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

Volume 22, No. 1 **January 1, 2020**

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Whitmore Ryan-Froslie Leurer, October 2, 2019 (CA19097)

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The appeal concerned whether the Saskatchewan Human Rights Commission (SHRC) properly dismissed a complaint. The appellant was dismissed from his employment with the respondent. He was unsuccessful in grieving the dismissal pursuant to the terms of the collective bargaining agreement with the respondent (arbitrator's decision). The appellant also complained to the SHRC and his complaint was dismissed (SHRC decision) because the substance of the complaint had been dealt with in the labour grievance procedure. The Court of Queen's Bench dismissed the appellant's application for judicial review. The appellant also applied to adduce new evidence. The union to which the appellant belonged initiated a grievance alleging his termination was without cause. The arbitrator's decision was 50 pages long. The appellant also commenced a civil action against the respondent and other employees, including union representatives. The claims were dismissed upon the defendants' application, as was the appellant's appeal from the dismissal. The appellant's claim to the SHRC alleged that the respondent's termination of him was discriminatory. Section 30(2)(d) of the current Human Rights Code, The Saskatchewan Human Rights Code, 2018 (s. 27.1(2)(d) of the Code at the time), gives the chief commissioner authority to defer

further action if another proceeding would be more appropriate. The parties agreed that the Figliola/Hebron framework that was used by the chief commissioner was applicable to the determination of whether the respondent should have been allowed to pursue his human rights complaint. The issues were: 1) whether the chambers judge correctly identified and applied the standard of review applicable to the chief commissioner's determination that the SHRC and the arbitrator enjoyed concurrent jurisdiction to decide the appellant's human rights complaint; 2) whether the chambers judge correctly identified and applied the standard of review applicable to the chief commissioner's determination that the complaint before the SHRC was "essentially the same" as that determined in the grievance arbitration; 3) whether the chambers judge correctly identified and applied the standard of review applicable to the chief commissioner's determination that the grievance arbitration provided an opportunity for the appellant to know the case to be met and have a chance to meet it; and 4) whether the chambers judge erred by not finding error by the chief commissioner for ignoring s. 28 of The Worker's Compensation Act (WCA).
HELD: The appeal was dismissed, as was the application to adduce fresh evidence. The issues were determined as follows: 1) the chambers judge was correct in confirming the correctness of the SHRC decision that the grievance arbitrator and the SHRC had concurrent jurisdiction to decide the appellant's human rights complaint; 2) the appeal court agreed with the chambers judge that a reasonableness standard should be applied when the court reviewed the chief commissioner's determination on the second step of Figliola analysis. The chief commissioner was found to have been reasonable in concluding that the substantive issues at play before the grievance arbitrator were essentially the same as those the appellant had been seeking in his complaint to the SHRC; 3) there were three determinations to be made within this issue: a) whether the chambers judge was correct that the applicable standard of review was reasonableness; b) whether the appellant's fresh evidence should be admitted; and c) whether the chambers judge correctly applied the applicable standard of review. The determinations were made as follows: a) the appellant said that he was denied a fair hearing before the arbitrator so his human rights complaint should have been allowed to proceed. The appeal court found that many of the appellant's arguments did not relate to issues of procedural fairness but rather to his relationship to and interaction with his union representative. The appellant was found to be raising questions regarding whether his union breached its duty of fair representation as per s. 6-59 of The Saskatchewan Employment Act. The appellant had an outstanding application with the Labour Relations Board, which was the proper forum for the determination. The chambers judge correctly determined the standard of review; b) the proposed fresh evidence was irrelevant because it would not have been appropriate for the chief commissioner to have inquired into the quality of the representation between the union and the appellant; and c) the chambers judge

correctly held that the chief commissioner's decision was reasonable; and 4) the grievance arbitrator could not take into account s. 28.1 of the WCA because it had not come into effect until after the arbitrator's decision. The appeal court did not find that the WCA had application in any event. The appellant's appeal was dismissed with costs in favour of the respondent.

