean that she failed to take reasonable care for her own safety; 2) it was open to the jury to find the appellant negligent while simultaneously rejecting the claim that the third party's negligence contributed to the accident; 3) the jury did not commit reviewable errors with respect to its award of damages, based on the evidence, concerning the respondent's loss of a chance to enter into an interdependent relationship or the amount of the award for pre- and post-trial income or earning capacity or the amount of the award for

future care costs. Furthermore, the jury's damages verdict fell within a range that was given to it by the appellant by way of its damages summary worksheet; and 4) the respondent's counsel's remarks were not prejudicial. The trial judge had found them not to be and his conclusion attracted deference.

 Back to top

R v Herman, 2019 SKPC 31

Martinez, May 21, 2019 (PC19024)

Constitutional Law – Charter of Rights, Section 11(b)

The accused was charged first with two counts of common assault in January 2017 and then with violating one of the conditions of his initial release from custody in October 2017. His trials were scheduled to be held in La Loche on May 16, 2019, which would be 28 months and 19 months after the laying of the first and second charges, respectively. As the delay exceeded the presumptive ceiling of 18 months set out in R v Jordan, the accused applied for a stay of proceedings under s. 11(b) of the Charter. The application was heard on April 26, 2019. The history of the proceedings was: i) the accused had initially adjourned his first set of charges to April 3, 2017 in order to apply for a Legal Aid lawyer; ii) on April 3, the accused's Legal Aid lawyer asked for a further adjournment to May 1 to review the Crown's resolution proposal; iii) the accused entered his not guilty pleas on that date, but his Legal Aid lawyer had to withdraw because the Meadow Lake Legal Aid office had discovered a conflict on the file. The matter was adjourned to May 29 so that outside counsel could be appointed; iv) the accused's new counsel asked for an adjournment to June 19 to review the file, the Crown's disclosure and its resolution proposal; v) on June 19, the trial was scheduled for March 29, 2018; vi) the defence lawyer brought forward the charges in order to schedule a new trial date on May 3, 2018 and waived the delay from March 29; vii) on May 3 the trial could not be held at La Loche because the power was out; viii) on May 12, an RCMP officer served a summons on the accused to appear in court on July 16, 2018; ix) the defence counsel requested that the matter be brought forward to an earlier date but Crown counsel did not respond; x) on July 16, the accused scheduled his trial on the first available date of February 7, 2019; xi) the trial did not proceed on that date because dangerous weather conditions prevented flying to La Loche and the trial was adjourned to May 16, 2019. The issues were: 1) what period of time should be deducted as attributable to defence delay from the total delay with respect to the first charge, specifically the period between April 3 and June 19, 2017 as set out in (ii) to (v) above; and 2) whether the Crown had shown the remaining periods of delay should be deducted because they resulted from exceptional circumstances outside of its control,

as described in (vii) and (xi) above. The Crown argued that the neither the power outage nor the inclement weather were foreseeable or avoidable and that by accepting the first available trial date after each event, the Crown had done everything it could to remedy the delay it caused. The accused submitted that neither of the events qualified as exceptional circumstances as both were generally foreseeable in La Loche and the Crown could have arranged, for example, to use a generator when the power failed. The defence submitted that if additional court resources were committed, it would greatly reduce trial delay when such events occur, particularly in this specific circuit location where delays were endemic, chronic and significantly greater than in the rest of the province.
HELD: The application was granted and the proceedings were stayed. After deducting the defence delay, the remaining trial delays in each of the accused's cases were above the presumptive ceiling and the Crown had not met the burden of establishing exceptional circumstances justifying such delay. The court found with respect to each issue that: 1) it would not attribute all of the delay in the specific period to the defence. It would not include legitimate actions taken by the defence to address the charges as happened after the accused's second appearance in court. The accused was responsible for the delay of one month required for outside counsel to be appointed, but it should not have taken the Legal Aid office one month to identify a potential conflict of interest. The court deducted 2.5 months of defence delay from the total, leaving a net delay of 25.75 months; and 2) the Crown had not established that it could not have reduced the periods of delay resulting from the events. After reviewing other provincial court circuits serving northern Saskatchewan or that have the same complement of judges, the court accepted the defence's assertion that institutional delay in the Meadow Lake circuit, and in the La Loche court specifically, is much higher than in the rest of the province.

 Back to top

R v Sand, 2019 SKQB 123

Danyliuk, May 9, 2019 (QB19118)

Criminal Law – Manslaughter – Sentencing
Criminal Law – Break and Enter with Intent to Commit Indictable Offence – Sentencing
Criminal Law – Aboriginal Offender – Sentencing
Criminal Law – Home Invasion – Sentencing

The accused pled guilty to one count of aggravated assault contrary to s. 268 of the Criminal Code and one count of breaking and entering a dwelling house and committing the indictable offence of robbery contrary to s. 348(1)(b) of the Code. This offence was

committed in Prince Albert in September 2015. In October 2015, the accused planned another home invasion to occur at a drug house in Saskatoon. The purpose of the operation was to get drugs and to beat up the man who worked as an enforcer or 'muscle' for the dealer. The accused retained four young men to invade the home. During the invasion, the man who had been targeted shot and killed one of them. The accused was then charged with manslaughter contrary to s. 236 of the Code and break and entry with the intent to commit an indictable offence contrary to s. 348(1)(a) of the Code. During his trial on these offences, the accused pled guilty. The author of the pre-sentence report (PSR) noted that the accused was a manipulative liar who had not accepted responsibility for what he had done. While on remand, he had attempted to bribe a corrections officer to smuggle contraband into the jail and he had been involved in a violent altercation with another inmate. His recidivism risk was assessed in the one hundredth percentile and he was unmanageable in the community. His criminal record began in 2002 and included 100 convictions. With respect to the first offences, counsel for the Crown and the defence made a joint submission that the accused should receive a sentence of six years for each offence, to run concurrently. Regarding the second set of charges, the defence argued that because the accused was Aboriginal and a member of the Mistawasis Frist Nation, the Gladue factors should be taken into account as a mitigating consideration in his sentencing. The defence pointed to the accused's abuse of alcohol and drugs, beginning when he was eight years old, as a reason for his criminal conduct. The defence also submitted that it was a mitigating factor that the accused had not forced the other four men into the home invasion. The individuals who perpetrated the invasion had each received seven- or five-year sentences, and parity thus dictated that the accused should receive the same sentence. The Crown's position was that an appropriate sentence was ten years and that parity with the other individuals was not applicable as the accused had pled guilty to manslaughter as well.

