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S.T. v J.T., 2019 SKCA 116

Schwann Barrington-Foote Kalmakoff, November 8, 2019 (CA19115)

Family Law – Custody and Access

The appellant appealed the decision of a Queen's Bench judge that granted sole custody and primary residence of the parties' 10-year-old son and seven-year-old daughter to the respondent. The parties had separated in 2014 when the appellant and the children moved to Saskatoon. She had since returned to live in Regina whilst the respondent had moved to Saskatoon. The children's primary residence had been with the appellant since the separation. Following the separation, the appellant alleged that the respondent had sexually assaulted her and had inappropriately touched their daughter. The Ministry of Social Services (MSS) and the police investigated the latter allegation, but no further action was taken. The respondent was charged with and tried for assault charges against the petitioner but was acquitted. The petitioner also made an interim application in 2014 pursuant to The Children's Law Act, 1997 and The Family Maintenance Act, 1997 for sole custody of the children and a restraining order against the respondent and the respondent sought an order for the return of the children and interim joint custody. The court granted an order for joint custody with primary residence to be with the appellant. The respondent was given supervised access for four hours weekly. He made a number of unsuccessful applications to vary that order before his trial and following his acquittal. In 2014, the appellant also filed a petition for divorce, sole custody, child support and division of family property and the trial proceeded in May 2016. The appellant consented to the respondent having unsupervised access on

alternating weekends but then reported that their daughter had informed her that the respondent had inappropriately touched her, exposed himself to her and the 10-year-old daughter of his new partner and that their son told her that he was physically and verbally abused by the appellant. The MSS investigated, but no charges were laid. After the respondent's application to have the trial reopened in 2017 with respect to custody and access, he obtained an order granting periods of unsupervised access again in 2018. In a final judgment issued in January 2019, the trial judge ordered that the respondent would have sole custody and primary residence of the children. The appellant was given generous parenting time. The judge delayed the transfer of primary parenting until July 2019 to avoid disrupting the children's schooling. He found that the appellant loved the children and could care for them physically, but her actions in making allegations against the respondent had had a detrimental effect on the children's emotional well-being. Because of her negative attitude toward the respondent, the judge did not believe that a "stern warning" would be sufficient to deter further inappropriate behaviour in the future. He did not believe that she would promote any contact with the respondent if the children remained with her. The judge indicated that he was aware that they had done well in her care for four years but that the respondent was an equally capable parent and would promote maximum contact with her. The appellant's primary ground of appeal was whether the judge had erred in law by changing custody and primary residence instead of ordering that the parties have joint custody, that the children reside primarily with her and that the respondent have specified access. Some specific errors included that he concluded that there was parental alienation based solely on the respondent's claim, without sufficient evidence including a lack of expert evidence.

HELD: The appeal was dismissed. The court found that the trial judge had not erred in changing the custody and primary residence of the children. The evidence supported his conclusion that none of the appellant's allegations were true and were part of a prolonged course of action designed to affect the outcome of the proceedings and that she could and would not change her beliefs about the respondent or her behaviour. These conclusions related to the appellant's parenting ability and the best interests of the children. He also took into account the status quo as a key factor in his decision to provide for a lengthy transition. The judge had not found that there was parental alienation and regardless, expert evidence was not required before such a finding could be made.

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Big River First Nation v R, 2019 SKCA 117

Jackson Barrington-Foote Tholl, November 8, 2019 (CA19116)

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Statutes – Interpretation – Canadian Environmental Protection Act, 1999, Section 14, Section 272, Section 273, Section 287, Section 295
Environmental Law – Canadian Environmental Protection Act, 1999, Section 238 – Sentencing – Appeal
Aboriginal Law – Band – Legal Nature

The appellant, Big River First Nation, appealed the decision of a Queen's Bench judge sitting as an appeal judge in a summary conviction appeal. The appellant had pleaded guilty to the summary conviction offence under s. 272(1)(a) of Canadian Environmental Protection Act, 1999 (CEPA) of failing to comply with an Environmental Protection Compliance Order, contrary to s. 238(1) of CEPA. The Provincial Court judge found that the appellant was an "individual" within the meaning of s. 272 of CEPA and imposed a $10,000 fine (see: 2017 SKPC 16). Upon appeal of the sentence by the Crown, the summary conviction appeal court judge found that the appellant was a "person" under CEPA and substituted a sentence of a $100,000 fine (see: 2018 SKQB 109). The appellant applied for leave to appeal and its grounds of appeal were whether the appeal judge: 1) erred in law by finding that it was a person within the meaning of s. 272 of CEPA. It submitted that the meaning of "person" in that section is ambiguous and it claimed the benefit of the common law presumption in favour of strict construction of penal statutes; and 2) erred in law by failing to consider s. 273 of CEPA.
HELD: The appeal was dismissed. The court granted leave to appeal because the grounds raised questions of law alone that were so bound up with the sentence as to be inherent in it. It found with respect to each ground that: 1) the appeal judge had not erred in finding that the appellant was "person" under CEPA. The assessment of ambiguity in the interpretation of a statute cannot be based on the grammatical and ordinary sense of the words without considering the scheme, the object of an act and the intention of parliament and s. 12 of the Interpretation Act. The court found that the preamble of CEPA identified its purpose as a regulatory but not a penal statute. The purpose of its sentencing provisions set out in s. 287 were to deter and denounce to effect the principle of "polluter pays". CEPA applies to reserve lands. The stiffer penalties applicable to a "person" more effectively serve the purpose of sentencing. The court noted that there was no definition of "person" in CEPA but interpreted s. 14(2) and s. 295 to conclude that "person" in s. 272(1) includes "public bodies" that are neither bodies corporate nor individuals. The appellant, a First Nation, was a public body and thus is a person that is not an individual under s. 272. An individual, in any case, is a natural person, which the appellant was not, confirmed in CEPA by the nature of s. 17; and 2) the appeal judge failed to consider s. 273 and thus the court was required to consider a fit sentence. It examined the evidence submitted by the appellant at the sentencing hearing regarding its income and expenses. The court found that the evidence could not reasonably support a finding that a fine of $100,000 would cause

undue financial hardship. The sentence imposed by the appeal judge was correct.

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R v Cramer, 2019 SKCA 118

Richards Jackson Tholl, November 13, 2019 (CA19117)

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

The Crown appealed from the decision of a Queen's Bench judge acting as a summary conviction appeal judge that granted the appeal by the respondent (see: 2018 SKQB 298). The respondent had been found guilty of impaired driving by a Provincial Court judge. The trial judge found that the respondent was impaired because of the evidence: he had been driving 120 km per hour in a 50 km per hour zone; he admitted he had consumed alcohol; he had difficulty retrieving his licence from his wallet; and he emitted a strong smell of alcohol. The judge also noted that the respondent had not: had problems with his balance; slurred his speech or had bloodshot eyes. The judge found the respondent's speeding was significant evidence of poor judgment and thus impairment. The respondent appealed his conviction on the basis that the guilty verdict was unreasonable and not supported by the evidence. The appeal judge found that it was not reasonable for the trial judge to conclude that the evidence as a whole excluded all reasonable alternatives to a finding that the accused was impaired. The evidence as a whole left open the plausible alternative that the accused fumbled because he was nervous, smelled of alcohol due to recent consumption and that speeding itself was not an indication of impairment. The Crown's grounds of appeal were that the appeal judge: 1) misinterpreted the trial judge's reasons and wrongly read them as meaning that the respondent's nervousness while in detention to have indicated impairment; and 2) applied the wrong standard of review.
HELD: The appeal was dismissed. The court found with respect to each ground that: 1) the appeal judge misinterpreted the trial judge's reasons for decision regarding the respondent's nervousness in detention as indicating impairment. The trial judge had clearly identified the signs of impairment he was going to consider in deciding if it had been proven that the respondent's ability to drive was impaired. However, the misreading of the trial decision had no effect because it had no impact on the appeal judge's conclusions; and 2) the appeal judge had not applied the wrong standard. He was required to review, analyze and, to some extent, reweigh the evidence in order to determine whether the trial judge's verdict was unreasonable. The appeal judge accepted all of the trial judge's preliminary findings of fact. However, the appeal judge did not have an obligation to defer to the trial judge's finding that the

respondent's speeding was relevant to the question of his impairment rather than to his alcohol consumption.