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R v Arnault, 2019 SKCA 109

Jackson Whitmore Schwann, October 18, 2019 (CA19108)

Criminal Law – Appeal – Acquittal – Exclusion of Evidence
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Criminal Law – Defences – Charter of Rights, Section 8, Section 24(2)
Criminal Law – Firearms Offences
Criminal Law – Search and Seizure – Recognizance – Search Clause – Roommate

The respondent was charged with weapons and drug-related offences after his home was searched. He shared the home with K.S., who had a provision in his recognizance that the police were permitted to do a cursory search of his residence for alcohol, drugs, or weapons. The respondent also had a recognizance, but his did not have a search clause. After voir dire, the respondent's s. 8 Charter rights were found to have been violated. The evidence obtained from the illegal search was excluded and the respondent was acquitted of all charges. The provincial and federal Crowns appealed. Constable L. testified that she saw the following in the residence: a spoon with drug residue on it; a bladed weapon in an open closet; and alcohol on the kitchen table that one of the visitors in the house said he brought in to share with the respondent. A sawed-off shotgun was located behind a couch cushion by Constable H. After the shotgun was located, all the people in the house were arrested. A more robust search ensued. More weapons, drugs, and drug paraphernalia were located. The trial judge found that the respondent enjoyed a reasonable expectation of privacy in the shared dwelling and that the search was unreasonable. The appeal court interpreted the trial judge to conclude that the search was unreasonable in relation to the respondent as soon as the police entered the residence. The trial judge conducted a s. 24 Charter analysis and found that the s. 8 breach was serious. The respondent had advised the officers that he did not consent to the search. The impact of the breach was found to be substantial. The admission of the evidence would have brought the administration of justice into disrepute, according to the trial judge. The trial judge also found that the search was not cursory, as was allowed by K.S.'s recognizance. The issues on appeal were: 1) was the search of the

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residence an illegal search that breached the respondent's s. 8 Charter rights; and 2) did the trial judge err by excluding all relevant evidence pursuant to s. 24(2) of the Charter?
HELD: The appeals were dismissed. The issues were determined as follows: 1) the appeal court concluded that the trial judge properly framed the s. 8 analysis by first determining that the respondent had a reasonable expectation of privacy and further, considering the search to determine whether it was unreasonable. The trial judge's reasons were not expansive, but they were adequate. The reasons did not impair the Crown's right of appeal. The trial judge did address the final Collins factor in his analysis. He determined that the search was not carried out in a reasonable manner because it went beyond a cursory search. The appeal court then considered whether the search was authorized by law as against the respondent. The Crown argued that the warrantless search should be considered at each stage of the police search, with separate sources of authority for each phase of the police search. The respondent did not waive his constitutional rights: he expressly objected and challenged the police authority to search his residence. He did not consent to the search condition that his roommate had. The appeal court looked at whether the police can rely on third-party consent to enter and search a home as a source of authority as against a co-resident. If the appeal court had to decide on that matter it indicated that, broadly speaking, the police may not rely on the authority to effect a search against another person who happened to reside in the same home as someone subject to a search condition on a recognizance. The appeal court was also satisfied that the trial judge did assess co-resident consent from the perspective of the respondent's reasonable expectation of privacy by finding that his reasonable expectation of privacy was not diminished by the search clause in the roommate's recognizance. The plain view doctrine was also found not to assist the Crown; 2) the appeal court owed the trial judge considerable deference with respect to the admissibility of the evidence. The Crown argued that the trial judge's failure to conduct a full and robust s. 8 analysis should lead to a new trial since the findings would have had a substantial impact on the s. 24(2) analysis. The appeal court rejected the argument for the same reasons it was rejected in the s. 8 portion of the appeal. The Crown also argued that the trial judge failed to conduct a principled analysis of the Grant factors. With respect to the first factor, the Crown's argument assumed that the police could lawfully rely on the roommate's recognizance to enter the home vis-à-vis the respondent. Further, the appeal court could not just substitute its own view of police conduct in place of the trial judge's unless the trial judge's were tainted by clear and determinative error. The appeal court interpreted the Crown's argument with respect to the third Grant factor as one regarding a lack of sufficient reasons. A trial judge is presumed to know the law. The appeal court concluded that the trial judge did not commit an error in principle or unreasonable finding of fact that would justify

intervention with his decision to exclude evidence. The appeals were dismissed.

