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The Crown appealed the global sentence imposed on the respondent after a finding of guilt for nine Criminal Code offences. The offences were: arson causing damage to property (s. 434); two charges of assault (s. 266); assault causing bodily harm (s. 267(b)); four threat charges (s. 264.1(1)(a)); and breach of recognizance (s. 145(3)). The respondent also appealed the sentence. While the respondent was under the influence of alcohol, he slapped and kicked his spouse. The next day, the respondent assaulted his spouse again and told her he would kill her. When a friend of the spouse's came to assist, the respondent told her that he would slit all of their throats. This was in front of the spouse's children. The respondent assaulted the friend, causing her bodily harm before she fled. The respondent then set the house on fire. The neighbouring houses were damaged. The respondent then sent his spouse and her friend threatening social media messages. The respondent was Indigenous and was primarily raised by his mother in a non-Indigenous neighbourhood. He had been significantly involved in structured recreational activities and organized sport as a child. The respondent had a

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substantial criminal record including a conviction for manslaughter. The sentencing judge found the following aggravating factors: the assaults were committed to the respondent's spouse over two days; the respondent's record included crimes of violence; the assaults and threats took place in front of young children in their home; the damaged property was a dwelling house; and the offences were committed only one month after the respondent completed his sentence for a homicide. The court also considered that the respondent completed his GED while incarcerated, that he never received any treatment for substance abuse, and the letters of reference from his parents and extended family members. The respondent made a statement to the court expressing remorse and a desire to change. The six years and four months of incarceration was based on the following: three months for the first s. 266 assault on his spouse; three months consecutive for the second assault on his spouse; six months consecutive for the threat to his spouse; six months concurrent for the threat to the friend; nine months consecutive for the assault causing bodily harm to the friend; one month consecutive for breach of recognizance; four years consecutive for arson; and six months consecutive for knowingly threatening his spouse on social media. The Crown argued that the sentencing judge failed to conduct a proper assessment of the gravity of the offences and the respondent's moral culpability. Further, the Crown argued that the sentencing judge erred in principle in his handling of parity, deterrence, and denunciation, as well as the respondent's history of violence and gang membership. The respondent argued that four years of incarceration for the s. 434 offence was excessive and not within the sentencing range.
HELD: The Crown appeal was allowed in part and the respondent's appeal was dismissed. The appeal court did not find merit in the Crown's argument that sentencing judge failed to have proper regard for the respondent's involvement with a gang. The respondent's gang membership was unrelated to all but one of the offences. The appeal court was satisfied that the sentencing judge made no error with respect to the arson offence; however, the same was not found with the application of the objectives regarding the balance of the offences. The sentencing judge did consider the fact that the respondent burned his partner's home and that the occupants lost their home and belongings as an aggravating factor. The sentencing judge did not reference the risk to the neighbours in his decision, but the appeal court did not find that to be an error. The sentencing judge adequately addressed the aggravating circumstances. The gravity of the arson and the moral culpability of the respondent were also found to have been adequately assessed by the sentencing judge. With respect to the remaining charges, the sentencing judge was found not to have given proper regard to the objectives of denunciation and deterrence. The sentencing judge was also found to have failed to impose sentences that were proportionate to the gravity of the offences and the respondent's moral culpability. Domestic violence is an aggravating factor. The sentencing judge focused on the assault causing bodily harm to the

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friend, thereby not having proper regard to the remaining offences. All of the remaining offences were found by the appeal court to be very grave. The sentences imposed for all but the assault causing bodily harm were not proportional. The sentences were also found to be an unreasonable departure from the sentencing objectives and principles and were demonstrably unfit. The court found that a fit sentence was as follows for the four assault and threat charges: nine months for threatening the friend, concurrent; twelve months for the threat to cause death to all, concurrent; fifteen months for the assault causing bodily harm on the friend, consecutive to all other sentences; and fourteen months for the threat to the spouse on social media, consecutive. The increase in imprisonment was fourteen months.

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Figley v Figley, 2019 SKCA 94

Richards Whitmore Leurer, September 20, 2019 (CA19093)

Civil Procedure – Queen's Bench Rules, Rule 5-20 – Leave to Question
Wills and Estates – Appeal
Wills and Estates – Costs – Solicitor and Client Costs
Wills and Estates – Estate Administration – Procedural Fairness

The appellants, R.F. and S.F., sought to set aside two decisions made by a case management judge: the decision refusing to order that the deceased's lawyer be the subject of questioning (C.B. Order) and the second wherein the judge ordered that $50,000 be paid out of the deceased's estate to cover legal fees incurred by one of his sons, E.F., a respondent, and prohibited two more of his sons, the appellants, from paying their legal bills out of the proceeds of a farming operation that was using estate property (Costs Order). The deceased died in 2007, leaving a large estate. The deceased executed a will and codicil in 2007. C.B., one of the respondents, was his lawyer and he witnessed the execution of the will and codicil. R.F. commenced an action alleging that the deceased lacked testamentary capacity and had been under undue influence when he made the will and codicil. It was ordered that the will and codicil be proven in solemn form. In 2012, a case management judge was appointed due to the several actions in relation to the estate. R.F. sought leave pursuant to Queen's Bench Rule 5-20 to question C.B. The case management judge declined to make the order, referring to Rule 5-20(3)(a), which indicates the order is only allowed if the applicant is unable to obtain the information from other persons whom the applicant is entitled to question or from the person the applicant seeks to question.
HELD: The appeal was dismissed. The case management judge refused to grant the C.B. order pursuant to Rule 5-20(3)(a). The

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person who would have the information was E.F. as purported executor of the will, yet no attempt to obtain the information from him had been made by the applicants. The applicants argued that they had questioned E.F. and he had undertaken to allow them to question C.B. It was unclear whether the transcript now before the court had ever been put before the case management judge. R.F.'s affidavit did not make any mention of E.F. being questioned, nor of the fact that he said he only drove his dad to the appointment with C.B. but did not go in the meeting. The appellants failed to develop an adequate record for the purposes of their application. Further, the nature of the information sought through the proposed questioning of C.B. was never identified or specified. With respect to the Costs Order, the appellants first argued that E.F. never even requested funds from the estate to pay his legal fees. They argued that the request was only for fees going forward, not those already incurred. The court determined that the appellants' position was based on a narrow reading of the record. It was difficult for the court to see how the appellants would not have been put on notice that E.F. was seeking an order in relation to expenses already incurred. E.F.'s affidavit refers to the legal fees already owed. The case management judge did not deny procedural fairness to the appellants by granting relief against them without notice. The second argument advanced with respect to the Costs Order was regarding the order prohibiting the appellants from using proceeds of their farming operations to pay legal costs. The appellants argued that E.F. did not request such relief and that they were not afforded the opportunity to make submissions on the matter. E.F.'s notice of application sought an order to have land and assets in the estate removed from the control of the appellants. It was clear that E.F. wanted the Public Guardian and Trustee to control the assets of the farming operation so that the appellants could no longer use income derived from the assets to fund their litigation against E.F. The case management judge did not move the control of the assets to the Public Guardian and Trustee but barred the appellants from using farming income to pay their legal fees. There was no procedural unfairness to the appellants. The appeal court ordered that costs against the appellants be paid forthwith. The costs were calculated on Column 2 to C.B. for the C.B. Order and solicitor and client costs to E.F. on the Costs Order. E.F. requested that the costs payable to him be paid to the estate.