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R v Springett, 2019 SKPC 48

Metivier, August 16, 2019 (PC19049)

Criminal Law – Defences – Charter of Rights, Section 11(b)
Criminal Law – Defences – Delay – Defence Delay
Criminal Law – Defences – Delay – Exceptional Circumstances
Criminal Law – Defences – Delay – Presumptive Ceiling
Criminal Law – Stay of Proceedings – Unreasonable Delay

On July 17, 2017, the accused and two co-accused were charged with possession of cocaine for the purpose of trafficking under s. 5(2) of the Controlled Drugs and Substances Act (CDSA). He elected trial by Provincial Court on December 27, 2017. One co-accused elected Queen's Bench trial so a preliminary inquiry was scheduled for all accused on June 19, 2018. That co-accused pled out to his charges, so the preliminary inquiry never occurred. The matter was rescheduled for Provincial Court on November 14 and 15, 2018. On November 14, 2018 the second co-accused pled out. The trial proceeded for the accused and was adjourned to February 2019 for decision on the voir dire. After delivering his decision on the voir dire, the trial judge mistakenly rendered a judgment on the trial proper without first hearing closing arguments, so there was a declaration of mistrial on March 27, 2019. A second trial was scheduled for July 22 to 24, 2019. The accused applied for a stay of proceedings alleging that his s. 11(b) Charter rights had been breached because he was not tried within a reasonable time. The total delay was 24 months and 7 days. The issues were: 1) which of the two presumptive ceilings set out in Jordan applied in this case, the 18 months for Provincial Court or the 30 months for Queen's Bench; and 2) whether the total delay in this case exceeded the presumptive ceiling.
HELD: The issues were determined as follows: 1) the Crown submitted that by operation of s. 565(1)(b) of the Criminal Code, the accused was deemed to have elected trial in the Court of Queen's Bench when the co-accused elected that court. On June 19, 2018, it was clear that the accused intended to be tried in Provincial Court with the Crown's consent. In Jordan, there is an explicit exception for cases "going to trial in the provincial court after a preliminary inquiry". The court used the plain language approach and gave "after" its ordinary meaning. The 30-month ceiling was found not to apply to cases tried in Provincial Court before or during a preliminary inquiry. The applicable presumptive ceiling of delay was found to be 18 months; and 2) the total delay from the date the Information was sworn to the end of the second trial was 737 days.

Defence delay can consist either of waived periods or of delay caused solely by the conduct of the defence. There were 28 days of waived delay by the defence. The court concluded that there were an additional 25 days of delay caused by defence conduct. The total delay was therefore 684 days, which exceeded the 18-month ceiling. The delay was presumptively unreasonable; therefore, the Crown had to demonstrate exceptional circumstances. The Crown argued that the declaration of a mistrial was an exceptional circumstance and therefore 119 days should be deducted from the total delay. The accused agreed the mistrial was an exceptional circumstance but argued that fewer than 119 days should be deducted given the Crown's and the justice system's failure to mitigate the delay. Even if all 119 days were deducted, the delay still exceeded the presumptive ceiling. The Crown did not meet the onus of exceptional circumstances justifying delay above the 18-month presumptive ceiling. The proceedings were stayed by the court.

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R v F.K., 2019 SKPC 59

Harradence, October 18, 2019 (PC19050)

Charter of Rights – Arbitrary Detention
Criminal Law – Defences – Charter, Section 9, Section 24(2)
Criminal Law – Youth Criminal Justice Act – Firearm Offences

Two experienced officers, Cst. A. and Cst. S., observed the youth and M.M., who was known to the police for his membership in a street gang, walking down the street. The youth had a hat on that signaled the gang to the officers. They also determined that there was a warrant for M.M.'s arrest. The officers followed the pair for 15 to 20 minutes and concluded that it was possible that M.M. had a gun or other weapon in the front of his shorts. One officer alerted patrol officers to arrest M.M. immediately. No direction was given regarding the youth. Two patrol officers arrested M.M. and did not locate any weapons on him. A third officer, Cst. T., arrived and, without hesitation, detained and searched the youth. A loaded sawed-off gun was found in the front of the youth's shorts. The youth was arrested and charged with five Criminal Code firearms charges. The youth gave a statement indicating that M.M. had given him the firearm minutes before he was searched. He pled not guilty. The youth argued that his ss. 8, 9, and 10(b) Charter rights were breached, which resulted in the need to exclude the firearm and the youth's statement from evidence. The justification for the detention, arrest, and search of M.M. was not in issue.
HELD: The youth was detained when the officer placed his hand on the youth's shoulder and lifted his shirt. The court reviewed the delay in arresting M.M. when there was a concern that he had a firearm on him. The court did not accept Cst. S.'s explanation for the

delay, that the patrol officers were very busy. It was found that Cst. A. and Cst. S. decided to continue surveillance in an attempt to gather further information even after they believed that M.M. had a weapon. The court found it significant that they did not give any direction to the patrol officers regarding the youth. Cst. T. said he arrested the youth for officer safety reasons. The court found that Cst. T. reacted to the concern of a weapon without considering the limited nature of the evidence or the limits on his ability to detain and search the youth. He was found to be acting on a hunch at best. The detention was found to be arbitrary and in contravention of s. 9 of the Charter. The court proceeded to a Grant analysis. Cst. T. was found not to have acted in bad faith by detaining and searching the youth. His reaction, however, was negligent in his regard and respect for the youth's rights. The seriousness of the breach was found to be high given the well-settled nature of the rights breached. The court considered the specific context of the detention in determining the impact of the breach. The youth had no criminal convictions, he was detained for several hours at minimum, and the detention was carried out without lawful basis and in the absence of any grounds. The court concluded that to admit the firearm would bring the administration of justice into disrepute given the s. 9 breach. The firearm was excluded from evidence and the youth was found not guilty.

