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R v J.S.M., 2018 SKPC 71

Scott, November 28, 2018 (PC18073)

Criminal Law – Assault – Sentencing
Criminal Law – Sentencing – Aboriginal Offender – Gladue Factors

The accused pleaded guilty to two assaults contrary to s. 266 of the Criminal Code. The victims were his spouse and his six-month-old child. He struck his wife because of an argument and in the case of the child, because he was frustrated with her crying. There was no long-term physical impact. The accused was raised on the Waterhen Lake First Nation. His grandparents and parents attended residential schools and he witnessed domestic violence and was physically abused by his father. The accused had been employed for ten years and was the sole support of his wife and four children. Since the assaults, he has had no contact with his family but has continued to support them financially. The accused had been sober for six years and had a minimal criminal record. His employer, co-workers and spouse filed letters with the court describing him as good worker and outstanding person who cared for his family and friends. The accused had taken a domestic violence treatment program and had also received individual counselling from a mental health therapist. The reports of how he performed in both instances indicated that the accused was intelligent and committed to correcting his behaviour and addressing his anger problems.
HELD: The accused was given a six-month conditional sentence to be served in the community followed by 12 months' probation. The court imposed numerous conditions on the accused including prohibiting him from visiting his family without prior written permission of his supervisor. The court took into account the aggravating factors that the

accused's victims were his spouse and his infant child which were breaches of s. 718.2(a)(ii) and s. 718.2(2(a)(ii.1) and s. 718.2(a)(iii) of the Code. The mitigating factors included that he took responsibility for the offences, expressed remorse, participated in domestic violence treatment, was gainfully employed and supported by his employer, family and friends. The court found that in its assessment of the Gladue factors, the accused's unique personal circumstances had bearing on his responsibility for the offences and diminished his moral blameworthiness.

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Danyliuk, December 31, 2018 (QB18343)

Civil Procedure – Queen's Bench Rules, Rule 1-3, Rule 3-57, Rule 3-58

The applicant applied for judicial review of an arbitrator's decision in a labour law case. It filed its originating application and served its supporting material on the arbitrator including a Notice to Obtain Record of Proceedings pursuant to Queen's Bench rule 3-57. The arbitrator acknowledged receipt of the notice but printed on it: "as for the record, you have it" and then refused to file any return. As a result, there was no certified copy of the record before the court.
HELD: The court ordered the arbitrator to comply with Queen's Bench rule 3-58 by filing a copy of the decision within nine days from the making of the order.

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Caldwell Whitmore Leurer, January 15, 2019 (CA19004)

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

The appellant appealed his conviction on the charge of possessing cocaine for the purpose of trafficking on the ground that the trial judge erred by finding him in possession of a substance that he had secreted in a hidden compartment of the van he was driving and that it was cocaine (see: 2016 SKPC 53). The RCMP had conducted an investigation into the transportation of cocaine into Canada at the border between Saskatchewan and Montana. After one member of the trafficking operation agreed to become a police agent, he was involved in a drug transfer set up by the police at a site in Saskatchewan. As the police knew the description of the vehicle being driven by the courier, they

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surveilled it in a number of locations as it travelled from British Columbia to Saskatchewan. The agent identified the appellant as the courier at trial, but the drug transfer occurred on a dark night. The appellant's grounds of appeal were that the trial judge erred: 1) in law by admitting the Certificate of Analyst. Under s. 51(3) of the Controlled Drugs and Substances Act in effect at the time of the appellant's arrest, the Crown was required to provide reasonable notice to him of its intention to produce it as presumptive proof that the substance found in the van was cocaine. In the absence of reasonable notice, the judge was permitted to exercise her discretion to admit the certificate. In this case, the judge found that the Crown had not provided reasonable notice but exercised her discretion to admit and erred by doing so because the Crown had not explained why it had failed to provide notice, and thus his right to full answer and defence was impaired because he was not aware of the Crown's case against him prior to trial; and 2) by misapprehending relevant evidence and entering an unreasonable verdict not supported by the evidence. The appellant argued that she should not have accepted the police agent's eyewitness testimony identifying him as the individual to whom the agent had given the cocaine and then failed to appreciate that gaps in the police surveillance of the van's route which gave rise to a reasonable doubt that it was he who had driven it from Medicine Hat to Saskatchewan and back. Therefore, she failed to properly assess his theory that someone else had met with the police agent, taken possession of the cocaine and then driven back to Medicine Hat. The appellant contended that he had only taken over driving in Medicine Hat without being aware that there was cocaine hidden in the van.
HELD: The appeal was dismissed. The court found with respect to each issue that the trial judge: 1) had not improperly exercised her discretion to admit the certificate. The appellant had not provided any evidence of actual prejudice to him or of some impairment of his right to make full answer and defence. Furthermore, this was not a case of substantive failure to give notice. The judge found that the appellant had been given notice twice but it was not "reasonable" notice from a timing perspective. After the appellant received notice, the trial was adjourned for six months and thus the judge exercised her discretion to admit it based on the lack of prejudice to him and in the interests of the administration of justice; and 2) had not erred in her treatment of the evidence. She recognized the frailty of the agent's evidence but concluded that it was the appellant with whom he met based on the whole of the evidence from which there was no other reasonable conclusion that he was the courier. Her finding of inferred fact that the appellant had knowledge or control of the cocaine was based upon the whole of the circumstantial evidence that he had driven the van to the meeting place, accepted the drug from the agent and then hidden it.

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R v Barrett, 2019 SKCA 6

Jackson Caldwell Leurer, January 18, 2019 (CA19005)

Criminal Law – Appeal – Conviction
Criminal Law – Assault – Assault with a Weapon
Criminal Law – Break and Enter with Intent to Commit Indictable Offence
Criminal Law – Common Intent Parties – Criminal Code, Section 21(2)
Criminal Law – Defences – Self-defence

The respondents were acquitted of two Criminal Code offences: breaking and entering a dwelling house and commission of an indictable offence, contrary to s. 348(1)(b), and use of a weapon in committing an assault, contrary to s. 267(a). The respondent, T.'s, two children were in the custody of the complainant, the father of the children. T. believed that her children were in peril in his care and developed a plan to peacefully regain custody of them. T. attended the complainant's property with her brother, M., the other respondent and another person, D. The complainant took the youngest child into the house when he realized they were there to take the children. The respondents and D. forced their way into the house. The complainant was waving a knife and D. used pepper spray on him in an attempt to disarm him. Both respondents testified in their own defence. The trial judge found that the reaction and actions of the complainant to the respondents and D. might have caused T. to fear for the safety of her son. M. argued that he acted in self-defence and defence of others, pursuant to s. 34 of the Criminal Code, when he entered the complainant's house. The trial judge concluded that T. also took that position. She was not represented by counsel and did not make any submissions. The trial judge found an air of reality to the defence pursuant to s. 34(1)(a), justifying the break and enter and subsequent assaults. The trial judge concluded that the Crown had not proven that the respondents knew or were willfully blind to the fact that D. had brought and intended to use pepper spray. The Crown's three grounds of appeal were: 1) did the trial judge err in law by finding an air of reality to a defence pursuant to s. 34 of the Criminal Code; 2) did the trial judge err in law by failing to find the respondents guilty as parties to D.'s assault pursuant to s. 21(2) of the Criminal Code; and 3) did the trial judge err in law by failing to consider indictable offences unrelated to the alleged assault of the complainant as a basis to convict pursuant to s. 348(1)(b) of the Criminal Code?
HELD: The appeal was dismissed. The grounds of appeal were dealt with as follows: 1) the Crown argued that the purpose of the respondents attending at the complainant's residence was to abduct the children, so it was an error to find that the respondents could have been motivated to break into the house and abduct the children by anything that they saw the complainant doing to the children after they arrived. The trial judge found as a fact that the son had been taken into the

house and the respondents had reasonable cause to fear for his safety. He also found that the immediate purpose of the break and enter was the protection of the son. The actions of the complainant in the home were found by the trial judge to threaten the safety of the respondents and the children. The trial judge was found to be alive to each element of the defence. The Crown was incorrect in seeking to place the onus of proof of a defence on the respondents. The appeal court did not agree with the Crown that the respondents had to present admissible evidence to prove the children were in danger; 2) the Crown argued on appeal that the respondents were liable because they formed a common intent with D. to abduct the children and they knew or ought to have known an assault was probable. The appeal court rejected the Crown's arguments, which relied on s. 21(2) on appeal as a new basis to find the respondents liable for D.'s assault of the complainant; and 3) the Crown argued that there could have been several offences, for example abduction, committed by the respondents. The Crown specifically argued on appeal that: a) the indictable offences alleged to have been committed in association with the break and enter did not have to be particularized. The appeal court indicated that there was a lengthy exchange at trial where it was fair for the trial judge and respondents to understand that the Crown's entire case was premised on the submission that there was proof of an assault with a weapon and not any other indictable offence; b) the Crown argued that they were not giving particulars, but that they were just expressing the theory of their case. Oral particulars are binding. The appeal court found the statement made by Crown counsel amounted to particulars; and c) the appeal court found that there would be a risk of prejudice to the respondents if the Crown were allowed to shift its theory of liability on appeal.