HELD: The accused was sentenced, with respect to the Saskatoon offences, to nine years on the charge of manslaughter and seven years on the charge of breaking and entering with intent, to be served concurrently. This sentence would run consecutively to the two six-year concurrent sentences the accused received for the two offences he committed in Prince Albert. The total sentence of 15 years would be reduced to 11.2 years as a result of the accused receiving credit at the rate of 1.5 to 1 for 1,395 days on remand. The court found that there were almost no mitigating factors to take into account, particularly because the Gladue analysis was affected by the accused's failure to take responsibility for his actions. It would not consider as mitigating that the four men had decided to commit the home invasion in Saskatoon in light of the role the accused played as the planner. The aggravating factors included: the accused's lengthy criminal record; his risk of recidivism; and that the manslaughter occurred in the context of a home invasion.

 Back to top

Heiser's Health and Fitness Ltd. v Saskatchewan Government Insurance, 2019 SKQB 124

Tochor, May 8, 2019 (QB19119)

Civil Procedure – Evidence – Expert Evidence
Insurance – Actions on Policy – Fire – Cause

The plaintiff's business location was extensively damaged by flooding after a rainstorm. The business had to cease operations for the clean-up. The plaintiff made a claim for insurance from the defendant. At the end of the same month, the building was destroyed by fire and another insurance claim was made. The defendant denied liability and alleged the plaintiff's president, C.H., deliberately set the fire, which vitiated the plaintiff's first and second claims. The sole issue at trial was whether C.H. deliberately set the fire. The defendant's expert concluded that the fire was deliberately set, whereas the plaintiff's two experts concluded that the cause of the fire was undetermined. The expert for the defendant found the fire was incendiary. He concluded that the fire started in the storage room. The cause of the fire, being deliberate, was determined after all other potential hypotheses were discounted. The expert sent samples for testing and a paper sample came back with the presence of an ignitable liquid. The plaintiff's first expert, Mr. T., prepared a critique of the defendant's expert's report wherein he criticized his use of a process of elimination to conclude the fire was incendiary. Mr. T. relied on the "Guide for Fire & Explosion Investigations" (Guide) that was amended from 2008 to 2011 to be critical of the elimination approach. He also criticized the report for not fully considering an electrical cause and for not even considering spontaneous combustion. The room identified as the room of origin was also questioned by Mr. T. because he said that the room of origin should have had more damage. The plaintiff's second expert, Mr. D., also criticized the defendant's expert's report. Mr. D. indicated that more consideration should have been given to the possibility of the fire starting in the roof given its pre-existing damage, a possible electrical cause of the fire, or the origin of the fire being the laundry room given the damage to the dryer drum and wood. The court assessed the evidence in three parts: 1) an examination of the expert evidence, and the findings that might be made therefrom; 2) consideration of the defendant's evidence of (a) motive; (b) opportunity; and (c) other inculpatory evidence; and 3) assessing the evidence as a whole using the legal test in Lancer Enterprises.
HELD: The defendant had the onus of proving on a balance of probabilities that the plaintiff deliberately caused the fire. The court assessed the evidence as follows: 1) the court did not accept objections of the plaintiff indicating that the defendant's expert's

report did not comply with Rules 5-37 and 5-43 of The Queen's Bench Rules. The ignitable liquid identified on the paper sample included copier toner as one of the possible liquids. The court found that the copier toner would ordinarily be found in the materials in storage room. The evidence explained the presence of the ignitable liquid in the storage room. The defendant's expert acknowledged on cross-examination that there was no physical evidence the fire was deliberately set. The court accepted the evidence of Mr. T. indicating that the defendant's expert should not have concluded that the fire was incendiary when there was no physical evidence. His evidence was also preferred over the defendant's expert's with respect to his criticism of not following the Guide in his approach. Mr. D.'s criticism of the defendant's expert was also accepted with respect to his approach in limiting his investigation of possible causes of the fire to those in his perceived room of origin. The court concluded that the defendant's expert did not adequately consider possible causes of the fire outside of the storage room. The lack of consideration was found to be a significant shortcoming in his investigation. Further, the defendant's expert sometimes relied on evidence that did not support his opinion. The court also noted that the defendant's expert insisted that his opinion would not change even when some information relied on earlier was not borne out by the evidence. Additionally, the court found that the defendant's expert was strident when testifying, at times not showing the expected neutrality. The plaintiff's experts on the other had testified in a neutral manner. Mr. T.'s and Mr. D.'s evidence was preferred to that of Mr. B. The court concluded that the cause of the fire must be classified as undetermined; 2)(a) the plaintiff acknowledged that the business was under financial stress prior to the fire. The court, however, was not persuaded that the plaintiff had a motive to start the fire to release him from the financial stress; (b) the plaintiff admitted to being at the business a short time before the fire was reported. He prepared a list of stationery items damaged by the flood and put clean wet towels in the dryer. The plaintiff did not try to hide that he had been at the business. He was there at a time that it would commonly be occupied by tenants of the business. He took his business truck to the business; it had logos on it and was the only one like it. He parked in front of the main door. The plaintiff immediately told others he had been in the building that evening; (c) the defendant's other inculpatory evidence against the plaintiff was not found to be particularly significant; and 3) after considering all of the evidence, the court concluded that the defendant did not meet its onus. The plaintiff's claim was allowed, and a date could be set for continuation of the trial to determine damages.

