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**Subject Index**



## R v Bellefleur, 2018 SKPC 57

Kovatch, October 30, 2018 (PC18074)

Criminal Law – Defences – Charter of Rights, Section 8, 9, 10(b)
Criminal Law – Driving over .08
Criminal Law – Impaired Driving

The accused was charged with impaired driving and driving while over .08. The officer set up a check stop near a campground on a long weekend. There was nothing unusual about the accused's driving when he pulled up to the check stop. At 7:05 pm, he told the officer that he had one drink. The officer then asked him to go to the police car for an ASD. Once in the car he read the formal ASD demand to the accused. The officer told the accused that he had to make sure he was safe to drive. The ASD fail was at 7:13 pm. The officer said that he knew the accused had alcohol in his body. The accused argued that the ASD demand was not made until the accused was at the police vehicle. At the detachment, the accused was given his rights to counsel on more than one occasion. The accused replied stating "what would that do" when asked whether he wanted to call a lawyer. The officer answered that he could not advise the accused. After the same answer twice, the officer stated that he was taking the answer as no. The officer also told the accused that he could change his mind and call a lawyer at any time. The accused never asked to call a lawyer. The issues were as follows: 1) did the officer have a reasonable suspicion the accused had alcohol in his body and was the seizure of breath in the approved screening device (ASD) authorized by law; 2) was the ASD demand made forthwith; 3) did the officer have a subjective belief that the accused was committing or had committed an offence under s. 253

within the preceding three hours and did the officer have a subjective belief that the accused was impaired by alcohol; 4) was the accused denied his right to consult with counsel of his choice, contrary to s. 10(b) of the Charter. Was the accused confused about the information he received from the police officer, and was the police officer obligated to take further steps to explain the right to the accused?
HELD: The findings after the voir dire were as follows: 1) the Crown does not need to prove that the detained person in fact had alcohol in his or her body. The officer had a reasonable suspicion the accused had alcohol in his body. The demand and seizure of breath in the ASD were authorized by law and there was no Charter breach in that regard; 2) the court concluded that there is no requirement that the officer make the ASD demand at the accused's vehicle. The officer was entitled to detain the accused and take him to the police vehicle to make that demand. There was no Charter breach. The test was made forthwith; 3) the accused argued that the officer failed to provide evidence of his understanding of a "fail" result on the ASD: therefore, there was no evidence that the officer held the required subjective belief that the accused's ability to operate a motor vehicle was impaired by alcohol. The court adopted the reasoning in Pavey and found that the officer had reasonable grounds for the Intoxilyzer demand, which was lawful; 4) the court found that the officer fully met the informational obligation to advise the accused of his Charter rights. The evidence also established that the accused never invoked those Charter rights. The accused never provided any evidence that he did not understand the information given to him. The officer did not have to convince the accused that he should exercise his rights to counsel. All of the evidence led in the Charter voir dire was to be applied to the trial proper.

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## *Ernst v Saskatchewan Government Insurance*, 2019 SKCA 12

Ottenbreit Whitmore Ryan-Froslie, January 16, 2019 (CA19011)

Automobile Accident Insurance Act – Appeal – Injury
Civil Procedure – Appeal – Fresh Evidence
Civil Procedure – Costs

The appellant appealed to the Automobile Injury Appeal Commission (AIAC) when the insurer found that her whole-body impairment was only 4.5 percent. She argued that it was higher, and she sought permanent impairment benefits. The insurer and appellant provided expert evidence of causation at the appeal to the AIAC. The AIAC upheld the insurer's decision. The appellant's notice of appeal and factum in the Saskatchewan Court of Appeal argued different grounds for her appeal. She argued that the insurer's expert evidence should not have been admitted and that the insurer should not have been

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Piller v Schmidt

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permitted to rely on subsequent-event evidence. The insurer requested costs.

HELD: The appeal was dismissed. The AIAC's conclusion implicitly included a finding of fact that the functional impairment of the appellant beyond 4.5 percent was not caused by the motor vehicle accident. The appellant made the appeal something substantially different from what had been set forth in her notice of appeal and what had been argued before the AIAC. The appellant did not challenge the admissibility of, nor limit, the insurer's expert evidence before the AIAC, but she did so in her factum. The appellant did not even cross-examine the qualification of the expert before the AIAC. The appellant indicated that she did not argue against permitting subsequent-event evidence sooner because her counsel only recently became aware of a 2015 Supreme Court of Canada case. The appeal court found that the insurer would be prejudiced if the appellant's arguments were allowed. The appeal court did not consider the new arguments set forth in the appellant's factum or oral argument. The appeal court also found that the appellant attempted to introduce fresh evidence in her factum without an application for fresh evidence. The fresh evidence was determined by the appeal court to have been available for presentation to the AIAC. The appeal court disregarded any fresh evidence. The AIAC was entitled to accept hearsay evidence, that being the insurer's expert opinion based on a review of the appellant's file. The appeal was dismissed. The appeal court found that there was a substantial disregard by counsel for the practice, procedure, and rules of the Court with respect to the conduct of the appeal. The court was concerned with how the appeal was conducted, but did not order costs against the appellant or her counsel.

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## *Haghir v University Appeal Board*, 2019 SKCA 13

Jackson Whitmore Ryan-Froslie, January 30, 2019 (CA19012)

Administrative Law – Judicial Review – Appeal
Human Rights – Employment – Duty to Accommodate
Statutes – Interpretation – Saskatchewan Human Rights Code, 1979

The appellant appealed from the decision of a Queen's Bench judge dismissing his application for judicial review of the decision of the University of Saskatchewan Appeal Board (USAB) confirming the appellant's dismissal from the Neurology Program in the College of Medicine. The appellant, a physician trained in Iran, applied for admission to the program in 2009 without informing the College that he had a criminal record for shoplifting. After he was charged with a further theft, the College was informed and it required him to undergo an independent psychiatric assessment. The psychiatrist reported in