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Ottenbreit Schwann Leurer, January 22, 2019 (CA19006)

Criminal Law – Robbery – Conviction – Appeal
Criminal Law – Robbery – Sentencing – Appeal
Criminal Law – Obstruction of Justice – Conviction – Appeal declared
Criminal Law – Obstruction of Justice – Sentencing – Appeal
Criminal Law – Sentencing – Aboriginal Offender – Gladue Factors

The appellant was convicted after trial by jury on the charges that he committed armed robbery contrary to s. 344(1) of the Criminal Code and masked his face with intent to commit an indictable offence contrary to s. 351(2) of the Code. At the outset of his trial, he had pled guilty to dangerous driving, possession of a stolen vehicle and theft. The trial judge sentenced him to nine years' imprisonment on a global basis for the six convictions and then gave him credit for remand time

on a 1:1 basis so that his aggregate net sentence was 7.5 years (see: 2015 SKQB 404). The appellant appealed his sentence on the basis that the judge erred by: 1) placing excessive emphasis on aggravating factors while downplaying mitigating factors, particularly his reduced moral culpability in consideration of s. 718.2(e) of the Code and the Gladue factors; and 2) failing to give him credit on an enhanced basis of 1.5 days for each day spent in remand. He argued that his statutory right to release after serving two-thirds of his sentence entitled him to enhanced credit pursuant to s. 719(3.1) of the Code. The appellant also appealed his conviction and sentence for attempting to obstruct justice in relation to communication with a witness testifying against him in his preliminary hearing. The witness was a young offender who was the appellant's accomplice in the robbery and testified from a soft room. Before he gave his evidence, the appellant asked if the witness could see the courtroom and was advised he could not. During the testimony, the appellant made a loud sound in the courtroom that could be heard by the witness, at which time, he appeared to no longer have knowledge of the events about which he had been testifying. In his oral decision, the judge found that there was no possible rational explanation for the sound except that the appellant was trying to interfere with the proceedings and sentenced him to 10 months' incarceration to be served consecutively to his other sentence. The appellant argued that the judge's inference was unreasonable and incorrect as to his intent. The sentence he imposed was inappropriate because he failed to consider the Gladue factors.
HELD: The appellant's first appeal was allowed in part. The court found with respect to each ground that the sentencing judge had not erred: 1) by imposing a nine-year sentence. He had considered s. 718.2(e) of the Code and the Gladue factors; and 2) in finding that the appellant had failed to provide evidence for enhanced credit regarding the qualitative features of his remand. However, he had erred in principle in his application of the onus and inference described in the Supreme Court's decision in Summers, so far as a claim is staked on a quantitative basis. His sentence was adjusted accordingly. The appellant's second appeal as to conviction and sentence was dismissed. The court found that the judge's inference was reasonable as to the mens rea of the offence based upon his voluntary commission of the actus reus. The sentence imposed was not demonstrably unfit and the judge had considered the proper principles set out in s. 718.2(e) of the Code and Gladue.

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Richards Whitmore Schwann, January 23, 2019 (CA19007)

Criminal Law – Assault – Assault Causing Bodily Harm – Conviction –

Appeal
Statutes – Interpretation – Criminal Code, Section 726

The self-represented appellant was convicted after trial of assault causing bodily harm, unlawful confinement, evading police and dangerous driving and was given a global sentence of five years' imprisonment less 952 days' credit for remand time and prohibited from operating a vehicle for two years following his release. The charges had been laid after the appellant's girlfriend, P.W., who was a passenger in his truck, called out to a passerby to call the police. When the police located the parked truck, the appellant drove through the city at high speed. In the ensuing chase, the police observed the appellant repeatedly punching P.W. At one point, the appellant slowed down and P.W. jumped out of the vehicle. The judge found that her injuries were caused by the appellant's blows and the impact of her fall. The appellant denied that he had confined or assaulted P.W. because the fight was consensual and during the chase, P.W. struck him and he extended his arm to keep her at bay. He said that the police officers were far enough behind his vehicle that their line of sight was obstructed so that it was impossible for them to have witnessed him strike P.W. Among his grounds of appeal were his contention that the judge: 1) erred in convicting him on the assault charge because he failed to conclude that his fight with P.W. was consensual in nature; 2) was biased because he elected not to publish his decision. In his remarks in court the judge said that he would prefer if another judge would not read his decision; and 3) erred in sentencing him because he failed to give him an opportunity to address the court, precluding him from expressing remorse.
HELD: The appeal was dismissed. The court found with respect to each ground that: 1) the trial judge had not erred. He accepted the evidence of P.W. and the officers. There was no basis to interfere with his decision; 2) the judge had not shown bias. A judge is not obliged by law to render a written, published decision after every criminal trial. He was entitled to render it orally and, in this case, explained that he could deliver it more quickly; 3) the judge had not erred because the jurisprudence relating to s. 726 of the Criminal Code clearly indicates that a failure to ask an offender whether they want to make a statement prior to sentencing does not automatically vitiate the sentence. In this case, there was no evidence that the error was intentional. Defence counsel had made extensive sentencing submissions and did not object when the judge did not make the request. As well, the appellant had not explained what he would have said that would have influenced the judge and also failed to express remorse at this appeal.

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Risseeuw v Saskatchewan College of Psychologists, 2019 SKCA 9

Ottenbreit Whitmore Schwann, January 24, 2019 (CA19008)

Administrative Law – Judicial Review – Appeal
Civil Procedure – Queen's Bench Rules, Rule 3-56
Civil Procedure – Court of Appeal Rules, Rule 59
Professions and Occupations – Psychologist

The self-represented appellant appealed the decision of a Queen's Bench judge dismissing her application for judicial review. In 2016, she applied for review of the decision made in 2014 by the Saskatchewan College of Psychologists to deny her application for membership pursuant to s. 20(2) of The Psychologists Act, 1997. The chambers judge dismissed the application because of undue delay and on various alternate bases (see: 2017 SKQB 8). The appellant sought an order to set aside that decision and to compel the college to approve her application and applied pursuant to Court of Appeal rule 59 to adduce fresh evidence in support of her argument on the undue delay issue. Her main ground of appeal was that the chambers judge erred in dismissing her application on the basis of undue delay.
HELD: The court denied the appellant's application to adduce fresh evidence and dismissed the appeal. It found with respect to the application that the some of the documents sought to be adduced had been available at the time of the judicial review application. The fact that her counsel chose not to put the material into evidence did not change the fact that it existed. The other documents were related to mental health problems suffered by the appellant as a result of the failure of her ongoing attempts to gain membership in the college. The court found that the materials would not have had an impact on the outcome of the judge's decision regarding delay. Respecting the appellant's ground that the judge erred in finding the delay undue pursuant to Queen's Bench rule 3-56(3), the court said that as the decision was discretionary, it was entitled to appellate deference. The judge correctly selected and applied the test set out in Henry. His finding that two years' delay was undue when the period of time was just under two years did not warrant intervention, nor did his finding that the appellant had not offered an explanation for the delay. He had not erred either in his determination that to allow her application would be detrimental to the good administration of the College exercising its regulatory responsibility. Obiter, the court observed that the chambers judge's approach to the standard of review for procedural fairness was not consistent with the law in Saskatchewan.

