The Law Society of Saskatchewan Library's online newsletter
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Criminal Law – First Degree Murder – Conviction – Appeal

The appellant appealed his conviction for first degree murder (see: 2016 SKQB 363) and applied to adduce fresh evidence. The appellant had been a high-ranking member of the White Boy Posse, a gang involved in the drug trade in Alberta. When a member left the gang, the appellant advised other members that he was placing a $40,000 bounty on the man. He and some other members drove to Saskatoon from Edmonton when it was believed that the man had been located there. They went with the intention of killing him, but because they had the wrong address, they killed the resident of that address by accident. At trial, five members of the Posse testified for the Crown, one of whom had been convicted of first-degree murder for his role in the killing. The other witnesses had sold drugs for the appellant and had been involved to various degrees with carrying out the murder plan. The appellant argued on his application to adduce fresh evidence that his trial counsel had been unaware that payments had been made by the police to three of the witnesses and because of that, he had not cross-examined them. As a result, the trial judge's assessment of the worth and credibility of their testimony was affected as was the fairness of the trial. With regard to his grounds of appeal, the appellant argued that the trial judge erred: 1) by failing to properly apply Vetrovec; 2) by failing to order third-party records from the Witness Protection Program (WPP) and failing to allow cross-examination of two witness on benefits they received under it; 3) by finding him guilty of first-degree murder on the basis that it was planned and deliberate and that the murder was committed

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for the benefit of a criminal organization; and 4) by unreasonably finding that he was guilty of conspiracy to commit murder, conflating evidence of planning and deliberation from another charge.
HELD: The court dismissed the application and the appeal. Respecting the application, it found that it did not meet the diligence test set out in Palmer as most of the evidence was actually known to counsel at trial. It was generally known that some witnesses had been paid money pursuant to the WPP. That evidence, taken with all the evidence at trial, would not reasonably be expected to have affected the verdict. Regarding the grounds of appeal, the court found that the trial judge had not erred: 1) in the manner in which she applied the Vetrovec warning. It acknowledged that she observed the witnesses testified in a credible manner before she cautioned herself. However, that did not compel an inference that she could not perform an appropriate Vetrovec analysis thereafter, and the court found that she had conducted it properly and relied on confirmatory evidence in respect of each witness; 2) because nothing in the record indicated defence counsel ever made an application to have third-party records disclosed or that he was prevented from cross-examining witnesses regarding benefits they received under the WPP; 3) in finding the murder was planned and deliberate under s. 231(2) of the Criminal Code regardless of the fact that the victim of the murder was not the intended victim. The judge correctly found that there was consideration paid for the murder as required by s. 231 of the Code because the appellant forgave one member's drug debt to him after he committed the murder. The judge's finding that the Posse was a criminal organization within the definition of s. 467.1(1) was proven by the evidence, as was the fact that the appellant, as its head, was guilty of the murder under s. 231(6.1) because he sanctioned the murder for the benefit of the Posse; 4) in finding conspiracy, because she considered the same evidence related to planning and deliberation. Evidence is capable of being relevant to more than one offence.

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R v Bissky, 2018 SKCA 102

Jackson Herauf Whitmore, December 31, 2018 (CA18100)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Conviction – Appeal

The appellant appealed his conviction for trafficking in cocaine contrary to s. 5(2) of the Controlled Drugs and Substances Act. Both he and the Crown appealed the sentence of 12 months in custody. The police had obtained a warrant under s. 11(1) of the Act to search the appellant's home and found a small amount of cocaine in the appellant's bedroom that indicated personal use, but 110 grams of cocaine in two plastic bags

R v Gartner

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Reid v 1934723 Ontario Inc.

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and two cell phones were also found locked in a safe in the basement. Each of the bags contained smaller bags. The contents were estimated to be worth between $6,000 and $8,000. The cell phones revealed no evidence of trafficking. At trial, the appellant challenged the sufficiency of the Information to Obtain (ITO) used to obtain the warrant because it had not shown reasonable grounds to support the granting of the warrant and made a Charter application, alleging that the appellant's s. 8 Charter rights had been breached by a warrantless search. The trial judge held that the search warrant was valid because, considering all the information contained in the ITO, the issuing justice could reasonably have concluded that the appellant was in possession of cocaine for the purpose of trafficking. Thus, there was no Charter breach and the evidence obtained from the search was admitted. At trial, a police officer, testifying as an expert witness regarding drug trafficking, stated that the amount of cocaine, the way it was packaged, and its concealment were evidence of trafficking. The appellant's counsel objected to the witness being qualified as an expert because his objectivity was questionable, primarily because he had not mentioned that the police had not found any other indicia of trafficking in the appellant's home and had not explained the effect of the absence of this evidence in his report. The Crown objected to this line of questioning and the judge determined that defence counsel's questions relating to the omission in the report were not relevant to the assessment of the officer's ability to give opinion evidence and ruled that they were inappropriate. He then found that the witness was properly qualified and would be permitted to give opinion evidence related to the question whether the drugs found in the appellant's home could be considered evidence of possession for the purpose of trafficking. Insofar as objectivity was concerned, counsel's questions regarding objectivity went to weight but not to admissibility. The judge convicted the appellant largely on the expert's testimony. The judge determined that because the appellant did not have a criminal record and had addiction and mental health problems which he was attempting to address, the appellant's sentence would be 12 months. The grounds of appeal were that the trial judge had erred in: 1) assessing the sufficiency of the ITO. The appellant raised numerous issues regarding this ground, such as whether the ITO was based on conclusory statements by the informants; 2) curtailing the cross-examination of the proposed Crown expert witness; and 3) imposing a sentence that was disproportionate to the seriousness of the offence or the culpability of the offender and did not take into account his serious addiction issues and mental health problems. The Crown's appeal regarding sentence was that the judge had erred by focusing on the appellant's circumstances rather than the gravity of the offence. The defence argued that the appellant should have received an intermittent sentence on the basis of his having no criminal record and his personal circumstances.
HELD: The appeal from conviction was dismissed as were the sentence appeals. The court held that the standard of review for the conviction