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R v Lemioer, 2019 SKCA 95

Schwann Leurer Tholl, September 20, 2019 (CA19094)

Constitutional Law – Charter of Rights, Section 11(b);
Criminal Law – Trial – Defence of Unreasonable Delay under Charter – Stay – Appeal

The Crown appealed the decision of a Queen's Bench trial judge to stay criminal proceedings against the respondent because his right to be tried within a reasonable time under s. 11(b) of the Charter had been violated (see: 2017 SKQB 106). The charges against the respondent were pending when the decision in R v Jordan was released. The trial judge held that because the charges were pending at that time, the delay could not be justified on the basis of a "transitional exceptional circumstance". The trial judge conducted his analysis in accordance with the Jordan framework provided in R v Coulter, but before the Supreme Court's later decision in Cody. He determined that the total delay between the laying of charges and the expected completion of the trial exceeded four years. He defined three periods of delay: i) 92 days between the Crown's initial disclosure in September and December 2013. During this period, the respondent's first lawyer withdrew after having received the Crown's disclosure and the respondent retained new counsel who sought and received further disclosure from the Crown. The Crown argued that the entire period should be attributed to the change in defence counsel. The judge held that some delay would always be associated with a change in counsel and decided that as some portion of it should be attributed to the defence, two months would be appropriate. He deducted that amount from the total delay; ii) 419 days between October 2014, the date of the first scheduled preliminary inquiry (PI), and December 2015, the second date at which the preliminary inquiry was set to begin. Counsel for the co-accused in the case withdrew in October 2014 and new counsel for her appeared on April 1 and April 30, 2015 when the new dates for the PI were set. The Crown argued at trial that this entire period should be deducted from the calculation of a reasonable time to trial under the Jordan framework on any of the three requisite bases. The judge held that the delay was attributable to the Crown because it had not opposed the adjournment allowed at the request of the co-accused's counsel to withdraw; and iii) 141 days between December 2015 and May 2016, when the preliminary inquiry actually commenced. The judge attributed the delay to the Crown because of its improper disclosure and the Crown agreed. The Crown argued on appeal that the trial judge erred: 1) in his findings regarding the first two periods of delay: the entire first period of 92 days should be attributed to the change in defence counsel and the second period of 419 days because the withdrawal of the co-accused's counsel should be considered as an exceptional circumstance of the "discrete event" variety justifying some or all of the delay; 2) in his rejection of its argument that the delay above the presumptive ceiling in the case was justified by its complexity, qualifying as an "exceptional circumstance" as set out in Jordan; and 3) in his rejection of its argument that the second period of delay of 419 days flowing from the withdrawal of the co-accused's counsel should be considered as a "transitional exceptional circumstance". It submitted that under the Morin framework, this delay would have been considered as neutral delay to be subtracted from the overall time that the prosecution of the case should reasonably take. The judge erred

when he stated that the onus was on the Crown to show its reliance on the Morin framework at the time of the delay and it had not presented evidence to show such reliance.
HELD: The appeal was dismissed. The court found that although the trial judge had erred in his reasons, there was no basis upon which to interfere with his determination that the respondent's right to trial within a reasonable time had been violated. It recalculated the delay to be 35 months and therefore above the ceiling prescribed in Jordan. With respect to each ground of appeal, it found that the trial judge: 1) erred regarding the first period of delay, because it was not axiomatic that some delay that will always be attributed to a change in counsel. It was not a sufficient reason to attribute delay during this period to the respondent. The Jordan analysis required examining whether there were other events occurring in the prosecution that would have caused the delay in any event. However, there was an evidentiary basis for the judge's conclusion that some portion of this period of delay should be attributed to the respondent. Further, the judge erred regarding the second period by failing to consider the delay caused by the withdrawal of counsel for the co-accused to be an exceptional circumstance of the discrete event variety justifying delay after October 2014. He wrongly concluded that the PI would have gone ahead if the Crown had opposed the withdrawal of counsel because he failed to consider whether it was unreasonable for the Crown not to oppose it in the circumstances as they existed in October 2014. Based on the application of the transitional rules, the delay should not have been counted against the Crown in this case. Therefore, 419 days were deducted from the net delay; 2) erred by rejecting the Crown's argument regarding the complexity of the case, because he failed to analyze precisely what delay he would have attributed to the complexity and what additional delay might have been justified. The court conducted its own assessment of the complexity of the case and found that it was not satisfied that it justified additional delay; and 3) erred in placing the onus on the Crown to demonstrate that it relied upon the Morin framework at the time of the delay in question only because the Supreme Court's decision in Cody issued after he rendered his decision. However, the court had already deducted the 419 days from the delay: it could not be counted again, and the remaining delay still exceeded the Jordan ceiling. The basis for the stay had been strong before Jordan was decided and the court found that the Crown's actions following the decision were responsible for extending the delay even further.

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Walker v Walker, 2019 SKCA 96

Ottenbreit Whitmore Schwann, September 20, 2019 (CA19095)

Family Law – Child Support – Imputing Income
Family Law – Determination of Income – Imputing Income
Family Law – Division of Family Property – Appeal
Family Law – Division of Family Property – Valuation – Corporate Shares
Family Law – Spousal Support – Compensatory
Family Law – Spousal Support – Indefinite Order

The appellant appealed in relation to the trial judge's valuation of family property and determination of his income for spousal and child support purposes. The respondent cross-appealed the trial judge's determination that she was entitled to spousal support for a limited duration of seven years. The parties married in 1994 and had two children. They separated in 2013. At the time of trial, the appellant had been working in the oil fields in Saskatchewan with the same company since 1991. The appellant also formed an oilfield rig servicing company, with the appellant and his employer each owning 50 percent of the shares. He also formed a holding company with the parties each owning 50 percent of the shares. The respondent worked in various part-time administrative positions. Both children were attending university. The service company's primary source of income was from servicing rigs for the appellant's employer. The trial judge valued the service company as of the trial date at $675,000. The trial judge determined the value of the holding company to be negative $161,031. In the end, the trial judge ordered that the appellant was required to make an equalization payment of $108,827 to the respondent. The issues were whether: 1) the trial judge erred in principle in the imputation of income to the appellant; 2) the trial judge erred by misapprehending the evidence in imputing income to the appellant; 3) the trial judge erred in the valuation of the service company; 4) the trial judge erred in the valuation of the holding company; and 5) the trial judge erred by failing to explain why he departed from the Spousal Support Advisory Guidelines (SSAG) by limiting spousal support to seven years.
HELD: The appeal court allowed the appellant's appeal in relation to the valuation of property. The respondent's cross-appeal was allowed. The issues were discussed as follows: 1) the trial judge found it fair and reasonable to add $90,000 to the service company's pre-tax income. The trial judge then imputed additional income to the respondent, clearly not intending to apply s. 18 of the Federal Child Support Guidelines (Guidelines), but rather imputing income under s. 19. Section 18 does allow the imputing of corporate pre-tax income to a payor. Section 19 gives judicial discretion to impute income to a payor where the income stated on the tax return does not truly represent the income available for child support purposes. The appeal court found that the trial judge's imputing the appellant's personal expenses paid by the service company to him as income represents an indirect, but not incorrect, method of imputation. The appellant also argued, unsuccessfully, that even if the use of s. 19 was open to the trial judge, he erred by relying on a