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Johnson v Saskatchewan Government Insurance, 2019 SKCA 110

Richards Whitmore Leurer, October 30, 2019 (CA19109)

Insurance – Automobile Insurance Act – Appeal – Costs
Insurance – Automobile Accident Insurance Act – Benefits – Surviving Dependents
Statutes – Interpretation – Automobile Insurance Act, Section 114, Section 145
Statutes – Interpretation – Personal Injury Benefit Regulations

The appellants were the three dependent children of the deceased who died in a motor vehicle accident. The deceased did not have a surviving spouse within the meaning of The Automobile Accident Insurance Act (AAIA). The appellants each claimed, pursuant to s. 145 of the AAIA, to be entitled to the death benefit that would otherwise have been available to a surviving spouse. The respondent insurer determined that one surviving spouse benefit was to be divided amongst the appellants as provided in The Personal Injury Benefits Regulations (Regulations). On appeal to the Court of Queen's Bench, the respondent's decision was upheld. Section 144 of the AAIA sets out the benefit payable to a surviving spouse and s. 145 indicates that if there is no surviving spouse, the dependent of the deceased is entitled to the spousal death benefit. The parties agreed that the spousal death benefit was $66,696. The respondent relied on s. 26 of the Regulations to divide the benefit amongst the appellants with the payments being $7,778.44, $24,659.32, and $34,258.24, from oldest to youngest dependent. The appellants argued that the Queen's Bench judge erred in his interpretation of the Act and the Regulations because the Act refers to "the" dependent. They also point out that the Regulations do not refer to the minimum benefit payable under s. 144 of the Act.
HELD: The appeal was dismissed. The appeal court found that the grammatical and ordinary sense of the words used in the AAIA and the Regulations did not support the position of the appellants. If the word "the" created any ambiguity in s. 145(3), the appeal court found that it could be resolved by s. 145(6). Section 145(6) requires that benefits be paid "in the prescribed manner" when there is more than one dependent. If each dependent were entitled to the full amount of the benefit, there would be no need to include s. 145(6) in the AAIA. The appeal court disagreed with the appellants that the lack of mention of ss. 144(4) in s. 26 of the Regulations meant that the appellants were each entitled to a full spousal death benefit payment. Further, the appeal court found that s. 26 of the

Regulations was lawfully authorized by the terms of the AAIA. The Act contemplates that multiple dependents will share in a death benefit in a manner prescribed in the regulations and the AAIA authorizes the making of such regulations. The appellants indicated that there should be an enhanced order for costs in their favour regardless of how the appeal was resolved. The AAIA puts in place a no-fault regime that does not allow them to sue for damages. They indicated that they should not be required to pay the cost of legal services. They indicated that they should not receive less than what the AAIA contemplated after legal fees are taken into account. When no-fault was introduced in the AAIA, it provided for solicitor and client costs to a claimant successful at Queen's Bench. In 2002, there were amendments to the AAIA that have been interpreted to mean that solicitor and client costs are no longer mandatory. The appeal court did not consider an award of enhanced costs, noting that the appellants were not successful on any application, nor was it a situation where the merits of the case were sufficiently strong or where the case was sufficiently "close to the line" as to make a costs award appropriate even though the appeal was not successful. The appeal court did not make an order with respect to costs.

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R.D.F. v R, 2019 SKCA 112

Richards Jackson Tholl, October 31, 2019 (CA19111)

Criminal Law – Young Offender – Sentencing – Adult – Appeal Statutes – Interpretation – Youth Criminal Justice Act, Section 27, Section 72

The appellant appealed the decision of a Provincial Court judge in which he was sentenced as an adult (see: 2018 SKPC 28). The appellant had pleaded guilty to two counts of second-degree murder and seven counts of attempted murder. He had committed the offences just before his eighteenth birthday. After the Crown applied for an order that he be sentenced as an adult pursuant to s. 64 of the Youth Criminal Justice Act (YCJA), substantial evidence was presented at a sentencing hearing regarding the appellant. The sentencing judge found the Crown had established the two requirements under s. 72(1) of the YCJA by rebutting the presumption of diminished moral blameworthiness or culpability and that a youth sentence would not be of sufficient length to hold the appellant accountable for his offending behaviour. The primary ground of appeal was whether the sentencing judge erred in determining the Crown had rebutted the presumption of diminished moral culpability. The defence submitted that the court's errors included misconstruing or failing to take into account the evidence regarding his cognitive and mental health issues, his diagnosis of Fetal Alcohol Syndrome Disorder (FASD) and his