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R v A.D.B., 2019 SKPC 60

Bazin, November 18, 2019 (PC19054)

Criminal Law – Young Offender – Sentencing
Criminal Law – Offences Against Public Order – Dangerous Materials and Devices

The accused pleaded guilty to four offences: failure to comply with his sentence under the Youth Criminal Justice Act (YCJA) not to possess any firearms or explosive substances and to abide by his curfew, both contrary to s. 137 of the YCJA; unlawful possession of methamphetamine contrary to s. 4(1) of the Controlled Drugs and Substances Act; and possession an explosive substance contrary to s. 82(1) of the Criminal Code. The accused was just under the age of 18 at the time of the offences and was still serving a sentence rendered three months earlier for assault, resisting arrest, failing to comply with an undertaking and possession of a weapon and a homemade explosive device. For these offences he had received a sentence of 45 days in custody, 23 days under supervision in the community and an additional year of probation relating to the possession of a weapon charge. He committed the present offences within days of commencing probation. The most serious offence was possession of an explosive device. The Crown argued that a fit sentence would be

one year of secure custody with six months of community supervision. The defence asserted that the accused's sentence should be four months of open custody and two months of community supervision, pointing out that that he was still under a probation order until January 2020.
HELD: The accused was sentenced to one year in custody served as six months in closed custody and three months in open custody followed by three months of community supervision and a one-year probation order subject to multiple conditions. There were few sentencing precedents for persons subject to the YCJA charged with an offence under s. 82(1) of the Code. Younger offenders who appear to make explosive devices out of curiosity or without awareness of the danger because of their age had been treated more leniently than adults. If the offender was dealing with explosives for an improper or illegal activity, the penalties increased. The accused in this case fell between the two categories. He had high moral culpability because he had been sentenced for making a pipe bomb and then found with material to make another.

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Demong, October 17, 2019 (PC19051)

Contracts – Breach – Faulty Workmanship – National Building Code
Contracts – Breach – Faulty Workmanship – Small Claims
Contracts – Interpretation
Small Claims – Breach of Contract – Tort
Torts – Negligence

The plaintiff sought to recover payment of $8,769.00 plus interest from the defendant pursuant to a roofing contract. The defendant counterclaimed. Asphalt shingles were installed over cedar shakes in the 1990s on the defendant's roof. in June of 2018, the parties agreed that the asphalt shingles would be removed and replaced pursuant to a written estimate. The estimate did not include any reference to interest. The defendant's employee accidentally dropped a plastic bottle down the plumbing stack that resulted in an overflowing toilet when it was flushed. When the job was completed, the plaintiff forwarded his invoice for the total as per the estimate, minus the hotel stay required when the toilet overflowed. There was also a notation that interest was payable 30 days from the invoice date. The defendant was concerned because the flat portion of the roof (approximately 80 square feet) over the kitchen area was not re-shingled. The plaintiff advised the defendant that he did not shingle flat rooves. The defendant had someone inspect the plaintiff's work and a number of deficiencies were noted, including work contrary to the National Building Code of Canada 2015 (Code). The plaintiff did not dispute the amounts that the defendant

tendered to repair the alleged deficiencies. The plaintiff indicated that he intended to provide expert evidence on his own behalf regarding roofing and that he would call a plumbing expert regarding the negligence action brought by the defendant. The defendant also planned to call an expert regarding the quality of the goods and services provided. The issues were: 1) whether one of the plaintiff's employees dropped a bottle down the stack and caused the defendant's toilet to overflow, damaging the main floor ceiling. If so, was the act negligent and if so, what were the damages? 2) did the plaintiff breach the contract with respect to the kitchen roof; crack in the plumbing stack cover; failing to clean the eavestrough; failing to adhere to the Code in terms of nails and number of roof vents; 3) if the plaintiff did breach the contract, was he entitled to recover payment of the invoice? and 4) costs.
HELD: The estimate was the entire agreement between the parties. There was no express written agreement between the parties to pay interest, nor did the defendant agree to pay it. The court concluded that the plaintiff could not claim the interest. The court did not allow any of the proposed experts to offer opinion evidence because the plaintiff could be biased; the plumbing expert was the plaintiff's friend, so could be biased; and the assessor also offered to repair the deficiencies, leading the court to question his neutrality. The issues were determined as follows: 1) the court found that a reasonable person of ordinary intelligence would know that a problem can arise if an object, like a bottle, is deposited in a sewer stack. The court was further satisfied that a roofer would be even more alive to this potential than others. Care should have been taken to ensure it did not happen. The employee foresaw the potential problem and acted in less than a careful and prudent manner. The toilet had no further problems once the bottle was removed from the stack and there was nothing else clogging the system when the defendant had it video scoped. The defendant made out causation. The defendant was awarded the cost of the video inspection and the repairs, which totaled $1,221 plus applicable taxes; 2) the court found that the sewer stack cap cracked due to the manner in which it was installed by the plaintiff, which was not good workmanship. The defendant was awarded the cost of correcting the deficiency, which was $310.00. Removal of debris from eavestrough – the defendant's claim was denied, as there was no evidence to prove the claim. Kitchen roof – the defendant was buying the plaintiff's expertise and labour. If the plaintiff could not complete the shingling, it was incumbent on him to advise the defendant of that. The defendant was awarded $400. National Building Code Standards – the court found that compliance with the standards comes within the obligation of a contractor to provide services in a good and workmanlike manner. The plaintiff was found to have been mistaken in stating that he was not required to adhere to the Code because the city had not expressly directed him to do so. The court was also not convinced of the plaintiff's other arguments for not being required to follow the Code. The court did not agree with the plaintiff that the estimate only included installation of exhaust vents

and not the intake vents. One more vent was found to be required per the Code. The defendant was awarded $100 for the new vent. The court was satisfied that the plaintiff failed to adhere to the nailing requirements set forth in the Code and as a consequence, the defendant had a roof that was not as structurally sound as it should be. The plaintiff was in breach of the implied term of the contract that the services would be provided in a good and workmanlike manner and that the goods used would be reasonably fit for their intended purpose. The defendant was entitled to be put in the same position that she would have been in had the contract been complied with. The court awarded her $8,880.00. After set-off, the defendant was granted judgment against the plaintiff in the sum of $2,302.80. The defendant was directed to file an affidavit of disbursements identifying her out-of-pocket expenses and position regarding costs. If the plaintiff objected to the defendant's disbursements, he was directed to file the nature of his objection.

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R v Badger, 2019 SKPC 65

Hinds, November 18, 2019 (PC19053)

Criminal Law – Aggravated Assault
Criminal Law – Attempted Murder
Criminal Law – Evidence – Credibility
Criminal Law – Evidence – Identity of Accused

The accused was charged with attempted murder while using a firearm, contrary to s. 239(1)(a.1) of the Criminal Code and breach of an undertaking, contrary to s. 145(3) of the Criminal Code. There was a knock on the door and the victim answered it. A woman was on the other side of the door and two "masked up" men came up to the doorway. The victim grabbed the barrel of the gun that one of the masked men had pointed at his head. The gun went off and shot the victim, resulting in wounds to his right hand, legs, and chest. The victim testified that he did not know who shot him because he was too drunk to remember. In an earlier judgment, the court found that the victim made two admissible statements: during the call to 911, the victim told his mother that the accused shot him and as he was being loaded into the ambulance, the victim referred to the accused as the one who shot him. Cst. M. was at the location and heard the victim's second statement. He arrested the accused for attempted murder. He was wearing his duty gloves when he arrested the accused. His hands would have come into contact with the accused's wrists and hands when he placed the hand cuffs on the accused. Cst. M. wore his duty gloves when he would practice his shooting. Sampling swabs were taken from the accused's hands and they were positive for particles characteristic of gunshot residue (GSR). The samples from his face were not. An expert testified in

GSR. GSR is lost rapidly from the skin with 90 percent or more being lost between two and four hours after the firearm is discharged. GSR remains on clothing until it is washed. The expert could not conclude whether the GSR found on the victim's hands was from a firearm he fired, a result of being in proximity to someone else firing a firearm, or a result of GSR transfer. The accused testified he had been at the victim's residence but told everyone that he was going to go home and sleep at around 3:00 am. He said that he would be back in a bit. The accused said that he received a Facebook message from the victim's brother advising him that the victim had been shot. He said that him and the two people he was with decided to go and see what happened. The two other people did not continue to the house when they saw police and ambulance lights. He denied being part of the group that shot the victim and indicated that he had not touched a firearm since April 2017. The issues were: 1) whether the Crown proved beyond a reasonable doubt the accused was the individual who shot the complainant; 2) whether the Crown proved beyond a reasonable doubt that the accused intended to kill the complainant by discharging the firearm and thereby attempting to commit murder; and 3) if the answer to the latter was no, did the Crown prove beyond a reasonable doubt that the accused was guilty of a lesser included offence?