appeal was one of deference to the findings of the trial judge made in assessing the record and respecting the s. 8 Charter application. It found with respect to each ground that the trial judge had not erred: 1) in his assessment of the sufficiency of the ITO, and his s. 8 Charter disposition was upheld. He applied the appropriate test. He had correctly reviewed whether the information in the ITO was compelling, credible and corroborated and determined that it was sufficient and had not relied only on conclusory statements. He had not erred on the other issues raised in the appellant's factum; 2) in curtailing the questioning of the proposed expert witness when he did. The judge allowed the questioning to take place until he determined the precise nature of defence counsel's objection to the qualification of the witness. By permitting him to give opinion evidence, the judge concluded that that the witness would give objective evidence and the omissions in his report would be considered in weighing it; and 3) in his sentencing decision. With respect to the Crown's appeal, the court found that the judge had a reasonable doubt as to whether the appellant was involved in commercial trafficking to any significant degree. He balanced the gravity of the offence and moral culpability against the appellant's personal circumstances and by doing so, did not err in principle. Otherwise, the court did not find that the sentence was demonstrably unfit. As far as the appellant's appeal was based on the idea that his personal circumstances should be emphasized, the court had dealt with the question in the Crown's sentence appeal.

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R v Dorie, 2018 SKPC 67

Bazin, December 19, 2018 (PC18069)

Criminal Law – Assault – Sexual Assault

The accused was charged with sexually assaulting two women, J.M. and D.A., on or about March 2, 2015 and December 17, 2015 respectively. At the time of the alleged offences, the women were serving prisoners housed at the Okimaw Ohci Healing Lodge and the accused was the acting deputy director of the facility. The accused denied that the assault occurred and argued that the charges were related to a scheme to falsely accuse him. J.M. testified that prior to the alleged assault, the accused had been very friendly and often flirtatious. At some point, she became uncomfortable with his attention and began to avoid him. On the day of the alleged assault, the accused came into the kitchen where she was working alone and pressed himself against her back and buttocks. She expressed shock and the accused asked her if "she felt it". At that point, the kitchen supervisor entered the room and asked what was going on. J.M. did not tell her because she didn't feel that she would be believed, but she did tell her best friend, another

inmate and another friend over the phone. She did not report the event to the authorities in or outside the prison because her parole hearing would be held in two months and she was extremely cautious about making any allegations against the institution or the guards that might threaten the prospect she had of being released. About eight months after being released, J.M. was contacted by the RCMP about the incident because after D.A. reported what had happened to her, one of the investigating officers asked the director of the Lodge to canvas the inmates about whether the accused had acted inappropriately with any of them and J.M.'s name came up. When interviewed by the officer, J.M. was reluctant to report what had happened to her but agreed to provide a statement. The accused testified and denied that the incident happened and said that he had not been in the building at the time that J.M. said that the alleged assault occurred. In the case of D.A., she testified that she and the accused had had a friendly relationship and that he often hugged her and other inmates. On the day in question, he came into her room when she was lying on her bed. He removed the blanket covering her, knelt down over top of her to give her a hug and she hugged him back because of their past interactions. The accused then kissed her and she resisted. He asked her if it was okay and she said that her husband would not think so, but she would not tell him. Although reluctant to report the matter because she thought that she would be blamed for it, D.A. did so. The accused admitted that he had entered D.A.'s room but said that they had only conversed.
HELD: The accused was found guilty of both sexual assaults. The court accepted the evidence given by each of the women and did not find the accused credible. In accordance with the test in R v D.W., the court found it was not left with a reasonable doubt as to the accused's guilt.

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R v Mashiana, 2018 SKPC 68

Snell, November 20, 2018 (PC18063)

Criminal Law – Assault – Sexual Assault
Criminal Law – Evidence – Credibility

The accused was charged with sexual assault. The complainant entered the front passenger seat of the taxi that the accused was driving and requested that she be taken to her home address. The complainant had epilepsy, which prevented her from being able to drive a vehicle or drink alcohol. According to the complainant, the accused asked her a number of personal questions as well as asking her for a date the next night. She said that she told the accused she was busy. The complainant said that the accused then asked if he could come into her house that night and he put his hand on her upper thigh. The complainant said that she offered the accused a compromise by saying that he could not

come into her house but that she would give him a kiss. When she turned to motion the air kiss, the complainant said that the accused's elbow came down hard on top of her knee and his hand pressed up to her vagina through her dress while his other hand cupped her breast. The complainant said that she pulled back in a panic and ran to her house, locking herself inside. The complainant was not able to identify the accused in court. There were a few inconsistencies in the complainant's testimony with the statement she gave the police. The accused provided a statement to the police that the complainant was drunk and extremely talkative. He did not recall if she sat in the front or the back of the taxi. The accused's testimony was fairly consistent with his statement to the police. He indicated that the only thing that happened that may have upset the complainant was that he had to yell after her to pay the taxi fare when she exited the taxi. The complainant did not report the incident for a few days.
HELD: The accused was found guilty of the offence. The court applied the principles from D.W. to determine the credibility of the witnesses. There were no negative aspects to the complainant's testimony. The inconsistencies in her evidence were not found to be significant and she explained them to the court's satisfaction. The court was not concerned with the complainant's credibility or reliability given the inconsistencies. The complainant did not identify the accused in the courtroom, indicating that she looked away from the driver when his questions made her uncomfortable. She said that she did not want to be unfair to anyone. The court found that evidence important to the complainant's credibility in two respects: it demonstrated her strong commitment to be fair when testifying; and it negated any possibility that the accused's complaint was due to malice towards the accused. The court did not find it concerning that the complainant did not go to the police right away given her explanation that she did not notice right away that the letter from the taxi company did not mention why the accused was fired. She said her concern was that the accused not be able to sexually assault someone else while driving taxi. The court found the accused's testimony to be lacking in detail and to be evasive. The court was confident that the complainant was not drunk as indicated by the accused. Two aspects of the accused's testimony were found to support his credibility: he told the police to watch the in-car video when the police told him they had the video, although they didn't; and he agreed to take a polygraph test. The court determined that neither aspect of the evidence raised a reasonable doubt. The court believed the complainant's evidence, not the accused's, and his evidence did not raise a reasonable doubt.