2009 that the appellant's criminal behaviour resulted from an impulse control disorder, kleptomania, triggered by stress and that he would respond well to treatment. The psychiatrist further found that his risk to reoffend was moderate to high, but there were factors that would decrease the risk to low or completely controllable. The appellant was granted admission to the College in 2009 after signing an undertaking to obtain care from a psychiatrist and assistance from the Physician Support Program (PSP). In 2010 he signed an agreement with the local health authority to comply with his undertaking with the College and to refrain from committing any further violations of the Criminal Code and an accommodation agreement with the College, agreeing to comply with his undertaking and his agreement with the health authority. The appellant then received psychiatric counselling, enrolled in the PSP and met with a mentor. The College did not maintain any supervision of the appellant and he was not consistent in his participation in treatment, but no concerns were raised by either party until January 2013 when he was suspended from the program. The College had learned that he had been the subject of a hearing held by the University's Senate regarding his attempted theft of textbooks from the bookstore. The College had the matter investigated by the Postgraduate Medical Education Investigation Committee (PMEC) and it recommended that the appellant's participation in the program be terminated. The appellant's appeal to the Appeal Adjudication Board (AAB) was dismissed. The AAB considered the appellant's psychiatrist's report dated 2013 diagnosing the appellant as having an impulse control disorder that emerged when he was under stress. The psychiatrist said that the appellant had not made much progress and he needed more intensive therapy with a psychotherapist. The appellant appealed to the USAB in 2015. He provided a current report from his psychiatrist saying that the appellant had improved immensely as a result of taking a new medication and was at a minimal risk to reoffend and recommended continued treatment. His psychologist also submitted a letter confirming the diagnosis of kleptomania and that his current psychotherapy treatment was appropriate. The director of PSP testified that relapses of certain mental disorders were to be expected. The USAB declined to consider the current evidence within the parameters of the appeal. The USAB found that the appellant had commenced the program with a clear understanding that continuation of his residency was conditional upon compliance with his agreement with the College. It analyzed whether the College had failed to accommodate the appellant's mental health disabilities and found that the appellant had agreed in his accommodation letter that no further medical accommodations were required. The PSP had concluded that its services were no longer required in 2010 and the appellant had done nothing to disabuse the College that it was doing everything it should be doing to accommodate him. After the attempted theft on campus, the appellant made no effort to claim that he suffered from a disability or to seek accommodation or contact the PSP. The chambers judge

identified that reasonableness was the applicable standard of review and concluded that the USAB's determination was reasonable that the College had appropriately accommodated the appellant's mental health disability because the appellant had never identified a mental health disability that required accommodation. He found that the appellant's theft was unrelated to his mental disability. Preliminary to the appeal, the appellant raised whether the 2015 evidence from his psychiatrist and others should have been considered by the USAB and his grounds of appeal were: 1) had the chamber judge correctly applied the reasonableness standard to the USAB's decision; and 2) if so, was the USAB's decision reasonable?
HELD: The appeal was allowed and the matter remitted to the USAB for rehearing. With respect to the preliminary issue, the court found that the USAB had not erred in not considering the "subsequent-event evidence" because its decision fell within its purview. It gave its reasons for refusal and its decision was justifiable, transparent and fell within the range of acceptable outcomes. With respect to each ground, the court found: 1) the chambers judge misapplied the standard by overlooking obvious errors in the USAB's decision. He failed to examine how the USAB reached its conclusion and it was clear from its decision that it had not considered the law with respect to accommodation in reaching it. The judge also erred in making findings of fact not made by the USAB nor the other bodies. In addition, he failed to recognize that material evidence was overlooked by the USAB as it found incorrectly that the appellant had not claimed to be suffering from a mental disability before the bookstore incident and by endorsing the USAB's approach to the 2010 accommodation agreement as a "last chance agreement"; and 2) the USAB's decision was unreasonable. It failed to consider the law of accommodation in arriving at its decision and overlooked material evidence.

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*Artis Builders v Kehoe*, 2019 SKCA 14

Richards Caldwell Herauf, January 30, 2019 (CA19013)

Statutes – Interpretation – Builders' Lien Act, Section 55, Section 60
Statutes – Interpretation – Limitation Act, Section 3, Section 5, Section 6

The appellant appealed the decision of a Queen's Bench judge to declare its lien to be void. The appellant, a construction firm, provided construction materials and services to the respondent in connection with renovations to a property owned by her. It had provided similar services to her in the past when she would make partial payments to it to pay for materials and then cover the balance when the house sold. The principal of the appellant deposed in his affidavit that the

respondent advised him she would be delayed in selling the property and so he registered a builders' lien on the title in August 2015 to give notice of the agreement between the parties and that the respondent had not yet paid. In the respondent's affidavit, she denied any indebtedness to the appellant. She applied in September 2017 for an order declaring the lien to be void because the appellant had failed to commence proceedings to enforce its claim of lien within two years of registering the lien. It was therefore void. The chambers judge applied the two-year limitation period prescribed in The Limitations Act and held that the latest date on which the lien was registered was the latest date on which it could have discovered its claim and the latest date on which the limitation for an action to enforce the lien could have begun to run. As two years had elapsed since the registration, the lien was void.
HELD: The appeal was allowed and the matter remitted to the Court of Queen's Bench so that the factual issues could be resolved by way of trial. The court found that the chambers judge erred because he had not resolved the conflict in the affidavit evidence and thus incorrectly concluded that there was no agreement between the parties in spite of the appellant's affidavit. The question of when a claim is discovered is one of fact because a cause of action does not automatically arise when a lien comes into existence by virtue of provision of services or materials, or later by virtue of a lien being filed with the Registrar of Titles.