HELD: The issues were determined as follows: 1) the court did not believe the evidence of the accused, so did not have to acquit him. He was found to be less than credible on two matters: he at first denied having heard the victim indicate that he shot him, but reluctantly admitted to having heard it on cross-examination; and there was a lack of evidence corroborating the accused's alibi. The court also did not accept all of the victim's evidence. For example, the court did not believe that he did not know who shot him. The court gave considerable weight to the two spontaneous utterances of the victim. The victim was not found to be so impaired that he would make an error in his identification of the person who shot him. There was also compelling evidence from the fact that the shooting occurred eight to 13 minutes after the accused left the residence and then he was seen walking alongside the yard. The court was unable to rule out the possibility that the GSR on the accused's hands was not from Cst. M.'s gloves. The GSR evidence was thus not compelling. The court concluded that the Crown proved the identity of the shooter, the accused, beyond a reasonable doubt; 2) the court found that the accused pointed a double-barreled shotgun in front of the victim's face. A single shot was fired after the victim grabbed the gun. The court was unable to infer that the accused intended to kill the victim. It was as reasonable to infer that the accused intended to threaten or intimidate the victim by pointing a firearm at him. The firearm was found to have been accidentally discharged during the brief struggle. The accused was not guilty of attempted murder; 3) aggravated assault contrary to s. 268 of the Criminal Code was found to be an included offence of attempted murder. The accused's act of coming to the front door of

the residence armed with a shotgun and pointing it at the head of the victim was an intentional threat to apply force to him. The act also caused the victim to believe upon reasonable grounds that the accused had the present ability to effect his purpose. Further, the court found that a reasonable person in the position of the accused would have foreseen that the pointing of the shotgun in the direction of the victim would subject him to the risk of bodily harm. The shotgun also caused serious wounds to the victim. The accused was found guilty of aggravated assault. The accused was guilty of the breach of undertaking charge.

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Fall v Wollner - addendum, 2019 SKPC 66

Demong, November 12, 2019 (PC19052)

Small Claims – Costs

The defendant sought out-of-pocket costs of $150 in her successful small claims counterclaim against the plaintiff, a contractor she hired to replace the shingles on her house. She also sought general costs of $575, which she characterized as a sum for her lost wages for having to attend the case management conference and trial. HELD: The court found the out-of-pocket costs of $50 to reply to the plaintiff's claim and the $100 to file her counterclaim to be reasonable. The defendant was awarded the $150 pursuant to s. 36(1) of The Small Claims Act, 2016. Sections 36(3) of the Act and s. 6(3) of the Regulations allow an award of general costs up to ten percent of the amount of the claim. If there is a counterclaim or third-party claim, a judge may choose the claim of the highest value (s. 36(4)). The court calculated the amount of the counterclaim to be $10,911. The court indicated that it did not award the full ten percent unless it could be shown that an earlier offer had been refused and then the successful party was entitled to more after trial. The court considered s. 36(3)(g) and noted that the trial was difficult and time-consuming to prepare for. The court awarded general costs equivalent to five percent of the amount claimed, $545.55. The total costs awarded to the defendant were $695.55.

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R v Morin, 2019 SKPC 69

Daunt, November 25, 2019 (PC19056)

Criminal Law – Firearms Offences – Possession of a Firearm
Criminal Law – Sentencing – Aboriginal Offender

The accused pleaded guilty to possession of an unloaded prohibited firearm without being the holder of a licence together with readily accessible ammunition contrary to s. 95(1)(a) of the Criminal Code and to possession of a firearm while prohibited contrary to s. 117.01(1) of the Code. The police had arrested him after receiving a tip that he was in possession of a firearm. They followed him in his vehicle to a bar. After arresting him the police searched him and his vehicle and found several rounds of ammunition on his person and a sawed-off .22 rifle in the back seat of his vehicle. The accused explained that he kept the shotgun to protect himself from his former gang. The Pre-Sentence Report indicated that the accused, now 25, had been born to a Métis father and a Cree mother. His parents abused drugs and alcohol, which led to domestic violence and child neglect. They separated when he was eight years old and he and his siblings were sent to live with grandparents on his mother's reserve for two years. He then returned to Prince Albert. He received a probation order from a Youth Court when he was 14 and when he was 16, his mother died of a drug overdose. This deeply affected him. He started abusing drugs and alcohol and did not complete high school. He began selling drugs and at 20, was convicted of possession for the purpose of trafficking, served two years in the Prince Albert Penitentiary and later that year received a 42-month sentence for aggravated assault with a firearm, an offence connected to his trafficking. In prison he was recruited into the Terror Squad, a regional Aboriginal gang, but also upgraded his education and participated in traditional spiritual practices. After his release, the gang opposed his effort to leave it and he feared for his safety and began carrying the sawed-off rifle and ammunition. He and his girlfriend were expecting a child. After his arrest for these offences, the accused released to the electronic monitoring program. Fearing retribution from the gang, he cut off his bracelet and went on the run but was kidnapped by the gang and was beaten and tortured by members. He managed to escape after he sustained serious injuries. He was re-arrested and had been in custody since. He expressed a desire to parent his child and work on his sobriety. His girlfriend and her family and his father offered support for him. He believed that he would be able to stay out of the gang. The community support in Prince Albert could include a prospective anti-gang program, but that was dependent on its obtaining funding. The Crown argued that a global sentence of three years was appropriate. The defence submitted that the accused should receive a global sentence of two years in light of the significant Gladue factors.

HELD: The accused was sentenced to 18 months in custody for the s. 95 offence followed by 18 months on probation subject to multiple conditions, including participation in addiction and anti-gang programming, if available. For the s. 117.01(1) offence, he received a 12-month sentence to be served concurrently, based on the Kienapple principle. The sentence was reduced by 317 days for enhanced credit for time on remand. A prison sentence was necessary for the purposes of denunciation and deterrence. The

court found that s. 95 was a serious offence, but the accused's degree of responsibility was low as explained in Gladue and Ipeelee. It took into account the impact that colonialism had had on Indigenous communities generally and on the accused specifically, in that his childhood and youth were damaged by his parents' substance abuse and violence, their separation and his mother's death. The effect was to limit his education and then his employment prospects which in turn led him into drug dealing. That criminal activity led to the accused's penitentiary sentence and while imprisoned, joining a gang to protect himself against other inmates. He committed the s. 95 offence because he was attempting to protect himself from retribution for trying to leave the gang. The aggravating factor was that the accused was subject to a firearms prohibition at the time of the offence but he had been charged separately for it. The mitigating facts included that the accused entered a guilty plea. He acquired the weapon because he was genuinely and justifiably afraid for his personal safety. The gun was not loaded, nor had the accused used it to threaten anyone.