non-enumerated factor under that section to impute income. The s. 19 list is not exclusive. The appeal court also found that the appellant's complaint that the trial judge's reasons were inadequate regarding his income was without merit. The appellant argued that the limited rule was violated when income was imputed under s. 19 because more than one fiscal year was considered. There was no suggestion that the limited rule applies to s. 19; 2) the appellant was essentially disagreeing with the facts found by the trial judge. It was reasonable for the trial judge to find that the appellant received a personal benefit from the vehicle that should be imputed to his income without a reduction for the use of a personal vehicle for business. The appeal court found that the evidence at trial did not support the appellant's argument that the personal expenses should not be added to his income because he had to repay them to the corporation. The trial judge found that a mobile home was purchased for the appellant's benefit, which was supported by the evidence. Also, imputing the use value and the capital value of the mobile home was not double accounting as alleged by the appellant; 3) the appellant's accountant indicated during testimony that he had made an error in the documentation presented to the court. The error resulted in the valuation of the service company being reduced from $675,000 to $411,000. The appeal court made the necessary correction to the equalization payment due from the appellant to the respondent. The appeal court did not reduce the service company's value further based on the appellant's accountant's cautionary words that the value could be reduced by as much as 50 percent based on downward market trends; 4) the appellant disagreed with the trial judge's decision to treat potential oil well remediation liabilities for the holding company under The Oil and Gas Conservation Act as a contingent liability for each party in equal parts, but he provided no authority for his position. Thus, the appeal court found no error; and 5) the trial judge found that the respondent was entitled to spousal support on a compensatory basis. The trial judge erred by focusing on the respondent's relative youth at the time of the marriage breakdown and her ineffective efforts to secure employment. The respondent's appeal with respect to spousal support was allowed. The court made the term of her spousal support indefinite. The court did not award costs given the mixed success on the appeal.

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Durocher v R, 2019 SKCA 97

Caldwell Schwann Barrington-Foote, September 24, 2019 (CA19096)

Criminal Law – Appeal – Conviction – Sexual Assault
Criminal Law – Appeal – Conviction – Sexual Interference under the Age 16
Criminal Law – Evidence – Admissibility – Hearsay – Out of Court

Statement
Criminal Law – Evidence – Credibility
Courts – Judges – Duties
Statutes – Interpretation – Canada Evidence Act

The appellant was found guilty of sexual assault, contrary to s. 271 of the Criminal Code and of sexual interference with a person under the age of 16, contrary to s. 151 of the Criminal Code. He was sentenced to one year of imprisonment followed by one year of probation on the s. 151 offence. A judicial stay was entered with respect to the s. 271 offence. The appellant appealed his conviction, arguing the following errors: 1) the trial judge found him guilty of the s. 151 offence even though he found as a fact that the complainant was 16 years old; 2) the trial judge admitted social media evidence as a full Crown exhibit without conducting a voir dire of his own motion to determine its admissibility; 3) the trial judge failed to consider critical pieces of evidence in determining issues of guilt; and 4) the trial judge refused to consider the complainant's behaviour and simply dismissed the appellant's arguments as sexual assault myths. The complainant moved in with her aunt and her aunt's spouse, the appellant. She testified that a couple of weeks before her sixteenth birthday, she awoke to find the appellant kneeling on the floor beside her bed touching her vaginal area beneath her underwear. The next night, the complainant awoke to the appellant on top of her in bed. The complainant also testified that the appellant had sent her Facebook messages several days before and after the alleged assaults, saying "gross things" to her. The complainant reported the incidents after she was kicked out of her aunt's home. The crux of the trial judge's decision was based on his positive finding of credibility regarding the complainant.
HELD: The appeal was dismissed. The errors argued by the appellant were addressed as follows by the appeal court: 1) the complainant's age was never put into issue at trial. The trial judge was also found not to have misinterpreted the evidence regarding when the offences took place; 2) the appeal court found that the appellant's argument on appeal that the trial judge should have held a voir dire regarding the admissibility of the Facebook messages required consideration of three related issues regarding the messages: authorship; hearsay and/or admissions by the accused; and authenticity. The truth of the content of the messages was not in issue, the authorship of them was. The appeal court found that the trial judge properly applied the Evans test to determine threshold admissibility. The trial judge was entitled to rely on circumstantial evidence to make the determination and he was not required to hold a voir dire to make the determination. Neither party alerted the trial judge to the possibility that the Facebook messages might be hearsay evidence or that a voir dire was required because of the possibility. The appeal court reviewed cases and determined that the statements made by the appellant in the messages were either not hearsay (because they were not adduced for the truth of their contents) or, if they were, they fell under a recognized exception to

the hearsay rule and were presumptively admissible for the truth of their contents. The rules regarding authenticity are found in statute and common law. Facebook messages have been found to be electronic documents within the meaning of the Canada Evidence Act (CEA) and smart phones have been found to fall within the definition of a computer system. The threshold required to establish authenticity for the purposes of s. 31.1 of the CEA is low. The appeal court found that the trial judge was sufficiently alive to the issues of authentication and integrity even though he did not specifically mention s. 31.1 of the CEA. The appeal court was satisfied that the complainant provided some evidence capable of supporting a conclusion that the printouts were what she claimed them to be; 3) the appellant argued that the trial judge disregarded three key pieces of evidence: a) the trial judge not letting the complainant answer the appellant's question in cross-examination as to whether her family would believe her. The questions required the complainant to speculate about what others thought of her and would adduce her guess rather than any facts; b) the trial judge did not allow the appellant's wife to provide an opinion on the complainant's truthfulness. The trial judge did not err. Tt was his job, not the witnesses', to make the determination regarding the complainant's credibility; and c) the appellant's wife testified about her nephew and during the closing argument, the trial judge challenged the appellant on the weight to be assigned to it. The trial judge commented that the wife could not possibly know the nephew always followed the appellant around because the wife was not there all the time. The trial judge can engage counsel in closing argument; 4) the trial judge rejected the appellant's notion that all victims of sexual assault fight back or scream. The court did not agree with the appellant that the Crown had to establish that the complainant's behaviour was reasonable and the trial judge had to address each and every piece of evidence and explain why it was accepted or rejected.

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R v Keenatch, 2019 SKPC 38

Harradence, August 28, 2019 (PC19046)

Criminal Law – Assault – Assault Causing Bodily Harm
Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Fetal Alcohol Syndrome
Criminal Law – Sentencing – Dangerous Offender Application
Criminal Law – Sentencing – Long-term Offender

The accused was charged with aggravated assault after he and two other inmates attacked another inmate at a penitentiary. The other two inmates pled guilty to assault with a weapon and were sentenced to 18 months' incarceration. The accused was found

guilty of assault causing bodily harm after trial. The accused was assessed and the Crown filed a notice of application indicating their intention to have the accused found a dangerous offender. Six Crown witnesses testified and described the programming available at the penitentiary. The accused was left on wait lists for programming until partway through the hearing. He had a significant criminal record with respect to the number and severity of convictions. The convictions included a youth conviction for manslaughter and adult convictions for assault causing bodily harm and robbery. He continued to serve the sentence of five years, six months for the robbery conviction. A Gladue report was provided as was a report of a Dr. M., a psychiatrist with experience and research in Fetal Alcohol Spectrum Disorder and its effects. Dr. M. also provided expert evidence during the proceedings. The accused's aunt provided a statement of her support indicating that she had a room for him in her drug- and alcohol-free house. The aunt's husband would have employment for the accused in his carpentry business. The accused's parents were both deceased. His mother had a history of drug abuse including alcohol and solvent abuse during her pregnancy with him. At approximately eight years of age, he and the other children in his grandparents' house were sent into foster care. He had a history of gang involvement. Reports provided to the court concluded that the accused had Partial Fetal Alcohol Syndrome (PFAS) and little accommodation in programming had been made for the diagnosis. Dr. M. agreed that the accused was an untreated offender. He was assessed at a moderate to high risk of violent recidivism. Dr. M. said that he was a risk to public safety without treatment. Dr. M. indicated that the accused should not be immediately released but he was optimistic for the accused's future. The accused commenced programming after the evidentiary portion of the sentencing hearing. Dr. M. found that the accused's performance in the programming indicated a sincere effort to change. The final report indicated that the accused did not complete the program and more improvement was needed. The report did indicate that the accused was no longer affiliated with the gang, he had been violence-free for over a year, he was knowledgeable about his culture, he maintained a positive attitude, he was the victim of assault and placed in segregation that contributed to his inability to complete the program, and he was on a wait list to continue the program.