 Back to top

Quiring v R, 2019 SKQB 125

Zuk, May 9, 2019 (QB19121)

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

The appellant appealed his conviction of dangerous driving under s. 249(1)(a) of the Criminal Code. The appellant had been charged after an RCMP officer had observed him driving his truck at 3:00 am, making a right-hand turn at a higher rate of speed than normal while driving into a residential area. As the RCMP officer approached the appellant's vehicle, he noticed that the headlights were on high beam. Suspecting that the appellant might be impaired, the officer made a U-turn and followed the appellant, whereupon the latter accelerated away at a speed of 100 km per hour in a 40 km per hour zone. The appellant was veering from the right-hand lane into the opposing lane to go around parked vehicles. After driving approximately 250 metres for 10 seconds or so, the appellant abruptly stopped his vehicle in a driveway and attempted to run away but he was stopped and arrested. The appellant testified that he panicked because he had consumed five beers prior to driving and feared he might be found to be impaired. The officer testified that the street was well-lit and there was no foot or vehicle traffic at the time. During his cross-examination, the officer was shown a map printed from Google Maps by defence counsel and agreed that it was consistent with the location of the driving. He was provided with a protractor and then asked to review, using the scale on the map, the distance between where he made his U-turn and where the appellant stopped. He admitted that the distance was 150 metres shorter than he had originally estimated. Among the issues on appeal were whether the trial judge erred: 1) in law by failing to place any weight or reliance on the map provided as an exhibit in evidence; 2) in holding that the appellant's operation of his vehicle was done within the jurisprudential definition of dangerous driving as he stated the law to be; 3) in considering the consumption of alcohol as a factor in determining whether the actus reus or mens rea had been established; and 4) by failing to properly consider the brief duration of the alleged dangerous driving.

HELD: The appeal was dismissed. The court found with respect to each issue that the trial judge had not erred: 1) in his treatment of the map. It was used as demonstrative evidence and had no probative value. In order for defence counsel to meet his intended purpose of establishing the exact distance travelled by the appellant, he should have used a map containing a reliable and accurate scale, such as one prepared by a licenced land surveyor; 2) in selecting and applying the cases pertaining to the offence. The judge applied the modified objective test and concluded that the speed at which the appellant drove his vehicle combined with the other circumstances represented a marked departure from the standard expected of a reasonably prudent driver. As the appellant failed to provide any excuse for his manner of driving, the judge properly concluded that the mens rea of the offence had been established beyond a reasonable doubt; 3) in considering the appellant's alcohol

consumption as a factor in assessing mens rea. He took the consumption as simply one of the factors to consider and did not place undue weight on it; and 4) because he had considered all other factors when combined with the high rate of speed, albeit of short duration, before concluding that the manner of driving constituted a marked departure from the standard of a reasonable person.

 Back to top

University of Regina v HTC Purenergy Inc., 2019 SKQB 126

Krogan, May 10, 2019 (QB19125)

Civil Procedure – Statement of Claim – Application to Strike
Civil Procedure – Queen's Bench Rules – Rule 7-9
Civil Procedure – Undertaking – Relevance
Civil Procedure – Undertaking – Solicitor-Client Privilege
Contract Law – Negotiation – Pre-Negotiation Duty of Good Faith

The plaintiff was involved with research to develop technologies for capturing carbon dioxide that is emitted as a consequence of industrial activities. HTC was granted a licence regarding certain carbon capture technologies pursuant to a Head Licence Agreement (HLA). The plaintiff commenced the action to determine whether the HLA was exclusive or non-exclusive. In 2008, DP and DH (collectively the D Companies) purchased equity in HTC and entered into a Sublicence Agreement (SLA) with HTC to enable the D Companies to use the HTC technology and the licenced technology from the plaintiff. A letter confirming certain arrangements (confirmation letter) was sent from the plaintiff's liaison office (UILO) to HTC. There was also an amendment to the HLA in September 2008 that contained modifications contemplated in the confirmation letter. HTC argued that the plaintiff tried to terminate the HLA by its conduct, designed to diminish or frustrate HTC's ability to benefit from the HLA. They further submitted that the plaintiff pressured HTC, through its conduct, to withdraw from its bid on another project. The D Companies argued that the plaintiff breached its rights under the SLA and wrongfully interfered with the D Companies' economic interests. All of the parties applied to the court regarding the proper answering of undertakings or questions. The plaintiff wanted access to the working papers the D Companies had prepared prior to their purchase of equity in HTC. The D Companies argued, among other things, that solicitor-client privilege applied to the working papers. HTC argued that the plaintiff inappropriately refused four undertakings. The plaintiff argued that they were irrelevant. The D Companies applied for an order requiring the plaintiff to answer undertakings 5 and 7 relating to the amount spent on legal counsel and the budget to the UILO. The D Companies also requested an order requiring the plaintiff to answer undertakings 8 and 18, regarding email exchanges between

the plaintiff's employee and HTC or the D Companies and to advise if the president of the plaintiff was aware of the details concerning the $10 million purchase and the seat on the HTC board prior to her signing the schedule. The plaintiff also applied to compel the D Companies to answer questions or undertakings. The D Companies' objections were divided into four parts: 1) solicitor-client privilege; 2) invalidated through disclosure to a non-client third party; 3) further disclosure of relevant material required; and 4) based on questions being irrelevant, overly broad or requiring a legal interpretation. The D Companies also applied for an order pursuant to Rule 7-9 of The Queen's Bench Rules to dismiss a portion of the plaintiff's claim on the basis that it lacked merit, was fundamentally flawed or did not disclose a reasonable cause of action. Specifically, the D Companies argued that the portion of the paragraph where the plaintiff alleged that it breached a duty of good faith and fair dealing by negotiating strategically uncertain language into the confirmation letter for its benefit at the plaintiff's expense, should be struck. The plaintiff argued that there was a duty of good faith given what preceded the confirmation letter.