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Caldwell Ryan-Froslie Schwann, January 24, 2019 (CA19009)

Civil Procedure – Summary Judgment – Appeal
Civil Procedure – Queen's Bench Rules, Rule 7-3, Rule 7-5

The appellant appealed the decision of a Queen's Bench judge that granted summary judgment pursuant to Queen's Bench rule 7-2 in favour of the respondent. The respondent had applied for an order declaring it to be the owner of extracted gravel that it stockpiled on land owned by the appellant and for a reasonable amount of time to remove it from the land. In response to that application, the appellant sought an adjournment to marshal further evidence and an order striking an affidavit by the previous owner of the land and portions of five other affidavits. If such relief was not granted, the appellant sought an order permitting it to cross-examine the respondent's affiants because their information was relevant to the central issue of the nature of the history of the agreement and because Queen's Bench rule 7-3(2) expressly contemplates cross-examination of deponents on their affidavits in the context of a summary judgment application. The chambers judge determined that the matter could be dealt with under summary proceedings as it involved as a question of law: the interpretation of the agreement between the parties. The appellant advanced numerous grounds of appeal but the first and threshold ground was that the judge erred by proceeding with the application on its merits without first giving the appellant the right to cross-examine the respondent's affiants on their affidavits.
HELD: The appeal was allowed on the threshold issue and the court set aside the summary judgment decision. The chambers judge had erred in failing to undertake the proper analysis necessary to decide the respondent's application. The decision to permit cross-examination is discretionary and attracts appellate deference. Parties do not as a rule have an automatic right to cross-examine affiants and Queen's Bench rule 7-3 does not provide a stated right to do so but the party responding to a summary judgment application must put its best foot forward in terms of evidence and that usually weighs in favour of permitting cross-examination and determining whether to do so follows the proportionality principle in Queen's Bench rule 1-3(4). This analysis was not undertaken by the chambers judge. Further, in tackling the interpretation of the agreement as a pure question of law, the judge erred in law. She failed to apply the principles set out in Sattva and consider the factual matrix of the contract by allowing the cross-examination of the affiants.

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Ottenbreit Caldwell Barrington-Foote, January 25, 2019 (CA19010)

– Criminal Law – Appeal – Conviction

Criminal Law – Appeal – Sentence
Criminal Law – Release – Judicial Interim Release
Criminal Law – Release – Release on Parole
Criminal Law – Sentencing – Long-term Offender – Long-term Sentence Order

The appellant appealed his convictions and sentence following two trials before the same judge on charges arising out of separate incidents. The appellant was convicted of the following Criminal Code offences: two assaults with a weapon contrary to s. 267(a); resisting lawful arrest, contrary to s. 270(1)(b); and two breaches of undertaking, contrary to s. 145(3). He was designated a long-term offender (LTO), sentenced to two years' imprisonment and given a ten-year long-term supervision order (LTSO). The appellant applied for interim release pursuant to s. 679 and for release on parole. He also appealed his conviction and sentence. The grounds claimed by the appellant were: 1) procedural errors; 2) a miscarriage of justice based on: racial bias; fabricated disclosure; perjured evidence; or systemic failure within the judicial system; 3) the verdicts were unreasonable or unsupported by the evidence; 4) the LTO determination; and 5) the length of the LTSO. HELD: The application for judicial interim release was denied and all appeals were dismissed. The appeal court did not have any jurisdiction to deal with the appellant's application for parole. Also, the appellant was not in custody under the sentence at issue in the appeal because the warrant had expired in 2018. Therefore, he was serving a sentence not before the court, so the appellant's application for judicial interim release was moot. The grounds of appeal were dealt with as follows: 1) there were irregularities and some confusion regarding the process leading up to the trial on the two sets of charges against the appellant. The appeal court found that any substantive irregularities and resulting prejudice to the appellant had been dealt with by the time of the trials. The court of appeal found that the record did not support the appellant's allegations of trial unfairness or a miscarriage of justice as a result of procedural irregularity; 2) the onus was on the appellant to establish that a miscarriage of justice had occurred, and he failed to do so; 3) the appellant did not call evidence at his trials, nor did he challenge the credibility or reliability of the Crown's witnesses in any substantive way. The verdicts were supported by evidence and were not unreasonable; 4) an LTO determination is a finding of fact. The trial judge considered the required issues pursuant to s. 753.1(1)(a) of the Criminal Code. The appeal court did not find that the trial judge's findings were unreasonable or unsupported by the evidence that was before him. Further, there was no error of law; 5) the ten-year LTSO was not unreasonable in the circumstances. The forensic psychiatrist's opinion outlined the appellant's poor rehabilitative outlook, concluding that it "would be hazardous to assume that the risk posed" by the appellant "in the foreseeable future could be effectively reduced through available treatment programs". The trial judge's imposing a ten-year LTSO was not unreasonable.

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R v Iron, 2019 SKPC 2

Martinez, January 4, 2019 (PC19001)

Regulatory Offence – Entrapment
Regulatory Offence – Fisheries Act
Regulatory Offence – Stay of Proceedings – De Minimis
Regulatory Offence – Undercover Operation

The accused was charged with six counts of unlawfully marketing fish, contrary to s. 13 of The Fisheries Act (Saskatchewan), 1994 and s. 60 of The Fisheries Regulations. It was alleged that the offences occurred on three dates in 2017. Two conservation officers testified at trial as did the accused. The accused admitted that he did not have a commercial fishing licence, that he sold to an undercover conservation officer, and that he knew it was illegal to do so. The accused's defences to the charges were: the undercover officer entrapped him into committing the offences; and the offences were so minimal that the law should not be concerned with them (the principle of de minimis non curat lex). The investigation of the accused occurred after complaints of him selling fish. An undercover conservation officer posed as a scientific researcher and arranged to put up air testing equipment in the accused's yard for a fee. The officer would check the results once or twice per month. Eventually, on one stop at the accused's house, he said that he had fish for the conservation officer. The officer paid him $10 for two northern pike fillets. On another occasion the accused sold four bags of walleye for $10 per bag. On the final occasion northern pike were purchased. The accused sold the officer a total of 10 bags of fish over 16 months for a total price of $90. The accused said that all of the fish were taken from Canoe Lake. The accused said that the undercover officer enticed him by waiving money in his face when he was poor, illiterate, and an alcoholic.
HELD: The accused was found guilty of all charges. Entrapment allows for the staying of charges when an accused shows that the state's authorities exceeded the bounds of permissible conduct resulting in the only appropriate remedy being a stay of proceedings. The court reviewed the factors from Mack to determine if means were employed that went further than providing the opportunity for a defendant to commit the offences that they were charged with: a) did the offence of illegally marketing fish warrant an undercover investigation operation. The court found the offence to be serious, even though it was a regulatory offence. The offence was especially serious because Canoe Lake's level of fish was at a fragile state. The illegal marketing of fish is difficult to investigate and anything other than an undercover operation would be unlikely to succeed; b) whether the undercover officer's tactics would induce an average person to commit the offence,

taking into account the officer's persistence and the kinds of inducements he offered to the defendant. The officer never asked the accused to sell him any fish. The accused kept saying that he would have some fish for him the next time he came. The accused also placed the price on the fish. The officer said that he never saw the accused intoxicated; and c) whether the conduct of the state's authorities was directed at undermining other constitutional values. A previous case concluded that conservation officers could enter on First Nations Land to enforce provincial legislation without first obtaining permission from the First Nation. The court concluded that the hallmark of entrapment was not present. The court did not agree that the accused should not be convicted because he only sold a small number of fish fillets to the undercover officer. The accused sold fish to the officer three times over the span of six months. The accused also admitted that he knew it was illegal to do so. The court found that selling fish illegally was not a blameless or victimless offence. The fish were essentially being taken from other members of the community and threatening the sustainability of the fishing as well as the livelihood of the licenced fishers. The accused was found guilty of the three offences contrary to The Fisheries Act and the three charges under the Regulations were stayed due to the Kienapple principle.