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Blonde Ambition Investments Inc. v RJM Ventures LLC, 2019 SKQB 275

Smith, October 16, 2019 (QB19260)

Civil Procedure – Forum Conveniens
Civil Procedure – Jurisdiction – Territorial Competence
Civil Procedure – Queen's Bench Rules, Rule 3-14

The defendants, R.J.M. and RM, sought an order under Rule 3-14 of The Queen's Bench Rules dismissing or staying the action on the grounds that the Saskatchewan Court of Queen's Bench was not the appropriate forum to try the proceedings. The sole officer and director of the plaintiff corporation was T.P. In May 2017, P.A., another defendant, advised T.P. that he was purchasing tickets for events at bulk at discounted prices and then reselling them at a profit. He offered T.P. the opportunity to be included but required $40,500 USD. T.P. and P.A.'s company signed an agreement and T.P. transferred him the money. T.P. expected her profit by the end of December 2017 but did not receive anything. In November 2018, T.P. first heard from P.A. when he texted her advising that her money had went to his company and then to R.J.M. but was due back to his company so that she could be paid. This was the first she heard of the involvement of R.J.M. T.P. did some research and discovered actions by the Security and Exchange Commissions in Saskatchewan and New York against R.M. or parties related to him. The action by the Security Exchange Commission against R.M.'s wife and the other defendants alleged an investor fraud relating to a ticket resale business. This action was commenced in March 2019. R.J.M. and

R.M. argued that Saskatchewan should decline jurisdiction. They claimed that it would be more convenient for the matter to proceed in the State of New York given the location of the witnesses, including one who was imprisoned in New York City. Further, they claimed that the contract between the plaintiff corporation and P.A.'s corporation contained a clause that required the matter to proceed in the State of Delaware.

HELD: The Court Jurisdiction and Proceedings Transfer Act (CJPTA) addresses the issue of a Saskatchewan court's territorial competence. The court found that the clause referring to the State of Delaware in the contract between the plaintiff and P.A.'s corporation was non-sensical and had no application. It was simply grafted into the contract from another agreement. One factor to consider in determining the forum conveniens is the situs of the tort. The Supreme Court of Canada noted that there are no rules that should be strictly applied when determining whether a court should decline to exercise jurisdiction. The party asking for a stay on the basis of forum non conveniens must show that the alternative forum is "clearly more appropriate". Normally, once jurisdiction is established, it should be exercised. The court found that the last essential act of the arrangement was done by the plaintiff by wiring the money. The court concluded that the contract was formed in Saskatchewan. Section 10(2) of the CJPTA requires the court to look at the ability to enforce a judgment obtained in Saskatchewan in the jurisdiction of the defendants. The plaintiff's counsel indicated that the Saskatchewan judgment could be enforced in New York State. The court determined that the ultimate question was whether there was a clearly more appropriate forum for the hearing of the action. A balancing exercise must be undertaken to determine whether, in the circumstances of the case, another forum is more appropriate. The existence of an appropriate forum must be "clearly" established to displace the forum selected by the plaintiff and the doctrine of forum non conveniens is to be "applied exceptionally". The court dismissed the defendants' concern with the people they would have to assemble to answer the case against them. The person imprisoned in New York was not connected to the case and he would add nothing. Also, it was found to be likely that a summary judgment would be made before there was a trial requiring the defendants' attendance in Saskatchewan. Also, the court found it likely that R.M. would be allowed to present his evidence via video given his assertion of non-involvement. The plaintiff was likely the victim of civil fraud. The plaintiff was sought out in Saskatchewan and the agreement was signed in Saskatchewan. The money was also wrongfully converted from Saskatchewan. The court concluded that R.J.M. and R.M. did not clearly establish that New York State was the more appropriate forum to determine the action. The application was dismissed with costs in favour of the plaintiff in any event of the cause.

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R v Stanley, 2019 SKQB 277

Hildebrandt, October 17, 2019 (QB19249)

Criminal Law – Jury Selection – Judicial Notice
Criminal Law – Jury Selection – Peremptory Challenges
Criminal Law – Jury Selection – Questions to Potential Jurors
Criminal Law – Jury Selection – Race
Criminal Law – Jury Trial – Exclusion of Jurors – Criminal Code, Section 640(2.1)
Criminal Law – Jury Trial – Juror Impartiality

The accused elected to be tried by jury on his charges of sexual assault and unlawful confinement. He applied for "an order challenging prospective jurors for cause, specifically, racial bias" and it was expanded to pursue challenges based on the #MeToo movement. There were amendments to the jury selection process effective September 19, 2019. Courts had yet to determine whether the amendments were procedural or substantive in nature and retrospective or prospective in operation. Both counsel proceeded as if the new amendments were operative. Subsection 638(1)(b) of the Criminal Code stated prior to September 19, 2019 that the number of challenges in the jury selection was not limited if a juror "is not indifferent between the Queen and the accused". The amended wording indicates that jury selection challenges are not limited to the ground that a juror is "not impartial". The accused proposed the following questions be asked of jurors: 1) what, if anything, did you know of the case? 2) What opinions, if any, have you formulated as a result of material that you have read, watched or listened to about this case? 3) Do you think that you can remain impartial? 4) Have you or any of your family members ever been a victim of a crime; if yes, do you know the race of the person who committed the crime: a) if the person who committed the crime was Indigenous, can you be unbiased in a case involving Indigenous people? and 5) If the answer to the first question is no, can you remain unbiased as a result of your racial attitudes?
HELD: The amendments to the Criminal Code pertaining to the jury selection process were determined to be in essence substantive so they do not operate retrospectively. The jury was selected in accordance with the procedures in place prior to September 19, 2019, including the availability of peremptory challenges. When the accused elected to be tried by jury, he had an expectation of the jury selection process. If the court found that the new procedures applied retrospectively, the accused's expectations could be altered. The conclusion was found to be in accord with the Interpretation Act and the presumption against retrospectivity. The accused applied for "an order challenging prospective jurors for cause, specifically, racial bias". The first three proposed questions were viewed in light of the application regarding the #MeToo movement. It became clear to the court that the accused was really seeking a line of questioning

regarding the prospective jurors' awareness of high-profile sexual assault cases, particularly those involving celebrities, and not necessarily knowledge of the accused's case. The accused asked the court to take judicial notice of movements such as #MeToo. He also wanted the court to accept that the impact of the movement was widespread with the view that the complainant is always to be believed therefore negating the impartiality of the jury pool. The court determined that it would be too great of a leap to take judicial notice of the #MeToo movement and its speculative impact on the belief system of the public. Other courts have not taken judicial notice of similar movements, even when the applicant provided much more information to the court. Even if the court accepted that there had been an increase in both awareness and allegations of sexual offences, it would not establish widespread bias against alleged offenders. The application to challenge for cause based on the alleged impact of the #MeToo movement and the increased attention in social media on allegations of sexual misconduct was dismissed. The fourth and fifth posed questions addressed potential racial bias on the part of prospective jurors. The Crown had no objection to the court taking judicial notice of the potential for racial bias in relation to an Indigenous accused. The court was nonetheless concerned with the wording of the questions. Asking a person whether they have been the victim of a crime is such a broad question as to be meaningless. The question focused more on the offence than the issue of racial bias. An acceptable format would be a question in generic form, such as "will you be able to judge the evidence in this manner without regard to the race of the accused?" or less generically, such as "would your ability to judge the evidence in this trial without bias, prejudice, or partiality be affected by the fact that the complainant and the accused are of First Nations ancestry?" The final choice of questions would be determined after discussion with counsel prior to the opening of the trial. The court did grant the application to exclude sworn and unsworn jurors until determination of the ground of challenge.