HELD: The undertakings refused by the plaintiff concerned HTC's withdrawing of its bid on a project and the plaintiff's knowledge regarding it. The court found the requested information to be relevant. The plaintiff was ordered to re-attend their questioning and provide proper answers to the four undertakings. The plaintiff was not ordered to answer the D Companies' undertakings 5 and 7 because of the court's decision on the strike application. The plaintiff seemed to concede the relevance of undertakings 8 and 18. The plaintiff was not successful in its application for the D Companies to provide further information on undertakings. The court found that the D Companies did not have to provide material that was legal advice and subject to privilege. They had not waived the privilege. Undertakings relating to matters pursuant to the privilege did not have to be answered by the D Companies, nor did undertakings seeking the D Companies' subjective views on matters. The due diligence summary created by the D Companies' lawyers subsequent to the execution of the HLA was privileged and the correspondence at that time was also not part of the factual matrix, being subsequent to the execution of the HLA. The information from the accountant's file in May 2008 including working papers and all correspondence did not have to be answered because the D Companies were not a party to the HLA: the information was created after the execution of the HLA. It was not part of the factual matrix. The information was also privileged. The D Companies also did not have to answer whether their minds were put to specific provisions in the HLA because the question was aimed at finding the D Companies' view of the meaning of the HLA. The subjective view of a party is irrelevant and, further, the events occurred after the HLA was executed. The plaintiff was ordered to pay the D Companies and HTC taxable costs of their respective applications. There is no good faith duty known in law to avoid using strategically uncertain language in a commercial agreement. The D

Companies' application could be granted on that basis; however, the court first had to examine whether there existed a duty of good faith to pre-contract negotiations. The plaintiff did not establish that there was an imbalance in the relationship between it and the D Companies that would bring the negotiations within the ambit of a duty of good faith. HTC also did not have a special relationship with the plaintiff, so even if the D Companies were standing in the place of HTC, as argued by the plaintiff, there was no duty to negotiate a contract in good faith. Even if a duty existed, the court concluded that there were no facts pled or in any document referred to that established a bad faith negotiation that resulted in the "strategically uncertain language calculated to enrich HTC and the D Companies". The portion of the claim disclosed no reasonable cause of action and had no prospect of success. The D Companies were granted the relief requested. They were entitled to costs set in the amount of $2,000.

 Back to top

Eaton v University of Regina, 2019 SKQB 127

McCreary, May 15, 2019 (QB19122)

Privacy – Access to Information
Privacy – Access to Information – Review of Request – In Camera
Statutes – Interpretation – The Local Authority Freedom of Information and Protection of Privacy Act

The applicant submitted an access to information request to the respondent university pursuant to s. 6 of The Local Authority Freedom of Information and Protection of Privacy Act (LAFOIP) for information respecting fossil fuel research being conducted by the respondent between 2006 and 2017. The respondent generated a spreadsheet of potentially relevant research projects (Database Query Spreadsheet). The respondent provided the applicant with a fee estimate to identify and review the research files relevant to her request. The applicant then applied to the Office of the Saskatchewan Information and Privacy Commissioner (Commissioner) for a review of her request pursuant to s. 38(1) of LAFOIP. The Commissioner recommended that the respondent: 1) regard the Database Query Spreadsheet as the record responsive to the applicant's inquiry; 2) release to the applicant the project title, funding amount, funding agency, and unit receiving the funding, 3) comply with s. 17(4) of LAFOIP; and 4) rescind the fee estimate. The respondent decided not to follow most of the recommendations. The applicant appealed to the court. The respondent requested that the entire court file be sealed, including the Database Query Spreadsheet and its legal submissions and affidavits, and that they be embargoed from the applicant to avoid inadvertent disclosure. HELD: The Database Query Spreadsheet was ordered to be sealed.

Section 47 of LAFOIP allows exceptions to the open court principle on appeals. There are protections against disclosure of what would otherwise be protected information. The protection is granted where a party's position cannot be communicated in open court without disclosing information otherwise exempt from disclosure. The onus is on the respondent with a presumption of public access. The court concluded that the Database Query Spreadsheet was not the "record" that fully responded to the applicant's request. The applicant, however, indicated that she would accept it at this point. She agreed to four categories of information being included in the response to her request. The respondent objected to disclosing the identity of the funding agency and the unit receiving the funding, arguing that they were "details of academic research" under s. 17(3) of LAFOIP. The court disagreed with the respondent that it was necessary to disclose examples for the court to make a determination. The court held that because the parties knew the general categories of information in dispute, they could argue effectively in open court regarding whether the category of information should be kept private, without referencing the specific information at issue. It was determined not to be necessary to hear the submissions in camera or ex parte with respect to whether the exemption applied to the identity of a funder or to the recipient of funding. The s. 17(3) exemption application was to be received by the court in the usual manner and heard in open court.

 Back to top

Hydrodig Canada Inc. v 101202529 Saskatchewan Ltd., 2019 SKQB 128

Scherman, May 16, 2019 (QB19126)

Personal Property – Security Interest
Civil Procedure – Judgments and Orders – Final

The applicant obtained a court order in December 2018 that it had a valid and enforceable option to purchase (OTP) a certain truck and equipment at a fixed purchase price when the option was exercised. Following the order, the respondent, J & D Pawliw Trucking Ltd. (Pawliw), informed the applicant and the court that it had sold the truck in September 2018 to the respondent, Versa A1 Industrial (Versa). The applicant then brought this supplemental notice of application seeking a further order whereby it would acquire the truck from Versa, free and clear of all rights and interests of all parties, upon payment of the fixed price. The respondents opposed the application on the basis that as the option was never exercised, Versa's purchase of the truck was not subject to the applicant's OTP and the limitation period for the applicant to enforce its claim by action had expired. The applicant's interest in the truck had been arranged by contract with a company and it had registered its