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*McLean v McLean*, 2019 SKCA 15

Richards Whitmore Schwann, January 31, 2019 (CA19014)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike – Appeal
Tort – Battery – Damages
Tort – Civil Assault – Damages
Tort – Intentional Infliction of Mental Suffering

The appellants appealed from the decision of a Queen's Bench judge in chambers to strike the majority of their statement of claim as disclosing no reasonable cause of action (see: 2017 SKQB 127). The appellants' grounds were that the chambers judge erred: 1) in striking the cause of action for civil battery against the respondent, D.W., an RCMP officer. He found that there was no specific claim of battery contained in the statement of claim, but rather what was alleged was criminal assault. The judge disallowed the appellants' proposed amendment to plead civil battery on the basis that the appellants could not succeed because the battery resulted in no compensable damages. He held that a breach of the Criminal Code, standing alone, could not constitute a civil tort

and therefore no cause of action was available. On appeal, they argued that the facts as pleaded were sufficient to allege the tort of civil battery. Further, the damages that they suffered were distrust of the RCMP resulting from the alleged battery; 2) in striking the cause of action for civil assault against the respondent, P.M. The judge found that the facts required to make out a claim for such were not pleaded and that mental distress and anxiety were not compensable damages; 3) in striking the cause of action for intentional infliction of mental suffering caused by the actions of P.M. Again, the judge found that the facts as pled could not support this cause and mental suffering was not compensable unless a recognizable psychiatric or psychological condition had been established. The appellants argued that the Supreme Court's decision in Saadati, released after the judgment under appeal, clearly stated that plaintiffs are not required to prove a recognized psychiatric illness; 4) in dismissing their harassment claim. The judge's reason was that harassment is not a recognized tort in Saskatchewan and that the appellants had not claimed damages, and his conclusion was supported by his finding that "distrust of the RCMP" was a subcategory of mental distress. As such, he had already ruled it out as a head of compensable damages; and 5) in striking the claim for harassment.
HELD: The appeal was allowed in part. The appellants could proceed with their claim in civil battery, civil assault and intentional infliction of mental injury. Their appeal on the other claims was dismissed. The court held with respect to each ground that the chambers judge had: 1) erred by narrowly construing the claim as a statutory breach and when he required damages to have been sustained. It was not plain and obvious that the facts pleaded by the appellants could not support a cause of action in battery. There is no need to establish that damages had been incurred; 2) erred in striking the claim on the basis that the pleadings failed to identify a compensable injury. No injury was necessary and although the pleadings did not disclose the imminence of the threat, the matter could be dealt with by amending the pleadings, as no statement of defence had been filed; 3) erred in striking the claim. The appellants had met the requirements for pleading the tort of intentional infliction of mental suffering and after Saadati, a psychiatric diagnosis is not necessary for proving compensable mental injury; 4) had not erred in deciding distrust of the RCMP is not a compensable head of damages; and 5) had not erred. The judge cited the decision in Collins that harassment had not been characterized as a distinct actionable tort in Saskatchewan and on appeal, that view had been upheld by the Court of Appeal.

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*Nagel's Debt Review Inc. v Mosiuk*, 2019 SKCA 16

Jackson Ottenbreit Herauf, January 31, 2019 (CA19015)

Statutes – Interpretation – Statute of Frauds, Section 4, Section 7, Section 8
Equity – Clean Hands Doctrine
Trusts – Express Trust

The appellants appealed from the decision of a Queen's Bench judge declaring that the land and fire insurance proceeds, arising from the destruction of a building were the property of the respondents, the land's prior registered owner (see: 2017 SKQB 173). The appellants' grounds of appeal included that the trial judge erred: 1) by finding an express trust in light of the respondents' pleadings; 2) as a matter of law by finding an express trust. They submitted that the respondents could not rely on part performance to satisfy the requirements of s. 7 of the Statute of Frauds for the trust agreement to be in writing, as part performance can only be used to avoid the requirement for writing under s. 4 of the Statute; and 3) in finding a voluntary resulting trust when the respondents had not come to the court with clean hands. HELD: The appeal was dismissed. In considering the standard of review, the court found that the trial judge had made no palpable or overriding error when she found that the parties' intention was for the appellant Nagel to hold the land in trust for the respondent Mosiuk in order to defeat the town's bylaw enforcement measure. The remaining grounds of appeal would be considered in light of the judge's findings of fact and credibility regarding the appellants, the real reason the land was transferred, and how the associated documents reflected it. With respect to each ground, it found that the trial judge had: 1) not erred in finding that the respondents' pleadings had claimed an express trust. Their assertion that the appellants held only the bare legal title was sufficient to assert a claim on behalf of the beneficiary of a trust and the appellants' own trial pleadings demonstrated that they clearly understood the respondents were claiming not only an express trust but a resulting trust as well; 2) not erred by relying on part performance to prove a trust under s. 7 of the Statute. As the respondents also pleaded the existence of a voluntary transfer resulting trust, it was open to her to find that they could claim the benefit of such a trust under s. 8 of the Statute. It was also open to her to find that the fraud exception can overcome the lack of writing; and 3) had not addressed the question whether the clean hands doctrine prevented the respondents from seeking a remedy from a court. However, she found as a fact that the appellants had instigated the scheme and implemented it. The court exercised its discretion respecting the application of the doctrine and based on that finding by the judge, held that no social interest would be served in permitting the appellant to retain the land and insurance proceeds.

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*A.G.P., Re*, 2019 SKPC 3

Kovatch, February 5, 2019 (PC19008)

Family Law – Child in Need of Protection

The Ministry of Social Services sought a temporary committal order for five children apprehended in February 2018. The Ministry had had a fairly lengthy involvement with the respondent parents before the apprehension because of concerns it had with the state and maintenance of the family home. Family supports were put in place, but any success with cleanliness and clutter management was short-lived. The apprehension occurred after the respondents had moved out of their rental accommodation. The landlord entered the premises and found the property to be in atrocious condition. He then called the Ministry and the police. An emergency worker with the Ministry visited the house and corroborated the landlord's observations. The children were immediately apprehended and placed with their mother's sister and parents. The trial took place in July and many photographs of the house were entered as exhibits. The Ministry called many witnesses including social workers, the landlord and members of the respondents' families. The witnesses all testified that the conditions in the house were deplorable and that they had had concerns for some time that the respondents were not keeping the children clean or looking after them properly. The parents testified that before moving out of the house, they cleaned it thoroughly and believed that someone else had entered the house after their departure and created the mess. The Ministry's application was for a three-month temporary committal order with conditions including that the respondents must participate in mental health and parenting capacity assessments.
HELD: The court granted the Ministry's application and made a six-month temporary committal order because it did not believe that the respondents could remedy their problems in only three months. The court attached the conditions requested by the Ministry. It found that the children were in need of protection under s. 37 of The Child and Family Services Act. It did not believe the respondents' evidence and remonstrated their counsel for failing in his duty to advise the respondents that there was no real prospect of the court accepting their position and that the focus of their defence should have been on the steps that they were taking or willing to take to establish that their children were no longer in need of protection.

