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

Volume 21, No. 4 **February 15, 2019**

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Patel v Carson, 2018 SKCA 98

Richards Ottenbreit Whitmore, December 13, 2018 (CA18096)

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

The appellant appealed from the decision of a Queen's Bench judge denying his judicial review application to quash the decisions: 1) of the Senior Medical Officer (SMO) of the Regina Qu'Appelle Regional Health Authority (RQRHA) to suspend the appellant's operating privileges; and 2) of the RQHRA Board to uphold the SMO's suspension decision. In the application, the appellant sought to have his hospital privileges restored in full (see: 2017 SKQB 377). The SMO had suspended the appellant pursuant to the RQRHA's Practitioner Staff Bylaws passed under the authority of s. 43 of The Regional Health Services Act, which was in force at the time. As required by the bylaws, the board held a hearing within 14 days of the suspension, confirmed the suspension by the SMO and referred the matter to a discipline committee for a hearing. The appellant appealed the board's decision to the Practitioner Staff Appeals Tribunal, as permitted by the Act, but then requested an adjournment of the hearing. The committee had also held 20 hearings at that time but before it concluded its proceedings, the appellant commenced his action in the Court of Queen's Bench. His application was based on grounds that included allegations that he had been suspended because of interpersonal conflict, not incompetence, and that no evidence had been tendered demonstrating incompetence. The appellant argued that the chambers judge's dismissal of his application was based on her finding that the regulatory framework set up by the Act prohibited judicial review applications and that such

applications constituted an abuse of process. His grounds of appeal, largely based upon that view of the judge's decision, included the arguments that the chambers judge had erred in failing to consider s. 102 of the bylaws and in finding that s. 45 of the Act prohibited judicial review of decisions suspending hospital privileges. Further, the judge erred in finding that there was an adequate alternative remedy as a result of her application of the Supreme Court's decision in Strickland. The appellant submitted that the alternative proceedings available to him were not convenient or expeditious.
HELD: The appeal was dismissed. The court found that the appellant had misunderstood the decision of the chambers judge. She had not rested it on a finding that his application was an abuse of process but rather decided that it should be dismissed because the procedures established by the Act provided him with an adequate means of seeking a remedy. Therefore, the appellant's grounds of appeal that the chambers judge erred in failing to consider s. 102 of the bylaw and misinterpreting s. 45 of the Act could not succeed, because the judge had not held that the Act or the bylaws precluded judicial review. The judge correctly found that there were appropriate alternatives available to the appellant under the regulatory regime established pursuant to the Act to permit him to take issue with the board's decision rather than seeking judicial review.

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Gerhardt v Miller Estate, 2018 SKCA 99

Ottenbreit Caldwell Whitmore, December 12, 2018 (CA18097)

Family Law – Family Property – Interspousal Contract
Statutes – Interpretation – Family Property Act, Section 24, Section 35(e), Section 42

The appellant appealed from the decision of a Queen's Bench judge dismissing her application in chambers for an order under The Family Property Act (FPA) declaring that $78,300 from the respondent's estate to be family property and to be vested in her. When the appellant and her spouse separated in 2016, they entered into an interspousal contract. It dealt with property and spousal maintenance issues and stipulated that the spouse would continue to make all the required payments on the appellant's vehicle for the duration of the lease term and to pay her the sum of $50,000 in installments of $10,000 per month for the five months following the execution of the contract for the purposes of property equalization. The appellant's former spouse died in January 2017 before he had completed his payment obligations to her. She then applied under the FPA for the order against the estate, arguing that the total amount owing for both payments should be held in trust for her by the estate as her share of the family property and the

amount owing to her was not family property subject to division. The chambers judge reviewed s. 21 and s. 24 of the FPA and determined that the contract executed by the parties was an interspousal one and caught by s. 24. Therefore he could not deal with the matter of the outstanding payments and dismissed the application. He noted the remedy for breach of an interspousal contract was an action in contract. The appellant's grounds of appeal were that the chambers judge had erred in: 1) determining that the amounts owing to her were dealt with by the contract because s. 24 applied. He thereby wrongly declined jurisdiction; and 2) failing to apply s. 42 of the FPA to find that the monies were vested in her if s. 24 was inapplicable. Under s. 35(e) she was entitled to an order that required the estate to pay her in priority to any unsecured creditors in accordance with s. 35(e) of the FPA.
HELD: The appeal was dismissed. The court found with respect to the issues that: 1) the judge was correct to dismiss the application and find any remedy available to the appellant would be found in contract. However, the judge had erred in finding s. 24 applicable because the subject matter of the application was not family property. The amounts owing under the contract were not family property. The terms of the contract indicated promises to pay money in the future. The lease payments were family debt obligations of the appellant that were to come due monthly over the next four years which her spouse obligated himself to pay on her behalf. The obligation was created by the contract and did not divide property even though it was part of an overall settlement of the parties' rights under the FPA. The funds to pay the lease and the equalization amount would not come from discrete funds in existence at the time of the contract. The statutory definition of family property requires that property must be owned by the parties or be in existence at the time of the application; and 2) the judge had not erred in not applying s. 42 for the same reason explained respecting the inapplicability of s. 24. Section 42 requires that the property sought to be vested must be family property.

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R v Stewart, 2018 SKPC 65

Metivier, November 7, 2018 (PC18066)

Criminal Law – Motor Vehicle Offences – Dangerous Driving Causing Death
Criminal Law – Evidence – Identity of Accused

The accused was charged with two counts of dangerous driving causing death, one count of dangerous driving causing bodily harm, two counts of impaired driving causing death, one count of impaired driving causing bodily harm, two counts of driving while his blood alcohol level exceeded the legal limit causing death, and one count of

driving while his blood alcohol level exceeded the legal limit causing bodily harm. After working a 12-hour night shift, the accused and his two co-workers began drinking in their hotel room where they were joined by a fourth person. The group then went to a bar arriving at 10 am according to its security video. They consumed eight rounds of drinks in just over an hour. The video showed them leaving the bar at 11:16 am. The accused got into the driver's seat of his vehicle and the three others took their seats. The group decided to drive to Saskatoon and witnesses testified that the accused passed them going at speeds as great as 160 km/hr in a 100 km/hr zone. The vehicle left the road on a corner and rolled. The accident killed the two passengers in the back seat and severely injured the accused and the other person sitting beside him. The accused admitted that he was driving the vehicle after the group left the bar and was guilty of dangerous driving, impaired driving and driving while over the limit, but testified that prior to the accident, he pulled the vehicle to the side of the highway and switched places with the front seat passenger. He testified that it took about 30 seconds for them to switch places and the passenger to resume driving and achieve a high rate of speed. He denied that his driving caused the death or bodily harm of the other occupants. The Crown argued that the accused was the driver at the time of the accident and if he wasn't, he remained in care and control of the vehicle or was liable as a party to the offence by aiding and abetting the passenger in the commission of the offence.
HELD: The accused was found guilty of all charges. The court did not accept the accused's testimony that he switched places with the passenger and his evidence had not raised a reasonable doubt. His credibility on the issue was seriously undermined by the timing of events. The evidence provided by the bar's video camera, the accident reconstruction expert and the witnesses who observed the accused driving when he passed them and the time they arrived at the scene of the accident indicated that it would not have been possible for the accused to switch places in the short time and at the location that he alleged.

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R v Boyer, 2018 SKPC 70

Kalenith, December 5, 2018 (PC18067)

Aboriginal Law – Métis – Hunting and Fishing Rights – Historic Métis Community of Northwest Saskatchewan
Regulatory Offence – Wildlife Act, 1998 – Unlawful Hunting
Regulatory Offence – Fisheries Regulations – Unlawful Fishing
Statutes – Interpretation – Natural Resources Transfer Agreement

The accused W.B. was charged with unlawfully fishing contrary to s.