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R v Bird, 2018 SKPC 75

Baniak, December 12, 2018 (PC18070)

Criminal Law – Assault – Assault Causing Bodily Harm
Criminal Law – Defences – Self-Defence

The accused was charged with committing an aggravated assault on one person, contrary to s. 268(1) of the Criminal Code and committing an assault with a knife on a second person, contrary to s. 267(a) of the Code. The offences occurred in the accused's apartment building and the first assault was filmed by a video camera in the building. Police officers who came to apartment observed the aftermath of the second assault. Neither of the victims attended the trial or testified. A witness who was present throughout the relevant period testified that she, the accused and the two victims had all been drinking. She said that the accused started the fight with the first victim (L.P.) and the second victim (D.M.) joined in kicking L.P. while he was on the floor. She described L.P. as being bloody and thought his jaw was broken. She left the apartment with the accused and L.P. and saw D.M. in the hallway with a knife but could not remember anything else. The accused admitted that he punched L.P. and kicked him. Because of D.M.'s aggressiveness, the accused tried to get L.P. and the witness to leave in the elevator, but D.M. followed and attacked him in the foyer. He feared for his life because D.M., a much bigger man, was choking him and in self-defence, he slashed at D.M.'s face. The police officers testified that when they arrived, the accused was on the ground and D.M. was kicking him.
HELD: The accused was found guilty of assault causing bodily harm and not guilty of assault with a weapon. The court found that the video showed the accused punching L.P. As there was no medical evidence that the accused wounded L.P., on the evidence available to it, the accused was not guilty of aggravated assault but of the lesser included offence of assault causing bodily harm under s. 267(b) of the Code. The court accepted that the accused was acting in self-defence. The accused's testimony that he was in fear of his life when he slashed at D.M. had an air of reality about it. He was in danger, reacted by using reasonable means to escape D.M., and his actions were proportional to the threat posed. The accused had not continued to attack D.M. but tried to leave the scene but was pursued and attacked by him.

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Quewezance v Federation of Sovereign Indigenous Nations, 2018 SKQB 313

Scherman, November 15, 2018 (QB18315)

Administrative Law – Judicial Review

The applicant applied for an order quashing a decision of the Federation of Sovereign Indigenous Nations (FSIN) that removed him

from his position as a senator of the FSIN. Under Queen's Bench rule 3-56(2) the applicant sought judicial review and an order quashing of the decision on the grounds that the FSIN failed to: comply with the specific procedure for divestiture of a senator stipulated in the FSIN Senate Act; and provide procedural fairness and observe the principles of natural justice. The preliminary issue before the court was whether judicial review was available in respect of the actions of the FSIN, which was not a lower tribunal or agency of the government.
HELD: The application for judicial review and quashing of the decision was dismissed. The court found that the FSIN is not a governmental body and its decisions are not subject to judicial review. As the FSIN is a voluntary association, the law does not provide a freestanding right to procedural fairness with respect to decisions taken by it. The applicant had not filed an action by statement of claim nor in any way made a claim founded on a valid cause of actions such as breach of contract, a tort or a claim of restitution. Jurisdiction for judicial review depends on the presence of a legal right and only then can the courts consider the failure of an association to adhere to its own procedure and the fairness of those procedures.

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Harimenshi v R, 2018 SKQB 316

Chicoine, November 19, 2018 (QB18304)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Conviction – Appeal
Constitutional Law – Charter of Rights, Section 8, Section 9, Section 10

The appellant appealed his conviction for driving a vehicle when his blood alcohol content exceeded .08 contrary to ss. 253(1)(b) and 255 of the Criminal Code. The appellant represented himself at trial in Provincial Court. He advised the judge that he intended to raise issues in relation to possible breaches of his rights under the Charter. Although the appellant had not met the notice requirements of Part III of The Constitutional Questions Act, 2012, the judge allowed a blended voir dire and trial to proceed. The trial was conducted in French at the appellant's request and both the judge and Crown prosecutor were bilingual. An interpreter translated the evidence of English-speaking witnesses into French. The appellant alleged that there had been an unlawful detention because of the lapse of time between the traffic stop and the ASD demand and that the officer had failed to inform him at the stop that he had the right to the services of a French translator if he had difficulty understanding instructions in English. The alleged Charter breaches occurred after a police officer observed and followed a speeding vehicle. After the vehicle stopped in a driveway, the officer spoke to the appellant through the driver's window and asked him to