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R v Iron, 2019 SKQB 278

Acton, October 24, 2019 (QB19261)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Dangerous Offender
Criminal Law – Sentencing – Determinate Sentence
Criminal Law – Sentencing – Robbery

The offender was found guilty of two Criminal Code offences, namely: robbery contrary to s. 344(1) and breach of undertaking contrary to s. 145(3). He was 35 years of age and belonged to a First Nation but had been raised primarily in a city. The offender had a

lengthy and violent criminal record with his first offence of assault at the age of 12. He had 35 adult convictions, 13 of which were for violent offences and involved weapons. The offender has served several periods of incarceration with only brief periods of time in the community in between those periods of incarceration. Prior to this incarceration he was using prescription medication, cocaine, opioids, and crystal meth daily. The offender did not engage in available programming nor did he participate in any of the cultural services offered. His parents separated shortly after his birth and he was raised primarily by his mother with little involvement from his father. The offender's mother was in a succession of abusive relationships and he was placed in as many as 12 foster homes. He did not have any children and has never been married. The psychiatrist that prepared the report for the court concluded that risk management of the offender would require monitoring, supervision, and ongoing programming. The doctor considered the offender a good candidate for treatment and programming so long as he abstained from alcohol and drugs for the remainder of his lifetime. The offender stated to some of the witnesses that he was not willing to abstain from cannabis and alcohol.

HELD: The court reviewed the law with respect to dangerous offender designations. The evidence was found to establish that the offender would be a good candidate for treatment and programming if he abstained from drugs and alcohol, but that the offender may not be willing to do so. The court accepted that the predicate offence (robbery) was part of an established pattern of violence. It was also a lifelong pattern of weapons, robberies, assaults and threatened and actual violence. The court also accepted that the risk of harmful recidivism by the offender was extremely high. The Crown provided evidence that the offender was untreatable and intractable. It was only speculation to say that the offender would now participate in programming and thereafter apply the skills. The court determined that the offender never had any sense of remorse for his offences. It was determined that there was a substantial risk that, without incarceration for the balance of the offender's lifetime, or a major change in attitude, he would reoffend and endanger more people. An indeterminate sentence would allow for incarceration or conditional release for the remainder of the offender's life. The court concluded that nothing short of an indeterminate sentence was appropriate because there was no reasonable expectation of protection of the public from future acts of violence by the offender. It was accepted, as the doctor suggested, that there was the possibility of risk management under certain structures. There was, however, no evidence that the offender had actually done anything in that regard, nor was it anticipated that he would. The court accepted that the offender's treatment could not be successful with his attitude. Also of concern was that the offender was intoxicated and carried a weapon during the commission of all of his offences. The court found the offender to be a dangerous offender and sentenced him to an indeterminate sentence because there was no reasonable expectation that a lesser

sentence would adequately protect the public against the commission of another serious personal injury offence.

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Luby v 101144734 Saskatchewan Ltd., 2019 SKQB 279

Elson, October 23, 2019 (QB19268)

Civil Procedure – Queen's Bench Rules, Rule 3-22, Rule 3-23
Civil Procedure – Default Judgment

The plaintiff applied without notice for a judgment in default of defence pursuant to Queen's Bench rule 3-22. The supporting material described the plaintiff's claim as one for a debt or liquidated demand and for interest that was not precisely pleaded or calculated. The plaintiff issued her statement of claim in September 2016. It contained minimal information regarding an asset purchase agreement between her and the defendant that included payment provisions over time, but the defendant corporation had breached the agreement by failing to meet its payment obligations. The plaintiff also pleaded, without particulars, that the defendant, Shah, had promised payment personally and had only paid an undisclosed amount. The defendants were noted for default in October 2016. In the affidavit supporting this application, the plaintiff deposed that the defendant had made six payments since that date and now owed $41,000 as a debt or liquidated demand. Although interest was claimed, the plaintiff had not supplied a calculation of the amount.
HELD: The application was dismissed without prejudice to the plaintiff's right to apply for judgment under Queen's Bench rule 3-23 and to her right to withdraw the noting for default and to amend her statement of claim. The claim as pleaded was insufficient to support a claim for a debt or liquidated demand and the plaintiff could not enter judgment on that basis. The claim against Shah failed to disclose a cause of action and the court lacked jurisdiction to issue judgment by default or otherwise. The plaintiff could pursue judgment against the corporate defendant for pecuniary damages and interest pursuant to Queen's Bench rule 3-23 that would require affidavit evidence setting out the basis and quantum of her claim. The claim against Shah could only be made if the plaintiff amended the statement of claim. In order to rectify the deficiencies, the court could grant leave to the plaintiff to withdraw the noting for default if she chose to take that step.

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Saskatchewan Health Authority v Service Employees International Union - West, 2019 SKQB 282

Currie, October 31, 2019 (QB19262)

Labour Law – Arbitration – Judicial Review – Affidavit Evidence
Civil Procedure – Appeal – Stay of Proceedings
Civil Procedure – Affidavits

The Saskatchewan Health Authority (SHA) applied for judicial review of the award made by an arbitrator in favour of grievances lodged on behalf of two employees in relation to their applications for positions as continuing care assistants (CCA). Each grievor had applied for a position as a CCA but had not been selected despite being senior to the successful applicants who had been selected because they had the educational qualification specified for the position (a Continuing Care Certificate) and the grievors did not. The arbitrator interpreted the provisions of the collective agreement and two Letters of Understanding (LOU) that formed part of the contract to find that the grievors should not have been automatically excluded from consideration on the basis of whether they had equivalent qualifications. The SHA argued that the arbitrator's decision was unreasonable because she failed to apply established arbitral precedent or explain why she failed to consider such precedents such as Prince Albert Regional Health Authority v CUPE. The arbitral board in that case stated that where the collective agreement provided that vacancies would be filled on the basis of seniority, qualifications and ability sufficient to do the job, it would not rule that "qualifications" and "sufficient ability" meant the same thing because that would not be in accordance with the provisions of the collective agreement. The SHA also requested a stay of the arbitrator's award pending the decision in this application. It sought the stay because it did not wish the award to constitute a precedent and argued that implementing it might cause irreparable harm. The respondent union opposed the application and applied as well for an order striking out the affidavit submitted by an employee of the SHA that had been supplied for the purpose of providing as complete a record as possible given that that the proceedings before the arbitrator were not recorded.
HELD: The application was granted. The arbitrator's award was quashed. The court found that the decision had not met the standard of reasonableness. In this case, the court noted that Parkland was an arbitral precedent, that the arbitrator had not explained why she did not follow it and the decision was not justified, transparent or intelligible. The arbitrator's decision that ability to perform the work was equivalent to possessing the necessary qualifications was in error because the effect of the decision was to render nugatory an express contractual provision such that the decision did not fall within the range of acceptable conclusions. Regarding the preliminary issues, the court declined to grant the stay because it was reasonable to expect anyone in possession of the award to investigate and become aware that it

remained subject to judicial review. As the arbitrator had not yet determined any remedy in connection with her award, implementation had not occurred and thus there could be no irreparable harm arising from implementation. The court admitted the affidavit following the decisions in Mosaic Potash and Hartwig that held that the law in Saskatchewan encourages the filing of additional information in a judicial review. The court disregarded portions of the affidavits that contained arguments.