security interest prior to these proceedings. The company ceased operation in 2013 and in July of that year, the applicant gave notice to it that it was exercising its option. However, the applicant was unable to obtain information about the location of the truck until May 2017, when it learned that it was in the possession of Pawliw, who was then notified that the applicant requested the return of the truck to them pursuant to its security interest and OTP. Pawliw refused to release the truck, claiming a garage keeper's lien. The applicant disputed the lien because the amount of it was higher than the fair market value of the truck. After arranging an auction, Pawliw refused the bid made by the applicant which was the highest one received. The applicant then made its first application. At the hearing, Pawliw appeared by counsel. The judge was satisfied that the applicant had a valid and enforceable option to purchase the truck and determine its fair market value and Pawliw did not appeal the decision.
HELD: The application was granted. The court found the first order was a final determination by the court, holding that the applicant had a valid and enforceable OTP. Versa had no right to make either a direct or a collateral attack upon a final decision of the court. Any remedy available to it was against Pawliw. The security interest that the applicant had respecting the truck did not lapse by reason of any failure of it to commence proceedings against the other party to the contract. The limitation period defence was not raised by that party or Pawliw at the first hearing and, as the decision had not been appealed, it was an impermissible collateral attack on a final decision of the court by Versa to now attempt to raise a limitation period argument. Alternatively, the applicant had not learned that Pawliw was in possession of the truck until May 2017 and thus it could not have discovered the cause of action against it prior to that. The proceedings were commenced against Pawliw by December 2018, well within the two-year limitation period. The applicant was to pay the price fixed by the order into court to the credit of the proceedings and Versa was ordered to deliver the truck to the applicant.

 Back to top

A.S., Re, 2019 SKQB 129

Megaw, May 16, 2019 (QB19123)

Family Law – Child in Need of Protection
Family Law – Child Protection – Mental Health

The Ministry of Social Services (Ministry) applied for an order declaring the children in need of protection and placing them in the care of their biological fathers. The mother was 34 years old. The oldest child, A., was 9 years old and the youngest child, B., was 18 months old. A.'s father was R. and B.'s father was M. The Ministry

became involved when B. was born in August 2017 when the mother's mental health worker contacted the Ministry concerning the mother's mental health. The children were apprehended in November 2017 after B. was taken to the emergency ward. B. was initially placed in foster care but was moved to live with M. in September 2018. A. was immediately placed in her father's care. It was not clear what happened at the mother's house prior to the ambulance being called. The written report of the EMS personnel indicated that the mother advised them that she had placed a pillow over B.'s face to stop him from crying. It was also recorded that she had placed her fingers in B.'s mouth to get him to suckle. Her long fingernails cut his mouth and caused him to bleed. The mother indicated that she did not place the pillow directly on B.'s face, but some distance from it to muffle his cries so as not to wake up A. She said prune juice, and not blood, was coming from B.'s mouth. Sometime later, the mother did admit to the Ministry that the EMS version was true, but said the reason for the admission was to get joint custody of the child. The mother was diagnosed with schizophrenia at the age of 13 or 14. She has also been diagnosed with generalized anxiety disorder. The mother did not accept her diagnosis and was non-compliant with taking necessary medication for its treatment. The mother's adult life had been relatively stable with housing. She also parented A. from her birth until November 2017. After the apprehension, the mother was hospitalized, and it was suspected that she had not been taking her medication. The issues for the court were: 1) the effect of the emergency room incident; 2) whether the children were in need of protection; 3) the effect of the mother's mental health on her ability to parent; 4) the appropriate order; and 5) conclusion.

HELD: The court dealt with the issues as follows: 1) the court did not accept the mother's reason for admitting the EMS version of the story because it did not make sense. The court was unable, on the whole of the evidence, to determine what actually took place the night the ambulance was called. The mother was struggling to properly care for the child and the court found that the mother was in crisis at the time. The crisis was caused by the mother's mental health difficulties. The incident was not enough on its own for the court to conclude that the children were in need of protection, but it did inform the court on what was to be done with the children; 2) the mental health professionals that testified were concerned with whether the mother could gain actual insight and accept her mental health condition. Also, there was concern with whether the mother would continue to take her medication; 3) in one doctor's opinion the mother was not capable of parenting the children at the time of the application for a number of reasons: a) she lacked insight into her mental health conditions. The court accepted that the mother now acknowledged the existence of her illness, however, did not accept that it was completely genuine; b) there was an order in place requiring the mother to comply with the taking of her medication. Its existence indicated to the court that the mental health professionals were not yet convinced that the mother was

committed to complying with taking mediation. The court was also not convinced; c) the court found that the mother did not have adequate supports; d) the mother was an engaged parent with the oldest child, but had not had that opportunity with B. The mother's mental health issues prevented her from becoming fully engaged with him; and e) the children were determined to be in need of protection while the mother dealt with and established a track record of dealing with her mental health concerns. The court made an order pursuant to s. 11(a)(i) and (ii) of the Act, that the children were in need of protection; 4) the court found that the mother had not yet shown the level of consistency required to allow the children to be returned to her safely. The court found it was in the children's best interests to remain in their father's care pursuant to s. 37(1)(b) of the Act. The mother was to have unsupervised access that would expand as she successfully worked with her mental health condition. The access would be suspended if the mother failed to remain compliant in taking her medication or attending her psychiatrist's appointments.

 Back to top

R v Sanderson, 2019 SKQB 130

Mitchell, May 10, 2019 (QB19124)

Criminal Law – Assault – Aggravated Assault
Criminal Law – Defences – Battered Spouse Syndrome
Criminal Law – Evidence – Credibility

The accused was charged with aggravated assault, contrary to s. 268 of the Criminal Code. The victim was the accused's common-law spouse at the time. The accused's defence was the defence of battered spouse syndrome under s. 34(2) of the Criminal Code. There was inconsistency between the testimony of the accused and that of the victim. On Christmas Eve, the accused, the victim, and the victim's siblings began drinking shortly after 6:00 pm. The accused and the victim's cousin went to get more liquor. When they returned to the house, the victim was angry and demanded to know where they had been and why it had taken so long. The victim called the accused names. The victim's sister took a child upstairs. She testified that she could hear yelling from the kitchen and the victim calling the accused names. The sister also indicated that she was aware of a history of physical violence between the couple. She called her mother and asked her to call 911 because she feared that the victim would assault the accused. An officer testified that while she was on the phone with the sister, she heard a male person shout "I will kill you." The victim admitted that he was very angry with how long it took the accused to get more alcohol. He denied threatening her. He said that he was sitting at the kitchen table with his head down when he saw that the accused was going to stab him.