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R v Slippery, 2019 SKPC 5

Snell, January 24, 2019 (PC19002)

Criminal Law – Defences – Charter of Rights, Sections 8, 9, 10(b)
Criminal Law – Traffic Stop – Passenger

The accused was the front seat passenger of a vehicle stopped pursuant to The Traffic Safety Act. Various items were found when he exited the vehicle: a loaded firearm; drugs; and a radio belonging to the City of Regina. When a vehicle was stopped the officer observed the front passenger door open and then shut quickly. The door opening and shutting raised an issue of officer safety to the officer. He called for backup and did not approach the vehicle until backup arrived. Just as the backup officers arrived, the officer saw the front passenger, the accused, get out of the vehicle. The accused got back in the vehicle when instructed to do so. When the officer approached the vehicle, he not only requested the driver's information, but also asked the accused his name and birth date. The accused gave a name that was later determined to be false. A computer check of the driver of the vehicle revealed that he could only operate a motor vehicle if the registered owner was also in the vehicle. The driver was arrested for not having the registered owner in the vehicle. When the officer returned to the vehicle, the accused was standing outside of the vehicle with another

officer. The officer noticed a firearm on the floor of the vehicle. He arrested the accused for possession of a firearm. The arrest was estimated to be about 10 minutes after the traffic stop. An officer gave the accused his rights and warnings at approximately 12:03 am. He indicated that he wanted to speak to a lawyer, and so was given that opportunity at the police station at 12:33 am. The issues were: 1) whether the accused was detained, and if so, whether it was an arbitrary detention; 2) whether where was an unreasonable search and seizure; 3) whether there was a breach of the accused's right to counsel; and 4) whether evidence should be excluded pursuant to s. 24(2) of the Charter for any breaches.

HELD: The issues were determined as follows: 1) the court found it very clear that the accused was detained when he was instructed to get back into the vehicle. The detention, however, was found to be lawful and not arbitrary. The court agreed with the officers that there was a safety concern for them requiring the detention of the accused. The officer's request for the accused's name and birthdate were not found to significantly extend the duration of the detention; 2) there were two seizures to consider: the request for the accused's name and birthdate; and the seizure of drugs, the firearm, and the radio. The court did not find that it was entirely clear whether the officer was entitled to demand the accused identify himself, so the court assumed that it was a breach of the accused's s. 8 Charter rights. With respect to the firearm, the accused had a reduced expectation of privacy as a passenger in a vehicle. Therefore, the court concluded that the accused could not argue that his s. 8 rights had been breached regarding the articles found in the vehicle. The court nonetheless considered whether the search was conducted in a reasonable manner. The firearm was found to be in plain view. The plain view doctrine is a common law exception to the general rule that warrantless searches are unreasonable. Once the firearm was in plain view, there was a power to search the vehicle to ensure that there were no other firearms in it. The search resulting in the seizure of the firearm was lawful; 3) the accused argued that he should have been given his rights to counsel sooner. The accused was detained from the time he was told to get back into the vehicle. At that point, he should have been told of the reason for his detention. It would not have been practical for the officer to give the accused his full rights to counsel at that point, but the officer could have advised the accused that the detention would be brief while he checked on the driver's licence and registration. There was a breach of the accused's s. 10(a) rights. He was still detained when he exited the vehicle a second time. The court found that it had not been more than a few minutes that the accused was standing outside when the firearm was noticed in plain view. The accused was then arrested immediately with no delay in his rights being given. The court concluded that there was no breach of the accused's s. 10(b) Charter rights; and 4) the only Charter breach was the unlawful search of the accused when he was asked to provide his name and date of birth. He did not request the exclusion of the evidence, but

the court found that if he had the evidence would have been excluded as an appropriate remedy under s. 24(2) of the Charter. The application for exclusion of firearm, drugs, and radio was denied.

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R v Paterson, 2019 SKPC 7

Snell, January 24, 2019 (PC19003)

Criminal Law – Defences – Charter of Rights, Sections 7, 8, 9, 12, 23(1), 24(1)
Criminal Law – Impaired Driving – Care or Control
Criminal Law – Stay of Proceedings

The accused was charged with having care or control of a motor vehicle when her ability to do so was impaired by drugs or alcohol. The police received a report of two intoxicated people attempting to buy alcohol at a drinking establishment. The two went to the parking lot. The female was slumped over the console of a vehicle and the male was in the front passenger seat. When the officer arrived, the reverse lights of the vehicle were on. The officer opened the driver's door and put the vehicle, which was not running, into park. She removed the keys from the ignition. The officer smelled alcohol but could not tell it was coming from the accused until the accused was in the police vehicle, which was after the initial arrest. The officer arrested the accused based on the 911 call; her observations of the accused; her difficulties in arousing the accused; and the accused's inability to focus her eyes. When the accused was out of the vehicle, her impairment was obvious. A videotape was made of the accused using a toilet in the police detention area. Two female officers were with the accused in the cell because she required their assistance to use the toilet due to her intoxication. The Crown did not tender any evidence regarding the purpose of the videotaping or policies regarding the surveillance system. The cameras were on at all times and all staff had the ability to view the monitors. The video was also recorded. The issues were: 1) did the arrest of the accused prior to her exiting her vehicle breach her rights under ss. 8 and 9 of the Charter, and if so, should a remedy be granted under s. 24(2) of the Charter; and 2) was there a breach of the accused's ss. 7, 9 and 12 Charter rights, and if so, what, if any remedy should be granted? HELD: The court determined that there were no Charter breaches due to the arrest, however there were breaches when the accused was videotaped using the washroom. The issues were determined as follows: 1) the officer had the subjective belief required for the arrest prior to the accused exiting the vehicle. The officer was entitled to rely on information provided by a third party, such as the 911 call. The information was from someone in the business of serving and selling alcohol. The court presumed that they had some experience assessing a

customer's level of intoxication. There were sufficient grounds for the officer to arrest the accused for impaired care or control of a motor vehicle before the accused was out of the car; and 2) the accused had a reduced right to privacy in short-term police custody, but was still presumed innocent so was in a different category from persons entering the general prison population. Videotaping someone at a time when they have a reasonable expectation of privacy will constitute a seizure within the meaning of s. 8 of the Charter. The court reviewed previous cases of videotaping a female accused using the toilet. The court found that since there were two female officers available to assist the accused in using the toilet, they could have ensured the videotape was off or could have put a privacy screen in front of the toilet. There was no thought given to the fact that it was videotaped, so the court assumed that it was routine practice and not an isolated incident. A previous 2015 Saskatchewan case gave notice of the need to remedy defects in surveillance systems. The accused's s. 8 rights were breached. A stay of proceedings is an exceptional remedy. The videotaping fell into the residual category of cases that may attract a stay of proceedings because it did not deal with the fairness of the trial. The court weighed the interest in granting a stay against society's interest in having a trial on the merits. A stay was found to be the only appropriate remedy when the court considered the nature of the charge, the previous decision of the court, and the broader interest of the community in having the charge disposed of on the merits.

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Cherkas v Bielecki, 2019 SKPC 8

Green, January 30, 2019 (PC19005)

Contract Law – Breach - Damages

The plaintiff brought a small claim action against the defendant in damages. He claimed for the return of $3,000 he paid under an agreement with the defendant to purchase a house that had belonged to the defendant's deceased father. The agreement was made in August 2014 that the plaintiff would pay $2,500 in down payment and $500 per month from September to January 2015. The defendant believed at that time that he had the authority to sign the agreement on behalf of his father's estate, but he did not in fact become the administrator until January 2015. The plaintiff paid the down payment and made one payment in September, but discovered that the defendant did not have title to the property. He then refused to make the remaining payments. He continued to reside in the house. In January, the defendant sold the house to another purchaser who then became the plaintiff's landlord. It applied under The Residential Tenancies Act, 2006 for an order evicting the plaintiff. The eviction did not occur and the plaintiff began renting

the premises from the new owner. The defendant argued that the plaintiff's claim was barred by s. 5 of The Limitations Act. The plaintiff filed his claim on May 18, 2016.
HELD: The plaintiff was given judgment in the amount of $1,000. The court found that there was a valid agreement between the parties but that it did not fall within the meaning of The Agreements of Sale Cancellation Act. The defendant breached the agreement when he sold the property. The court determined the plaintiff's damages to be the difference between what he paid the defendant ($3,000) and what he had not paid in breach of his obligation under the agreement ($2,000). The action was not statute-barred as the date of filing was within two years of the date that the plaintiff discovered he had a claim.