11(1) of The Fisheries Regulations, after being found fishing for food at Chitek Lake. The accused B.M. was charged with unlawfully hunting without a licence, contrary to s. 25(1)(b) of The Wildlife Act, 1998, after being found hunting for food at Rush Lake. The accused, O.P., was charged with unlawfully hunting contrary to s. 25(1)(a) of The Wildlife Act, after being found hunting for food at Alcott Creek. The three accused acknowledged that their offences were proven, but claimed to have Métis harvesting rights in their respective areas and harvesting rights under paragraph 12 of the Natural Resources Transfer Agreement 1930 (NRTA). The issues were: 1) whether the Métis were included in the term "Indians" in the NRTA; 2) whether the accused had Métis rights to hunt or fish in the areas where they were harvesting.
HELD: The court found W.B. and O.P. guilty and B.M. not guilty. The court held that the term "Indians" in the NRTA did not include Métis. It then reviewed the facts relating to each accused and his offence by applying the test set out in the Supreme Court's decision in R v Powley. Although the court found that in the case of each accused, they were members of historic Métis communities and possessed the right to fish and hunt in the area qualified as the historic community of Northwest Saskatchewan (HMCONWS), it determined that W.B.'s claim to Métis harvesting rights at Chitek Lake could not succeed because no Métis community existed there prior to effective European control, nor was it part of the HMCONWS. O.P.'s claim was denied because Alcott Creek was not part of HMCONWS. B.M.'s claim regarding Rush Lake was allowed because Green Lake was part of HMCONWS.

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McKay v Peters, 2018 SKPC 77

Scott, December 31, 2018 (PC18071)

Contract Law – Breach

The plaintiff brought a small claim action against the defendant for breach of contract. She alleged that he entered into an oral contract with her to provide grass-planting services for a quoted price of $2,000. The plaintiff wanted to have her property landscaped and hired the defendant as a Bobcat operator to level the ground. When that was completed, the defendant recommended that the plaintiff consider hydroseeding to plant grass and estimated the cost at $2,000. The plaintiff agreed and understood that the defendant would hire a company that performed that type of work. The defendant made the arrangements with the company. Upon completion of the seeding, the plaintiff received an invoice from the defendant in the amount of $5,000 charging $4,000 for seeding and the remainder for the cost of water and the truck used in the process. The plaintiff was shocked at the cost and,

as the defendant was too, he discounted $1400 from the total and covered the shortfall himself. He did not receive any payment. The plaintiff had been advised by both the defendant and the hydroseed company that because the seed was planted on sandy soil, it would require a lot of watering. The plaintiff testified that despite adequate watering, the seed had not grown.
HELD: The plaintiff's action was dismissed. The court found that there had been an oral contract between the parties because the defendant's offer to arrange the work was accepted by the plaintiff and then upon completion of the work, the defendant issued an invoice under his own name. The contract had not been breached because it was unclear what had caused the seeding failure. The plaintiff's claim that the defendant had misrepresented the effectiveness of the hydroseeding process was dismissed as she had not established that she relied on the defendant's representations.

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R v Elgren, 2018 SKPC 78

Henning, December 17, 2018 (PC18072)

Criminal Law – Blood Alcohol Level Exceeding .08 – Breath Demand – Reasonable and Probable Grounds
Criminal Law – Defences – Charter of Rights, Section 11(b)

The accused was charged with impaired driving and driving over .08. The vehicle the accused was driving collided with another vehicle with two occupants. Both occupants of the other vehicle testified. The driver of the other vehicle testified that he was proceeding through an intersection when the accused turned left in front of him and he hit the passenger side of the accused's vehicle. The accused filed notice of multiple Charter breaches, including delay. According to the accused, the delay was in excess of the guidelines specified in Jordan. The accused was charged December 8, 2016. The first trial date was September 7, 2017, it was adjourned at the Crown's request. The trial date of January 25, 2018 was adjourned peremptorily on the Crown after disclosure confusion. The second trial date was May 7, 2018. The Crown evidence proceeded, but defence evidence was adjourned because the constable was not available. The continuation date was not selected in court. The trial continued on October 25, 2018. Therefore, the time from charge to the trial was 21 months and 7 days. The accused argued that any delay with the constable witness should be attributed to the Crown because they undertook to make the witness available. The Crown argued that the accused knew of the witness' unavailability due to course attendance one month prior to the trial date yet did not bring the matter forward to set a new trial date. The accused also argued that the investigating officer did not have sufficient information

or evidence, other than a statement under s. 253 of The Traffic Safety Act (TSA), to permit her to make a demand pursuant to s. 254(3) of the Criminal Code. Specifically, the accused argued that a prohibition exists with respect to use of TSA statements in Criminal Code or other proceedings. The officer indicated that she was the first officer on the scene and that she had received information from EMS personnel that they suspected alcohol impairment by one of the drivers. The officer noted a moderate smell of alcohol from the accused as he got into her vehicle. According to the officer, the accused indicated that he had consumed four light beer and that he would blow over. She testified that she did not arrest the accused based on the accident. At the detachment, the officer noted that the accused was unsteady on his feet. HELD: The evidence of the other driver was accepted. The accused could not insist that the Crown make the witness available without fail and take no steps for alternative dates when he became aware that the witness had a course to attend. The court found that counsel was responsible and had to be diligent to bring the matter back before the court if a suitable continuation date could not be arranged sooner than within five months. The court concluded that any delay beyond two months from the trial date of May 7, 2018 was not delay to be credited against the Crown. The adjournment from the trial date in January 2018 to May 2018 was also not attributed to the Crown because the adjournment was caused by the accused being mistaken as to the disclosure received. Therefore, six months of the delay in 2018 was attributed to the accused. The delay did not exceed the guidelines established in Jordan. The court did not find the accused's evidence reliable or compelling. The court did not find the accused's evidence to be credible in saying that his memory failed to the extent that it did. The court did not need to consider whether the conversation between the accused and the officer was precluded as being conscriptive evidence under the TSA because it was clear from the evidence that the officer did not concern herself with the accident investigation. The accident investigation was being handled by another officer separate from the impaired driving investigation. There were no issues with respect to the TSA. The court did not find any unexplained delay at the accident scene or the detachment that could be the foundation of a Charter breach. The court found that the officer knew the grounds necessary for a breathalyzer demand and attempted to apply them. The court concluded that a reasonable person standing in the shoes of the investigating officer with the information available to her would consider that reasonable grounds for the breathalyzer demand did exist. The demand met both the subjective and objective aspects of the test for validity and was therefore lawful. The Certificate of Qualified Technician was admitted.

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R v Butler, 2018 SKQB 275

Megaw, October 9, 2018 (QB18263)

Criminal Law – Motor Vehicle Offences – Impaired Driving Causing Bodily Harm
Constitutional Law – Charter of Rights, Section 8, Section 9, Section 10(b)

The accused was charged with two counts of impaired driving causing bodily harm contrary to s. 255(2) of the Criminal Code. The defence brought a Charter application alleging that the accused's ss. 8, 9 and 10(b) rights had been breached and sought the exclusion of evidence pursuant to s. 24(2). A voir dire was held. The police officer called to the scene of a motor vehicle accident found the accused sitting in the driver's seat. The EMS staff had to help her to the ambulance as she was unable to walk on her own and had a dazed look on her face. She was taken to the hospital and with the consent of the EMS personnel, the officer accompanied her in the ambulance. He did not ask the accused any questions but observed that she had slurred speech and constricted pupils. At 20:45 the officer concluded that the accused had been impaired by consumption of a drug and placed the accused under arrest, read her rights and warning and asked her if she wanted to speak to a lawyer. She answered "Why?" and then failed to respond to the officer's Drug Recognition Evaluator (DRE) demand. The officer believed that she had not understood the questions and waited until 22:35 when he felt she was more coherent and advised her again that she was under arrest and gave her rights and warning. She responded to the questions and said she did not want to speak to a lawyer. Upon discharge, the officer took the accused to the police station where he provided her with an opportunity to contact a lawyer and she declined again. The officer began the DRE procedure. The accused informed the officer that she took prescription medication including morphine, Wellbutrin, trazadone and Oxycontin. Based upon the accused's failure to complete the tests in the DRE, the officer made a urine demand. In cross-examination, the officer admitted that he could have completed the DRE procedure at the hospital, but it had not occurred to him as being an appropriate venue. Another officer who attended at the scene of the accident testified that she searched the accused's vehicle after the accused had left in the ambulance because she was looking for evidence of impaired driving, although she had no information regarding the circumstances before she began her search. She found two empty prescription bottles for Oxycontin and morphine. The accused alleged that her s. 8 Charter rights were violated when her vehicle was searched without a search warrant or it being incidental to her arrest. The second breach of s. 8 occurred when the DRE procedure was not conducted as soon as practicable. She also alleged that her s. 9 Charter rights were violated because she had been placed under an investigative detention from the time that the first officer attended on her. The excessive delay