The knife entered at the top of the victim's forehead and came to the bottom of the left eye. The accused's version of events was somewhat different. She indicated that the victim was very angry when she returned and that he was accusing her of being with another man. She admitted to being very intoxicated as well. The accused said that she tried to calm down the victim. A physical scuffle started, and the accused said that the victim tried to physically intimidate her. She indicated that she "blanked out" and the next thing she knew, the victim was lying on the kitchen floor, bleeding. The accused indicated to the police that she punched the victim with her fists. She gave a videotaped warned statement the next day. She was consistent in stating that she could not remember what had happened because she had been drinking heavily.
HELD: The court undertook a credibility analysis pursuant to D.W. The accused was found to testify in a forthright, candid manner. The court did have some concerns with the reliability of the accused's testimony. For example, the night of the altercation she indicated that she had punched the victim and then the next day she said that she had a "black-out". The accused was found to be credible and her evidence regarding her lack of recollection was accepted. The victim was not found to be a credible or reliable witness. His testimony was rejected. The elements of the offence of aggravated assault were made out: the stabbing wounded the victim; the accused's conduct caused the victim's injuries; and a reasonable person would realize that the accused's conduct likely would cause bodily harm to the victim. The Crown had the burden of proving beyond a reasonable doubt that self-defence was not made out. There must be an air of reality to the defence, which was conceded to by the Crown and which the court agreed with. Therefore, the Crown had to disprove at least one element of the defence beyond a reasonable doubt. The first two elements of the defence were found to be made out: the accused believed on reasonable grounds that force was being used or threatened against a person; and the act that constituted the offence was committed for the purpose of defending or protecting against that use or threat of force. The Crown did not prove beyond a reasonable doubt that these elements were displaced on the facts of the case. Next was a consideration of the reasonableness of the accused's actions. The accused testified to at least four occasions when she feared for her life and other instances of abuse. The court found that the circumstances constituted a reliable basis for concluding that the accused's actions were reasonable. The court took particular note of the victim's size as compared to the accused's size, as enumerated in s. 34(2)(e) of the Criminal Code. Further, the victim had threatened to kill the accused that night in the kitchen, a statement that an officer heard. The victim also had two convictions for assaulting the accused prior to the incident and he also had one after the incident. The accused was found not guilty.

 Back to top

Peepeetch v R, 2019 SKQB 132

Kalmakoff (ex officio), May 24, 2019 (QB19129)

Criminal Law – Aboriginal Offender – Sentencing – Gladue Report

The accused sought an order that a special Gladue report be prepared to assist the court in determining the appropriate sentences for his convictions of impaired driving, refusing to provide a breath sample and possession of a prohibited weapon, a set of brass knuckles (see: 2018 SKQB 65). Prior to making this application, the sentencing had been adjourned so that a pre-sentence report (PSR) could be prepared because of the accused's Aboriginal heritage. The court had requested that the report provide information particular to his circumstances as mandated by Gladue and Ipeelee. The Crown served the accused with a notice that it would seek greater punishment under s. 727 of the Criminal Code. It indicated that it would ask the court to treat the accused's matter as a subsequent conviction within the meaning of s. 255 of the Code. Accordingly, the accused would face a minimum sentence of 120 days of imprisonment respecting the impaired driving and refusal charges and a minimum driving prohibition of three years. The criminal record of the accused included 14 previous convictions for Criminal Code driving offences, eight of which related to drinking and driving. As a result, the Crown would argue that the accused should receive a sentence of more than two years' imprisonment. The PSR was prepared and filed with the court, but defence counsel asked for a further adjournment to May 2018 to seek the preparation of a special Gladue report. Further adjournments occurred for various reasons until the date of this application. In the interim, the decisions in Sand and Desjarlais were rendered and the accused relied upon them as authority that the courts can and should make the requested order as an exercise of their inherent jurisdiction. The accused argued that the PSR did not contain all of the information required by s. 718.2(e). For example, it did not include all available reasonable alternatives to incarceration, nor did it provide sufficient detail concerning the accused's childhood and family history and a description of his mother's residential school experience and its impact upon her parenting of him. There was no mention of his childhood experience with familial drinking and driving as it related to his own pattern of offending nor of his relationships with his family members. In addition, the accused suffered from the effects of a serious brain injury that meant his individual circumstances called for a report prepared by a writer who could devote more time to the process than could a regular probation officer because the accused was unable to relate his own history. HELD: The application was granted. The court ordered that Court Services should pay for the preparation of a Gladue report. It found that there were specific and exceptional circumstances in this case that required that a publicly-funded Gladue report be prepared to assist it with the information essential to it to carry out its function in sentencing in light of s. 718.2(e) of the Code because the PSR

before it had not provided the necessary information to conduct the proper analysis. In this case, the accused might face a much longer jail term and alternative sentences must be considered in light of his personal circumstances. The other deficiencies in the PSR had been described by the defence. The accused could not pay for a Gladue report himself. As 15 months had elapsed since the convictions, the court expressed concern that although it could order the preparation of supplementary report by a probation officer, it might not suffice and further delays would be incurred.