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*R v Bucko*, 2019 SKPC 4

Cardinal, January 17, 2019 (PC19004)

Criminal Law – Care or Control – De Facto – Actual
Criminal Law – Care or Control – Presumption

Criminal Law – Driving with a Blood Alcohol Level Exceeding .08
Criminal Law – Impaired Driving

The accused was intoxicated after drinking at a bar. He arranged to take the free shuttle ride home that was offered by the bar. He was in the front passenger seat of the vehicle when its driver exited it to go back into the bar to see if anyone else needed a ride. The vehicle was running and unlocked. While the driver was in the bar, an officer observed the accused walk around the vehicle and enter the driver's seat. The accused was the sole occupant of the vehicle. When asked what he was doing, the accused said that he was waiting for a ride and indicated that he was in the passenger seat. The officer arrested the accused. The officer agreed that he did not see any brake lights come on; the engine did not rev; nor did the vehicle move in any manner. The accused admitted that he was highly intoxicated and had blacked out. The accused said that the vehicle stalled while he was waiting in it, so he got out of the passenger's seat and went around to the driver's seat where he got in and re-started the vehicle. He also testified that he recalled telling the officer that he was in the passenger seat and said he believed he was in the passenger seat. He said that he thought he left the driver's seat and went back to the passenger's seat after re-starting the vehicle. The issue was whether the accused was in care or control of the vehicle. The sub-issues considered by the court were: 1) whether the accused rebutted the presumption that he had been occupying the driver's seat to set the vehicle in motion; and 2) whether the accused had de facto care or control of the motor vehicle.
HELD: The court made the following findings: 1) the accused clearly occupied the driver's seat. The court concluded that the accused established on a balance of probabilities that he did not occupy the driver's seat for the purpose of setting the vehicle in motion. He rebutted the presumption; and 2) the court adopted the essential elements of care and control from Boudreault and addressed them as follows: a) with respect to whether there was an intentional course of conduct associated with the motor vehicle, the court commented that the accused had an intention to move from the passenger to the driver's seat. The court found that the vehicle was running, it had not stalled at any point, and the accused was upright in the driver's seat; b) the accused admitted that he was a person whose ability to drive was impaired or his blood alcohol level exceeded the legal limit; and c) the last element was a consideration of whether, in the circumstances, there was a risk created, as opposed to a remote possibility, of danger to persons or property. The court found that there was no realistic risk that the accused might put the vehicle in motion either intentionally or accidentally. There was no evidence that he did anything other than sit in the driver's seat. In finding so, the court noted that there was evidence at trial that the accused had two plans for a sober driver that evening. The stationary vehicle did not endanger any person or property in the manner in which it was parked. The accused was found not guilty of both charges.

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*R v Sidhu*, 2019 SKPC 10

Cardinal, January 25, 2019 (PC19009)

Criminal Law – Trial Procedure – Filming – Live streaming

The CBC and Postmedia applied to live stream and record the sentencing hearing of the accused. They revised their application so that only the submissions of counsel and/or the oral reading of the judgment would be videotaped and not the impact statements given by the victims. They argued that they should be allowed to stream, record and broadcast the proceedings because of the high public interest in this proceeding and that it would promote the "open court" principle. The Attorney General for Saskatchewan opposed the application on the basis that there was insufficient time to give the matter the consideration needed to canvass the issues, as live streaming is an unprecedented step. Although the applicants served notice on multiple other institutions who might have an interest in the application, none of them filed a response.
HELD: The application was dismissed. The court found that the applicants had not met the onus of persuading it to grant the application. There was neither sufficient time nor sufficient factual background to make a considered decision concerning live streaming.

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*R v Bellerose*, 2019 SKPC 13

Lane, February 1, 2019 (PC19010)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Crystal Methamphetamine

The accused pleaded guilty to possession of crystal methamphetamine for the purpose of trafficking. She was found in possession of 30 grams and was selling it to street level traffickers. Her trafficking involvement was prompted by her own addiction and need for money. The street value of the drug ranged from $3,000 to $4,000. In a pre-sentence report (PSR), the accused was identified as a 41- year-old woman of Métis descent. Her father was an alcoholic who abused her mother, who left him when the accused was four years old and raised the accused as a single parent. The accused said that she had not experienced any physical, sexual or emotional abuse when she was a child. She had a limited criminal record and had been employed throughout her life until 2017 when she suffered a brain aneurysm that left her unable to

work. She testified that she became involved with trafficking and began using drugs after she was discharged from the hospital. The defence filed a letter from an organization that helps individuals to reintegrate into the community after having difficulties with addiction. The report spoke positively about the accused's progress during her residency in the program and said she was a valued member of the community. HELD: The accused was sentenced to 27 months in custody less enhanced remand time. The court noted that as crystal meth was a Schedule I drug, sentencing should be guided by the principles of deterrence and denunciation, but the court also considered the personal circumstances of the accused in this case. It reviewed the mitigating circumstances such as the accused's brain injury and that she sold drugs to feed her addiction and the aggravating factors that she had minimized her involvement in the offences and was selling drugs for profit. As she seemed to be making some strides in the right direction by living in a treatment facility, the court reduced the sentence from the 33 months it would otherwise have given to the accused.

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*R v Custer*, 2019 SKPC 14

McAuley, January 31, 2019 (PC19011)

Criminal Law – Procedure – Mistrial
Criminal Law – Disclosure

The accused was charged with seven offences, amongst which were threatening two RCMP officers, contrary to s. 264.1(1)(a) of the Criminal Code and resisting arrest, contrary to s. 129(a) of the Code. The Crown provided its disclosure package at the accused's first court appearance. The defence made further disclosure requests in the month preceding the scheduled trial date and the Crown complied with respect to some, but not all, of the requests. When the trial commenced, the Crown and defence agreed to proceed with an application for Charter relief under ss. 7, 8, 9, 10(a) and (b) as a blended trial and voir dire. The Crown called its entire case as part of the voir dire and then closed their case. The defence advised that they would not be calling any evidence on the voir dire. The trial date was set for a week later when argument on the Charter application would be heard. The defence then advised they wished to call evidence on the voir dire prior to any arguments and requested an adjournment, and the Crown consented. The Crown had not made application to apply the evidence to the trial proper because of defence's position on the voir dire. During the adjournment, the defence requested further disclosure, but the Crown refused. The defence applied to the court to determine whether to order disclosure. The defence's request was for: cell block footage and other CCTV footage of the accused's time in custody related to these matters; any