was an ongoing detention and continued violation of her rights. The accused's s. 10(b) rights had been breached because the officer failed to provide her with her rights to counsel upon the commencement of the investigatory detention.
HELD: The Charter application was allowed with respect to the search of the accused's vehicle. The court found that the accused's s. 8 Charter rights had been violated and after applying the Grant analysis, it excluded the pill bottles obtained from the search. It found that the accused's s. 8 Charter rights had not been breached when the officer had accompanied her to the hospital in the ambulance. He was a passive bystander and was present with the consent of the EMS personnel. The officer administered the DRE procedure as soon as practicable in light of the fact that he had to wait until her medical condition stabilized. It was not reasonable to expect him to have administered the procedure somewhere in the hospital. It also found that the accused had not been arbitrarily detained by the officer immediately after the collision but rather she had been detained by her medical condition and, therefore, her s. 9 Charter rights had not been breached. The application to exclude the results of the DRE procedure or the urine sample taken from the accused was dismissed because there had been no breach of ss. 8 or 9 of the Charter on those grounds.

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Hignell v Leeb, 2018 SKQB 330

Tholl, November 28, 2018 (QB18312)

Torts – Negligence
Professsions and Occupations – Financial Advisors – Negligence

The plaintiff brought an action against the defendant Leeb operating as a financial advisor and his corporation in negligence, negligent misrepresentation, breach of fiduciary obligations and contract. She claimed damages for the loss of the principal amount of her retirement savings, lost earnings on the investments, punitive damages and solicitor-client costs. The defendant Leeb denied all of the claims and asserted that he had no personal liability because the plaintiff was a client of the corporate defendant and not in his personal capacity. The plaintiff and her husband first consulted the defendant in 2000 because they were concerned that the husband's pension would be insufficient to support the plaintiff if he predeceased her and decided to invest her earnings to assist her in her retirement. They had no background or experience in investing and, being unhappy with the financial advice they received from their bank regarding RRSP investments, they sought advice from the defendant. They informed the defendant of the plaintiff's need for these funds in the future. After reviewing the types of investments that he could make on behalf of the plaintiff, she agreed

that the defendant would invest in specific mutual funds. In 2005, the defendant decided that he would no longer sell mutual funds to his clients and contacted the plaintiff to advise her of that, and she decided to stay with him because she trusted him. The defendant recommended transferring the plaintiff's mutual funds to guaranteed segregated funds. In 2007 and 2008, the defendant became interested in an American private corporation, New Life (NL), that was selling life settlement investments. He reviewed their promotional material and despite the fact that he would have known that NL was a very high-risk, speculative investment and without doing further research, the defendant recommended purchasing shares in it to his clients. He telephoned the plaintiff in January 2008 and advised her that he was quite worried about her investments and conveyed that they should meet on an urgent basis. The plaintiff testified that during their one brief meeting that followed, the defendant told her that she might lose everything because of the market crash and that he presented her with the single option of an investment in NL, describing it as a low-risk investment. The plaintiff had never heard of life settlements before but agreed to invest her entire retirement savings into NL, believing that the investment had some guarantee that made it safe from loss. There was no discussion as to any fees or commissions that the defendant would receive. The defendant said in cross-examination that he explained to the plaintiff that the worst case scenario was that she could lose all her money. The defendant learned in October 2008 that a cease trade order had been issued relating to NL shares but did not inform the plaintiff. She discovered it herself in January 2009 after mentioning the NL investment to her insurance agent who expressed a negative opinion. When she googled NL, she found that it was in receivership. She called the defendant immediately. He told that there was nothing to worry about. The plaintiff then contacted the receiver and filed a claim but did not receive any money back from her investment. The plaintiff claimed that: 1) the defendant owed her a duty of care and breached it, causing her to lose her entire retirement savings and their future growth. The defendant said that he did not owe a duty of care as he merely provided investment options to clients and followed their decisions by completing the transaction. He did not give financial advice; 2) the defendant made negligent misrepresentations to her; 3) the defendant breached his fiduciary obligation to her through his actions related to her investment. He admitted that he had a fiduciary duty but denied that he breached his obligations; 4) the defendant was in a contractual relationship with her and he breached the contract through his negligence; 5) the defendant was personally liable for his negligence, negligent misrepresentation and for his breach of fiduciary duty and contract; 6) the defendant should pay damages in the amount of her loss of principle and potential earnings; 7) the defendant's conduct as her financial advisor warranted an award of punitive damages of $100,000; and 8) the defendant's conduct in the litigation merited an award of solicitor and client costs.

HELD: The plaintiff was given judgment and awarded damages of $262,000. The court accepted the evidence of the plaintiff and her husband. The defendant knew that the plaintiff was an unsophisticated investor at the outset of their relationship and remained so throughout it and that she relied completely on his advice. It found with respect to each claim: 1) that the evidence confirmed that the defendant was a financial advisor and owed a duty of care to the plaintiff. He breached the duty of care of a reasonably prudent financial advisor, primarily because he knew that the plaintiff was financially unsophisticated and had no understanding of life settlements. He failed to adequately research the investment before recommending it to her and advising her that her existing investments were at risk. In accordance with the standard required of Certified Financial Planners, he should not have presented the plaintiff with this investment option at all, let alone convince her to invest in it. The defendant's many breaches caused the plaintiff's losses; 2) the defendant was liable for the tort of negligent misrepresentation. He made several misleading, inaccurate and untrue representations to the plaintiff and acted negligently in making them. She relied upon those representations and suffered damages as a result; 3) that as the plaintiff's financial advisor, the defendant owed a fiduciary duty to her and began breaching it when he contacted her to inform her that her investments were at risk and then convinced her to convert them to the NL share purchases and accepted a commission for the sale. He then failed to promptly advise her of the problems with the investment when he became aware of them; 4) the corporation and the defendant were jointly and severally liable for the negligence, negligent misrepresentation, breach of fiduciary duty and contract by the defendant. Leeb was personally liable for his breach. The breach of a fiduciary obligation by an individual employed by a corporation remained a breach by the individual; 5) there was a contractual relationship between the parties based upon the defendant's agreement to provide financial advice to the plaintiff in exchange for her investing through him and as a consequence he was paid commissions by third parties; 6) the defendant was liable for damages concurrently in tort and contract. In addition to placing the plaintiff in the position she would have been in regarding the negligence and negligent misrepresentation and the breach of fiduciary duty, the court would compensate her for the lost opportunity as well as her business loss respecting the breach of contract. By taking the number of units in each segregated fund in the plaintiff's investment formats from 2008 and using their current price, damages were set at $262,300 with pre-judgment interest accruing since December 2017. The plaintiff had not failed to mitigate her losses nor was she found contributorily negligent; 7) that it was not appropriate to award punitive damages. The defendant's conduct was reckless, but he had not set out to defraud the plaintiff nor had he provided advice with the sole purpose of earning a commission; 8) it was not appropriate to award solicitor-client costs either. Although available for breach of fiduciary duty, the court found

that the breach in this case did not warrant such an award.