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Lysyk v Sharma, 2019 SKPC 9

Demong, January 29, 2019 (PC19006)

Statutes – Interpretation – Sale of Goods Act, Section 14(c), Section 54
Contract Law – Breach – Damages

The plaintiff purchased a used car from the defendant for $12,500. When the defendant was asked about a tear in the upholstery, he replied that "that it is what it is and you see it now". Shortly after the purchase, the vehicle was involved in an accident. SGI concluded that the cost of repair exceeded its actual cash value and estimated the payout to the plaintiff to be $13,700. However, when SGI searched the Personal Property Security Registry, it discovered that a bank held a security interest in the vehicle and consequently paid $13,700 to it in satisfaction. The plaintiff commenced this action to recover the amount of the payout, alleging that the car was sold to her by the defendant without clear title. The defendant stated that he identified the "as is" condition of the vehicle. He relied on caveat emptor. He brought a third party claim against the person who sold him the car just before he sold it to the plaintiff. In his discussion with that vendor, she advised that she was selling the car "as is". He sought recovery of the purchase price of $9,000 from her because she failed to ensure that he received the car free of any charges.
HELD: The plaintiff's action was allowed and she was awarded $13,700 in damages. The defendant's third-party action was allowed and he was awarded $9,000 in damages. The court found that the implied warranty set out in s. 14(c) of The Sale of Goods Act applied in the circumstances because neither the plaintiff nor the defendant were advised of the security interest registered against the car during their respective negotiations regarding the purchase of it. Each of the respective negotiations and the description that the vehicle was being purchased "as is" were not sufficient to negate the implied warranty

under s. 14(c) or s. 54 of the Act. The doctrine of caveat emptor was displaced by s. 47 of The Personal Property Security Act, 1993 that states that registration of a security interest is not constructive notice or knowledge of its existence.

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R v Martell, 2019 SKPC 11

Martinez, January 29, 2019 (PC19007)

Criminal Law – Assault – Sentencing
Criminal Law – Sentencing – Aboriginal Offender – Gladue Factors

The accused pleaded guilty to one count of assaulting her 11-year-old son. She had come home drunk, become angry with him, grabbed him by the throat and thrown him to the floor. Although the assault frightened the child, there was no evidence that he suffered any long-term physical or psychological effects. The Crown and the defence agreed that child abuse falls into two distinct types according to R v Marks and in this case, the Crown argued that the accused's unprovoked assault fell into the first and most serious category involving a high degree of culpability and required a custodial sentence of six to nine months. Defence counsel submitted that the accused's assault was in the second category where an immature and unskilled parent acted out of emotional upset and thus her sentence should be rehabilitative and she should receive 12 months' probation. The accused, 31 years old, was raised in poverty on the Waterhen First Nation and suffered physical and sexual abuse. At the age of nine, the accused entered the foster care system for the rest of her childhood and continued to suffer physical abuse. In 2015, she began attending post-secondary school online with the goal of becoming a social worker. She had to quit school after her common-law spouse abandoned her and her four children. The accused became depressed and began drinking. HELD: The accused was granted a conditional discharge and given 12 months' probation subject to conditions such as refraining from drinking, undergoing assessment and receiving counselling for addiction and anger management. She was granted access to her son under the supervision of the Ministry of Social Services. The court noted that the sentence was appropriate because of the extensive Gladue factors present in the accused's background. It also noted that the offence fell within the second, less serious category of child offences described in Marks, that it was an isolated incident, the injury to the child was minor and the accused had expressed remorse and attended alcohol addiction and anger management programs and obtained help from a family support worker since it occurred.

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R v Cameron, 2019 SKQB 10

Acton, January 15, 2019 (QB19017)

Criminal Law – Assault – Sexual Assault – Sentencing
Criminal Law – Sentencing – Aboriginal Offender

The accused was found guilty of committing sexual assault upon the complainant, his step-daughter, contrary to s. 271 of the Criminal Code and sexual touching of the same complainant, contrary to s. 152 of the Code. The offences occurred in 2001 when the complainant was 11 years old. Her victim impact statement indicated that as a result of the accused's actions, she had to leave home and had no relationship at all with her mother. She suffers from PTSD and loss of self-worth. The accused, now 60 years old, had a criminal record that included convictions in 1993 for indecent assaults committed against two of his nieces. The Gladue report indicated that he was a residential school survivor. He was found to be at medium risk to reoffend and not to have accepted responsibility nor expressed remorse for his actions. HELD: The accused was sentenced to three and one half years less enhanced remand credit at 84 days regarding the sexual assault offence and nine months concurrent regarding the second offence. The court made orders under s. 161 of the Code prohibiting the accused from having contact with the complainant or being in a public place where persons under 16 were present for three years after discharge.

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Alie-Kirkpatrick v Saskatoon (City), 2019 SKQB 13

Acton, January 14, 2019 (QB19018)

Administrative Law – Judicial Review
Statutes – Interpretation – Tax Enforcement Act

The applicant applied for judicial review of the decision of the respondent, the City of Saskatoon, not to refer the applicant's proposal for settlement to the Provincial Mediation Board (PMB), pursuant to s. 9 of The Provincial Mediation Board Act (PMBA), or to City council. The applicant was the former owner of property in Saskatoon and after failing to pay arrears on her property taxes, the respondent commenced tax enforcement proceedings pursuant to The Tax Enforcement Act (TEA) and registered a lien against the property. After the applicant failed to respond to the six-month notice provided by the respondent under s. 23 of the TEA, it requested the consent of the PMB pursuant to s. 7 of the PMBA to obtain title to the property. The applicant contacted the respondent to propose a payment arrangement but it did not accept the proposal because the tax arrears would not be made paid within a

reasonable period. After the applicant sought and obtained several extensions to allow her to secure a loan but failed to do so, the PMB issued its consent to the respondent to obtain title to the property in May 2017. In June 2018, the applicant informed the respondent that she believed it was in a position to take title and she would not participate in any further discussion. The respondent then obtained title to the property and as a result, under s. 36 of the TEA, the applicant was deemed to be the respondent's tenant. The respondent served the applicant with notice to vacate under s. 58(1)(n) of The Residential Tenancies Act, 2006 (RTA) to terminate the tenancy effective August 2018. The Office of Residential Tenancies (ORT) set a hearing for early September which was adjourned by consent of the parties to facilitate potential settlement or resolution with the respondent retaining the right to bring back the ORT hearing within 60 days if settlement could not be reached. The effort failed and the hearing was rescheduled for October. The applicant was informed and then before the hearing, she filed this application.
HELD: The application was dismissed. The court found that there was no basis for it. The TEA was a complete code for tax enforcement proceedings and the landlord and tenant relationship created by s. 36 of the TEA was governed by the ORT's procedures under the RTA. The evidence submitted by the respondent showed that it was attempting to obtain a settlement with the applicant without prejudice to which it had a right to accept, reject or propose an alternative. However, the applicant proceeded with this application in spite the continuation of the ORT hearing, repeating her pattern of behaviour in causing lengthy delays and showing bad faith. The court found that the applicant had not come to court with clean hands and was barred from any equitable relief.