produce his licence. He asked her if she could speak French and she told him no. She could smell alcohol coming from the vehicle and when asked if had had anything to drink, the appellant admitted that he had had a couple of drinks. The officer testified that she believed the appellant was impaired and asked him to accompany her to the cruiser. The camera in the vehicle videotaped the officer asking the appellant about his alcohol consumption again and then the exchange was interrupted because the appellant's passenger got out of that vehicle and the officer had to tell him to go back and stay in the vehicle. She read the ASD demand at 22:34 hours and the appellant failed at 22:37. The officer made the breath demand, informed the appellant he was under arrest and that he had rights to counsel and to remain silent. During the exchange in the cruiser, the appellant asked the officer to speak more slowly, which she did, and repeated his right to remain silent. The appellant told her that he understood. The appellant said that he wanted a lawyer and he called Legal Aid when he was taken to the police station. The appellant and his passenger both testified that as soon as the officer approached their vehicle, the appellant told her immediately that he spoke French and had difficulty speaking English. The appellant claimed that he did not understand his rights prior to taking the ASD test. At the police station, he said that he also requested that police have someone present who spoke French. The trial judge found that the appellant's ss. 8 and 9 Charter rights were not breached because the delay was reasonable – it was only a seven-minute delay between the demand and the ASD test. Some of the time was taken by the officer trying to keep the passenger from leaving the appellant's vehicle. The judge did not believe the appellant or his passenger's testimony that the appellant requested to have services provided to him in French. The judge was satisfied that the appellant understood his right to remain silent. Absent any finding of Charter breaches, the judge found the appellant guilty. Amongst the appellant's grounds of appeal were whether: 1) the officer had reasonable grounds to make an ASD demand; 2) the demand was made forthwith as required by s. 254(2) of the Code; and 3) the appellant's Charter rights to have an interpreter or French-speaking counsel were violated.
HELD: The appeal was dismissed and the appellant's conviction upheld. The court found with respect to each ground that: 1) the trial judge had ample evidence to find the officer had reasonable grounds to suspect the appellant had alcohol in his body and had operated a vehicle within the previous three hours; 2) after viewing the video recording taken in the police cruiser, the appeal court judge was satisfied that the trial judge's finding that the delay of seven minutes was satisfactorily explained was reasonable and supported by the evidence, and therefore the Charter was not violated; and 3) the appellant's rights to a trial in French were fully met pursuant to s. 530 of the Criminal Code. The trial judge's determination that the appellant had never requested the services be provided to him in French at any time during the evening in question and that he fully understood his

Charter rights under ss. 10(a) and 10(b) as they were explained to him was reasonable and supported by the evidence. In particular, the video recording demonstrated that the appellant had sufficient command of English to ensure that he understood his Charter rights.

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Reid v 1934723 Ontario Inc., 2018 SKQB 327

McCreary, November 27, 2018 (QB18317)

Statutes – Interpretation – Residential Tenancies Act, Section 70(11)(d)
Statutes – Interpretation – Private Sewage Works Regulations

The appellant tenants appealed from a decision of a Hearing Officer of the Office of Residential Tenancies pursuant to s. 72(1) of The Residential Tenancies Act, 2006. The appellants purchased a trailer in 2009. It had been located on the same leased lot in a trailer park for 30 to 35 years. The respondent had purchased the park in 2013. In 2016, the appellants noticed a strong gas-like smell in their trailer and hired a plumber to investigate it. He determined that the trailer's drain pipe had become disconnected from the lateral pipe running to the trailer park's sewer line and charged them for his services to fix the connection. The appellants argued that it was the respondent's responsibility to ensure that their trailer was properly connected to the park's lateral pipe and sewer line and its failure to do so should result in it paying for the cost of the plumber. They also argued before the officer that the respondent had increased their rent by 59 per cent which was unreasonable, arbitrary and calculated by the respondent for the purpose of enabling it to end the tenancy. The officer found that the appellants were responsible for their leaking drain pipe. She also found that the rent increase was permitted by the Act as six months' notice had been given to the appellants and then determined that she did not have jurisdiction to reduce their rent because the defence under s. 70(11)(d) was only available to tenants if they faced eviction for non-payment of rent. On appeal, the appellants argued that the officer had erred in law. They raised on appeal a new ground that s. 23 of The Private Sewage Works Regulations requires the owner of a mobile home to ensure that the fixtures are connected to sewage works.
HELD: The appeal was dismissed. The court found that the officer had not erred in law when she determined that: it was not the respondent's responsibility to maintain the connection from the trailer's drain pipe to the lateral pipe provided by it and they could not obtain reimbursement for the plumber's charges. The court rejected the appellants' reliance upon s. 23 of the regulations in their appeal as when the regulations were read in their entirety, they did not impose responsibility on landlords to maintain the connection after the initial connection to the sewage works; and 2) she did not have the

jurisdiction under the Act to reduce the appellants' rent. As she found compelling evidence that the respondent raised the rent for an improper purpose, the appellants might be able to make a claim for a reduction in rent if, in the future, they were unable to pay it and the respondent brought an application for possession. They could then argue that the increase was unfair and for the purpose of ending the tenancy.

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Beitel v Hilkewich, 2018 SKQB 328

Rothery, November 27, 2018 (QB18318)

Tort – Vicarious Liability
Civil Procedure – Limitation Period

The plaintiff brought an action against the defendant T.H. for negligence and damages she suffered resulting from exercises given to her by the latter, in her capacity as the plaintiff's personal trainer. The plaintiff also alleged that the defendant, Professional Sport Rehabilitation (Pro Sport), was vicariously liable for T.H.'s actions and the plaintiff's injuries. The plaintiff's two training sessions were held at Pro Sport's facility. The plaintiff's academic background and occupation was in anatomy and nursing. She suffered from chronic back pain and in order to return to work, her chiropractor recommended that she should receive help from a personal trainer. The plaintiff selected T.H. and the parties met for her first session in late January 2009. The plaintiff was unsure whether the second session occurred on February 3 or 9, 2009 but following it she began to suffer extreme back pain. She tried to contact T.H. to ask her opinion whether she should continue the personal training. T.H. was on holidays and upon her return on February 17, she called the plaintiff. T.H. expressed remorse that the plaintiff was in pain and said that her skill set was not right for the plaintiff and she would return the remainder of the funds she had charged the plaintiff. The plaintiff's statement of claim was issued on February 11, 2011. Counsel for all of the parties provided a draft consent order to the court and it ordered a trial of two issues: 1) was Pro Sport vicariously liable for the actions of T.H.: and 2) was the plaintiff's claim barred by s. 5 of The Limitations Act?
HELD: The plaintiff's claim was dismissed. The court found with respect to each issue that: 1) Pro Sports was not vicariously liable for T.H.'s actions as she was an independent contractor. There was no employment contract between them and they had only an oral agreement allowing T.H. to use the gym in exchange for a fee; and 2) the claim was statute-barred by s. 5 of the Act. The plaintiff knew that the injury appeared to have been caused by T.H.'s personal training session and because of her medical training, she knew or ought to have

known that she had suffered an injury on February 9. Thus, the plaintiff's claim was commenced more than two years after she discovered it.