Gladue factors by focusing on the seriousness of the offences rather than regarding it as only one factor to be considered in her determination under s. 72(1)(a). Jackson J.A., writing in dissent, restated the issue as whether the sentencing judge gave proper effect to the presumption of the constitutional principle that a young person is less morally responsible or less culpable than an adult and that the Crown must justify the loss of a youth sentence.
HELD: The appeal was dismissed. In his judgment for the majority, Tholl J.A. noted first that the matter had not been appealed on the ground that the sentencing judge applied the wrong standard of proof to the presumption of diminished moral culpability under s. 72(1)(a) of the YCJA nor on the ground that the judge had applied the wrong burden of proof in considering s. 72 as she clearly identified that the Crown bore the burden of proof to displace the presumption. Under s. 72(5) of the YCJA, a decision to sentence a young person as an adult is considered part of the sentence upon appeal. The standard of review of the sentencing judge's decision under s. 72 is the same standard the court applies when reviewing a sentence, which is one of deference to the judge's decision, and the court would intervene only when the sentence is demonstrably unfit or there has been an error in principle such as a failure to give appropriate weight to a relevant factor or reliance on an irrelevant factor that must have had an impact on the sentence. The findings of fact made by a sentencing judge under s. 72 of the YCJA attract deference and can only be overturned if they involve palpable or overriding error and the court is precluded from reweighing the evidence and substituting its views for those of the sentencing judge. The court found that the sentencing judge had not erred in her determination that the Crown had rebutted the presumption. She had not ignored or misapprehended the evidence of his cognitive and mental health issues. She was aware of the conflicting evidence regarding them and his level of maturity and accepted that he had cognitive difficulties. In assessing what effect his difficulties had on his moral culpability, the judge concluded that his actions were not those of someone of lower maturity or who did not have a full consideration of the results of those actions. Given the standard of review, these findings were open to the judge and the court could not interfere with them. She had not inappropriately focused on the seriousness of the offences or given improper consideration to their seriousness in a way that would warrant intervention by the court.
In dissent, Jackson J.A. allowed the appeal and set aside the sentence. The appellant would receive the maximum youth sentence: ten years from the original imposition of sentence to be divided between six years in custody and four years in the community under supervision. Under s. 37 of the YCJA the appeal from an order under s. 72(1) is the same as an appeal of an adult sentence under the Criminal Code and the court must consider the fitness of the order imposed. Its review extends to considering whether there was an error in principle that materially affected the sentence and, if so, the appellate court may set aside the sentence and conduct its own analysis to determine a fit sentence in the

circumstances. The standard of review regarding finding of fact in a criminal context is an inquiry as to whether the finding is reasonable or whether it is supported by the evidence as a means of considering the real issues of material error and demonstrable unfitness. An appeal from sentence is not about individual facts, but about the sentence as a whole. However, where a fact must be reviewed, the standard of review is whether there is evidence to support the finding of fact or whether the finding is reasonable. The civil standard of palpable and overriding error with respect to findings of fact is inappropriate to appeals from sentence. The judge found that the appellant planned the crimes and executed them in a way that belied his intelligence and because of their seriousness, she found his actions "were not impulsive nor were they the actions of someone at a 'lower mental maturity than his chronological age' or someone who 'acted violently without full consideration of the results of his acts'". In order to arrive at this conclusion, the sentencing judge did not give proper effect to the constitutional presumption. She reasoned from the appellant's actions and their seriousness to the conclusion that the Crown had overcome the presumption. By law, the focus cannot be on the circumstances and seriousness of the offence only. There was no evidence in this case that showed that the appellant was functioning as an adult at the time of the offences. In addition the judge accepted the evidence that he suffered from documented cognitive impediments and all the experts agreed he was intellectually challenged. The judge did not reject the defence's evidence with respect to the appellant's mental functioning and its effect on his ability to make proper decisions nor did she give reasons why she preferred the Crown's evidence and thereby did not give proper effect to the constitutional presumption.