HELD: The accused had a record including violent offences that was relevant to an assessment of his future threat to public safety. The predicate offence was also violent. The accused argued that there had been a positive change in his behaviour and attitude. The court found that the correctional authorities had not adequately modified programming to accommodate the accused's disability that had been first diagnosed 15 years ago. Paragraph 718.2(e) of the Criminal Code was engaged because of the accused's ancestry, background, and upbringing as an Indigenous person. The court found evidence of the accused's desire to seek programming. He had not used substances for over six months and had been violence-free while

incarcerated over the past two to three years. The court dismissed the application to designate the accused as a dangerous offender. The court next considered a long-term offender designation. One of the critical questions for the court was whether there was a substantial risk that the accused would reoffend in a violent manner. A risk of recidivism was found to be present given the accused's disability and his history of non-compliance. There must, however, be a substantial risk of reoffending for a long-term offender designation. The court found that the accused was inclined to act violently in gang-related settings. The accused's PFAS was found to contribute to his impulsive and aggressive behavior. Medication and specific treatment would be necessary to manage the disability. The court found that the first requirement for a long-term offender designation, a sentence of two or more years, was met. The second requirement was also met: the accused was a substantial risk to reoffend violently. The third criterion was also met because there was a reasonable possibility of eventual control of the offender's risk in the community. The accused was declared a long -term offender. The court found that a 30-month sentence was appropriate, to be served consecutively to the sentence he was serving at the time of sentencing. A long-term supervision order of six years was ordered. Ancillary orders were also made, including a s. 109 firearm prohibition and requirement to provide bodily substances pursuant to s. 487.051.

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R v Rohovich, 2019 SKPC 47

Cardinal, August 13, 2019 (PC19048)

Criminal Law – Indictment and Information – Defective in Form
Criminal Law – Indictment and Information – Endorsements
Criminal Law – Judicial Stay
Statutes – Interpretation – Criminal Code, Section 789(2)

The accused applied for a judicial stay of proceedings alleging a breach of s. 789(2) of the Criminal Code by a notation on an endorsement sheet attached to the information charging him. The notation read "(p)ossibility of custodial sentence – notice situation". The accused had been charged with impaired driving and driving over .08. Section 789(2) indicates that no information of an offence that contains greater punishment due to previous convictions shall contain any reference to previous convictions. The accused argued that endorsements form part of the information and he provided the case of Charles in support of his argument. The accused's counsel indicated that he had not listened to the recording of the transcript, nor had he filed the transcript with the court. The issues were: 1) whether the endorsement was in violation of s. 789(2); and 2) if so, what, if any, remedy was appropriate?

HELD: There was no breach, and if there had been, the appropriate remedy would have been to correct the record rather than to stay the proceedings. The court listened to the recording of the proceedings with the consent of both parties. The endorsement came as a result of the judge asking questions to determine whether the accused would be retaining counsel. The judge explained that Legal Aid would only represent him if the Crown were seeking jail time or in a notice situation. The notation on the endorsement was found to accurately reflect the discussion in court that there was a possibility of a custodial sentence. The term "notice situation" was used to refer to a situation where the Crown had provided "Notice of Intention to Seek Greater Punishment". The court could not find any reference in the Criminal Code to endorsement sheets forming part of the information. In Charles, the court determined that the information includes the face and back of the page. The court did not conclude that Charles held the information includes the endorsement sheets. The court concluded that the endorsement sheets do not form part of the information. They are part of the court record to assist the parties and court as to the status of the charges before the court. The Crown was responding to questions from the court. The Crown does not fill out the endorsement sheets: the clerk of the court does. The accused did not prove on a balance of probabilities that s. 789(2) of the Criminal Code had been violated. The appropriate remedy if the court were incorrect would be to strike the endorsement because the defect was in form, not substance.

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R v Fire Sand Real Estate Ltd., 2019 SKPC 54

Gray, September 12, 2019 (PC19047)

Criminal Law – Occupational Health and Safety – Sentencing
Regulatory Offence – Occupational Health and Safety – Prime Contractor
Statutes – Interpretation – Occupational Health and Safety (Prime Contractor) Regulations

The defendant company pled guilty to a charge of failing to ensure that all activities at the required worksite that may affect the health and safety of workers or self-employed persons were coordinated as required by s. 5(b) of the Occupational Health and Safety (Prime Contractor) Regulations (Regulations), resulting in the serious injury of a worker, contrary to ss. 3-78(g) and 3-79 of The Saskatchewan Employment Act (Act). This was the first charge since the Regulations had come into effect. According to the Regulations, the particular worksite required a prime contractor. The defendant had contracted with another company to construct the building, but the contract did not designate that company as the prime contractor.

Therefore, by virtue of s. 3(1)(b) of the Regulations, the defendant was the prime contractor. After the injury, the contract was amended so that the construction company was the prime contractor. At sentencing submissions, the Crown alleged that the victim, an electrician, had requested that the defendant's owner lock out the electrical system to the crane while he was working, but the defendant's owner refused to do so. There were three conversations about locking out the crane. The victim and the defendant's owner agreed that if the crane was to move, the two electricians working on the site in a scissor lift would be advised. The victim was seriously injured when the crane struck the scissor lift he was in and toppled it. The defendant indicated that their safety standards since the accident had improved and now exceeded industry standards. Further, any fine would jeopardize the defendant's viability, because it had not yet earned any profit. This was the first building project that the defendant had been involved in. The defendant's owner indicated his belief that a person's safety was his or her own concern and responsibility. The crane company was also charged and entered a guilty plea. They were fined $80,000 on a joint submission.

HELD: The court considered the following factors: a) the size of the business – the defendant was a relatively small, family-owned business that was part of a larger family-owned enterprise. The defendant lacked experience in construction; b) connection between profit and illegal action – the defendant's owner did acknowledge that his priority on the day of the injury was to install a glass beveller with the crane. The court concluded that one of the main reasons for making installation of equipment a priority was money: either to earn it sooner or to prevent extra expenditure due to a delay; c) gravity of the offence – the circumstances of the offence were very serious. The victim was in the hospital for two months and unable to walk; d) degree of risk, extent of danger and foreseeability – the risk and foreseeability of that risk were patently clear to all involved; e) maximum penalty prescribed by statute – the court accepted that a mere increase in fines by law did not mean that courts should assess higher fines. The court did, however, determine that the end result of the increased penalties would result in higher fines being assessed after balancing all relevant factors; f) range of fines and potential impact on business – the court indicated that it would be difficult to attach any weight to this factor without clarification regarding the financial situation of the company; g) past diligence and previous offences – there were none; h) degree of fault (culpability) or negligence of the employer – the prime contractor is at the top of the responsibility pyramid; i) contributory negligence of another party – the crane owner took responsibility for his role. Also, the victim decided to continue to perform the work on the word of the defendant's owner that there would be a warning horn before the crane moved. Ultimately, the onus for ensuring the safety of the victim was on the prime contractor; j) employer's response – the defendant had no contact with the victim after the injuries were incurred. The lack of contact was based on legal advice, so the court

considered the factor neutral. The defendant did take significant steps to train employees in the operation of the crane and mandated double safety checks; and k) a prompt admission of responsibility and timely guilty plea – a sentencing hearing became necessary and the victim was required to testify. The court was concerned with the defendant's repeated belief that the person at risk is the person responsible for his or her own safety. There was thus not any genuine remorse or a true understanding of the responsibility for employee safety. The court found that the defendant's guilty plea was thus neutralized. The court concluded that the defendant had more responsibility than either the crane company or the victim, and that the liability was even greater because the defendant's owner had a direct role in the incident. The court found aggravating circumstances militating toward a higher fine than the that imposed on the crane company. Given the defendant's positive steps after the injuries, the court was convinced that the increase in fine should be nominal. The defendant was sentenced to a fine of $60,000 plus a victim surcharge for a total penalty of $84,000.