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R v Gartner, 2018 SKQB 333

Turcotte, November 30, 2018 (QB18319)

Criminal Law – Motor Vehicle Offences – Dangerous Driving Causing Death

The accused was charged with dangerous driving causing death contrary to s. 249(4) of the Criminal Code. He was operating his motorcycle with a passenger riding on the pillion. They were proceeding eastbound on a major road in a speed zone of 50 km per hour. As the accused approached a stoplight, the light changed from green to amber and he continued through the intersection. Another vehicle turning across the eastbound traffic went through the intersection on the amber light and struck the accused's motorcycle. The accused was seriously injured and his passenger died. At the time of the collision, the accused's view of the vehicle turning across the intersection was obscured by a truck stopped in the left-hand turning lane. The driver of the vehicle in the lane to the right of the accused began to stop when the light turned amber. His dashcam video camera recorded the motorcycle passing his vehicle and colliding with the vehicle turning in front of it. The sound of the motorcycle accelerating as the light changed could be heard. The video was used by the police officer called to testify as an expert witness in accident reconstruction. In his opinion, the motorcycle was travelling at a speed of between 57 and 73 km/h as it entered the intersection. The driver of the vehicle turning in front of the motorcycle testified that he moved slowly into intersection as the light changed. The accused did not testify. The Crown argued that the manner of the accused's driving a motorcycle with a passenger and accelerating towards an intersection facing an amber light constituted dangerous driving. His decision to accelerate into the intersection at a speed considerably over the limit in the circumstances constituted a marked departure from what a reasonable person would have done, which would have been to stop.
HELD: The accused was acquitted. The court found that the accused was driving in a manner that was dangerous to the public, but was not satisfied that his objectively dangerous driving was a marked departure from the standard of care of a reasonable person. Both the accused and the other driver made careless mistakes. The video recording showed that the other driver did not inch into the intersection but rather accelerated as he turned into the path of the accused's motorcycle. The court concluded that the expert's evidence had not convinced it that the

accused was driving much over the speed limit as he entered the intersection.

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McPherson v Pham, 2018 SKQB 334

Kalmakoff, November 30, 2018 (QB18313)

Landlord and Tenant – Residential Tenancies Act, 2006

The appellant appealed the decision of a hearing officer made under the provisions of The Residential Tenancies Act, 2006. The appellant and the respondent signed a one-year fixed term tenancy agreement that would end in September 2018. The respondent was often late paying his rent and in April, he had indicated to the appellant that he would vacate the premises on June 1. However, at that time, the parties were discussing when he would pay his June rent. On June 4, the appellant went to the rental unit when the respondent was not present. She found his belongings and his dog there. She decided that the respondent had abandoned the premises and changed the locks. Because of the dog, the appellant had the suite cleaned and replaced the carpet. She filed a claim for loss of June's rent and the cleaning and carpet replacement costs and continued to hold the respondent's security deposit of $1,500. At the hearing, the appellant testified and filed various documents, such as the respondent's notice that he was leaving, in support of her claim. The respondent testified that he had not abandoned the suite and had been away from it at the time of the appellant's visit because he was recovering from surgery. The officer dismissed the appellant's claim and awarded judgment in favour of the respondent in the amount of $750, being one-half of the security deposit. The officer found that she did not believe that the appellant thought that the respondent had abandoned the rental unit and that she had locked him out, thereby preventing him from having quiet possession for the month of June. The appellant's grounds of appeal were that the officer had made findings of fact that were errors of law in failing to consider or misapprehending relevant evidence. She argued that the officer had not noted in her decision that the appellant had submitted the respondent's notice to terminate and the evidence was relevant to the appellant's belief that the respondent had vacated the unit.
HELD: The appeal was dismissed. The court found that the respondent's notice was clearly part of the evidence before the officer and although she did not mention it specifically, she stated in her decision that she had reviewed the documents filed by the appellant. The officer found that the appellant's assertion that she believed the unit had been abandoned was not credible. It was possible for the officer to reach that conclusion as it was reasonably supported by the evidence taken as a whole.

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H.D.H. v J.B.M., 2018 SKQB 335

Acton, November 30, 2018 (QB18320)

Family Law – Custody and Access

The parties married in 2002 and separated in 2013. Their three children were aged 13, 11 and 10 at the time of this application by the petitioner mother for summary judgment regarding custody, access and child support. The respondent opposed it and alleged a trial was necessary to deal with the issue of parental alienation. He submitted that the best interests of the children could not be determined without an expert analysis to determine whether this had occurred. The children had lived with the petitioner in the family home since the separation. She had been their primary caregiver during the marriage and continued in that role. The respondent had very little contact with the children following the separation and none at all in the previous two years. The petitioner submitted that the respondent had become estranged from his children due to his apathy. The petitioner was self-employed and had supported the children financially since the separation. The respondent's employment was erratic and he lived in his mother's basement. He deposed that he had amassed significant debt, which included s. 3 arrears of $16,500 and s. 7 arrears of $24,500.
HELD: The application for summary judgment was granted. The court found that it was in the best interests of the children for the parties to have joint custody with their primary residence to be with the petitioner and prescribed conditional time with the respondent. There was evidence that there was parental alienation resulting from the petitioner's reaction to the respondent's lack of interest in the children but it did not necessitate the court ordering a trial. The court encouraged the children to have contact with the respondent on a regular basis. Based upon the respondent's 2018 income, he was ordered to pay $736 per month for s. 3 support and s. 7 expenses of $250 per month and if paid regularly, the petitioner would waive payment of s. 7 arrears.