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Pelletier v R, 2019 SKCA 113

Ottenbreit Caldwell Ryan-Froslie, November 1, 2019 (CA19112)

Criminal Law – Assault – Aggravated Assault – Conviction - Appeal

The appellant, Pelletier, appealed his convictions and sentence for one count of breaking and entering and committing an aggravated assault and two counts of breaking and entering and committing assaults, contrary to s. 348(1)(b) of the Criminal Code. For each of these offences he received a sentence of seven years of imprisonment to run concurrently. The appellant, Tawiyaka, appealed his conviction for the same offences as Pelletier. The appellants and two others, Starr and Gray, all of whom were members of the Native Syndicate (NS) street gang, entered the home of the victim, a former NS member. The appellants kicked and stomped on the victim while Starr held the victim's wife and his daughter to prevent them from helping him. Initially the victim's

wife (N.C.) refused to cooperate with the police because she said she knew the street rules and what would happen to a "snitch". She later gave a statement identifying Pelletier and Starr as having been among the assailants. She had known Pelletier for many years through her husband's involvement with the NS. She did not know Tawiyaka. Gray testified that she went to the victim's home with the appellants and Starr and she identified Tawiyaka as well as Pelletier as having assaulted the victim. Gray testified that she knew at what time the assault had occurred because after leaving the scene, she had gone to her home and found it on fire. She said that she thought that it was 4 or 5 am, but evidence from the fire department differed. The appellants were tried together and conceded all the elements of the offence but that of their identity. The trial judge accepted N.C.'s identification of Pelletier and found that she was a credible witness, rejecting the argument put forward by Pelletier's counsel that N.C. was not credible because she was angry and defiant in giving her testimony in court and she refused to answer some questions. Regarding Gray's evidence, the judge expressed some concerns because Gray was facing serious criminal charges unrelated to the trial, had a prior criminal record and was an admitted former member of the NS. She instructed herself to approach Gray's testimony with caution and to have regard to confirmatory evidence with respect to her truthfulness. The judge accepted Gray's identification of both Pelletier and Tawiyaka because it was consistent with N.C.'s testimony as to the details of the assault. The appellants argued that Gray was not telling the truth because her testimony about the timing of the assault and when the fire occurred was implausible. The judge found that Gray was mistaken about the time at which the assault had occurred. Pelletier's grounds of appeal were that: 1) N.C.'s refusal to answer questions and the trial judge's failure to properly deal with that matter resulted in an unfair trial; and 2) the trial judge misapprehended N.C.'s evidence in finding her credible despite her conduct during cross-examination. Pelletier's and Tawiyaka's common grounds of appeal were that: 3) the trial judge misapprehended Gray's evidence in finding her credible and as a result, the verdicts were unreasonable or unsupported by the evidence.

HELD: Pelletier's appeal of his convictions and sentence was dismissed. Tawiyaka's appeal of his convictions was dismissed. The court found with respect to Pelletier's grounds that: 1) the trial judge had dealt with the N.C.'s difficult cross-examination properly. Defence counsel's questioning provoked her refusal to answer certain questions, but the refusal did not affect nor prejudice Pelletier's ability to make full answer and defence to the charges; 2) the trial judge did not misapprehend any evidence that would touch on N.C.'s credibility. She had properly engaged in reconciling her unequivocal identification of Pelletier with her demeanour on the witness stand and the other evidence in making a credibility determination; 3) the trial judge had not misapprehended Gray's evidence. She recognized the contradictions in her evidence with the documented timelines of the assault and the fire and regarded it as

unreliable. That finding did not preclude the judge from finding that Gray was credible. The verdicts were not unreasonable nor unsupported because the trial judge had not misapprehended the evidence. Pelletier's sentence was not demonstrably unfit.