RCMP radio communications relating to the incident giving rise to the accused's charges and any notes made during the debriefing between the RCMP officers involved in the accused's arrest and the NCO at the local RCMP detachment; all members' reports in relation to the incident and information related to when the report was initiated and concluded and any edits made; and discharge data log from the conducted energy weapon discharged in relation to the incident. These items were requested as "fruits of the investigation" as contemplated by R v Stinchcombe. The items would provide evidence of the accused's interaction with the investigating police, the question of whether the police use of force was justified and the credibility and reliability of the investigating officers. The Crown contended that if the court ordered the disclosure, it would change the manner and order in which it would be entitled to present its case as well as what evidence it decided to put before the court. Its ability to properly manage its case would be damaged by such a defence application made after the close of their case, creating an appearance of unfairness. The Crown argued that the defence was aware of these issues prior to the trial and had the opportunity to cross-examine the police officers but chose not to do so. Further, it submitted that if disclosure were ordered, the court should also declare a mistrial, thereby putting the Crown and the accused on fair ground to recommence the proceedings anew.
HELD: The application for disclosure was granted. The court granted a mistrial because ordering disclosure could irreparably alter the nature and fairness of the proceedings as a blended trial and voir dire, potentially harming the Crown's case. It found that the disclosure was the direct fruits of the investigation. It was directly relevant and went to the issue of whether excessive force was applied by the police officers. However, as the Crown had closed its case, it would be at a disadvantage due to the disclosure and how the defence might utilize it. To recommence the voir dire with the new disclosure would not remedy any potential damage to the Crown's case.

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*Chief Commissioner of the Saskatchewan Human Rights Commission v University of Regina*, 2019 SKQB 4

Krogan, January 4, 2019 (QB19006)

Statutes – Interpretation – Saskatchewan Human Rights Code, Section 29.7

The University of Regina applied for an order pursuant to s. 29.7(3) of The Saskatchewan Human Rights Code and Queen's Bench rule 15-12(2) requiring the complainant, Slopinski, to produce documents listed in a request for documents made by the University and for an order under s. 29.7(3) and Queen's Bench rules 5-18 and 5-23 obliging her to

attend oral questioning. Slopinski filed a complaint against the University in accordance with the Code and the Human Rights Commission conducted its investigation. At an unsuccessful pre-conference hearing between the parties, the university advised the commission that it would be requesting document disclosure and oral questioning. The commission refused to provide the documents and took the position that the university was not entitled to question the complainant. It argued that the hearing process under the Code is meant to be an abbreviated one and if the university's requests were permitted, the wording of s. 29.7(3) referring to a "hearing" would become meaningless. It would transform a hearing into a trial.
HELD: The application was granted. The court ordered that the documents sought by the applicant be provided to it by Ms. Slopinski and that she attend oral questioning by the University's solicitors before a court reporter. The court followed the decision in Robinson. The Code had been amended in 2011 so that hearings would be conducted in the Court of Queen's Bench and the Queen's Bench Rules of Court were available to the parties.

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*Carruthers v Carruthers*, 2019 SKQB 7

Goebel, January 9, 2019 (QB19007)

Family Law – Family Property – Division

The petitioner brought an application in March 2015 in which she sought a divorce, division of family property and spousal support after the breakdown of the 28-year marriage. Shortly after the marriage, the parties had moved to the respondent's parents' cattle farm in order to help them. The respondent's parents rolled all of their farm assets into a limited corporation in the early 1980s to facilitate intergenerational transfer of the operation in the future. The parties worked almost full-time on the farm with the expectation that they would eventually own and operate it. The corporation built a house for their use on corporate-owned land. They raised three children while trying to sustain the farm for very little recompense. They became shareholders in the corporation in 1996 with the petitioner owning 25 percent of the share and the respondent owning 30 percent. In order to meet their costs, the parties both obtained off-farm employment in late 1980s. When the respondent secured full-time employment in 2002 and began working towards a career as a millwright, the petitioner continued to work part-time so that she could meet the needs of the children, but she also absorbed more responsibilities for the farm operation. Negotiations began in 2008 between the parties and the parents to purchase the remaining 45 percent interest in the corporation, but they were unable to agree on a price or purchase plan. The parents moved out of their home on the

farm and into town and the purchase of their shares became necessary for their retirement. In 2009 the parties separated and the respondent moved into his parent's farmhouse. The parents brought an action in 2014 against the petitioner, the respondent and the corporation and retained a certified appraiser to appraise the corporation's land. They sought $500,000 in exchange for their shares and loans. The petitioner obtained financing from banks that enabled her to reach an agreement with the parents to transfer their shares to her for the amount they had requested. In her application for the determination of what constituted the family property and its value, the petitioner argued that: 1) the house in which the parties resided was not a family home set aside for special treatment pursuant to s. 22 of The Family Property Act. She proposed that the only those shares held by the parties at the date of application (55 percent) be divided between them and that the remaining 45 percent share was hers alone. The respondent argued that as long as 100 percent of the value of the shares were found to be divisible, the residence would be equally divided; 2) the 45 percent interest in the corporation she acquired after the date of petition was not family property and thus not subject to distribution under the Act. The respondent argued that as the shares had not been purchased at their fair market value, the difference between it and the purchase price represented the parties' "sweat equity" in the corporation earned throughout their marriage; 3) there were equitable reasons to diverge from the presumption of equal division under the Act insofar as s. 21(3)(j) specified tax adjustment on the value of the corporate shares. She also claimed under s. 21(3)(k), alleging that the respondent had dissipated family property; 4) she should receive spousal support on both compensatory and non-compensatory grounds, proposing the amount at $1,500 per month on an indefinite basis or a lump sum payment of $50,000 to be set off in the overall property distribution. HELD: The application was granted regarding the determination of the family property and its value. The court granted the parties' request that it refrain from making a specific distribution order. This left the parties with the opportunity to discuss with their accountants the options to distribute the assets and shares in the corporation to structure a distribution in the most taxefficient, and least disruptive, manner before the divorce was granted. The parties were given leave to seek further directions on those issues if they were unable to reach agreement. In response to the petitioner's assertions, the court held that: 1) under s. 2 of the Act, the house qualified as a family home. It was the parties' only residence for 27 years in which they had raised their family; 2) each party held an interest in the parents' 45 percent shares in the corporation at the date of the application. The evidence of the parents and the parties indicated that the parties had a recognized, but not yet qualified, claim against the parents at the date of application; 3) the value of the family property should be determined at the date of application. With respect to the value of the shares in the corporation, the court preferred the evidence provided by the petitioner's witness