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Gottinger v Runge, 2018 SKQB 343

Elson, December 11, 2018 (QB18330)

Civil Procedure – Queen's Bench Rules, 5-15, Rule 15-20, Rule 15-38
Family Law – Child Support – Shared Parenting

The respondent father applied for an order that the petitioner provide him with copies of her new spouse's Canadian and American tax returns for the past four years and documentary evidence relating to his contributions to the petitioner's household expenses. He sought disclosure of the information relevant to the determination of child support obligations in a shared parenting arrangement, relying upon the Court of Appeal's decision in Wetsch. The respondent pointed to the fact that the petitioner and her new spouse lived in a large home and were building a second home in the U.S., that suggesting that their lifestyle was more outwardly affluent than that maintained by him and his spouse. The petitioner did not deny the respondent's evidence but contended that her spouse's wealth and income was not a factor for consideration and that she had adequately described her spouse's financial contribution to her household. She also contended that the information requested was in the possession of a third party and the request had not complied with Queen's Bench rule 5-15. The issues were: 1) whether the information sought by the respondent had probative value in determining child support in a shared parenting arrangement; and 2) what was the authority under The Queen's Bench Rules to make the order?
HELD: The application was granted. In preliminary remarks the court noted that affidavits filed by the parties improperly contained argument, contrary to Queen's Bench rule 15-20. The court found with respect to each issue that: 1) some of the information sought had probative value and should be produced. The respondent's application engaged s. 9(c) of the Guidelines in a Contino analysis which was relevant to the circumstances here. As such an analysis required some evidence with which to measure the extent of a new partner's contribution to a shared parent's household, the evidence provided by the petitioner prior to the date of this application would not permit a judge to make the kind of measurement; and 2) Queen's Bench rule 5-15 did not apply because the new spouse was not a stranger to the proceedings in this case that involved a comparison of households. As there was a gap in the Queen's Bench Rules relating to a s. 9(c) inquiry, the court used the analogy power set out in rule 1-7 to find that rule 15-38 governed this application to permit it to order limited production of the 2017 American and Canadian income tax information of the

petitioner's spouse and any documentary evidence regarding his contributions to the household.

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JGL Commodities Ltd. v A. Puddell Farms Ltd., 2018 SKQB 345

Tholl, December 12, 2018 (QB18332)

Contract Law – Breach
Statutes – Interpretation – Frustrated Contracts Act, Section 3
Statutes – Interpretation – Sale of Goods Act, Section 9

The plaintiff, a grain trading company, entered into a deferred delivery contract with the defendant farming corporation, operated by its owner and sole shareholder, Allan Puddell. Under the contract the defendant agreed to provide 816 metric tonnes of durum to the plaintiff in exchange for payment based on a discount schedule that formed part of the contract. The defendant failed to do so and the plaintiff brought this action for breach of contract and claiming damages of $158,800. It also sought punitive damages of $10,000. The original delivery period in the contract was September 15 to October 15, 2014. The defendant's crop began to deteriorate due to weather conditions in August and when it submitted samples to the plaintiff, it became clear that due to its poor quality, the discount schedule would apply. The plaintiff's representative informed Puddell that as this was the case, the defendant should have the grain cleaned to attempt to increase the grade or buy out the contract at $140,000. In December the plaintiff's owner sent a formal buyout agreement that set out the two options available to the defendant: to pay $140,000 to the plaintiff or deliver the durum by January 31, 2015. Negotiations followed but the defendant neither paid the plaintiff nor delivered the grain. The defendant sold over 1,000 metric tonnes of durum to Viterra in early 2015 at the grade assigned by the plaintiff's testing. The defendant denied liability under the contract on the ground that the plaintiff's representative had said to Puddell that it would not take the grain. In its defence, it suggested that the contract was frustrated by the poor weather under s. 3 of The Frustrated Contracts Act (FCC Act) and under s. 9 of The Sale of Goods Act (SOG Act) the contract should be avoided. The issues were: 1) whether the defendant had breached the contract; 2) whether the FCC Act applied; 3) whether the SOG Act applied; 4) if not, what was the quantum of damages; and 4) whether punitive damages should be awarded. HELD: The court granted judgment in favour of the plaintiff and awarded damages in the amount of $158,800 and pre-judgment interest from January 31, 2015 to the date of judgment. The court found with respect to each issue that: 1) the defendant breached the contract. It accepted the plaintiff's evidence that its representative had not advised the defendant that it wanted to cancel the contract or that it would not

take delivery of the durum. The plaintiff had in fact indicated that it would extend the delivery deadline and take the crop if the defendant could not find a better option; 2) s. 3 of the FCC Act was not applicable. The weather and poor harvest conditions that decreased the quality of the durum did not constitute a frustrating event. The discount schedule in the contract provided for that contingency and the defendant had delivered durum in a larger quantity to Viterra; 3) s. 9 of the SOG Act was not applicable because the durum was not a specific good and it had not perished; 4) the plaintiff should receive in damages the difference in the price between what it would have paid under the contract versus what it paid to replace the durum after the breach; and 5) this was not an appropriate case in which to award punitive damages.

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R v Wass, 2018 SKQB 348

Smith, December 17, 2018 (QB18341)

Criminal Law – Expungement of Guilty Plea

The appellant pled guilty to a breach of s. 23(2) of The Midwifery Act at a sentencing hearing held before a Provincial Court judge. The appellant was represented by experienced counsel at the time. Events after the guilty plea caused the appellant to have a change of heart regarding her plea and, now self-represented, she brought this appeal to resile. The appellant had agreed to act as a doula during the complainant's pregnancy and through childbirth. It is not the role of a doula to deliver a baby nor to provide clinical care. During the complainant's labour, the appellant attended at her home to support her during it and her eventual delivery. However, the complainant had to be transferred to a hospital. In the affidavits of the complainant and another doula who was present during labour, they alleged that the appellant inserted her hand into the complainant's cervix, attempting to turn the baby's head. This constituted the most serious allegation in terms of breaching the Act, although she had improperly conducted internal examinations and committed other breaches. At the sentencing hearing, the appellant's counsel advised that she was prepared to plead guilty and be assessed the maximum fine under the Act. The Crown wanted the facts underpinning the charge to be reviewed in open court and admitted to by the appellant, including the most serious allegation. The appellant was prepared to admit breaches of the Act, but not that one, and the Crown would not agree to it and said that the complainant and the other doula would be called to give their evidence. The appellant would not permit her counsel to cross-examine them on their testimony and in the end, conceded the contents of the affidavits. The appellant wanted to file fresh evidence in her appeal regarding

information obtained after she was sentenced. She filed a transcript of a public meeting held concerning midwifery and doulas at which the complainant and the other doula had made statements about the appellant's actions that were inconsistent with their affidavits, particularly regarding the serious allegation. She argued that the Crown would not have charged her if that serious allegation had not been made and asked that the information be used by the court to decide that her guilty plea be expunged.
HELD: The appeal was dismissed. The court noted that this matter was in fact an application, not an appeal, but heard the matter pursuant to its concurrent jurisdiction under s. 8 of The Queen's Bench Act, 1998. Under the requirements of s. 606(1.1) and s. 686 of the Criminal Code and the test set out in Adgey that the accused may change her plea if valid grounds exist, the court found that the appellant had not justified expungement. Her plea was voluntary, unequivocal and informed. Regardless of the issue relating to the evidence regarding the most serious breach, the appellant had pled guilty to numerous other breaches of the Act. No miscarriage of justice would result from the dismissal of the application.

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Duxbury v Crook, 2018 SKQB 353

Richmond, December 21, 2018 (QB18342)

Employment Law – Wrongful Dismissal – Fixed Term Contract

The plaintiff brought an action for wrongful dismissal against the defendants and applied for summary judgment under Queen's Bench rule 7-2. She requested damages, including punitive damages. The defendants agreed to proceeding summarily and at the hearing, the parties agreed that the plaintiff had a fixed term employment contract. The plaintiff, a Chartered Professional Accountant, was working as a controller when the defendant Crook asked her to join him in his chartered accountancy practice. In their written agreement, the plaintiff was hired for a two-year term commencing in March 2016 and terminating at the end of February 2018 although either party could give three months' notice to terminate the agreement before that date. The agreement also acknowledged that the plaintiff could continue to perform accounting work for three other firms. It specified that the plaintiff would perform her duties diligently as per an attached schedule, but none were listed therein. If she failed to discharge her duties and failed to remedy them after reasonable notice, then the agreement would be breached and might be cause for termination without notice or compensation in lieu. The agreement further specified she would be entitled to paid vacation for four weeks annually. The parties also signed a letter of intent for the purchase of the assets of the

defendant accounting corporation although nothing in it constituted a binding commitment. In mid-January 2017, the plaintiff's employment with the firm was terminated and, under the impression that she was entitled to notice, the plaintiff learned from Crook later that month that she was being dismissed for cause. She mitigated and found employment within a few months. Crook alleged that the plaintiff breached the employment agreement because of some attendance-related performance issues, time spent on the other companies she continued to work with, that she had taken holidays during the busiest time of the year, and that some of her work called into question her competence. He argued that the employment agreement had to be read in conjunction with the letter of intent in this case as the plaintiff was hired to act like an owner. The issues were whether the plaintiff had been dismissed for just cause and if not, what were her damages? The parties agreed that because of the fixed term contract there was no duty to mitigate, but the defendants argued that once it had occurred, the plaintiff was prohibited from making a double recovery and any earnings from new employment should be factored into the calculation of damages based upon the decision in Park v 101143482 Saskatchewan. The plaintiff's position was that if there was no duty to mitigate, it would be against public policy for the employer to be rewarded when an employee had done so.
HELD: The plaintiff was given judgment and awarded damages in the amount of the remainder of the payments due under the fixed term contract and in lieu of benefits and for her moving costs. The court found that she was wrongfully dismissed. Crook had not shown that he clearly outlined his expectations to the plaintiff, nor had he warned her that she had failed to meet expectations or given her time to do so, nor that she would be dismissed if she did not meet them. Since there was no duty to mitigate and more recent case law from the Ontario Court of Appeal had not been reviewed in the Park decision, the court held that the plaintiff's fixed amount of damages should not be reduced by any amount earned from her new employment. Although the court did not condone Crook's conduct, it was not so reprehensible as to warrant punitive damages.