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Yolbolsum Canada Inc. v Golden Opportunities Fund Inc., 2019 SKQB 285

Scherman, November 4, 2019 (QB19263)

Civil Procedure – Queen's Bench Rules, Rule 7-9(2)(e)
Civil Procedure – Judgments and Orders – Final

The individual and corporate defendants brought an application to strike the plaintiff's claim against them pursuant to Queen's Bench rule 7-9(2)(e). They argued that the claim was an abuse of process, being an attempt to relitigate matters previously decided in the receivership proceedings, at which time the plaintiff should have raised any of the issues it now alleged in its statement of claim. The plaintiff acknowledged that it had consented to the interim and full receivership orders and had not opposed the application for sale approval and vesting order with respect to the receiver's sale of the assets of Phenomenone Discoveries Inc. (PDI) (see: 2016 SKQB 306). It submitted that its claim should not be struck because it raised issues not addressed in the receivership proceedings and it had not been appropriate for it to put forward its shareholder complaints in response to the receiver's application for the sale approval and vesting order. The plaintiff's president and principal was also the president and CEO of PDI. The plaintiff was the largest shareholder of PDI. The corporate defendants were shareholders of PDI and, pursuant to a unanimous shareholder agreement (USA), they nominated a number of individual defendants as directors of PDI. Under the provisions of the USA, the approval of three-quarters of the directors was required to approve material transactions of PDI, including invoking insolvency proceedings. The directors of PDI brought a successful receivership application and the receiver then obtained an order approving the sale of PDI's assets for $9,600,000.00. In its claim, the plaintiff alleged those assets had a value of $400 million and the sale and purchase of those assets concluded a history of oppressive conduct by certain shareholders to place it in a disadvantaged position and to conspire to defraud and deprive it of its rightful share in such value of those assets. HELD: The application was granted and the plaintiff's claim struck pursuant to Queen's Bench rule 7-9(2)(e) as an abuse of process. The

court found that the plaintiff's delay in advancing its claim constituted a collateral attack on the decisions rendered in the course of the receivership application that were valid and existing orders. It found that the plaintiff failed to allege oppressive conduct and breach of fiduciary duty at the time of the receivership application, two years before it issued its statement of claim. The court would have had the jurisdiction and discretion to decline to approve the sale of PDI's assets for $9,600,000.00 if it had been satisfied with the plaintiff's allegation that the value was $400 million. The plaintiff had not opposed the sale of the assets except to argue that it had a proprietary interest in them and that the receiver did not have the right to sell. The court hearing the matter had found that it did not have such an interest and the plaintiff's appeal of that decision had been dismissed by the Court of Appeal.

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Lane Realty Corp. v Rey, 2019 SKQB 286

Layh, November 6, 2019 (QB19264)

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

The plaintiff, a real estate company, and the defendants, Rey and Minor Creek Farms Ltd. (MCF), each applied for summary judgment pursuant to Queen's Bench rule 7-5. The plaintiff also claimed against the defendant, Cawkwell, a realtor, but later discontinued the action. The plaintiff alleged that the defendants owed them realtor fees they should have received upon the sale of the defendants' farm and the defendants requested that the plaintiff's claim be dismissed or, in the alternative, should the plaintiff's application be successful, that the court award judgment against the defendant Cawkwell in the amount of any judgment in favour of the plaintiff. The plaintiff and defendants had entered into an exclusive listing agreement for the sale of the defendants', Rey's and MCF's, farm for $30 million. The plaintiff was entitled to receive a five percent commission if the farm sold within the term of the agreement from January to May 2016. The agreement also provided that the commission would be paid if the farm sold within 180 days of its termination and the plaintiff's efforts were the "effective cause" of the sale. When the agreement expired, the plaintiff signed a new listing agreement with Cawkwell. He sold the farm to the East Raymond Hutterite Colony (colony) in August for $26 million. The plaintiff alleged that they had first introduced the farm to the colony and therefore the effective clause was operative and the commission rightfully belonged to them. The affidavit evidence submitted by two of the plaintiff's realtors indicated that through advertisement, telephone conversations and in-person visits with certain member of the colony, that they introduced the farm to it. They deposed that the defendant Rey was informed by them that

the colony was interested in the farm, but that the members would not be in a position to view it until the following summer. In his affidavit, Rey denied that the plaintiff advised him of the colony's interest. Affidavits filed by members of the colony denied that they had discussed the farm with the plaintiff's realtors, that the colony was interested in it, or that they would view it a later date. They deposed that they only became interested in the farm in June or July 2016 when they received a brochure in the mail from Cawkwell.
HELD: The applications for summary judgment were dismissed. The court was unable to reach a fair and just decision based upon the contradictory affidavit evidence before it.

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Nicholauson v Nicholauson, 2019 SKQB 287

Brown, November 6, 2019 (QB19265)

Family Law – Child Support – Interim
Family Law – Spousal Support – Interim

The petitioner applied for interim child and spousal support. The parties had lived together for ten years and been married for 8 years. They separated in July 2019. The petitioner had one child, aged 14, from a previous relationship who had resided with the parties and now resided solely with the petitioner. The child's father had recently agreed to pay child support of $734 per month based on his income. The petitioner's 2018 line 150 income tax employment income was $55,500 and respondent's line 150 income was $136,300, primarily derived from employment but including a consistent loss from farming in the range of $4,000 to $10,000 annually. The petitioner argued that the farm losses were an inappropriate deduction from income as it was not a true farming enterprise and thus the respondent's net income on his tax return did not fairly reflect his net income for the purposes of support. Evidence adduced regarding the gross farm income for the past three years showed that it ranged from $2,800 to $9,500 and that there had been losses for the last three years. Only 50 acres of the land was farmland and the rest was used for recreational purposes.
HELD: The application for interim child and spousal support was granted. The court found that the respondent was in loco parentis to the child for the purposes of the interim application under both the Divorce Act and The Family Maintenance Act, 1997 and had an obligation to support her. It determined that the respondent's income was $144,260 as the farm losses were expenses associated with a hobby rather than business losses that ought to affect income available for support. Based upon this income, the child support payable was $1,226. Taking into account the $734 owing from the child's father, the respondent's obligation to pay interim child support was $492 per month. His responsibility for s. 7 expenses

was fixed at 35 percent. The petitioner was entitled to interim spousal support because of the disparity between her income and that of the respondent. He had the ability to pay and she was economically disadvantaged by the breakdown in the marriage. The court found that the appropriate amount of spousal support was $1,425 per month, the mid-point of the range established by the Spousal Support Advisory Guidelines. It was payable as of August 2019 and was to continue until further order or agreement.