regarding the calculations of the value of the cattle inventory, equipment and machinery, the houses and the land and set it at $2,800,900; 3) the value of the family property should be distributed equally. However, because of the potential negative impact on the ability of the corporation to operate as a going concern that might be caused by effect of the judgment regarding distribution, the matter was left to the parties to settle the issue of tax adjustment; and 4) the petitioner was entitled to spousal support on a compensatory basis. It was as a result of her support that the respondent was able to work full-time and progress in his career as a millwright. It was appropriate in the circumstances to award support as a lump sum payment. The petitioner's claim to support on a non-compensatory ground was not allowed because the parties' standard of living before and after the separation was modest and comparable. The petitioner had chosen not to advance her education or accept full-time employment in favour of operating the farm.

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*R v Pennington*, 2019 SKQB 12

Tochor, January 14, 2019 (QB19009)

Criminal Law – Evidence – Affidavits – Cross-Examination

The accused was charged with an offence contrary to s. 163.1(4) of the Criminal Code. He gave notice of his intention to challenge the evidence tendered against him on the basis of violations of ss. 8 and 9 of the Charter and to seek relief under ss. 24(1) and 24(2). Prior to trial, he applied for leave to cross-examine two police officers on affidavits they swore in support of applications for production orders and search warrants in the course of their investigations against him on the basis that there were insufficient grounds for the issuance of those orders. In support of his application, the accused submitted a list of nine requests for information that would be the subject of his cross-examinations. HELD: The application was granted. The court gave leave to cross-examine the affiants on some, but not all, of the proposed issues. It reviewed the respective affidavits and applied the test set out in Garofoli and found with respect to some of the questions that the proposed cross-examination would assist the accused's application on the basis of that it might help the court in considering the validity of a potential claim of an unintentional upload. Leave to cross-examine the affiants was granted respecting another set of questions pertaining to whether the officers received any judicial assistance in connection with the affidavits or whether they provided any additional information to the issuing justice beside their affidavits. These questions were relevant to the accused's challenge to judicial authorization. The court did not grant leave to cross-examine on another group of questions because

there was no reasonable likelihood that it would assist the court in determining an issue in the accused's application.

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*Thebaud v Saskatoon Co-operative Association Ltd. Board of Directors*, 2019 SKQB 14

Gabrielson, January 11, 2019 (QB19010)

Statutes – Interpretation – Co-operatives Act, 1996, Section 104
Administrative Law – Judicial Review – Mandamus

The applicant applied for an order from the court requiring the Saskatoon Co-op's board of directors to hold a special meeting for the purpose of removing the board of directors and replacing them. He deposed in his affidavit in support of the application that he organized a petition requesting a special meeting be held of the Saskatoon Co-op members pursuant s. 104 of The Co-operatives Act, 1996. In response, the board passed a resolution declining to call the requested special meeting and commented that it was aware that the petition was directly tied to the collective bargaining being conducted by the Co-op and one of its unions. The applicant had been a member of the union and continued to advocate for it. In this application, the Co-op argued that mandamus could only issue when it had refused to perform a public duty which had not been established by the applicant. Alternatively, as mandamus is a discretionary remedy, the court ought to exercise its discretion not to call a special meeting in the circumstances of this case where the applicant was attempting to improperly influence the board on behalf of the union.
HELD: The application was dismissed. The court determined that the applicant's request for mandamus could not be granted because his motives were to force his own objectives on the board to the detriment of the members of the Co-op.

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*Piller v Schmidt*, 2019 SKQB 16

Tholl, January 17, 2019 (QB19012)

Civil Procedure – Trial – Non-Suit
Civil Procedure – Queen's Bench Rules, Rule 9-26
Barristers and Solicitors – Negligence – Expert Evidence

The defendant applied pursuant Queens' Bench rule 9-26 for non-suit after the plaintiff closed her case. The self-represented plaintiff sued the defendant lawyer, alleging that he breached his fiduciary duty and the

standard of care he owed to her in negligence and contract in his conduct of the family law litigation in which he represented her and caused her to suffer damages because of delay. The plaintiff had retained the defendant to aid her to retain the family farm in an acrimonious family property dispute with her husband. She was successful and the judgment gave her the first right to retain the farm by paying an equalization payment to her husband and to pay numerous debts by a certain date or she would forfeit the right and the right to buy out the farm would pass to her husband. The history of the case became complicated after the judgment issued because the trial judge issued an addendum to it and extended the deadline to December 30, 2013 after the husband's counsel sought directions regarding the implementation. The husband's counsel also filed a notice of appeal in October 2013. The defendant then filed a notice of cross-appeal on behalf of the plaintiff, which was rejected by the registrar as being served beyond the time limit, but the plaintiff was not informed of the rejection. The plaintiff had trouble obtaining financing, but the defendant pressured her to honour the deadline and she managed to pay the funds except for debts stipulated in the judgment. In January 2014, the plaintiff's husband sought further directions from the judge, asserting that as the plaintiff had not complied with the judgment and addendum, she was no longer entitled to buy out the farm. The judge agreed and granted the husband 60 days to buy out the plaintiff. The plaintiff then hired new counsel and appealed the fiat. The Court of Appeal found that because the filing of the notice of appeal had stayed the judgment until it was abandoned, the effect was to extend the plaintiff's deadline to March 30, 2014. It also found the plaintiff had sufficiently complied with the judgment and the addendum before the end of March. The court set new deadlines and provided directions to conclude the matter. The plaintiff complied with them and obtained sole ownership and possession of the farm. In this action, the plaintiff alleged that the defendant breached his duties to her in the handling of her case after the trial judgments issued, thereby delaying her obtaining ownership in the farm. She claimed damages in the amount of $400,000 for lost income, legal fees and interest on interim financing. When the court addressed preliminary issues in advance of the plaintiff commencing her case at trial, she was asked if she proposed to call any expert witnesses and after lengthy discussion, she advised that she would not be calling a lawyer as an expert witness. The plaintiff testified on her own behalf and the only witnesses she called were her current spouse and a friend as witnesses. The defendant filed a non-suit application at the close of the plaintiff's case, asking that her claim be dismissed. He submitted that the plaintiff's failure to tender any expert evidence regarding the standard of care or causation was fatal to her case.