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Savoy v Savoy, 2019 SKCA 1

Richards Whitmore Leurer, January 4, 2019 (CA19000)

Family Law – Spousal Support – Variation – Appeal
Family Law – Custody and Access – Variation – Appeal

The appellant appealed the decision of a Queen's Bench chambers judge that dismissed his application to vary an order made after trial in 2015, regarding an increase in the appellant's access to his daughter as

well as an increase to his spousal support (see: 2017 SKQB 290). Custody and the primary residence of the three children of the marriage had been awarded to the respondent wife, a doctor. The court had ordered that the youngest child, then four years of age, would spend a number of hours with the appellant each week and that the respondent would pay monthly spousal support to the appellant in the amount of $7,000. The appellant's application had been dismissed by the chambers judge because no material change in circumstances had been demonstrated.
HELD: The appeal was dismissed. The court found that the chambers judge had not erred in his findings. The trial judge's original order had considered and provided for all of the matters that the appellant had argued were changes that had occurred since the order was made.

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Ayers v Miller, 2019 SKCA 2

Jackson, January 3, 2019 (CA19001)

Civil Procedure – Appeal – Leave to Appeal
Statutes – Interpretation – Court of Appeal Act, 2000, Section 8(2)
Administrative Law – Apprehension of Bias – Recusal

The applicants applied for leave to appeal the decision of a Queen's Bench chambers judge to deny their request that he recuse himself. The recusal application had been initiated after the applicants complained to the Canadian Judicial Council (CJC). Following that complaint, the judge made what the applicants believed to be an unfavourable decision establishing the sequence of a series of upcoming applications that would be heard in the proceedings between the parties by way of a Scheduling Order. The applicants' complaint to the CJC was that there had been inordinate delay in how the judge had been managing the case management process. Shortly after the complaint, the judge released the order. The applicants believed that the schedule favoured the respondents and asked the judge to recuse himself. They maintained that he could not be impartial because of their complaint against him to the CJC. In his written refusal, the judge explained the delay was unavoidable and applied the test in Aalbers to determine whether he could adjudicate the applications without bias and found that a reasonable person would believe that there was no reasonable apprehension of bias and that he could decide the matters fairly. This application for leave was based on the applicants' position, with which the respondents were in agreement, that the recusal fiat was interlocutory and thus governed by s. 8 of The Court of Appeal Act, 2000. The preliminary issue in the application was whether a refusal to recuse was could be appealed.
HELD: The application for leave was dismissed. The court found that it

would resolve the matter on the basis that the recusal fiat was an interlocutory order and subject to the test set out in Rothmans. Regarding the question of the merit of the applicants' case, the court found that they had attempted to make a collateral attack on the Scheduling Order by arguing that bias could be inferred from the judge's delay in issuing his decision in the process. The only evidence that the applicants put forward to support their claim to bias in relation to it was the fact of the sequence of the hearings alone, saying that it favoured the respondents. A suspicion was not sufficient to support an allegation of bias and would fail. The application was not of sufficient importance to warrant an appeal.

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Saskatoon (City) v Wal-Mart Canada Corp., 2019 SKCA 3

Whitmore Jackson Ryan-Froslie, January 8, 2019 (CA19002)

Administrative Law – Judicial Review – Certiorari – Appeal
Municipal Law – Assessment – Appeal – Pre-Hearing Disclosure
Statutes – Interpretation – Cities Act, Section 223
Statutes – Interpretation – Municipal Board Act, Section 20

The appellant, the City of Saskatoon (City), appealed the order of a Queen's Bench judge sitting in judicial review of a decision of the Board of Revision (board) (see: 2016 SKQB 19). The respondent (Wal-Mart) had appealed the City's 2014 assessment of its properties in Saskatoon to the board and raised a number of grounds of appeal. Prior to the hearing, Wal-Mart had requested that the director of assessment for the City provide cost records for each property under appeal, rent data used to create the assessment model and the corresponding assessed rent versus actual rent data to assist in preparing its appeal. The City responded that it could only supply the information if the board issued an order declaring the information confidential and subject to a confidentiality agreement. Wal-Mart then applied to the board requesting that it order the assessor to provide it with, among other things, the rent data used to create the Retail Non-CBD model used to assess the subject properties and a comparison of actual versus assessed rents for properties assessed with the model. It made an additional request for the actual rents for properties excluded from the model because the information pre-dated the period 2008–2010 selected for the model. Wal-Mart offered to undertake to keep the information confidential pursuant to s. 201 of the Act. The board granted the request for information relating only to a list of contract rents and building sizes for the period but denied any other information that could identify the specific properties listed and refused to grant an order for the additional information without giving its reasons. Wal-Mart did not appeal the board's decision, but the City appealed it to the

Saskatchewan Municipal Board sitting as the Assessment Appeals Committee (committee). The committee decided that it did not have jurisdiction to hear an appeal from the board's decision because it had not in fact issued a decision. Wal-Mart then applied to the Court of Queen's Bench for relief from the board's decision pursuant to Queen's Bench rule 3-49, arguing that it had breached its duty of fairness by failing to order pre-hearing disclosure. The City also applied to set aside the decision. The parties ultimately agreed that it should be set aside, but the City argued that the court should not intervene to provide interim relief on the grounds that Wal-Mart's judicial review application was premature because the board had not yet decided the appeal, interlocutory decisions on procedural matters should not be subjected to judicial review, and Wal-Mart had not exhausted its remedies within the administrative process. It should have proceeded with the hearing and then appealed from the final decision of the board. The judge quashed the decision because it was unreasonable, as the board had not provided reasons for its refusal. He also addressed the question whether the court should be intervening given that Wal-Mart had not exhausted its remedies. He concluded that the remedies available to it were not adequate alternatives and that there were exceptional circumstances that would justify early recourse to the courts. At the time of hearing of the City's appeal, the court raised as a preliminary matter the issue of whether the chambers judge erred by assuming jurisdiction to hear the application for judicial review. The court then heard arguments relating to this and the issues were whether the chambers judge erred in law: 1) by not considering, when addressing the issue of adequate alternative remedy, whether judicial review was appropriate in a broader sense in light of the existing statutory framework; 2) by not addressing the question of prematurity; and 3) by otherwise finding that exceptional circumstances existed to justify judicial review.

HELD: The appeal was allowed and the decision of the chambers judge was set aside. The court found with respect to each issue that the chambers judge erred in law: 1) in his approach to the whether the internal remedies were not effective and by choosing to hear the application. He failed to take the required broader view of the issue of whether judicial review was appropriate in these circumstances involving the purposes and policy considerations underpinning the assessment appeal scheme. The judge focused only on the efficacy and convenience of the City's proposed alternatives. There was an adequate alternative remedy because s. 223 of The Cities Act empowered the committee to call new evidence and then under s. 20(2) of The Municipal Board Act, it could have obtained information from the assessor. As a statutory right of appeal from the committee's decision is available pursuant to s. 33.1 of that Act, it indicated a legislative intention to exclude the Queen's Bench supervisory jurisdiction while the administrative process is ongoing; 2) because he confused adequate alternative remedy and prematurity, treating them as one doctrine, he

failed to consider prematurity in his decision; and 3) by finding that Wal-Mart had established that exceptional circumstances existed despite the prematurity of its application and prior to exhausting its remedies. Concerns regarding procedural fairness are not exceptional circumstances.