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Verdient Foods Inc. v United Food and Commercial Workers, Local 1400, 2019 SKQB 288

Robertson, November 6, 2019 (QB19266)

Labour Law – Judicial Review – Labour Relations Board
Civil Procedure – Queen's Bench Rules, Rule 1.5, Rule 3-60, Rule 13-30
Civil Procedure – Stay of Proceedings

The applicant employer, Verdient, applied for judicial review of the decision of the Saskatchewan Labour Relations Board (SLRB) relating to certification of a bargaining unit. After the SLRB issued its decision, including that the ballots cast in the vote be tabulated, the employer obtained an order that the tabulation be stayed until further order. Before the judicial review application was to be heard, each of the parties brought these applications. The union sought an order lifting the stay regarding the tabulation of the ballots by the SLRB and in support of its application, it filed two affidavits. One affidavit was sworn by the president of the union and he stated that in his experience, employers who caused excessive delays prior to certification affected the success of organizing drives. He believed that the employer's attempt to stall the vote tabulation was an attempt to cause delay. The other affidavit was sworn by a former employee of Verdient who stated that he believed that the true reason for his termination related to his involvement in the organizing drive and that the delay in tabulating the votes had compromised the organizing drive. The employer sought an order striking parts of the affidavits, alleging that they violated Queen's Bench rule 13-30 because they contained opinion and hearsay evidence.
HELD: The union's application was granted. The court lifted the interim stay and the SLRB was authorized to proceed to tabulate the ballots. The employer had not proven that it would suffer irreparable harm if the stay ended. It was more likely that the union would suffer greater harm if it were continued. The public interest in allowing the statutory process to be followed also favoured lifting the stay. The court granted the employer's application in part. It struck paragraphs of the former employee's affidavit because they

stated opinions rather than facts. It permitted some of the paragraphs in the president's affidavit because his statements were based on his long experience as a basis for his beliefs, and such personal knowledge constituted direct knowledge. The concerns he expressed related to unfair labour practices prohibited by s. 6-62 of The Saskatchewan Employment Act and could be viewed as legislative facts. Other paragraphs were struck, though, as they represented an opinion that the employer was engaging in certain anti-union activity: such argument is properly stated in a brief rather than in an affidavit.

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Hilowle v Lamadine, 2019 SKQB 290

Richmond, November 6, 2019 (QB19267)

Family Law – Custody and Access

The parties lived together for a couple of years and after they separated the respondent mother gave birth to their daughter in 2010. The petitioner obtained an access order for parenting time. When the respondent began attending university, she found it difficult to care for the child and in 2012 she signed a consent order changing the primary care to the petitioner. Following this change, the respondent did not exercise her weekend parenting time. She claimed that it was because the petitioner moved to Saskatoon from Regina without telling her. Later that year, Social Services became involved over concerns respecting the petitioner's care. The petitioner was abusing alcohol and facing a jail sentence for committing aggravated assault. A social worker prepared a custody and access assessment. Both parents consented to the child being placed in the care of the petitioner's aunt in Regina and she was moved there from Saskatoon. The child stayed with the aunt and her family for five years, during which time she was raised in the Muslim faith. The petitioner remained in contact with the child during his time in prison and after his release, he saw her almost daily. In 2017, the respondent obtained a graduated access order to allow her to reconnect with the child, although the respondent was living in Moose Jaw. The petitioner's aunt and her family decided to move to Ontario and the aunt agreed both to leave the child with the petitioner and to the termination of the placement of the child with her as a person of sufficient interest. The petitioner and the respondent each argued that they should have primary residence of the child. In 2018, the court terminated the placement and ordered that the parties have joint custody, but her primary residence would be with the petitioner. As the matter was directed to pre-trial, a second custody and access report was prepared by the same social worker and she recommended that the child should live with the respondent because of her concerns about the petitioner's history of

alcohol abuse, mental health issues and his involvement with Social Services and the police.
HELD: The court ordered that the child remain in the primary care of the petitioner and the respondent was to have parenting time on three weekends per month. The child would be able to maintain her enrolment in the same French immersion school and stay with her friends in the community she knew. It was important not to subject her to further disruption. The petitioner had been sober for some time because he had embraced his Muslim faith. The respondent's failure to explain why she had not maintained contact with the child over long periods of time was noted by the court.

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Patel v Practitioners Staff Appeals Tribunal, 2019 SKQB 291

Scherman, November 7, 2019 (QB19270)

Administrative Law – Judicial Review
Professions and Occupations – Physicians and Surgeons

The plaintiff, Dr. Patel, filled a judicial review application asking the court to, among other remedies, quash the decision of The Saskatchewan Health Authority Board Practitioner Hearing Committee suspending his hospital privileges and the Practitioner Staff Appeals Tribunal (PSAT) constituted to hear his appeal from the Hearing Committee's decision. PSAT's hearing of the plaintiff's appeal was still proceeding at the time he brought this application. The Saskatchewan Health Authority (SHA) then brought an application asking the court to dismiss or strike the plaintiff's judicial review application on the grounds that: 1) the appeal to the PSAT provided an adequate alternative remedy to the judicial review; 2) a review of interlocutory decisions of the PSAT made in the course of hearing the plaintiff's appeal to the PSAT was premature; and 3) no exceptional circumstances existed that would justify in engaging in the judicial review, given the previous two grounds. The plaintiff made numerous amendments to his application and his counsel requested that the court have regard to them to inform his decision on whether exceptional circumstances exist when alternative remedies have not been exhausted and there were concerns of prematurity.
HELD: The application to strike out the plaintiff's notices of application for judicial review was granted. The court reviewed and applied the principles set out by the Supreme Court in Strickland and the Saskatchewan Court of Appeal's decisions in Patel v Carson and Wal-Mart v Saskatoon and found with respect to each ground that: 1) there was an adequate alternative remedy. The Legislature intended to exclude supervisory jurisdiction by the court of the proceedings before the PSAT, a tribunal with medical expertise, while such proceedings were ongoing. It had created a detailed

statutory framework to decide physician privilege issues that contained a right of appeal to a tribunal (PSAT) and an additional right of appeal to the Court of Queen's Bench on issues of law or jurisdiction; 2) the application was premature. The plaintiff's application and its amendments assumed that he would lose his appeal before PSAT because various jurisdictional and procedural decisions it had made had gone against him. In the course of such proceedings interlocutory rulings necessarily must be made, but they did not presage the final decision made on the merits. The plaintiff has the right of appeal to the court from that decision; and 3) there were no exceptional circumstances. The plaintiff's submission regarding the delay, cost and career impact caused by the legislative procedure did not constitute such circumstances.

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Lewis v Epp, 2019 SKQB 292

Robertson, November 12, 2019 (QB19271)

Statutes – Interpretation – Small Claims Act, 2016, Section 42
Civil Procedure – Queen's Bench Rules, rule 3-49
Administrative Law – Judicial Review – Provincial Court

The applicant applied to the Court of Queen's Bench for judicial review and quashing of the decision of a Provincial Court judge that dismissed her application to set aside the default judgment made against her in a small claims action. The plaintiff in the action had obtained judgment in the amount of $17,370 when the applicant failed to appear. In her application to set aside the judgment, the applicant deposed that she had not received the summons. At the hearing the judge asked the applicant about her claim that she had not had notice of the hearings leading up to the default judgment and then asked her how she found the summons and for details regarding her proposed defence. The judge found that she did not believe the applicant's explanations and that her defence was frivolous and vexatious.
HELD: The application for judicial review was dismissed. The court found that it had jurisdiction to review a final decision of the Provincial Court from which there was no appeal. The applicant was directly affected by the decision, had a significant interest affected by it and the application was made in a timely manner. The Provincial Court judge's decision was discretionary and based upon her findings of fact. The standard of review was reasonableness. The judge's reasons were brief but justifiable, intelligible and transparent. She properly considered the statutory criteria for setting aside default judgments set out in ss. 42(1)(c) and 42(3) of The Small Claims Act, 2016 and her decision fell within the standard of reasonableness.

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