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Graham Building Services AJV v Saskatoon (City), 2018 SKQB 336

Currie, December 3, 2018 (QB18321)

Statutes – Interpretation – Arbitration Act, 1992, Section 45(2)

The applicant joint venturers sought leave to appeal under s. 45(2) of The Arbitration Act, 1992 from an arbitration award made by the

respondent arbitrator regarding the agreement between the applicants and the respondent City of Saskatoon. Under the agreement the applicants agreed to build a bridge and 10 kilometres of roadway and exchanges. The applicants and the City disagreed whether the latter had improperly withheld $1,530,000 as liquidated damages for delay in completion of the project. Their dispute was submitted to the arbitrator who ruled that the City was entitled to withhold $1,230,000. The applicants argued that leave to appeal should be granted because the arbitrator failed to consider and apply the prevention principle or misapplied the principle. Counsel for the applicants raised the principle in argument before the arbitrator but he had not referred to in in his decision nor did he identify law relating to the principle.
HELD: Leave to appeal was granted. The court found that the requirements of s. 45(1) and (2) of the Act had been met: the proposed ground of appeal raised a question of law regarding whether the arbitrator used the correct law in his analysis; and as the amount of money was substantial, the appeal was justified because it was important to the parties and determination of the law at issue would significantly affect the rights of the parties in this dispute and in possible future dealings.

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T & C Arndt Minerals Ltd. v Silver Spur Resources Ltd., 2018 SKQB 337

Megaw, December 3, 2018 (QB18314)

Civil Procedure – Queen's Bench Rules, Rule 3-72, Rule 7-2, Rule 7-5, Rule 7-9, Rule 13-9

The plaintiffs, a number of the investors in Drilling and Completion Joint Venture agreements (DCJVs) and a Mineral Lease Joint Venture agreement (MLJV) brought an action against the defendant, Silver Spur Resources Ltd. (Silver Spur), the operator and manager of the DCJVs and the MLJV and against the defendant, R.M., the sole shareholder of Silver Spur and the managing mind of the joint venture operations. In 2010, Silver Spur entered into the MLJV with 49 participants, of which the plaintiffs comprised 12. The purpose of the MLJV was to purchase mineral leases. Silver Spur then entered into four DCJVs and their purpose was to drill and complete oil and gas wells at the location of the mineral leases arranged by the MJLV. The wells were not financially successful in some cases because of flooding, which resulted in costs in excess of the budgeted amount, and in others because of the drop in the price of crude oil. The defendants sought to charge back costs to the participants. The plaintiffs asserted they should not be responsible for the additional costs as the defendants were responsible for the failure of these investments. In their statement of claim, issued in 2016, the plaintiffs alleged the defendants had breached their fiduciary duty in

various ways and had made misrepresentations and also claimed they had acted improperly in their set-up and operation of the joint ventures. The plaintiffs were unable to pinpoint how that occurred. The defendants denied impropriety in their statement of defence and filed a counterclaim in which they sought to recover the plaintiffs' share of costs incurred in the joint ventures pursuant to the terms of the DCJVs. Eventually they brought this summary judgment application to determine a number of the plaintiffs' claims on the basis that certain claims disclosed no reasonable cause of action and other claims should attract summary judgment. However, as a result of information they obtained prior to and during the application, the plaintiffs applied to amend their statement of claim. In their proposed amendment they abandoned certain previous claims and asserted that it was the defendants' negligence, malfeasance and perhaps fraud that caused the investment losses.
HELD: The defendants' application for summary determination and judgment was allowed in part and the plaintiffs' application to amend the statement of claim was allowed. The court commented on the extensive time and effort involved in the summary judgment application and commented that it might have been more efficient to proceed by way of trial. The court assessed the claim against the defendant R.M. for breach of fiduciary duty and found that as the plaintiffs had not provided particulars that this claim would be struck and that there was no genuine issue to be tried. The defendants were entitled to summary judgment of the allegation. Similarly, the plaintiffs' pleading of fraud by the defendant R.M. was struck as it did not comply with Queen's Bench rule 13-9 because they had not provided full particulars. The plaintiffs' claims for damages incurred by the budget overages were found to be statute-barred by The Limitations Act, as the evidence showed that the plaintiffs knew of the overruns by 2011. Finally, the court decided that defendants were not entitled to summary judgment for the amount of their counterclaim because the plaintiffs' new claim that the defendants were negligent must proceed to trial.