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R v Naistus, 2019 SKCA 4

Jackson Caldwell Leurer, January 11, 2019 (CA19003)

Criminal Law – Murder – Second Degree – Conviction – Appeal
Criminal Law – Murder –Second Degree – Sentencing – Appeal
Criminal Law – Conduct of Trial – Jury Trial – Charge to Jury

The appellant was found guilty of second degree murder under s. 235(1) of the Criminal Code after trial by jury and sentenced to life imprisonment with no eligibility for parole for 10 years. He appealed: 1) his conviction, on the basis there was new evidence available that could have affected the jury's deliberations and the determination of guilt it reached; and 2) his sentence, on the ground that the trial judge failed to properly instruct the jury respecting the availability of a conviction for manslaughter under s. 234 of the Code and the defence of self-defence under s. 34 of the Code in the circumstances of the defence. The appellant abandoned this ground, but the Crown raised whether the court was obliged to accept the abandonment and the court directed argument on the issue of the sufficiency of the jury charge; and 3) his sentence, requesting that it be overturned.
HELD: The appeal was dismissed. The court found with respect to each ground that: 1) the appellant had not obtained any fresh evidence and had not applied to adduce any evidence; and 2) the appellant's allegation that the judge erred by failing to properly instruct the jury did not rise to a level that permitted it to intervene. The judge's charge was proper and fair given the circumstances of the case. He put manslaughter to the jury as a lesser included offence if they rejected the defence of self-defence on a charge of second degree murder. He also informed them that if they were not persuaded, beyond a reasonable doubt, that the appellant had the requisite intent for murder, then they had to convict him for manslaughter. He twice reviewed the evidence pertaining to self-defence and twice instructed the jury to consider all of that evidence and all other evidence in their deliberations regarding whether the appellant had the requisite intent; and 3) the sentence was the minimum available under the Code and the appellant had not provided any argument to support his request to overturn it.

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R v R.C., 2019 SKPC 1

Rybchuk, January 10, 2019 (PC19000)

Criminal Law – Assault – Sexual Assault
Criminal Law – Evidence – Child's Evidence – Criminal Code, Section 715.1
Criminal Law – Evidence – Credibility
Criminal Law – Sexual Interference

The accused was charged with two Criminal Code offences: 1) sexual assault, contrary to s. 271; and 2) sexual interference, contrary to s. 151. The accused and father of the complainant were out drinking and returned to the father's home late at night. The father, his wife, and three children, one of whom was the complainant, lived in the home. The accused stayed overnight at the home. The Crown tendered a picture taken by the complainant's mother with the accused at their home on the night in question. The next morning was the complainant's ninth birthday. Her parents noticed that she was sad. A few months later, after her mother's prodding as to what was going on lately, the complainant revealed the allegations against the accused by writing them down on paper. She indicated that the accused entered her bedroom and got into bed with her. He then began touching her and put something on her face. When interviewed, the accused denied having ever stayed at the complainant's new house. The accused did not testify. The complainant's statement was entered into evidence pursuant to s. 715.1 of the Criminal Code. She also gave vive voce evidence at trial.
HELD: The court had to determine the credibility of the complainant's and accused's evidence. The court did not believe the accused when he denied staying over at the home. There was a photo of the accused at the home given to the police only after he indicated that he did not stay there. He said he could not remember staying at the home, yet he could remember a lot of other details around that time period. The court rejected the accused's evidence wherever it conflicted with the Crown's evidence that was accepted. The accused's evidence did not raise a reasonable doubt. The court concluded that the statements made by the complainant in her statement were compelling and had a ring of truth to them. She was found to be a credible witness. The court concluded that the complainant's evidence was reliable and trustworthy. Any discrepancies in the complainant's evidence were not found to be on the important issues. There was no admissible evidence of the complainant's testimony being influenced by improper suggestion given she did not reveal the allegations for a few months. The complainant's evidence was supported by other surrounding evidence and circumstances that restored her credibility if it had been diminished at all. Even though the complainant did not use the word penis, the court found that the only logical conclusion was that the accused had put his penis on her face. The court was not left with any

doubt as to what happened. The accused was found guilty of both charges.

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I.S. v A.I.S., 2019 SKQB 1

Megaw, January 3, 2019 (QB19001)

Family Law – Custody and Access – Interim – Application to Vary

The parties had been separated for seven months before the petitioner brought this application to vary the terms of an interim custody and access order granted in October 2018. He sought to restrict or abolish the respondent mother's access to the three children of the marriage. Under the order, the parties had joint custody of the children with the two oldest children residing with the petitioner while the infant's primary residence was with the respondent. Since the separation, the petitioner had initiated 24 complaints about the respondent with the Ministry of Social Services (MSS). He had alleged that she suffered from mental health issues, had sexually abused the oldest child, was not properly caring for the youngest child and that her house was filthy. He said that the two oldest children didn't want to visit the respondent. The respondent denied all of the allegations. The police and MSS had conducted investigations and were satisfied that the allegations were unfounded. Recently, the MSS had opened an investigation into the petitioner's ability to parent the children because of concerns about the emotional and mental abuse being inflicted on them by him and he had entered into a Family Services Agreement with the MSS.
HELD: The court confirmed the existing interim order and expanded the amount of the respondent's parenting time. It was in the best interests of the children for the parties to have joint custody and for their present primary residences to be maintained. It was the responsibility of the petitioner to encourage the two oldest children in their relationship with the respondent. The matter should proceed to pre-trial and trial expeditiously.

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Marion v English River Enterprises Ltd. Partnership No. 1, 2019 SKQB 2

Danyliuk, January 3, 2019 (QB19002)

Civil Procedure – Pleadings – Statement of Claim – Striking Out
Civil Procedure – Queen's Bench Rules, Rule 4-44

The defendant applied to strike out the plaintiff's statement of claim for want of prosecution. Her claim involving personal injury was issued in

August 2015 and the defendant filed its statement of defence. Mandatory mediation did not occur until August 2016. One of the original defendants brought a successful application to strike some of the named parties in May 2017. The plaintiff was given 30 days to file an amended claim and to pay $500 as costs, failing which the claim would be dismissed. The amendment was filed late and the plaintiff failed to pay costs so that in October 2017 the defendant brought another application to strike out the claim. When the matter was heard in November 2017, the plaintiff's counsel failed to appear. She explained that she had lost contact with her client and elected not to appear. The court advised her that her conduct was not correct and adjourned the matter for a week. At that time, the court ordered that plaintiff would have three weeks in which pay her outstanding costs: otherwise the action would be struck. Throughout the winter the defendant's counsel wrote to the plaintiff's counsel to try to move the matter forward but received no response. After the defendant served its affidavit of documents in July 2018 without response, it filed an appearance day notice seeking the plaintiff's supplemental affidavit of documents. The plaintiff's counsel failed to appear, and the court ordered that the plaintiff provide the material within 14 days and produce the documents within 30 days. The plaintiff did not file same, nor did she produce any documents, nor did her counsel respond to letters from the defendant's counsel. The defendant then brought this application in December 2018 and the plaintiff's lawyer did not appear, explaining that she had forgotten. The defendant also requested that the plaintiff be found in contempt of court and pay costs on a solicitor-and-client basis.

HELD: The application was granted and the statement of claim struck pursuant to Queen's Bench rule 4-44. The court found that the delay was inordinate and inexcusable. It noted that the plaintiff's counsel had contributed to the delay and that she might be in violation of her professional and ethical responsibilities. The court refused to grant the declaration of contempt sought by the defendant under Queen's Bench rule 11-27 as a basis for dismissing the claim because it had not met the requirement of providing proof that the order being disobeyed was personally served on the offending party and that the application for contempt itself was served personally. It refused to grant solicitor-and-client costs as the defendant had not satisfied it that it was an appropriate case for such an award. The court decided that an award of fixed costs was appropriate in the amount of $5,000 above all other costs awarded to date.