 Back to top

Vey v R, 2019 SKQB 135

Dawson, May 27, 2019 (QB19131)

Criminal Law – Conspiring to Commit Murder
Criminal Law – Defences – Charter of Rights, Section 8, Section 24(2)
Criminal Law – Evidence – Admissibility – Private Conversation
Criminal Law – Evidence – Search Warrant

The two accused, C.V. and A.N., were charged with conspiring to murder their spouses, contrary to s. 465(1)(a). Both accused applied for orders that: a) their s. 8 Charter rights were breached; b) their s. 9 Charter rights were breached; and c) excluded any direct or derivative evidence obtained as a result of the Charter breaches. C.V.'s wife, B.V., recorded C.V. in October 2012 after she became suspicious he was having an affair. B.V. said that she confronted C.V. with the recording. In June 2013, she purchased a new iPod and began recording C.V. by hiding the iPod when she was away at work. On the July 1 recording, she heard C.V. and A.N. talking about their affair and then what B.V. believed to be C.V. talking about killing A.N.'s spouse. The police were contacted, and they were given the iPod. The officer who took the iPod contacted Constable W. from major crimes who advised her to take the iPod and get more information. C.V. and A.N. were both arrested three days later and search warrants on their homes were executed. Cst. W. testified that he did not think that he needed to get a search warrant to remove the recorded conversation from the iPod because it was handed over to the police by B.V. of her own volition. He also indicted that there was some exigency because of murder plans being made. Cst. W. obtained search warrants for the accuseds' computers and cell phones. No further information of use was obtained from any of the search warrants. The issues were: 1) when does s. 8 protection apply; 2) did C.V. and/or A.N. have standing to challenge the search, i.e. did they have a reasonable expectation of privacy in the subject matter of the state action: a) what was the subject matter of the search; b) did C.V. and/or A.N. have a direct interest in the subject matter; c) did C.V. and/or A.N. have a

subjective expectation of privacy in the subject matter; and d) was C.V.'s and/or A.N.'s subjective expectation of privacy objectively reasonable; 3) was there a search or seizure and, if so, was the search or seizure unreasonable; 4) should the evidence be excluded under s. 24(2) of the Charter: what was a) the seriousness of the Charter-infringing conduct; b) the impact of the Charter-infringing conduct on C.V.'s and/or A.N.'s Charter-protected interests; c) society's interest in an adjudication of the case on its merits; and d) should the evidence be excluded?

HELD: The court determined the issues as follows: 1) s. 8 protection applies when the claimant's subjective expectation of privacy is objectively reasonable so as to give the claimant standing to assert his/her right; 2) a) the subject matter of the search was the conversation between the accused, recorded and stored on the iPod; b) C.V. and A.N. had direct interests in the subject matter because they were participants in the conversation and were authors of the conversation; c) C.V. and A.N. were having a private conversation in a home where no one else was present. The court inferred that A.N. attended C.V.'s home with the expectation that she and C.V. would meet and talk in private. C.V. and A.N. had a subjective expectation of privacy in the conversation; and d) the place of the search was the data on the iPod. The private nature of the conversation was extremely high. C.V. and A.N. had meaningful control over the conversation. To accept the risk that the other participant will disclose the conversation is the same as accepting the risk that the state will intrude on the conversation when they were not present at the time. B.V. illegally recorded the conversation; she had no shared interest in the conversation. C.V. and A.N. had a reasonable expectation of privacy in the conversation so they each had standing to challenge the search and admission of the evidence; 3) the search or seizure complained of was the accessing and downloading of the private conversation between C.V. and A.N. recorded on the iPod. Cst. W. testified that he was aware that the recording was made illegally by B.V. and that it contained a conversation between C.V. and A.N. in C.V.'s home. The court found, from the Agreed Statement of Facts, that B.V. did not voluntarily give the iPod to the police, it was seized by them. B.V. had no privacy interest in the conversation, so had no authority to permit police to access the conversation. B.V.'s actions and consent could not nullify either C.V.'s or A.N.'s reasonable expectation of privacy in the conversation. The court found that the accessing, downloading, and transcribing of the conversation was a search or seizure. It was a warrantless seizure. The seizure of the iPod may have been justified due to exigent circumstances, the preservation of evidence, but there were no exigent circumstances in relation to accessing and downloading the conversation. There was no immediate surveillance put on C.V. or A.N. and the police did get search warrants for the homes, computers, etc. C.V.'s and A.N.'s rights under s. 8 of the Charter were violated; 4) a) the court found that the Charter-infringing state conduct was serious. The police should have known that a third party cannot waive the privacy rights of

another party to a private conversation that took place in the home of one of the conversation participants. The police also should have known that recording conversations of third parties by a private citizen was illegal. The officers involved were members of special units. The court found that the evidence did not support a conclusion of good faith. The breach was a willful or reckless disregard of Charter rights; b) the state conduct was found to have a serious impact on C.V.'s Charter-protected interest and it favoured exclusion. The court concluded similarly with respect to A.N. even though the conversation was not in her home; c) the court agreed that evidence was highly reliable and strongly supported its admission; and d) the admission of an illegally recorded private conversation, which occurred in a private home, and was then seized, accessed and downloaded by the police through a warrantless search, would bring the administration of justice into disrepute. The court concluded that the evidence should be excluded.

 Back to top

R v Highway, 2019 SKQB 136

Currie, May 27, 2019 (QB19128)

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

The Crown appealed the acquittal of the accused on a charge of impairing driving contrary to s. 254(3) of the Criminal Code and refusing to provide a breath sample contrary to s. 253(3) of the Code. The charges arose after a police officer stopped the accused's vehicle. She smelled alcohol coming from his truck and then smelled it on his breath. Her suspicion of impairment increased when she asked for his licence and registration because he only watched them when they fell out of a compartment. He spoke very slowly although his speech was not slurred. Otherwise, the accused did not exhibit signs of impairment and understood his rights and the breath demand. The officer had an ASD with her but did not make a roadside demand. Instead, she arrested him and charged him with impaired driving and demanded Breathalyzer samples. At the station, the police were unable to obtain an adequate breath sample and the officer charged him with refusal. During his trial in Provincial Court, a voir dire was held and the judge determined that the officer did not have grounds for demanding a breath sample. Without grounds, the accused could not have been arrested. The judge ruled that the arrest constituted a breach of the accused's s. 9 Charter rights. Under s. 24(2) of the Charter, the judge excluded the evidence gathered after arrest, including evidence the Crown would have relied upon to prove impairment. He acquitted the accused of refusing to provide a sample on the basis that the trial evidence was