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Hall v Sabic Innovative Plastics Canada Inc., 2018 SKQB 344

Scherman, December 11, 2018 (QB18331)

Civil Procedure – Pleadings – Statement of Claim – Application to Amend
Civil Procedure – Trial – Non-Suit

The plaintiff brought an action seeking damages from the defendants for injury he suffered when cutting a plastic product manufactured by Sabic and sold to him by Silvester. The plastic shattered and a piece of

the plastic entered his eye and he lost the sight in it. The claim alleged that Sabic was negligent in its design, manufacturing or inspection of the product and alleged negligent safety instruction or failure to warn of safety concerns. Against Silvester, the plaintiff alleged it sold the product knowing that it was unfit and dangerous to use and without adequate examination or testing to ensure it would be safe when used for its intended purpose. After the plaintiff finished presenting his case at trial, the defendants applied for non-suit. The plaintiff then applied to amend his pleadings. The plaintiff's proposed amendment of his claim against Sabic was based on its failure to warn consumers of the risks of cutting the plastic, including the fact that injury could result from shattering, and against Silvester, that it was aware of the instructions for cutting the product which it knew or ought to have known were unsafe and resulted in the injury to the plaintiff when he followed the instructions on the product. Silvester made many arguments opposing the proposed amendment, such as: it introduced a new cause of action against it; it would be prejudiced since the plaintiff had closed his evidence at trial; it was futile because the plaintiff had not presented any evidence that Silvester had knowledge that Sabic's instructions were unsafe and failed to warn of the risks; and was bad in law because there was no evidence that it knew or had reason to suspect the product posed potential danger. The plaintiff argued that it had raised the failure to warn as a cause of action against Sabic in its original pleadings. Silvester had cross-claimed against Sabic, alleging that it owed a duty of care to it as a retailer to ensure that the instructions were provided regarding the use and handling of the product. Therefore, Silvester treated the issue of proper instructions as an issue.
HELD: The plaintiff's application for leave to amend was granted. The defendants' non-suit applications were dismissed. The court found that the proposed amendments to the claim against Sabic were appropriate. It would not suffer prejudice and the amendment would fulfill the purpose of identifying the real issues. Respecting Silvester, the court was satisfied that its cross-claim showed that it was aware that failure to warn was an issue in the proceedings. The amendment would not prejudice Silvester in any way that could not be compensated in costs and it could not be said to be bad in law based upon flaws in the product's labelling and the knowledge that Sylvester would have had as a retailer selling only glass and plastic products. Sabic's non-suit application was dismissed because the court found that the plaintiff had made out a prima facie case that it was aware of a danger and breached a duty to warn. Silvester's non-suit application was dismissed because there was evidence that it might have had knowledge that at the time of sale and knew or should have known of the risks inherent in the use of the product and therefore would have had a retailer's duty to warn.

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R v McNab, 2018 SKQB 349

Dufour, December 18, 2018 (QB18337)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Conviction – Appeal
Criminal Law – Curative Discharge – Dismissal – Appeal

The appellant had been convicted of impaired driving contrary to s. 253(1)(a) of the Criminal Code. The police had found him unconscious behind the wheel of his parked truck. He was suffering from depression and tried to kill himself by ingesting two bottles of prescription medicine: sleeping pills and antidepressants. He pled guilty in Provincial Court, was convicted and applied for a curative discharge under s. 606(1.1) of the Code. At the hearing, the appellant testified that he put his keys in the glove box as he didn't plan to drive because he was trying to commit suicide. He also testified as to his mental health and substance abuse issues. The judge accepted all of his testimony. Two expert witnesses involved in the appellant's care testified that because the appellant had abused alcohol and marijuana, they were treating him for those addictions as part of the treatment for his severe depression. The judge accepted his guilty plea, convicted him and dismissed his application for curative discharge. He appealed both the conviction and the dismissal.
HELD: The conviction was vacated and a new trial ordered. The court found that the appellant's guilty plea could be challenged. In this case there was question at law whether he could have been convicted of the offence of impaired driving. If his version of events were to be accepted, the appellant had rebutted the presumption under s. 258(1) of the Code. Obiter, the appeal judge commented it had been open to the trial judge to grant a curative discharge. He found that her determination that she could not grant the appellant it on the sole basis that the appellant was not in need of curative treatment regarding his consumption of drugs or alcohol as required by s. 255(5), was too restrictive in relation to the evidence. The appellant's psychiatrist testified that his mental health issues were related to his substance abuse issues.

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Leach v Saskatchewan Government Insurance, 2018 SKQB 350

McCreary, December 20, 2018 (QB18338)

Statutes – Interpretation – Automobile Accident Insurance Act, Section 191
Civil Procedure – Queen's Bench Rules, Rule 3-81

The plaintiff applicant sought direction from the court respecting whether her appeal under s. 191 of the Automobile Accident Insurance Act (AAIA) had to be severed from her claim for damages for lack of good faith against the defendant respondent, Saskatchewan Government Insurance (SGI). If it were found that the appeal must be severed from the claim, she also sought directions as to whether discovery and questioning for both claim and appeal might be conducted simultaneously and used in both proceedings. The application was made as a result of the Queen's Bench decision in Gurniak v SGI (see: 2016 SKQB 391) in which the court concluded that the plaintiff could not bring a statutory appeal pursuant to s. 191 of the AAIA together with a claim in tort based on allegations of bad faith and malfeasance. They had to be brought in separate actions. In this case, the applicant initiated her appeal under s. 191 and the claim prior to the Gurniak decision. She and SGI had exchanged affidavits of documents and proceeded to questioning by agreement. Both parties wanted to have the provisions of the Queen's Bench Rules, including the exchange of the affidavit of documents and the questioning applied to the appeal and to the tort claim.
HELD: The court held that, following Gurniak, an appeal pursuant to s. 191 of the AAIA should be commenced in a separate action from a claim in tort and/or contract for breach of the duty of good faith. Following the close of pleadings, in cases where the standard of review for the s. 191 appeal is correctness and the plaintiff/appellant puts the facts at issue, either party may apply to the court pursuant to Queen's Bench rule 3-81 to consolidate the two actions. Whether consolidation is granted would rest with the chambers judge hearing the application who must determine the appropriate standard of review for the appeal and whether consolidation, or trying two separate actions together, would be appropriate. In this case, the court found it appropriate to consolidate the applicant's appeal and claim. She had appealed SGI's decision respecting her entitlement to benefits under the AAIA and its decision was reviewable on the correctness standard. Further, the proceedings had been commenced before Gurniak and the parties had proceeded to disclosure and discovery. There was no reason to separate the appeal and the claim now, only to comply with Gurniak. It would be an unnecessary waste of time and resources for the 82-year-old applicant.