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R v Winsley, 2019 SKQB 218

MacMillan-Brown, September 5, 2019 (QB19236)

Criminal Law – Child Pornography – Sentencing – Long-Term Offender

The accused pleaded guilty to seven counts of committing offences involving possession of child pornography, luring and making sexually explicit material available to a child. The court ordered an assessment of the accused pursuant to s. 752.1 of the Criminal Code that was conducted by a psychiatrist. Following submission of the psychiatrist's report, a long-term offender (LTO) hearing was held. Counsel advised that they agreed that the accused should be designated as such and made a joint submission that a global sentence of 6.5 years in custody followed by a 10-year supervision order (LTSO) would be appropriate. The accused, a 56-year-old man, was sexually abused at the age of 10 by a family friend and as a young adult by his uncle. He had been married twice and had had six children. In 2004, the accused was convicted of four counts of sexual assault against three of his daughters and another child and received a custodial sentence of 18 months followed by a two-year period of probation. Shortly after being released from custody in 2006, the accused was convicted of one count of accessing child pornography and received a sentence of 10 months with another two-year period of probation. The accused had taken sexual offender programming during both sentences, but when interviewed about it after committing the predicate offences, he said that he could not remember it and would consider retaking the

programming. The psychiatrist stated that the accused was a pedophile. His childhood experiences had created a long-standing pattern of boundary confusion and violation. His self-regulation was impaired and he would have to receive intensive counselling to help him learn to be self-aware. The kind of treatment offered by provincial programming that the accused had received during his previous sentences was not sufficient. The intensive programming available in federal prison to an LTO would help to manage the accused's risk of reoffending.
HELD: The accused was designated an LTO. The court accepted the joint submission that a 6.5-year custodial sentence to be served in a federal prison followed by an LTSO of 10 years after release was appropriate. It was satisfied that the requirements of s. 753.1 of the Code had been met. Based upon his convictions, the accused had demonstrated a pattern of repetitive behaviour of sexually exploiting children, despite the lengthy gap between his last convictions and the conviction in this case. There was a reasonable possibility that the accused could be managed in the community according to the psychiatrist's opinion that he was treatable and that his participation in the federal programming would be effective. The court assessed the global sentence it would assign to the seven counts to be eight years, but after considering the totality principle and the joint submission, it found that sentence excessive and accepted the proposed custodial sentence.

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R v Kleven, 2019 SKQB 238

Chicoine, September 17, 2019 (QB19232)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Care or Control – Acquittal – Appeal
Criminal Law – Defences – Charter of Rights, Section 8, Section 24(2)
Constitutional Law – Charter of Rights, Section 8 – Acquittal – Appeal

The Crown appealed the 2017 decision of a Provincial Court judge to acquit the respondent of charges of having care or control of a motor vehicle while impaired and while his blood alcohol content exceeded .08, contrary to sections 253(1)(a) and 253(1)(b) of the Criminal Code (now repealed – see: 2017 SKPC 4). The decision to acquit occurred after a blended trial and voir dire following an application by the defence alleging that the respondent's ss. 7, 8 and 9 Charter rights were breached. The remedy requested by the defence was the exclusion of all evidence gathered during and after a warrantless search of the respondent's residential property pursuant to s. 24(2) of the Charter. In this case, an RCMP officer determined that the respondent was inebriated when he left a local

bar and was threatening to drive himself home. The officer then learned that some friends would drive him home to a town 30 km away. Later that evening, two officers, who were on duty that night and had been informed by the other officer about the respondent, drove to his town to make sure that he wasn't on the highway and then drove by his house. They noted that his truck was parked in the driveway with the motor and lights on, which they thought was unusual. They could not see if anyone was in the vehicle. They left, returned about 20 minutes later and found it still running. They walked down the driveway and looked into the vehicle where they could see the respondent slumped over the steering wheel. After being arrested for impaired care and control, the respondent provided breath samples that showed he was over .08. The officers testified at trial that they had not obtained a search warrant before entering the respondent's property because they were simply concerned about the vehicle running for 20 minutes in the middle of the night and their intent was to make sure the respondent was safe. In his decision, the trial judge dealt only with the alleged breach of s. 8 of the Charter. He determined that the officers' intention when they entered the property was to gather evidence against the respondent and thus they were conducting a search that violated s. 8 of the Charter based upon the authority of the Court of Appeal's decision in R v Rogers because of the similarity to the facts. The issues were whether: 1) the trial judge erred in finding a breach of s. 8 of the Charter; and 2) he erred in law in excluding all of the evidence as a remedy under s 24(2) of the Charter.
HELD: The appeal was allowed. The acquittal was set aside and a new trial ordered. The court found with respect to each issue that: 1) the trial judge erred in finding a breach of s. 8 of the Charter because he erred in law in his determination that the fact situations in this case and in R v Rogers were similar. He erred when he concluded that that officers' only intention was to gather evidence against the respondent to investigate whether he had committed the offence of drinking and driving as he had failed to consider the officers' reasons for entering the respondent's driveway. The trial judge also erred by deciding that he must follow Rogers because this case was distinguishable: the police were entitled to enter upon the respondent's driveway to investigate why the truck's engine was still running after they had waited for 20 minutes. Further, the court held that there is not the same expectation of privacy in a driveway or in a vehicle parked on a driveway; and 2) it was unnecessary to consider the s. 24(2) question because of the court's finding that s. 8 of the Charter had not been breached. The court would have admitted the evidence in any case after conducting its own Grant analysis.

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Laliberte v R, 2019 SKQB 244

Scherman, September 19, 2019 (QB19239)

Criminal Law – Appeal – Conviction
Criminal Law – Defences – Charter, Section 8, Section 9
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08 – Breath Demand
Criminal Law – Impaired Driving – Reasons for Conviction

After trial, the appellant was convicted of impaired driving and driving over .08, contrary to ss. 253(1)(a) and 253(1)(b) of the Criminal Code respectively. At trial, the appellant argued that the lead investigator, Cst. P., did not possess the grounds necessary to arrest and make the subsequent breath demand on the appellant, thereby breaching his ss. 8 and 9 Charter rights. The trial judge did not find a breach and allowed the certificate of qualified technician into evidence. The grounds of appeal were: 1) the trial judge erred in failing to apply the appropriate evidentiary standard in finding that Cst. P. had reasonable grounds to believe the appellant's ability to operate the vehicle was impaired by alcohol; 2) the trial judge erred in finding that the facts as found by her amounted to reasonable grounds under s. 254(3); and 3) the trial judge erred by convicting the appellant on the count of impaired operation of a motor vehicle in the absence of providing any reasons for doing so. The appellant conceded that Cst. P. had subjective reasonable grounds to believe the appellant was impaired but argued that the quality of the evidence was too unreliable to meet the objective component required for a breath sample demand pursuant to s. 254(3) of the Criminal Code. The appellant was stopped by Cst. P. after the officer followed the appellant and noted some aberrant driving. The observations of the appellant at the stop were: the appellant had bloodshot eyes; there was a strong odour of alcohol on the appellant's breath; there was an intoxicated passenger in the vehicle along with two open beer in the vehicle; and when the appellant was asked to provide his driver's licence, he replied that he was almost home. When the appellant was placed in the police vehicle after being advised that he was being detained for an impaired driving investigation, the officer noted an overpowering odour of alcohol. The appellant was arrested and a breath demand was made. HELD: The court of appeal addressed the grounds of appeal as follows: 1) and 2) the appellant argued that the officer incorrectly relied on observations that the vehicle stopped at a bar and someone got out and then back in the vehicle after exiting the bar. The officer indicated that he did not know if the person who got out and back into the vehicle was the appellant. The appeal court found that the appellant's argument required the assumption that because the officer gave evidence of the observations, he must have treated them as indicia to rely on in coming to his subjective belief. There was nothing in the evidence that supported the assumption, nor did the court find any basis to conclude, that the trial judge applied an improper evidentiary standard when assessing the objective