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Gullet v Regina Qu'Appelle Health Region, 2019 SKQB 15

Krogan, January 15, 2019 (QB19011)

Civil Procedure – Application to Strike Statement of Claim – Limitation
Civil Procedure – Queen's Bench Rules, Rule 7-1
Professions and Occupations – Physicians
Statutes – Interpretation – Limitations Act

The applicants, a Health Region and two doctors, Dr. P. and Dr. M., applied to strike the respondent's claim in its entirety on the basis that it was statute-barred by virtue of s. 5 of The Limitations Act (Act). On October 17, 2012, the respondent was transported to the hospital by ambulance from his hotel room. He was incoherent, confused, and hallucinating. Dr. M. attended upon the respondent at the hospital. Dr. P., a neurologist, also saw the respondent, and ordered a lumbar

puncture test. The respondent was released from hospital the next evening. The respondent had a severe headache, so he drove back to his home province of Ontario rather than flying. The respondent's headaches persisted, and he continued to take acetaminophen and prescribed medications for another month, to November 21, 2012. On December 17, 2012, a neurologist in Ontario suggested that the respondent was suffering from post-lumbar puncture headaches. The continuous leaking of cerebral fluid from the punctures was the cause of the headaches. The respondent issued a statement of claim on October 24, 2014 claiming negligence, breach of contract and battery as a result of the medical care provided by the applicants. The applicants argued that the respondent was possessed with all the material facts on either October 17, 2012 or October 19, 2012 and therefore the issuance of the statement of claim was outside the stipulated two-year limitation period. The applicants asserted that the respondent was presumed to have known that the injury occurred on the day of the lumbar procedure, on October 19, 2012, when he chose to drive rather than fly back to Ontario. The respondent argued that he did not initially know that the headaches were caused by the lumbar puncture procedure. He said that he underwent a number of tests at the hospital when he was attended to by the applicants. The respondent also said that he thought the headaches would be transitory in nature. He did not recognize the situation as more serious until his prescription medication was completed on November 21, 2012. The respondent submitted that the negligence was not discoverable until some time after October 17, 2012 when he realized that the headaches were not temporary, or on December 17, 2012, when he was told the headaches were connected to the lumbar puncture procedure.

HELD: The court first considered whether the case was an appropriate one in which to proceed pursuant to Queen's Bench Rule 7-1. The first stage was to determine whether it was more likely than not that deciding the discrete issue in advance of the trial would save time and expense, be more convenient and not compromise fairness. If the limitation period was found to have expired, the action would end, saving expense and time. Next there was a consideration of whether a decision regarding the limitation issue would preserve the principles of fairness. The parties agreed that all the evidence necessary to make the limitation decision was before the court. The court was satisfied that the first stage was met; the issue determination would achieve the goals of time- and cost-saving, facilitate convenience, and preserve fairness. The second stage was the hearing of the defined issue, namely, whether the claim was statute-barred. Pursuant to s. 6 of the Act, the respondent was presumed to know the four elements for discoverability of the claim on the day the act or omission occurred unless the contrary was proven. On the day of the lumbar puncture the respondent may have been suspicious that the headache was caused by the procedure, but he would not have been more than suspicious. The headache could have been caused by the symptoms that brought him to the hospital. The

court found that medical information was required for the respondent to move the mere suspicion along the continuum towards discovery. It was not until December 17, 2012 that the respondent was told by a neurologist that the headaches were post-lumbar puncture headaches. Also, it was not until after the prescription medication was finished that the respondent could have believed that the headaches were not going away. The respondent was found to have rebutted the presumption that the claim was discovered on October 17, 2012, the day the procedure was performed. The mere suspicion was not sufficient to ss. 5 and 6 Limitations Act discovery. The respondent did not know enough facts on which to base his claim until November 2012, at the earliest and more probably until December 17, 2012. The limitation period did not begin until discovery occurred. The statement of claim was issued before the limitation period expired. The respondent's claim was not barred on the basis of the Act.

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Williams v Williams, 2019 SKQB 17

Brown, January 17, 2019 (QB19013)

Family Law – Child Support – Adult Child

The respondent applied for an order determining that one of his children, aged 19 at the time of the application, was no longer a child within the meaning of the Divorce Act and that he was no longer obligated to make any retroactive or ongoing payments for her support and an order that the petitioner commence paying child support to him for the parties' second child, aged 16, as she resided with him. The oldest child had just completed a four-month makeup artistry program in Regina. She planned to immediately take a nail course at the same school and then to attend the Vancouver Film School in August. The respondent argued that he had supported the child in her initial endeavour by cashing an RESP in the amount of $15,000 and submitted that no evidence has been put forward as to whether either of her present plans were reasonable to better secure her future employment and career prospects. The nail program would cost $5,800 and the film school would be $32,000. The petitioner replied that their daughter had made other plans, such as taking a film makeup program at a cost of $1,000, because of the respondent's objection. She argued that additional course would help her get a job and pointed out that the course just completed had only cost $7,800 whereas the respondent had withdrawn $15,000 from the RESP. He explained that he had the remaining funds in his possession. The petitioner's annual income was $42,300 and the respondent's was $228,500.
HELD: The court declined to make the order regarding the oldest child as there was insufficient evidence provided to establish that the

necessary criteria had been met that she: was unable to withdraw from the charge of her parents; had the necessary aptitude to proceed with the upcoming course; had been diligent and successful in the course she just completed; and would be employable. The matter should proceed to pre-trial and possibly trial. The court made an interim order that the respondent should pay any arrears in s. 3 support to the end of 2018 and make payment on the outstanding fees from the fall of 2018. He must apply the $7,000 taken from the RESP to the child's courses, past and present. The petitioner was ordered to pay support for the second child as at January 2019.

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R v Sand, 2019 SKQB 18

Danyliuk, January 18, 2019 (QB19019)

Criminal Law – Sentencing – Aboriginal Offender – Gladue Report

The accused was charged with manslaughter, breaking and entering with intent to commit an indictable offence, using an imitation weapon while committing an indictable offence, possession of a weapon for a purpose dangerous to the public peace, having his face masked with intent to commit an indictable offence and committing robbery. At trial he entered guilty pleas to the first two counts and the other four were to be dealt with at the conclusion of sentencing to be held in early February. As the accused was of Aboriginal ancestry, his counsel made an application to have a full Gladue report prepared with costs of same to be covered by Court Services because she had been appointed and funded by Legal Aid to act as his lawyer and Legal Aid did not have the resources to pay for the report and neither did the accused nor the First Nation with which he was affiliated. The application was brought as request for relief as an order pursuant to s. 718.2(e) of the Criminal Code. The Crown took no position, but Court Services opposed the application. It argued that the court had no jurisdiction to order such a report and only had the authority to order a pre-sentence report (PSR) pursuant to s. 721 of the Criminal Code. That section does not include the power to order a Gladue report. The issues were: 1) whether the court had jurisdiction to order a full Gladue report to be paid for by the state; and 2) what was the proper order to make in this case?
HELD: The court found with respect to each issue that: 1) it had the jurisdiction to order a state-funded, stand-alone Gladue report as a necessarily incidental power flowing from s. 718.2(e) of the Code and alternatively, such jurisdiction was also derived from its inherent jurisdiction; and 2) it ordered a PSR with a direction to provide information on Gladue factors. If problems or inadequacies occurred in the PSR, the accused was given leave to renew his application for a full state-funded Gladue report.