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R v Anderson, 2018 SKQB 351

Chow, December 21, 2018 (QB18339)

Criminal Law – Assault – Sexual Assault

The accused was charged with sexual touching of a person under the

age of 16 contrary to s. 151 of the Criminal Code and with sexual assault contrary to s. 271 of the Code. He pleaded not guilty. The complainant was the victim in both charges and at the time of trial was 16. For some period of time beginning in 2010, the complainant and a couple of her siblings lived with their maternal grandmother and her spouse, the accused. The complainant was not related to the accused, but he was her grandfather by virtue of his marriage to her grandmother. The complainant alleged that the incidents began when she was approximately eight to ten years old. The accused would take her to bingo with him during the evening once a week and when he drove home, he would ask her to sit on his lap and let her steer the vehicle. While in this position, the accused would touch various parts of her body including her vagina and breasts. She testified that he told her not to tell anyone because what he was doing was wrong. The complainant testified that these assaults occurred in two different vehicles owned by the accused although she had not mentioned one of the vehicles in a statement she had given earlier to the police. In the last incident, the accused had sexual intercourse with her in the bedroom he shared with her grandmother who happened to come in during the alleged assault. The accused threw her off him at that point. The grandmother only asked what was going on and left the room. The complainant could not recall much more than these details but said that the episodes in the accused's vehicles happened a lot. She had been interviewed by the police in approximately 2012, in 2015 and in 2016 when the interview was videotaped. During the first two interviews, the complainant had not disclosed what had happened but she testified that she had not told the truth because she was afraid to admit what had happened. The accused admitted that he took the complainant with him to bingos but denied that he had let her drive or that he had committed any of the alleged acts.
HELD: The accused was found not guilty. The court did not accept the accused's testimony but considering it in the context of the evidence as a whole, it could not reject it either. Neither could the court reject the evidence of the complainant but as it could not determine the truth and was left with a reasonable doubt as to the guilt of the accused, the accused was found not guilty of the charges. The court dismissed the argument made by defence counsel that it could draw an inference from the Crown's failure to call the complainant's grandmother because there might be any number of reasons to explain why she was not called to testify.

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Hanslip v Whitequill, 2018 SKQB 352

McIntyre, December 20, 2018 (QB18340)

Family Law – Custody and Access

The petitioner and the respondent were the parents of a 13-year-old son. In 2008, an order was made that they would have shared parenting of him. At that time, the petitioner father was living with his parents in Regina and they were active in parenting their grandson. As a result of an incident in 2011, the grandparents, the third parties in this proceeding, brought a successful application for an order declaring them to be persons of sufficient interest to bring an application for custody of their grandson. It was ordered that they should have custody and primary residence of the boy until further order and that the parents would have reasonable access. The respondent mother acknowledged that in 2011 she was not fit to care for her son. In 2013, she began seeing him most weekends, which had since remained the pattern. The respondent lived in Rouleau with her partner and worked in Regina. Her son attended school in Regina and wanted to remain there. In this application, the respondent mother applied to vary the 2011 custody order so that she would have custody and primary residence. The petitioner father was not involved. As no evidence was presented to the court about the nature of the child's relationship with his mother or his grandparents or the effect on him of any change to his primary caregiver, it commissioned a Voice of the Child Report. The assessor advised that the child was afraid of hurting the feelings of his mother and his grandparents but revealed that his preference would be to live on a week-on, week-off basis with the respondent and his grandparents.
HELD: The court made an order granting joint legal custody of the child to the respondent and his grandparents. It found that it would be in the child's best interests for him to be parented by the respondent and his grandparents on the week on/week off basis that he desired.

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Community Electric Ltd. v Royal & Sun Alliance Insurance Co. of Canada, 2018 SKQB 319

Currie, November 20, 2018 (QB18316)

Insurance – Actions on Policies

The plaintiff, an electrical contracting company, applied for summary judgment in its claim against the defendant insurance company for payment under an insurance policy. The plaintiff was engaged in electrical contracting work related to the construction of a facility owned by Cargill Ltd. The construction contract between the plaintiff and Cargill contained some provisions related to insurance, including that Cargill would self-insure or purchase property insurance on the work at the site. A fire broke out in the facility, caused by an error in the plaintiff's work. The plaintiff agreed that Cargill should withhold $191,000 from its payments to it under their construction contract for

the cost of labour and material to repair Cargill's property and construction delay costs because it was responsible for the fire. It then sought payment of that amount from the defendant under the commercial general liability (CGL) insurance policy issued to it by the defendant. The defendant argued that the policy did not insure the loss. It denied that the plaintiff was legally obligated to pay any amount to Cargill as compensatory damages because the plaintiff had a complete defence to Cargill's claim because Cargill was obliged under the construction contract to carry builder's risk insurance that would cover this kind of loss. The defendant asserted that Cargill and the plaintiff intended the provisions of the construction contract, in accordance with industry practice and expectations, would be that the plaintiff's policies would be primary only to the extent that the plaintiff contractually undertook. The plaintiff did not undertake to obtain builder's risk insurance, but Cargill did.

HELD: The plaintiff was granted judgment for $189,100. The court found that it was an appropriate case for summary determination under Queen's Bench rule 7-5(1)(b). It held that the plaintiff was legally obligated to pay Cargill for its loss arising from the fire caused by the plaintiff's error. The CGL policy covered the loss. It expressly stated that the plaintiff's policy would be primary. Regardless of the defendant's argument regarding what the intentions of Cargill and the plaintiff were in the construction contract, Cargill had not in fact obtained construction risk insurance. The court examined the exclusions in the CGL policy and found that none of them were applicable.

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