reasonableness of the officer's belief. A reasonable analysis of the evidence was found to lead to the conclusion that the officer relied on indicia once the vehicle left the bar and he knew who was driving. The driving and the observations of the appellant when he was stopped were found to support the officer's subjective belief and the trial judge's finding that it was objectively reasonable for the officer to believe that the appellant had driven while impaired within the preceding three hours. The appeal court concluded that the trial judge applied the proper evidentiary standard and that the facts as found by her amounted to reasonable grounds under s. 254(3) of the Criminal Code. The trial judge was correct in law in her decision; and 3) the trial judge did not provide express reasons for finding the appellant guilty of impaired driving. The trial judge did admit the certificate and also found the appellant guilty of driving over .08. She then stayed the impaired driving charge. The appellant was technically correct that no reasons were given for the impaired conviction. However, the appeal court found the error to be of no consequence because there was no substantial wrong or miscarriage of justice as the impaired driving conviction was stayed and there were good and obvious reasons for convicting the appellant of impaired driving. The appellant's appeal was dismissed, and the sentence of the trial judge became operative.

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7-Eleven Canada Inc. v BLS Asphalt Inc., 2019 SKQB 246

Chicoine, September 23, 2019 (QB19240)

Statutes – Interpretation – Builders' Lien Act

The applicant, 7-Eleven Canada Inc., applied for an order pursuant to s. 56(2) of The Builders' Lien Act (BLA) to vacate registration of the builders' liens and claims of lien of the seven respondents, sub-contractors who had worked on or supplied services in the construction of a new facility owned by the applicant upon payment into court of $59,900, and for an order that it would not be liable to the respondents following such payment. The applicant entered into a contract in 2016 with Cormode, a general contractor, to construct the new facility. The contract price was $1,657,500. Between August 2016 and October 2016, the applicant paid $1,520,600 to Cormode. The project was substantially completed by November 20, 2016. As at that date, the applicant still owed $136,850 to Cormode. Various builders' lien were registered between November 2016 and February 2017, but all of them were discharged by March 6, 2017. On March 9, 2017, EFL Flooring (EFL), a subcontractor, filed a claim of lien in the Land Titles Registry, claiming funds owed to it by Cormode. On the same day, the applicant accepted invoices from Cormode for $59,900 for approved change orders. On March 29, the applicant released $136,850 to Cormode who undertook to discharge the EFL lien and

pay any unpaid subcontractors. On April 6, A&B, another subcontractor, filed a lien claim in the registry. On April 21, 2017, Cormode obtained orders from the Court of Queen's Bench allowing it to pay into court the amount of the registered liens and providing that they were vacated and could be discharged from the applicant's title. The discharges were registered on April 27. Commencing on April 26, the first of the seven respondents began to file their claims of lien, which totaled $242,000. In September 2017, the respondents' statement of claim was filed against the applicant and Cormode. The applicant applied under s. 56(2) of the BLA because the amount of the liens of the respondents exceeded the amount owing to Cormode. It argued that the only amount owing to Cormode was $59,000 for the approved change orders and because there was no privity between it and the respondents, that amount was its only remaining obligation. The respondents argued that because EFL's lien was registered on March 6 and remained against the title on March 29, the applicant failed to comply with s. 43(1) of the BLA and was not entitled to pay the holdback funds to Cormode on March 29. Consequently, the entire 10 percent holdback ($165,750) must be deemed to still be available to the respondents in addition to the $59,900 for the unpaid change orders. The respondents relied upon the decision in Grasswood Mechanical v P.R. Hotels to support their argument. The applicant submitted that Grasswood could be distinguished because in this case because there were no registered liens on March 7 and 8, thereby satisfying the conditions in s. 43(1) of the BLA.
HELD: The application was allowed. Upon payment into court of $59,900 by the applicant, the court ordered that its liability was limited to that amount and vacated the respondents' claims of lien. The Registrar of Land Titles was directed to discharge the claims registered against the applicant's title. The court found that upon the court's April 21 order vacating and discharging the EFL and A&B liens, the applicant was immediately entitled to pay the balance of the monies owed to Cormode without jeopardy as it had not received notice of any claim of liens from any of the respondents. The fact that the applicant had paid the monies prior to the date that the title was cleared of all liens did not alter the fact that the right to pay out the remaining funds had accrued. As there was no continuous registration of claims of lien from and after the date 40 days after substantial performance (January 9, 2017), the applicant was entitled under the BLA to pay the balance of the monies owed to Cormode on the main contract including the holdback amount. The only amount it still owed was $59,900.

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Carry the Kettle First Nation v Gray-Bellegarde, 2019 SKQB 248

McCreary, September 24, 2019 (QB19241)

Statues – Interpretation – Cega-Kin Nakoda Oyate Custom Election Act, Section 4, Section 12, Section 22
Administrative Law – Judicial Review – Standing

The Carry the Kettle First Nation (CKFN) and two members of CKFN applied for judicial review of orders made by the Cega-Kin Nakoda Oyate Tribunal. The tribunal was created by The Cega-Kin Nakoda Oyate Custom Election Act, which governs the election of the CKFN's Chief and Councillors. Under the Act, s. 12 provides that electors may appeal an election on the grounds that election practices contravene it and any appeal is to be heard by the tribunal. The tribunal, composed of five individuals appointed by the chief and councillors, heard an appeal regarding an election held in 2018. A judicial review was held regarding the manner in which the tribunal conducted the election appeal and the court ordered the matter be returned to it for a new hearing (see: 2018 SKQB 324). Leave to appeal the decision was denied by the Court of Appeal. Since then, a dispute arose among the members of the tribunal respecting the decision of the chairperson to retain Nathan Phillips as its legal counsel. Three members refused to attend meetings when Phillips was present. The chairman proceeded to hold tribunal meetings without them and made several interim orders with the assent of only him and one other tribunal member. The applicants brought this application for judicial review to challenge the validity of the orders. The two members of the tribunal applied to dismiss the application for want of jurisdiction. The issues were whether: 1) the CKFN had the standing to bring the application; 2) the Court of Queen's Bench had jurisdiction to hear it; 3) the application should be dismissed as premature; and 4) the interim orders were valid. HELD: The application was granted and the orders quashed. The court found with respect to each issue that: 1) the CKFN had standing. It had a direct interest in ensuring that its elections are conducted in accordance with the Act and that the decisions of the tribunal are made in a fair and proper way; 2) the court had jurisdiction. The Act provided that electors could appeal elections to any competent court, including the Federal Court and the Court of Queen's Bench, and it was logical that appeals to such courts could be made from the tribunal's decisions. The Court of Queen's Bench had already dealt with the election appeal on the basis that it had jurisdiction; 3) although the orders were interim, they were fatally flawed and must be dealt with at the time of the application. The impact of the interim orders was significant and would affect the tribunal's final decisions; and 4) the orders were invalid and were quashed. The Act required that the tribunal may only decide issues by majority decision, which requires the assent of at least three of the five tribunal members. The two members did not have authority to make decisions on behalf of it.