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R v McIntyre, 2019 SKQB 19

Layh, January 18, 2019 (QB19014)

Criminal Law – Appeal – Acquittal
Criminal Law – Driving with a Blood Alcohol Level Exceeding .08 – Breathalyzer – Observation Period

The Crown appealed the acquittal of the respondent by the Provincial Court on a charge of operating a motor vehicle while over .08, contrary to s. 253(1)(b) of the Criminal Code. The trial judge disregarded the certificate of analysis from evidence after finding that the attending officer's attention was diverted for two and one-half minutes during the 15-minute interval between breath samples. The officer was talking to another officer. The Crown argued that the officer was in close proximity to the respondent and did not hear a burp or belch at any time and as a result the presumption of accuracy pursuant to s. 258 was maintained. The trial judge followed another decision that that held close proximity is not sufficient to constitute proper observation. The Supreme Court case of Cyr-Langlois was issued after the oral argument of the appeal, but before the decision. The parties submitted supplemental briefs of law to the court after its release. The appeal required an interpretation of the legal effect of the phrase "evidence tending to show" as used in s. 258(1)(c) of the Criminal Code.
HELD: The Cyr-Langlois case made the results clear; the appeal was granted. The respondent's acquittal was set aside, and a new trial was ordered. Section 258(1) creates a rebuttable presumption of the accuracy of a breath sample if given under certain conditions. In Cyr-Langlois the accused was not continuously observed during the 15-minute observation period. The Supreme Court of Canada cautioned against using evidence that is purely theoretical and favoured the defence-restrictive position that an officer's failure to observe a detainee for the required period will not automatically result in an acquittal without further evidence. The court must first find evidence of improper operation of a machine or a procedure. Then, the court must find that this improper operation is "seriously or…closely connected with reliability" sufficiently so as to create a "reasonable doubt". The court found that each case requires specific consideration of the evidence adduced; however, it will be rare that the evidence can be established without the accused providing evidence, perhaps from an expert. The two and one-half minutes did trigger a deficiency in the operation of the instrument. The court found it necessary to review the evidence. The first test resulted in a reading of .10. The second test was taken 20 minutes later and resulted in a reading of .09. The officer testified that the instrument was working properly because the two readings were within .02, as required. The respondent did not challenge the evidence

of the officer. The respondent focused his cross-examination of the officer on the reading resource material used by the RCMP for the breath instrument. The court found little value in the cross-examination. The reading resource material was not a manual. The court found that the respondent was asking for the reading resource material to be elevated to regulatory significance. The officer also testified that, in his experience, the instrument had always detected mouth alcohol that could be caused by a burp, etc. The court concluded that the officer's cross-examination did not establish an improper administration of the Breathalyzer. The court also commented that the appeal would have been allowed even if Cyr-Langlois had not been decided because the officer provided evidence that the instrument could detect the presence of residual alcohol in a detainee's mouth. An error message would have appeared if there had been any mouth alcohol. Even if the court found that the two and one-half minutes' distraction was proof of improper procedure, the court indicated that it would not affect the reliability of the results.

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Dillon v Dillon, 2019 SKQB 20

Megaw, January 18, 2019 (QB19020)

Family Law – Division of Family Property
Family Law – Child Support – Variation
Civil Procedure – Costs – Solicitor and Client Costs

After trial, the court rendered its judgment (unreported) in January 2018. The respondent filed this application the following May before a final order had been issued because the petitioner's counsel had not taken out judgment. The hearing was delayed from October to December 2018. Both parties agreed that the delay had been caused by the petitioner's former solicitor. The petitioner had obtained new counsel and she had requested an adjournment at the October hearing to review the file. The respondent's application concerned whether the trial judgment should be amended to take into account the finalized Canada Revenue Agency (CRA) debt and the final amount respecting child support, because he was now parenting in excess of 40 percent of the time, as well as other matters. Before the hearing of the application, the petitioner's counsel sent a letter to the Local Registrar asking the court to determine the respondent's 2017 income and to correct errors in the s. 7 expense calculations in the judgment. The respondent requested that the court order solicitor and client costs be paid by the petitioner's former solicitor because of his responsibility for the delay. HELD: The respondent's application was allowed in part. The court declined to deal with requests outlined in the petitioner's letter as the matters were not properly before it and instructed counsel to proceed

according to the Queen's Bench Rules. It found that the trial judgment should be amended to show the reduction in the debt owing to the CRA which would affect the calculation of the family property division. Regarding the final amount of child support adjustments, the judgment had permitted the respondent's parenting time to incrementally increase but had not dealt with whether a s. 9 Guidelines set-off ought to apply to the payment as the actual parenting arrangement was unknown at the time. The evidence showed that the parties had been engaged in shared parenting since the judgment, but as the parties had not presented a Contino analysis, the court gave leave to have the issue returned for consideration. The court would not make an order of solicitor and client costs against the petitioner's former solicitor as he had not been notified. Furthermore, his alleged failure to communicate with the petitioner did not rise to the level of conduct required for a court to consider ordering costs payable by a lawyer personally.

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Heck (Meszaros) v Meszaros, 2019 SKQB 21

Megaw, January 18, 2019 (QB19015)

Family Law – Child Support – Determination of Income
Family Law – Child Support – Imputing Income
Family Law – Child Support – Shared Parenting
Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Custody and Access Report
Family Law – Custody and Access – Health of Child – Mental Health
Family Law – Custody and Access – Primary Residence
Family Law – Custody and Access – Shared Parenting

The petitioner sought to change the interim shared parenting arrangement between her and the respondent regarding their three children. She asserted that she was the only parent able to deal with the two oldest children's mental health needs, so requested primary parent status. The parties married in 2006 and separated in 2015. The children were ten, nine, and seven years old. Post-separation, the children were in the primary care of the respondent. At a pre-trial conference in January 2017, the parties agreed to enter into a shared parenting regime. In February 2018, the two oldest children, both boys, were diagnosed with selective mutism. The younger boy also showed signs of anxiety and had obsessive-compulsive tendencies. The psychologist recommended cognitive behavioural therapy with involvement of teachers, parents, and a child psychiatrist. He also recommended reducing the parental conflict for the children. When the diagnosis was made, the petitioner arranged for tutoring for the boys, did extensive research, and implemented certain things without the respondent's input. The respondent indicated that he accepted the diagnosis made and was prepared to abide by the directions of health care

professionals. He wanted the children to remain in their current school, whereas the petitioner wanted to move them to a school closer to her house. A custody and access report (report) was prepared after the diagnosis was made. The report recommended that the shared parenting regime continue. The petitioner owned an answering service business. Her income was limited due to the debt load of the company. The respondent was not working outside of the home. He was living off the family property division. The issues were: 1) what was the appropriate parenting arrangement; 2) what was the petitioner's income for child support purposes; 3) what was the respondent's income for child support purposes; and 4) what was the appropriate level of child support?

HELD: The issues were determined as follows: 1) both parties had appropriate home environments for the children and they both had an ability to raise the children. The psychologist indicated that the stress and conflict needed to be eliminated to help reduce the children's anxiety. The sole focus for the court was the best interests of the children. The court concluded that the best interests of the children required specific factors to be considered: the children required stability and consistency; the children required ongoing psychological treatment and counselling; the children required a multi-disciplinary approach; the children required treatment with immediacy; and the children required that all parties participate in the treatment plan. The petitioner sought to immediately effect change in virtually every aspect of the children's lives. The continued involvement of the boys' current teacher was found to be essential for the best interests of the children. The court expressed concern with the petitioner's implementation of plans without consultation with the respondent. The court was unable to conclude that the conflict in communication was necessarily an impediment to the parties' ability to share parenting of the children. The continuation of the shared parenting regime was found to be in the best interests of the children; 2) the income of the petitioner from her company was limited by the company providing its financing. In 2017, it was limited to $195,000 and it decreased to $120,000 thereafter. In 2016, the petitioner's line 150 income was $213,028.84 and in 2017 it was $213,083.50. Neither amount actually reflected the amount of money provided to the petitioner by the corporation. The reported income of the petitioner for 2016 and 2017 included a capital gain triggered by the sale of shares to restructure the company when she purchased the respondent's portion. The petitioner also withdrew funds from the company to provide a down payment on her house, purchase furnishings, and pay her legal and accounting expenses. The court did not include funds in the petitioner's income that were used by her to purchase the business and the resulting restructuring of her ownership. The funds used to purchase the home and its furnishings were found by the court to be appropriately considered in the petitioner's income. The court determined the petitioner's income for 2016 and 2017 to be $250,000. The petitioner's income for 2018 was assessed at $120,000; and

4) the respondent's line 150 income for 2016 was $110,532.62 and his line 150 income for 2017 was $115,938.08. His income was comprised of dividends taken from his personal corporation, which were funds received as a result of the property division. It was not found to be reasonable that the respondent had done nothing to find employment despite having care of the children for only half of the time. The court imputed income to the respondent in the amount of $50,000. He could also earn investment income of $50,000. The respondent's total income for 2018 was found to be $100,000. The respondent's 2016 and 2017 incomes were as indicated on his tax returns; and 4) the court ordered that the set-off amount of child support be paid by the petitioner. The respondent was awarded costs because the majority of the evidence at trial concerned the parenting arrangements and he was successful in that regard.