insufficient to establish beyond a reasonable doubt that his ability to drive was impaired. The Crown appealed on the ground that the trial judge erred in determining that the officer did not have the grounds to demand a breath sample. The issues were whether the trial judge: 1) used the wrong test in determining whether the officer had reasonable grounds; and 2) if so, whether he was correct in concluding that the officer did not have reasonable grounds.
HELD: The appeal was allowed. The acquittals were set aside and a new trial ordered. The court found with respect to each issue that: 1) the trial judge failed to apply the correct test as set out in R v Gunn; and 2) the officer had reasonable grounds for the breath demand after considering the evidence in the context of the test set out in Gunn. There were at least five factors known to the officer at the time she arrested the accused that were rationally capable of supporting the inference that the accused was impaired. The accused had not provided any explanation for his behaviour as an alternative to the inference. The officer was not required to use the ASD. The court found that there was an objective basis for the officer's subjective belief. Thus the judge erred in finding that the accused's Charter rights had been breached and in excluding evidence from the trial and in dismissing the charge under s. 254(3) on the basis that the breath demand was unlawful. The dismissal of the charge under s. 253(1)(a) on the basis of insufficient evidence to prove commission of the offence could not stand.

 Back to top

Argue v Argue (Meier), 2019 SKQB 137

Megaw, May 27, 2019 (QB19132)

Family Law – Affidavit – Notice of Objection – Costs
Family Law – Child Support – Determination of Income
Family Law – Child Support – Section 7 Expenses
Family Law – Costs
Family Law – Custody and Access – Variation

The self-represented parties were involved in a lengthy and ongoing matter. The parties had three children. There was a trial judgment in May 2018. That judgment ordered that the shared parenting of the youngest child, E., be resumed. That seemed to be going well. In February 2019, the court ordered the respondent to pay $22,078 to the petitioner in retroactive child support. The petitioner was also awarded costs of $51,041. The respondent was to pay by April 20, 2019. The respondent had not paid any of the amounts. The respondent wrote a 16-page missive of her complaints regarding the petitioner. The missive was addressed to the children and she said that she only gave it to the middle child. The respondent applied to: 1) vary the child support, both retroactively and prospectively; 2) rectify errors in the trial judgment; 3) determine s. 7 expenses

retroactively and prospectively; 4) advance payment from the petitioner for orthodontic expenses for one of the children; 5) have additional income imputed to the petitioner; 6) be designated the primary parent responsible for the youngest child, E.; and 7) set ongoing child support.

HELD: The court determined the respondent's application as follows: 1) the respondent indicated that her accountant filed an amended 2017 income tax return after trial, reducing her income from $97,894.93 to $92,710.28 to reflect a loss in rental property income. The court dismissed that portion of the respondent's application because: the court was not satisfied the rental loss was appropriately established in the evidence; the court was not satisfied that such loss should be taken to reduce the respondent's income; and the court was not in the position to amend the judgment of another judge on a finding of fact based on the evidence presented at trial. The court did not grant the respondent the requested leave to file additional material regarding the loss, because it should have been filed with the original material and she was well aware it was required. Further, any alleged clerical error could have been brought to the attention of the trial judge. The loss also appeared to be a short-term venture. The 2017 income matter was settled by the trial judge; 2) the respondent alleged 11 errors in the trial judgment. The proper procedure would be for the respondent to appeal to the Court of Appeal for errors beyond clerical errors and for clerical errors she should make an application pursuant to The Queen's Bench Rules; 3) the expenses go back to 2016, which pre-dates the trial. The parties participated in a trial dealing with all issues, so the court declined to make an order regarding 2016 and 2017 expenses. The court preferred the petitioner's evidence over the respondent's regarding explanations for the expenses. The respondent did not provide any explanations regarding any payments made, nor did she provide a paper trail, whereas the petitioner did. The respondent was ordered to pay the petitioner $816.31; 4) both parties had dental insurance and have, in the past, been able to settle the dental expenses for the children. The court did not order that the respondent could deduct orthodontic costs from the monthly child support she was to pay; 5) the respondent argued that the petitioner was underemployed. She seemed to suggest that he should work more than full-time hours and that a higher income should be imputed to him. The court found that the petitioner was earning income according to his ability. He was not expected to work overtime. The petitioner earned a relatively consistent income over the years, so the court did not accept the proposed calculation of the petitioner's income based on one pay stub. The petitioner's income was as disclosed in his 2018 income tax return; 6) the reasons given by the respondent to change the parenting of the youngest child were: she was going into grade 9; she continued to struggle with her academics; and she suggested to the respondent that she would like to live full-time with her. Starting high school and a continuing issue with academics were not found to be material changes; they would have been in the contemplation of the trial judge. The alleged

suggestion of the child was also not found to be a material change. The parenting regime seemed to be going well; 7) the respondent's 2018 income was $94,149.43 and the petitioner's was $62,317.80. The formula to calculate child support outlined in the trial judgment was to be used. The petitioner was successful in opposing the application so was entitled to costs. The court looked to Rules 15-25 and 11-1 and determined that a significant lump sum award of costs was appropriate. The respondent was ordered to pay costs to the petitioner in the amount of $3,000, payable forthwith. If the costs were not paid the petitioner was allowed to deduct the amount from his proportionate share of s. 7 expenses. The respondent also had a notice of objection to affidavit evidence. It was dealt with by separate fiat with costs reserved. the respondent's objections were dismissed for the most part. It was not a legitimate objection but rather an attempt to remove any negative evidence regarding her. The notice of objection also did not follow the Rules. The petitioner was awarded costs in the amount of $300, payable forthwith and again with the ability to deduct the amount from his proportionate share of s. 7 expenses.

 Back to top