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Pavement Scientific International Inc. v Saskatoon (City), 2019 SKQB 254

Mills, September 27, 2019 (QB19242)

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

The plaintiff, Pavement Scientific International Inc. (PSI), brought an application pursuant to Queen's Bench rule 7-2 for partial summary judgment. It had been granted two contracts by the defendant, PCL Construction (PCL), to provide for delivery and placement of earth and gravel on two construction projects. It pleaded that PCL improperly terminated the contractual relationship and alleged that it failed to pay monies due and owing under the contracts. PCL defended the claim alleging that PSI had not fulfilled its obligations under either contract and filed a counterclaim that sought recovery for the damages and expenses it incurred in having the contracts properly completed. In its counterclaim, PCL also claimed against PSITECH Management Inc., PSI Technologies Inc., 101274906 Saskatchewan Ltd. and C.B., based on an allegation that they had guaranteed due performance of the contracts by PSI. In this application, PSI sought summary judgment on behalf of three above-noted corporate defendants and on behalf of C.B., dismissing the corporate and personal guarantee claims of PCL against them respectively on the ground that they were invalid and unenforceable. Regarding the corporate defendants, PSI argued that the guarantor "Pavement Scientific Group of Companies" named on the guarantee was not a legal entity. C.B., the president of PSI and the other corporate defendants, deposed that although his signature appeared on the document, he had no recollection of signing it nor of having any discussion about the matter with PCL. The senior account executive for PCL responded in his affidavit that he had discussed the guarantee only with the chief financial officer (CFO) of PSI and C.B. had not been involved. He explained that he prepared the corporate guarantee using PCL's standard parent company guarantee based upon consolidated financial information for all of the defendant corporations given to him by the CFO. The plaintiff's application was first returnable in February 2019 and the CFO had died in May 2019.
HELD: The application for summary judgment to dismiss the counterclaim as against the alleged corporate defendants was dismissed. The application for summary judgment to dismiss the counterclaim as against C.B. was granted. With respect to the alleged defendants, the court found that PSI and C.B. failed to put their best foot forward because they had not provided any information relating to the involvement of the CFO in the guarantee process as disclosed by PCL's executive in his affidavit. The plaintiff could have acquired information from him before his death and/or reviewed the contents of his files in preparation for the summary judgment application. Respecting C.B.'s personal guarantee, the court found that there was no evidence of intention on the part of

PCL nor of C.B. for him to provide a personal guarantee. PCL had not inquired as to who was the principal shareholder of PSI or the corporate defendants, nor did it request that C.B. provide a personal guarantee. The circumstances surrounding the creation and signing of the document all pointed to the creation of a corporate liability only.

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Delnea v Vanhouwe, 2019 SKQB 255

Mills, September 27, 2019 (QB19243)

Statues – Interpretation – Improvements Under Mistake of Title Act, Section 2

The applicants brought an originating application that sought an order under The Improvements Under Mistake of Title Act for an easement to cover a portion of the respondent's land that contained the applicants' septic tank. The applicants' cabin was constructed in the 1970s and the septic tank may have been installed then, but at that time, no survey plan had been prepared. Both they and the respondents knew of the location of the septic tank but it was not until 2012, when the respondents demolished their existing cabin and obtained a lot survey, that they learned that the tank encroached on their property. Their lawyer sent a letter to the applicants requesting that they relocate the tank, but the letter was never received by the applicants. Despite the absence of reply, the respondents began excavating for the construction of their new cabin without resolution of the issue but on the assumption that the tank would have to be removed.
HELD: The court granted an easement but reserved its decision regarding the appropriate compensation to be paid by the applicants to the respondents for it. It found that the applicants had established that the tank was a lasting improvement and the placement of it was based upon the applicants' family's intention and belief that they would eventually own the property, as required by s. 2 of the Act. The mistake that occurred in the construction may not have been a result of the actual placement of the tank but rather the after-the-fact survey. The respondents had created the problem themselves because they failed to resolve the issue of the encroaching tank when they were well aware of it. The court would not consider the respondents' claims under various provincial legislation that that the tank was non-conforming with various health and environmental regulations as the question was not properly before it.

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Mann v Mann, 2019 SKQB 262

Elson, October 2, 2019 (QB19244)

Statutes – Interpretation – Business Corporations Act, Section 116

The applicant brought an originating application for a number of orders, amongst which was a declaration that four shareholder resolutions made by the respondent, J.M., were invalid. The applicant and J.M. each held 50 percent of the outstanding shares of 101187148 Saskatchewan (the corporate respondent), a provincially incorporated company. The applicant served on its board of directors as the secretary-treasurer and J.M. was president. J.M. signed the resolutions in his capacity as president. The corporate respondent was the sole shareholder for two federally incorporated corporations and the resolutions pertained to them. The applicant argued that J.M. had no authority to sign the shareholder resolutions without his consent or approval. He contended that J.M.'s actions had not complied with s. 142 of the Canada Business Corporations Act or, in the alternative, with s. 136 of The Business Corporations Act (BCA).
HELD: The application was dismissed. The court found that the issue at play was whether J.M. had the power and authority to sign and approve the shareholder resolution on behalf of the corporate respondent as shareholder of the two companies to which the resolutions applied. Under s. 116 of the BCA, the powers of officers within a Saskatchewan incorporated company such as the corporate respondent may be determined by reviewing its bylaws. In this case, the bylaws of the corporate respondent gave the president broad power to manage and direct its actions as the sole shareholder. Therefore, J.M. had the power and authority to sign and approve the four shareholder resolutions.

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SaskEnergy Inc. v ADAG Corp. Canada Ltd., 2019 SKQB 263

Smith, October 2, 2019 (QB19245)

Partnerships – Limited Partnerships
Real Property – Lease – Option to Purchase – Enforceability

The appellants were a partnership comprised of a general partner (ADAG) and 1200 limited partners (GGG). ADAG granted a lease of a building owned solely by GGG to the respondent plaintiff, SaskEnergy, as well as executing an unconditional option to purchase agreement (OTP) regarding the property. When SaskEnergy exercised the option, ADAG refused to comply because GGG had not indicated its approval as required by its Limited Partnership agreement (LPA). SaskEnergy successfully applied for an order for specific performance of the OTP (see: 2015 SKQB 143).

ADAG and GGG appealed and the Court of Appeal allowed the appeal in part. It decided that the trial judge had erred with respect to some of his findings but that, with the agreement of the parties, it was not necessary to order a new trial. It remitted the matter back to the trial judge to consider an argument raised by SaskEnergy in its amended pleadings that he had not addressed at trial or in his judgment (see: 2018 SKCA 14). The issue that was argued before the judge when the trial was reconvened was whether, regardless of the fact that SaskEnergy knew that the unconditional OTP was beyond the authority of the ADAG because it had notice that the requirement for the majority vote of GGG had not been met, the OTP could still be enforced because the equitable doctrines of ratification and estoppel by election applied.
HELD: The court found that the OTP was enforceable because SaskEnergy had succeeded in making out that the equitable doctrines of ratification and estoppel by election applied. It reviewed the evidence from the original trial that the trustee for the limited partners in GGG, an attorney, had objected in a letter he sent to ADAG that the OTP did not comply with the requirement of the LPA for its approval and threatened legal action. However, no legal action was taken. The court examined the trust agreement. As the appointment of trustee in the trust agreement created a position that represented the interests of the limited partners, the trustee was its operating mind and was aware of the unauthorized grant of the OTP. Therefore, the trustee's knowledge and inaction could be visited upon GGG. Without recourse to this principle, the knowledge that ADAG had exceeded its authority having been impressed upon the limited partners, underpinning the doctrines of ratification and estoppel by election, ADAG would be able to enter into contracts and then abrogate them when it suited it.