HELD: The defendant's application was granted. The court dismissed the plaintiff's case and declined to grant her leave to re-open her case to provide expert evidence. The plaintiff had failed to establish a prima

facie case in relation to any of her three causes of action by failing to provide sufficient evidence to establish that the defendant had breached the standard of care with respect to each allegation, except his failure to inform her regarding the rejection of her cross-appeal, but for which the plaintiff had not claimed damages. Due to the complexity of this case, the plaintiff would have to have presented evidence from a lawyer testifying as an expert in order to support, in particular, her allegations that the defendant failed to properly determine the amounts to be paid under the judgment and addendum, failed to inform her what steps she must take and failed to ensure the proper amounts were all paid by December 30th. She had also failed to provide sufficient evidence that the defendant's actions caused her any losses. The court found that there were no exceptional circumstances in this case that would permit the plaintiff to re-open her case. She was alerted to the possibility of calling an expert witness at the pre-trial and the commencement of trial and chose not to engage an expert.

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*R v Bear*, 2019 SKQB 22

Dawson, January 18, 2019 (QB19021)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine – Sentencing
Criminal Law – Sentencing – Aboriginal Offender – Gladue Factors

The accused pleaded guilty to having possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act and possessing firearms without a licence contrary to s. 91(1) of the Criminal Code. He had been found inebriated in his vehicle by the police. In the vehicle, they located 35 grams of cocaine. The accused admitted to the charge but said that he and his friends had jointly purchased the cocaine for their own use. At that time in 2016, the accused was addicted to cocaine. The rifles found in the vehicle belonged to members of his family and he used them for hunting. The accused was a member of the Kahkewistahaw First Nation and resided on the reserve with his common-law spouse and their four children. He had been raised by his mother and after she married another man, the accused was exposed to several forms of abuse within his home. His parents abused alcohol and both were residential school survivors. The accused had been involved in athletics all through his childhood, but at the age of 17, he was introduced to alcohol and marijuana. He quit school at 18 to support his family when his girlfriend, now his spouse, became pregnant. When he was 23, they separated and his spouse would not allow him to see his children. He began associating with people who enabled him to abuse alcohol and introduced him to cocaine. It was at this time that he was charged with the offences. He

then reconciled with his spouse, and their relationship was now stable and focused on raising their children. He stopped using drugs and alcohol. Since the offence the accused had completed his grade 12 so that he could attend university, worked at three jobs to support his family, attended AA meetings and participated in his Aboriginal culture. Many letters of support were filed with the court on his behalf. The pre-sentence report (PSR) indicated that the accused was at low risk to reoffend and that he had taken full responsibility for his actions. The Crown submitted that the accused should receive a 20-month carceral sentence for trafficking and a four-month consecutive sentence for the firearms offence.

HELD: The accused was sentenced to 90 days' incarceration for trafficking, to be served intermittently from Friday to Monday, followed by two years' probation. For the firearms offence, he was sentenced to 30 days to be served concurrently and intermittently. The court found that the gravity of each offence was at the very low end and the accused's moral culpability was low. The only aggravating factor was the type of drug and that the rifles were in the vehicle while the accused was unconscious. There were many mitigating factors: the accused entered guilty pleas, expressed remorse and cooperated with the police throughout. The cocaine was purchased to feed his own addiction and not for profit. He had only one previous conviction. He was dedicated to his family and had been a contributing member of society. His risk to reoffend was low and he had taken steps to address his risk factors for re-offending. The court took into account the Gladue factors present in the accused's life and considered that they were mitigating and had an impact on his moral blameworthiness.

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*Knight Archer Insurance Ltd. v Dressler*, 2019 SKQB 30

Kalmakoff, January 25, 2019 (QB19027)

Injunction – Interim – Restrictive Covenant – Non-Solicitation

The applicant, an insurance brokerage company, applied for an interim, interlocutory and permanent injunction against the defendants, D.S. and D.S., two former employees. It sought an order restraining them from soliciting any of its clients or using any confidential information belonging to it. Each defendant had accepted the applicant's letters of offer, containing a non-solicitation agreement. It stated that upon termination of their employment they would not directly or indirectly solicit, contact or approach any client of the applicant or its partner companies or take or hire away any employee of the applicant for the purpose of employing that person in any business competitive with the applicant. The agreement defined "competitive" as being a business or purpose which offered substantially the same products or services as

the applicant, in the same jurisdiction where it carried on business. It defined "client" as being a client with whom they had contact, or from whom they received confidential information, on behalf of the applicant or any of its partner companies, in the 12-month period prior to cessation of employment. The agreement did not define "confidential information". Both defendants resigned from the applicant's employ in 2018 and began working for the defendant, TIPI General Partner Corporation (TIPI), a group of First Nations-owned insurance brokerages. The applicant alleged that before leaving its employ, D.S. solicited and persuaded two of its First Nation clients to sign brokerage agreements and take their business to TIPI.
HELD: The application was dismissed. The court found that the applicant had not met the first leg of the three-part test set out in RJR – McDonald to obtain injunctive relief. It had not established that there was a high likelihood that the restrictive covenant in the employment contracts would be upheld, in either the original or that contained in the contract amendment. They were ambiguous as to the prohibited activity and prima facie unenforceable. Neither of the restrictive covenants contained any definition of "partner companies" and "confidential information" that would be essential to clearly identify which persons or entities comprised the "clients" that D.D. and D.S. would be prohibited from soliciting or contacting for business purposes. Further, the applicant had not demonstrated that it would suffer irreparable harm if the injunction was not granted. Based on the evidence, the applicant could readily determine which, if any, former clients it has lost to TIPI and thus readily determine the value of the business those clients represented. Calculations of a reflective damage award may be made using that information.