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R v Caissie, 2019 SKQB 3

Danyliuk, January 4, 2019 (QB19003)

Criminal Law – Defences – Alibi
Criminal Law – Elements of Offences
Criminal Law – Evidence – Statement Against Interest – Mr. Big Operation
Criminal Law – Indignity to a Human Body
Criminal Law – Murder – First Degree – Kidnapping and Unlawful Confinement
Criminal Law – Murder – First Degree – Planned and Deliberate

The victim was killed in August 2011. The accused was arrested after a Mr. Big operation that resulted in confessions being made by the him. The statements were ruled admissible after a voir dire. The accused was charged with the following Criminal Code offences: 1) first-degree murder, contrary to s. 235(1); and 2) offering an indignity to the victim's body by disposing of it in a treed area, contrary to s. 182(b). The evidence of the voir dire was applied to the trial. The accused and victim lived in a rural area about one mile from one another. The accused lived with his spouse and children, but nonetheless had a romantic relationship with the victim. After the victim went missing, her vehicle was located in a slough. Her body was located three weeks after her death in a remote and abandoned farmyard. The accused was a suspect, but not enough evidence had been gathered to proceed with charges against him in 2012. In 2015, a Mr. Big operation was conducted, and the accused was arrested in July 2016. On March 16, 2012 the accused gave a very lengthy statement; he was questioned for 13 hours by four highly-skilled, experienced officers. The portion of the statement conducted by the last officer was excluded from evidence because it was oppressive and thus involuntary. The Mr. Big operation yielded several repetitive confessions to three different undercover officers. The accused claimed he killed the victim in the Mr. Big statements and there was a high degree of consistency among the statements. The accused said that he had travelled from his work site in Alberta to Saskatchewan and killed the victim before returning to Alberta the same night. He told his employees that he was going to look for an RV. The accused initially told the officers in the Mr. Big operation that he choked the victim to death. He later said that he had not choked her but had stabbed her. The accused said that he initially lied because an officer had told him the best way to kill someone was by choking them. The accused said that he had been planning the murder for a week. The only defence witness was an employee of the motel in Alberta where the accused was staying when the murder occurred. At first, she testified that she saw the accused at about 9:45 pm the night of the murder, but by the end of the cross-examination agreed it was very difficult to recall precise details from seven years ago. The Crown argued that the evidence, taken as a whole, was capable of satisfying either or both of the modes of committing the offence of first-degree murder: because it was planned or deliberate (s. 231(2)) or because it was a killing committed during the commission of an enumerated offence, namely, kidnapping (s. 231(5)). The issues were: 1) the

applicable governing laws and principles; and 2) whether the Crown proved its case beyond a reasonable doubt.
HELD: The accused was found guilty of both charges. The accused's witness was flustered, defensive, and she appeared confused giving her testimony. The court gave no weight to the accused's witnesses' testimony. Regardless, the testimony could not provide the accused with an alibi and was of no consequence in the case. The court determined the issues as follows: 1) the first principle is the presumption of innocence. The standard of proof must be applied to each element of the offence based on the totality of the evidence, rather than to each individual piece of evidence. The Crown only has to prove the elements of the offence, not every facet of a case. The reliability of the Mr. Big statements was a question of fact to be determined; and 2) the court first reviewed the confessions and found them to be reliable. The only discrepancy among the confessions was the mode of killing and the accused explained the reason for it. The court placed significant weight on the confessions in reaching the verdict. The court then discussed derivative evidence. Prior to the Mr. Big operation the police were not aware that the accused had hired two people to harass the victim in her home. The court accepted as a fact that the accused attempted to use the two men hired to create a false alibi. No negative inference was drawn against the accused because of the attempts to create false alibis. The court was unable to determine the cause of death but concluded that the Crown did not have to prove the precise way the accused killed the victim. When the accused's vehicle was pulled out of the slough a plastic windshield washing fluid jug was jammed against the pedals. The jug was holdback evidence and it was never explained by any evidence. The court did not find that this "unknown" seriously damaged the Crown's case. The court limited any consideration of the accused's silence during the trial to the specific matter of alibi. However, the court concluded that it did not even need to consider the matter of the accused's silence as to alibi because the alibi defence could not succeed based on the accused's witness, the motel employee. The accused argued that he could not have made the round trip to Saskatchewan from Alberta in the time limited. The court disagreed. The court accepted the accused's evidence of how the victim's vehicle ended up in the slough. There was evidence that the accused's cell phone had been shut off for a large part of the day of the murder, from the phone records that was the only occasion that he dealt with his phone in that manner. The exact location that the body was placed, and confirmed by the accused, was found to be a mundane detail that only the killer would know. There were deleted photographs recovered from the accused's camera that the court found assisted in establishing the timeline of events. A witness said that the accused stated he would kill the victim someday a year prior to the murder. The court did not place any weight on that statement. A GPS tracker was placed on the accused's vehicle after the victim went missing. There were instances of the accused's vehicle driving past the location of the body, the location

of the victim's vehicle, and the location that the accused said he burnt his clothes. The court said that it would be difficult to believe it was all coincidental and it was found to support the accused's Mr. Big confessions. The court noted the lack of consistency in the accused's statements to the police shortly after the victim went missing, which was contrasted to the consistency of his statements in the Mr. Big operation. The court concluded that the evidence pointed to the accused's guilt with certainty. The evidence did not raise a reasonable doubt. The Crown proved that the killing was planned and deliberate. The court also found that the evidence supported a finding of guilt through the operation of law by killing the victim as part of the overall transaction when he kidnapped and unlawfully confined her. Further, the court found that the accused was guilty of offering an indignity to a body by disposing of her body in some bushes in an abandoned farmyard.

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Ochapowace Ski Resort Inc. v Director of Public Prosecutions, 2019 SKQB 5

Krogan, January 7, 2019 (QB19000)

Criminal Law – Appeal – Deceased Appellant
Criminal Law – Appeal – Dismiss – Delay – Criminal Code, Section 825(b)
Criminal Law – Goods and Services Tax – Failing to File Return
Taxation – Goods and Services Tax – Filing – Enforcement

The respondents applied to: a) dismiss the appellants' appeal for delay pursuant to s. 825(b) of the Criminal Code; and b) dismiss the appeal of the appellant who died on August 16, 2009. On September 12, 2002, the appellants were convicted of failing to file GST returns for January 1, 1991 to May 31, 1997, contrary to s. 326(1) of the Excise Tax Act. The appellants filed a notice of appeal, appealing their convictions, on November 18, 2002. The appellants did not perfect their appeal or file their GST returns. The Crown's motion to dismiss the action for want of prosecution in 2004 was never resolved. In December 2004, the appellants applied to have the trial transcript produced in the language spoken by their witnesses rather than English and to have it paid for the by respondent. The applications were dismissed; however, the court did direct that the respondent use its best effort to cure deficiencies in the transcript where references were made to "Indian Name", "speaking Salteaux", etc. The transcript matters were completed in early 2012 and the appellants advised that they would provide further information about their appeal memorandum by May 1, 2013. No further information was provided until this application. In 2003, the First Nations Goods and Services Tax Act received royal assent

allowing a band council or other governing body to impose a goods and services tax. The appellants unsuccessfully attempted to resolve the appeal in 2016 by writing to the Federal Minister of Justice and Attorney General of Canada.