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Pomarenski v Saskatchewan Veterinary Medical Association Professional Conduct Committee, 2019 SKQB 264

Currie, October 2, 2019 (QB19246)

Statutes – Interpretation – Saskatchewan Veterinarians Act, 1987, Section 22
Professions and Occupations – Veterinarians

The appellant appealed the decision of the discipline committee (committee) of the Saskatchewan Veterinary Medical Association Professional Conduct Committee (SVMAPCP) that she was guilty of professional incompetence and/or professional misconduct on one charge pursuant to The Veterinarians Act, 1987. The committee had determined that the penalty would be a letter of reprimand, no fine and that she would pay to the SVMACPC "all costs related to the inquiry and hearing into the member's conduct". The appellant also

appealed the SVMAPCP's assessment of the costs as being $42,650. The appellant was licensed as an ambulatory practitioner, which entitled her to practice out of a vehicle and perform veterinary procedures except for major surgery and specifically any surgery that would require general anesthesia. The owner of an injured dog brought it to the appellant's home where she treated what she thought was a dislocated hip by administering general anesthesia to the dog so that she could manipulate its limb and reduce the dislocation. She was unsuccessful and so recommended that the dog be taken to a veterinary clinic. After the dog was treated at a clinic, the veterinarian there lodged a complaint with the association about the appellant. The committee found that she had breached the association's practice standards in providing anesthesia, failing to take x-rays and to refer the matter to a fully-equipped clinic and had performed major surgery in violation of her licence. The appellant argued that the committee's decision: 1) as to her guilt was unreasonable because it: a) failed to appreciate the unique, emergent situation she was in when she decided to treat the dog at her home and the reasonableness of her actions in those circumstances; and b) because it relied upon opinion evidence given by the registrar of the Saskatchewan Veterinary Medical Association rather than relying on its own knowledge and expertise. The appellant had been given no prior notice of opinion evidence being adduced and the witness had not been qualified to give opinion evidence; and 2) as to the costs that she should be required to pay. The parties agreed that the standard of review of the committee's decision was that of reasonableness.

HELD: The appeal as to conviction was dismissed, but the appeal regarding costs was allowed. The court remitted the matter to the committee for reconsideration and ordered that it must reconvene and give the appellant and the SVMAPCP the opportunity to address the award of costs in the context of the full supporting material for the amount of costs claimed that the latter must produce. The court found that the committee's decision as to guilt was not unreasonable. The legislature created this kind of professional association and committee in order to allow the members of a profession with the appropriate expertise to judge the conduct of its own members. Respecting each ground, it found that: 1) the committee's decision revealed that it had taken into account the difficult situation in which the appellant found herself but that it had not relieved her of her obligation to meet the established standards of practice. It directed, in light of the circumstances, that the penalty would be only a letter of reprimand; 2) that a discipline committee is not constrained by the rules of evidence as provided for in s. 22(4) of the Act. Although the committee probably considered the opinion evidence given before it, it would have also drawn on the training, knowledge and experience of its members who were veterinarians; and 3) the committee's decision as to the costs had not met the reasonableness standard in that it failed to explain its reasons for making the award in accordance with the factors set out by the Court of Appeal in Abrametz.

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Pro-Image Roofing and Gutters Ltd. v R, 2019 SKQB 267

MacMillan-Brown, October 7, 2019 (QB19247)

Statutes – Interpretation – Saskatchewan Employment Act, 2013, Section 3-38, Section 3-40, Section 3-41, Section 3-52, Section 3-77, Section 3-82
Constitutional Law – Charter of Rights, Section 11(b) – Pre-Charge Delay

The appellant, a roofing company, appealed its conviction of four occupational health and safety offences contrary to the Part III of The Saskatchewan Employment Act, 2013. The charges were laid against the owner of the appellant after an occupational health and safety officer for the Ministry of Labour Relations and Workplace Safety found numerous violations of The Occupational Health and Safety Regulations, 1996 at a worksite. The officer issued a stop-work order pursuant to s. 3-40 of the Act and served a notice of contravention on the owner on January 28, 2016. The information was not sworn until December 20, 2016 due to a four-month delay caused by the appellant's failure to provide information, followed by the time taken for reviews of the file conducted within the Ministries of Labour and then Justice. The trial was held in September 2017 with sentencing occurring in October. At trial, the appellant brought a Charter application, alleging that due to the Crown's delay in laying charges, they should be stayed. It argued that the respondent breached both s. 3-77 of the Act and ss. 7 and 11(b) of the Charter. The Crown had violated s. 3-77 of the Act because it requires that charges under it must be tried within a reasonable time and that as a result, the pre-charge delay in this case should be considered with respect to the 18-month timeframe set by the Supreme Court decision in Jordan regarding Provincial Court cases. The unwaived post-charge delay was seven months. When the pre-charge delay of 21 months was factored into the Jordan equation, the total delay exceeded the ceiling by nine months. The trial judge interpreted s. 3-77 of the Act to apply to mandatory decisions and not to discretionary decisions. A decision to prosecute a charge was discretionary and thus s. 3-77 was inapplicable. He found that the pre-charge delay was not to be considered because no exceptional circumstances existed in this case as there was no evidence of bad faith or abuse of process. The appellant argued that the trial judge erred in law by dismissing its application to have the charges stayed and that its convictions should be overturned because the evidence did not support them.
HELD: The appeal was dismissed. The court found that the trial judge had not erred in his interpretation of s. 3-77 of the Act and correctly dismissed the appellant's Charter application. It upheld

the convictions on the basis that the judge's findings of fact were amply supported by the evidence.

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Porter v WGG Construction Ltd., 2019 SKQB 269

Robertson, October 8, 2019 (QB19248)

Civil Procedure – Queen's Bench Rules, Rule 10-13, Rule 11-4
Civil Procedure – Pleadings – Statement of Defence – Noting for Default – Application to Set Aside
Civil Procedure – Judgments and Orders – Default Judgment – Application to Set Aside

The defendants brought an application to set aside a default judgment and for leave to file a statement of defence pursuant to Queen's Bench rule 10-13. The plaintiff had served his statement of claim on the defendants by registered mail on October 30, 2018. In it, he claimed that the defendants had wrongfully retained some of his equipment since 2011 and also owed him back wages. After no statement of defence was served or filed, the defendants were noted for default on November 28, 2018 and judgment for $58,800 in default of default issued in June 2019. In this application, the defendant G.W. deposed that he had received the statement of claim and immediately instructed his counsel to defend it. He checked back with his lawyers in December 2018 and January 2019 and was told that that the statement of defence had been filed. His law firm discovered in April 2019 that the defence had not been filed. This application was filed on July 30, 2019, one month after the default judgment issued.
HELD: The application was granted. The court ordered that the default judgment be set aside and the applicants allowed the opportunity to file a statement of defence on the condition that it be issued and costs of $1,020 be paid within 30 days of the decision. The court was satisfied that the defendants had met the four factors required by the jurisprudence developed under former Queen's Bench rule 346 and still applicable under Queen's Bench rule 10-13 to set aside the default judgment. It found that the applicants should not be faulted for their law firm's mistake and thus they supplied a satisfactory explanation for the failure to respond. As this was an application to set aside a default judgment, it fell within the exception to the general rule that costs under Queen's Bench rule 11-1(4)(a) are awarded to the successful party. The defendants were ordered to pay costs of $1,000 to the plaintiff under Schedule I B, General, Column 2, item 26(b).

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