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*Kurtz v Kurtz*, 2019 SKQB 31

Brown, January 29, 2019 (QB19028)

Family Law – Spousal Support – Interim
Family Law – Child Support – Interim
Family Law – Spousal Support Advisory Guidelines

The petitioner brought an application for an order providing for interim spousal support, interim child support, joint custody and shared parenting. The parties separated in 2017 after 17 years of marriage. They shared parenting of their two children, aged 17 and 15. The petitioner mother continued to occupy the family home. The respondent had paid the mortgage and related expenses and RESP contributions of approximately $2,000 per month during the separation. He contended that he could not continue to pay these costs and pay support. The petitioner asked for full spousal and child support from

the respondent and asserted that with that income she would be able to carry her share of the expenses until the family home was sold. The issue was what level of spousal and child support was appropriate in this interim application.
HELD: The court granted an order that the parties would have joint custody and shared parenting of their children. The respondent was ordered to pay the petitioner $900 per month in spousal support and $953 per month in child support. Section 7 expenses were apportioned at 80 and 20 percent for the respondent and the petitioner respectively. The petitioner should pay one-third of the home expenses from her support income. If she chose not to pay her share, then the respondent would assume the responsibility for the costs and he would not have to pay his support obligations. In the circumstances, it was not reasonable to expect the respondent to pay all the costs associated with the family home and full support as set out in the Guidelines.

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*Mahin v Kolosnjaji*, 2019 SKQB 32

Smith, January 29, 2019 (QB19029)

Wills and Estates – Wills – Formalities – Witnesses
Statutes – Interpretation – Wills Act, 1996, Section 13

The applicant applied for an order under s. 13(5) of The Wills Act, 1996 declaring that his interest granted under the will of the deceased, Duch, was not void by reason of him being a witness to the will. The respondent executor opposed the application. The applicant lived in Kuch's house as a tenant and they were also friends. Kuch suffered a stroke and was visited in the hospital by the applicant and two others of his friends, Walter Matweyko and his mother, Helen Mateweyko. During one visit, while the applicant and the Matweykos were present, Kuch, speaking in Ukrainian, asked Walter to write down in English what would happen upon his death. The priest of Kuch's church was also in the room. Walter deposed that Kuch told him that he wanted the Mateweykos and the applicant to have his home and to name the priest as executor. The applicant did not speak during the process and Walter stated that he did not believe anyone influenced Kuch to say what he did. The priest advised that Kuch should sign the document. After nurses told him that they could not witness it, Walter, his mother, the applicant and the priest all signed it. As a beneficiary, the applicant was required to bring his application that the will was valid within six months of the granting of probate under s. 13(6) of the Act. The applicant brought this application beyond that period and requested an extension of time. He argued that the court could do so under Queen's Bench rules 1-4 and rule 1-6.
HELD: The application was granted and the applicant was entitled to

one-third of the net proceeds from the sale of Kuch's home. The court found that it could not extend the statutory time period pursuant to its remedial powers under Queen's Bench rules 1-4 or 1-6, following the Court of Appeal's decision in Hunter. However, the application could be saved by s. 13(4) of the Act because there were sufficient witnesses to the will without the attestation of the applicant as beneficiary.

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*B.M. v P.M.*, 2019 SKQB 36

McIntyre, January 29, 2019 (QB19032)

Family Law – Child Support – Application to Vary
Family Law – Child Support – Adult Child

The respondent applied to vary s. 3 child support for three children of the marriage as of April 1, 2017 and an order requiring the petitioner to pay her proportionate share of s. 7 expenses, including post-secondary expenses for each of the three children. At the time of trial, the oldest child, E.M., was found to be primarily in the care of the respondent while E.E. and A.M. were subject to a shared parenting arrangement. The respondent's 2015 income was $145,900 and the petitioner's income was $94,700 for the purposes of the Guidelines. As at July 1, 2015, the petitioner was ordered to pay the respondent $797 per month to the respondent for the support of E.M.; and $643 per month for the support of E.E. and A.M. and the respondent was to pay the petitioner $1,940 per month for the support of E.E. and A.M. (see: 2017 SKQB 331). The petitioner was ordered to pay her proportionate share of s. 7 expenses from 2017 forward. The respondent claimed that the petitioner should pay him for her share of the expenses incurred by the three children between January 2017 and spring 2018. The issues were: 1) the income of the parties for Guidelines purposes; 2) the amount of child support for E.E., now 19 and attending the University of Regina (U of R). The respondent argued that the parties had always agreed that they would support their children to attend university. The petitioner disagreed and said that they would only pay living expenses if their children continued to reside with them and attend U of R. Furthermore, E.E. was earning $30,000 from summer employment. In the case of E.M., she chose to attend the University of Victoria (U Vic) because of her interest in rugby. The respondent paid $25,900 in expenses related to school, residence, travel costs and sports fees. E.M.'s employment income was approximately $6,000. Since the divorce, E.M and the petitioner had been estranged. She took the position that her child support obligation should cease for E.M. as of August 31, 2018 when she turned 18 and withdrew from the petitioner's care. If she was required to contribute, it should be on the basis as if E.M. were attending U of R. Regarding A.M., the respondent claimed all of the expenses he paid for

participation in various sports at high school. The petitioner argued that the claim should be dismissed because the respondent incurred the expenses without consulting her.

HELD: The respondent's application was granted in part. The court found with respect to each issue that: 1) the respondent's Guideline income for 2016 was $152,700 and $153,200 for 2017. The petitioner's 2016 income was $101,200 and her 2017 income was $110,700; 2) the hybrid parenting arrangement continued. Based upon their annual incomes for each year, the court determined the amount of table support payable by each party for six-month periods commencing in July 2017; and 2) regarding E.E., ordering child support under s. 3(2)(a) of the Guidelines and s. 7 contributions would be inappropriate because of his income: he had been able to withdraw from his parents' charge. In the case of E.M., it was reasonable for her to pursue her education at U Vic and her estrangement from the petitioner did not disentitle her to support. Of her total expenses, she would have to be responsible for $10,000. The petitioner's proportionate share of 40 percent of the remainder was $5,700 and she was ordered to pay the respondent $700 per month as of September 2018. The petitioner was ordered to pay her share of s. 7 expenses for A.M.'s sports activities in the future and to reimburse the respondent for her share of the amounts already paid by him.


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