HELD: The court considered the Carter criteria to determine if the appeal could be dismissed for want of prosecution: a) the delay of 15 years was found to be inordinately lengthy; b) the appellants said that the reason for the delay was to prepare the transcript and to pursue a political resolution to the matter. There was no communication between the parties from March 26, 2013 to the date of the current application. The court concluded that the appellants were not dedicated to, nor diligent in, pressing the appeal forward; c) if a new trial was ordered after a successful appeal, the respondents would be disadvantaged from presenting the quality of evidence they had at trial given that witnesses had retired, moved, or were deceased. The public also had an interest in the matters being adjudicated on the best evidence possible. The original trial was lengthy and comprehensive, leading the court to conclude that it would be difficult to recreate such a trial; d) the court did not find that five years of memorandum preparation was necessary. The court did not find that the appellants made a step to move the appeal forward when they contacted the Federal Minister of Justice and the Attorney General of Canada in 2016. Because the appeal was not pursued with diligence, the court concluded that there had not been adherence to the Rules. The first four criteria are the most important and the court found that they favoured dismissal for want of prosecution; e) the appeal had not been perfected, but the appellants did complete their appeal memorandum; f) the appellants argued that the First Nations did not have to administer GST upon reserve, thereby saying that the law of Parliament, the Act, had no application to them as individuals or as a band. The matter has been considered previously and it has been determined that GST has to be imposed on and paid by non-Indian persons purchasing goods and services on reserve lands. The Indian Act is thus not infringed. Also, there was an Act enacted to deal with a First Nation administering its own tax in reserve lands. The appellants did not raise an issue of public importance that had not been considered by the courts or addressed with legislation. The court concluded that the appeal was without merit. The appeal was dismissed for want of prosecution. Even though the appeal was dismissed, the court considered whether the appeal regarding the deceased appellant should have been permitted to continue. The deceased was identified in the prosecution individually as an officer and director of the resort, officer and director of the numbered company, and as Chief of the Band. Any arguments that could be advanced against the deceased could also be advanced on behalf of the legal entities. The case against the deceased became moot when he died; the court could not compel his attendance and he could not be punished for non-compliance. The court analyzed the Smith factors in consideration of whether the court should exercise its discretion to hear

and determine the matter involving the deceased: a) the deceased's interests would not necessarily be addressed if the matter proceeded against the other appellants; b) the appeal was already found not to have merit; c) there were not special circumstances that transcended the death of the deceased; d) the court should not use resources to consider an issue that other courts have already analyzed; and e) the appeal would be an intrusion into the role of the legislative branch of government. The court concluded that the factors did not support a conclusion that it was in the interests of justice to continue with the appeal. The court exercised its discretion not to allow the appeal involving the deceased to continue. The appellants' appeal was dismissed due to delay pursuant to s. 825(b) of the Criminal Code. The deceased's appeal was moot and was dismissed on the same basis.

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R v Desjarlais, 2019 SKQB 6

Gabrielson, January 8, 2019 (QB19004)

Criminal Law – Sentencing – Aboriginal Offender – Gladue Report

The self-represented accused pled guilty to a charge of breaking and entering a house and committing an assault with a weapon contrary to s. 348(1)(b) of the Criminal Code. The court canvassed s. 606 of the Code and accepted the plea. The accused agreed to the Crown's submission of a sentence of 20 months. The matter was adjourned and at the sentencing hearing the accused failed to appear and was arrested and held on remand. She sought an adjournment at her next appearance so that she could seek legal counsel to speak to sentence. Legal Aid counsel was appointed and he advised the court that time was needed to prepare a Gladue report. Legal Aid refused to fund such a report because it had no monies available for that purpose and the accused's counsel made a Charter application regarding it. The Crown filed an affidavit from an official with Community Corrections for the province that stated that as of 2014, all probation officers were required to include Gladue information in their Pre-Sentencing Reports (PSR) where they were ordered for an Aboriginal offender. The defence called the senior official with Legal Aid who testified that the pilot project it had established in 2014 to fund Gladue reports using discretionary funding from its annual budget only lasted one year and there was currently no funding available. A law professor was called and qualified as an expert witness regarding the use of Gladue reports in the sentencing of Aboriginal offenders. He testified that a PSR ordered pursuant to s. 721 of the Code and a report differed significantly in that the PSR would include only a couple of paragraphs and Gladue reports were lengthy and detailed. The defence argued that a Gladue report was necessary in this case and if the government of Saskatchewan

would not fund its preparation, then a stay of proceedings pursuant to s. 24 of the Charter should be ordered, relying on the Alberta Court of Appeal's decision in Mattson or alternatively, that this situation was analogous to funding for court-appointed counsel pursuant to Rowbotham applications. The Crown acknowledged that the court was required by s. 718.2(e) of the Code to take into account the accused's Aboriginal background when sentencing, but it did not have the legislative power to order a Gladue report and a full report was not necessary if the court could obtain sufficient information from other sources, relying on the Saskatchewan Court of Appeal's decision in Peekeekoot. The accused had not proven that exceptional circumstances existed here to warrant ordering a Gladue report.
HELD: The application was dismissed. The court found that the accused had not met the burden of establishing that the preparation of a Gladue report should be ordered and funded by the government. The ordering of a report should only be considered where the consequences for the accused are so great that they would render such a report essential to proper sentencing. Section 718.2(e) of the Code does not require the court to order such a report. The Saskatchewan Court of Appeal held that they were not mandatory in Peekeekoot and the court was bound by its decision. The court also found that the Charter guarantees under s. 7 and s. 11(d) were not applicable as they had been in Rowbotham because the accused here had pled guilty.

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Regional Tire Distributors (Saskatchewan) Inc. v Quality Tire Service Ltd., 2019 SKQB 8

Barrington-Foote (ex officio), January 10, 2019 (QB19008)

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

The plaintiff, Regional Tire Distribution Saskatchewan (RTDS), applied for summary judgment in relation to all of its claims against the defendants. It sought damages against the defendant, Quality Tire Service (QTS), for breach of the Management Agreement and the individual defendant, R.J., for breach of his fiduciary obligations and his statutory obligations under s. 117 of The Business Corporations Act in his capacity as director of QTS. The defendants had not applied for summary judgment in response, but submitted that the court should not only dismiss RTDS's application but grant summary judgment in their favour. RDTS, a Saskatchewan business corporation, carried on business as a tire wholesaler from September 2011 to April 2014. QTS and another company, RTE, each owned 50 per cent of the shares of RTDS. R.J. was the sole director of QTS and a director RTDS. QTS was the manager of RTDS pursuant to the 2011 Management Agreement

between RTDS and QTS. RTDS was a joint venture which resulted from negotiations between QTS, operating in Saskatchewan and Kirk's Tire Ltd. and RTE, operating in Alberta. The parties submitted affidavits and cross-examination of the affiants was permitted by the court. There was a conflict in their evidence as to whether there was agreement between them regarding the financial and operating relationship between RTDS and QTS, particularly the purchasing arrangements and manufacturer benefits. R.J.'s evidence showed that he had expressed his unwillingness to accept the RTE model regarding them offered by the principal of Kirk's and RTE in negotiations and disputed that he had accepted them, but the principal testified that he thought after explaining the RTE model to R.J., that the latter "got it" and accepted the model. The majority of the plaintiff's allegations concerning wrongs committed by the defendants were within the scope of the disputed terms.

HELD: The plaintiff's application and the defendants' request for summary judgment were dismissed. The parties could determine if they wanted to apply pursuant to Queen's Bench rule 7-6 for trial management directions enabling them to benefit from the application. The court found that there was a genuine issue requiring trial justified on the basis of contractual and damages issues raised. The claim was complex and a large amount of money was at stake. There was a lack of documentary evidence and it was unable to make the necessary findings of fact and to apply the law to them.

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Metz, Re (Bankrupt), 2019 SKQB 9

Thompson, January 10, 2019 (QB19005)

Bankruptcy and Insolvency – Discharge – Conditional – Non-Government Student Loans

The bankrupt applied for an automatic discharge. The Royal Bank (RBC) objected to the application. The bankrupt filed for bankruptcy in 2017, a little more than a year after completing her Licensed Nurse Practitioner (LPN) diploma which she obtained with assistance from a student loan from RBC. The trustee admitted RBC claims in the amount of $83,900 which made up 93 per cent of the bankruptcy debt. The bankrupt attributed her bankruptcy to a bad decision to lend money to a former boyfriend and to her failure to budget. She advised that it was difficult for her to obtain full-time employment as an LPN and was currently employed in a permanent part-time job earning $48,700. RBC alleged that the bankrupt's assets were not of value equal to 50 cents on the dollar on the amount of her unsecured liabilities and that she had assigned herself into bankruptcy for the primary purpose of evading her debt to it. The RBC loaned money to her for the purpose of

advancing her education and therefore it was entitled to a priority for non-government student loans.
HELD: The court granted a conditional order. The bankrupt was ordered to pay the amount of $83,900 to the trustee and make payments determined by the trustee according to the surplus income standards for the years in question until five years from the date of this decision. Upon meeting the conditions, an automatic discharge would issue. The court reviewed the special considerations that apply to non-government student loan debt set out in Insley and found that student loans ought to be classified on the same moral level as other undischargeable debts.

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