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Elchuk v Gulansky, 2019 SKQB 23

MacMillan-Brown, January 21, 2019 (QB19022)

Administrative Law – Judicial Review – Arbitration
Contract Law – Arbitration Clause
Statutes – Interpretation – Arbitration Act, 1992, Section 45, Section 46

The applicant applied to quash an arbitral award in which the arbitrator set the price of gravel extracted from property owned by the respondents and sold to the applicant. The parties had agreed in their 2016 profit à prendre contract that they would not stipulate a price for gravel for the period from January 1, 2018 to December 31, 2019. In the event that they could not agree on a price by a certain date, they would submit the question to an arbitrator, selected by mutual consent. The parties could not agree on the price so selected an arbitrator to whom they submitted the question. The applicant argued before the arbitrator that the price should be reduced from the $1.3 per metric tonne used in the previous year because the arbitrator should take into account numerous factors, such as the costs of processing the material and road haul fees, to allow him to compete with other pit operators and that the only market for gravel was the City of Saskatoon. The respondents submitted that the price should increase to $3.92 per metric tonne because the previous price did not reflect the current fair market value for gravel in the area. The arbitrator should have regard to the price of gravel contracts negotiated with other landowners and contractors in the area. The arbitrator agreed with the respondents and stated in his decision that the most significant factors in determining the price were recent contracts negotiated in the area. The applicant's grounds for this application were that: 1) he was denied procedural fairness; and 2) the arbitrator exceeded his jurisdiction by the manner in which he

calculated the price. The respondents argued that under The Arbitration Act, 1992 the application should be dismissed because the applicant failed to apply for leave under s. 45 and his grounds did not fall within those required by s. 46(1).
HELD: The application was dismissed. The court found that the Act did not prevent judicial review. It found with respect to each issue that: 1) the standard of review regarding the first ground was correctness. The court found no evidence that the requirements of procedural fairness had not been met; and 2) the standard of review regarding the second ground was reasonableness. The arbitrator expressly addressed whether other costs should be considered and whether there was only one market for gravel and rejected the applicant's position. His decision was reasonable.

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Liick v McLeod, 2019 SKQB 25

Scherman, January 22, 2019 (QB19023)

Civil Procedure – Small Claims - Appeal

The appellant appealed from the decision of a Provincial Court judge to dismiss her small claims action. The appellant, self-represented, had claimed damages from the defendants: her daughter, son-in-law and grandson, alleging that they had committed numerous acts such as: failing to return an item that had been loaned in trust; breaching a contract with her to purchase certain farm implements from her; taking advantage of her vulnerability and failing to act in her best interests; and making fraudulent misrepresentations and converting certain assets to their personal use without compensation. All of the parties testified at the trial. The trial judge interpreted the appellant's pleadings and identified the essential claims. He found that the plaintiff had failed to prove her allegations and accepted the defendants' evidence and dismissed the claim. The appellant's grounds of appeal were that the trial judge erred by: admitting a document submitted by the defendants' into evidence that he knew was not authentic; failing to consider the tort of deceit; showing bias against the appellant; and making his decision based on fabricated evidence and false testimony.
HELD: The appeal was dismissed. The court stated that the standard of review for appeals under s. 39 of The Small Claims Act, 1997 is that absent palpable and overriding error, it could not overturn factual decisions of a trial judge. In this case, the judge's decision was largely based on fact-finding and assessment of whose evidence he preferred, and there was no basis to suggest that he erred in any way regarding his fact-finding or his application of the law to the facts as found. The court provided its reasons for finding the appellant's specific grounds of appeal as being without merit.

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1522137 Alberta Ltd. v Shaking Prairie Properties Ltd., 2019 SKQB 27

Smith, January 23, 2019 (QB19024)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike

The defendants applied under Queen's Bench rule 7-9 for an order striking the plaintiff's claim in its entirety on the basis that it did not disclose a reasonable claim for negligent misrepresentation or fraudulent misrepresentation.
HELD: The application was dismissed. The court examined the statement of claim and determined that the plaintiffs had met the requirements set out in Gelmich to plead a successful claim based on negligent misrepresentation and those set out in Bruno Appliance to plead the elements of fraudulent misrepresentation.

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Boyd Excavating Ltd. v First Venture Holdings Inc., 2019 SKQB 28

Krogan, January 24, 2019 (QB19025)

Statutes – Interpretation – Builders' Lien Act, Section 55

The plaintiff applied for an order pursuant to s. 55(2) of The Builders' Lien Act extending the amount of time by one year of their existing registered lien, for an order requiring the defendant to satisfy its undertakings and for an order requiring the parties to set the matter for a pre-trial conference. The defendant sought an order pursuant to s. 55(3) of the Act dismissing the plaintiff's claim for failing to set the matter down for trial in accordance with s. 55(1) and for an order returning the security it posted in the amount of $265,600. The plaintiff issued its statement of claim in January 2015 and the defendants filed their defence and counter-claim by March 2015. Following those filings, the plaintiff's request for mediation in May was not fulfilled by the defendants until April 2016. The defendant did not respond in a timely fashion to the plaintiff's later requests for particulars and affidavit of documents. The lien was set to expire in January 2017 and the plaintiff successfully obtained a one-year extension following which, the plaintiff requested further documentary disclosure and to reschedule questioning from the defendant. It did not respond to either, but eventually explained that because it was busy, "law suits seem[ed] like a distraction". In its application, the plaintiff argued that the need for an extension was caused by the defendant's lack of cooperation. The defendant submitted that they had been disadvantaged by having paid substantial security and had desired to have the matter set for trial

within a year.
HELD: The plaintiff's application was granted. The court ordered under s. 55(2) of the Act that the time within which the action may be set for trial was extended by one year. It also ordered the defendant to fulfil their undertakings within 60 days of the decision and that a pre-trial conference be set in an expedited manner. The defendants' application was therefore dismissed. The court found that the plaintiff had attempted to move matters forward and the defendant had been less than cooperative.

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Yashcheshen v Canada (Attorney General), 2019 SKQB 29

Barrington-Foote (ex officio), January 25, 2019 (QB19026)

Constitutional Law – Charter of Rights, Section 15
Statutes – Interpretation – Canada Student Financial Assistance Regulations, Section 16
Statutes – Interpretation – Bankruptcy and Insolvency Act, Section 178
Statutes – Interpretation – Canada Student Loan Act

The applicant applied for an order exempting her from the application of s. 16(2)(d) of the Canada Student Financial Assistance Regulations and to strike that provision as invalid. She argued that as it precludes a borrower from applying for a new student loan for three years after their absolute discharge from bankruptcy, it is contrary to s. 15(1) of the Charter of Rights as it does not exempt those who declare bankruptcy due to disability. The applicant suffered from Crohn's disease and it affected her ability to obtain her undergraduate degree. In July 2008 she filed an assignment in bankruptcy and was discharged from her debts in January 2010, but this did not discharge her Canada Student Loans. At the time she entered repayment of the loans in 2012, she owed $73,600. When she went into arrears in March 2013, she applied successfully pursuant to s. 178(1.1) of the Bankruptcy and Insolvency Act for a release of that debt. As a result, she became ineligible for Canada Student Grants and Canada Student Loans until July 2019 under s. 16(2)(d) of the regulations and was not able to obtain that financial aid in 2017 when she enrolled in a master's program. She argued that the section denied medically disabled students equal benefit of the law.
HELD: The application was dismissed. The court found that s. 16(2)(d) of the regulations was facially neutral in that it treated students with and without medical disabilities the same and thus this was a claim of adverse effects discrimination whereby the applicant faced an added evidentiary burden at the first step of the analysis of s. 15 of the Charter: establishing a distinction. In this case, the applicant failed to adduce evidence as to the impact of s. 16(2)(d) on disabled bankrupts

and thus had not shown the lack of an exemption from the effect of it denies a benefit or imposes a burden as a result of an enumerated or analogous ground.

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