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Fiesta Barbeques Ltd. v Andros Enterprises Ltd., 2019 SKCA 114

Richards Caldwell Schwann, November 5, 2019 (CA19113)

Civil Procedure – Parties – Application to Add a Third-Party Defendant – Appeal
Civil Procedure – Queen's Bench Rules, Rule 3-31
Statute – Interpretation – Contributory Negligence Act, Section 7

The appellants, Fiesta Barbeques Ltd. (Fiesta) and Wolfedale Engineering Ltd. (Wolfedale), were named defendants in an action. They appealed the decision of a Queen's Bench chambers judge that dismissed their application for leave to file a third-party claim against the respondent, Vomar Industries Ltd. (Vomar) (see: 2018 SKQB 67). The action against the defendants arose because another defendant, Bennett, was using a propane gas barbeque (BBQ) that caught fire and caused significant damage to the apartment building in which Bennett lived. The plaintiffs claimed against Fiesta and Wolfedale in negligence for failing to properly design, manufacture or assemble the BBQ and other failures and against Bennett for failing to keep the BBQ in a safe operating condition. Later, information surfaced that the fire was caused by the mechanical failure of the propane cyclinder that had been requalified by Vomar. The plaintiffs then applied under Queen's Bench Rules 3-72 and 3-84 to amend their claim to add Vomar as a defendant, alleging negligence and, alternatively, if the applicable limitation period had expired, seeking leave to amend the claim pursuant to s. 20 of The Limitations Act (LA). The application was dismissed because Chicoine J. had found that the relevant limitation period had expired and that under s. 20 of the LA, the proposed amendment did not arise from the same occurrence as the original claim and there was no connection between Vomar, Fiesta and Wolfedale. Further, Vomar would be prejudiced by the delay (see: 2017 SKQB 234). Fiesta and Wolfedale then brought their application to file a third-party claim against Vomar under Queen's Bench rule 3-31 and s. 7 of The Contributory Negligence Act (CNA). The chambers judge applied the considerations used in s. 20 of the LA: the existence of a prima facie cause of action; a connection to the main action, causal or arising out of the same transaction; and absence of prejudice to Vomar. He was satisfied that the appellants met the first requirement but found that he was bound by the determinations reached by Chicoine, J. with respect to the second and third

requirements. Further, he found that Vomar had not had the propane tank for over a decade and it was no longer available for inspection. The appellant submitted that the chambers judge erred by taking the wrong approach in treating their application as one made to add a defendant under s. 20 of the LA and made errors of fact relating to the prejudice Vomar might suffer.
HELD: The appeal was allowed and the decision of the chambers judge set aside. The appellants were entitled to file their proposed third-party claim against Vomar. The court found that the chambers judge had erred in principle by running together the approach used by Chicoine J. in the application involving s. 20 of the LA and the approach used to determine whether the appellants should be allowed to commence a third-party claim against Vomar pursuant to s. 7 of the CNA. In addition, the chambers judge erred in his finding regarding prejudice to Vomar in that the evidence showed that the propane cylinder still existed and was available for inspection and because Vomar's business records would allow it to defend itself.

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Suteau v R, 2019 SKCA 115

Caldwell Barrington-Foote Ottenbreit, November 5, 2019 (CA19114)

Constitutional Law – Charter of Rights, Section 9, Section 10(a) – Appeal
Statutes – Interpretation – The Traffic Safety Act, Section 209.1

The appellant appealed the decision of a summary conviction appeal court judge (appeal judge) that overturned the trial judge's findings of breaches under ss. 9 and 10(a) of the Charter in the circumstances of the appellant's arrest. The trial judge excluded material evidence under s. 24(2) of the Charter as a result of the breaches and entered an acquittal on the charge of refusing to provide a breath sample contrary to s. 254(2) of the Criminal Code (see: 2016 SKPC 79). The Crown appealed and the appeal judge rejected the trial judge's conclusion under s. 9 of the Charter. The trial judge had found as a fact that the arresting officer had not formed a suspicion that the appellant had alcohol in his body at the time the officer directed him to accompany him to the police vehicle. The appeal court judge found otherwise. The appeal judge also found error in the trial judge's approach to the allegation of breach under s. 10(a) and ordered a new trial. He noted that the trial judge's approach was too narrow in finding that since the officer had not informed the appellant why he was being detained when he took him to the police vehicle, s. 10(a) had been breached. The appeal judge said that the trial judge should have determined whether sufficient evidence had been put forward to conclude, having regard for all of the circumstances, that the appellant knew the reason for his detention. The appellant applied for leave to

appeal the appeal court decision under s. 839 of the Code and, if granted, appealed the decision of the appeal judge and requested that it be set aside and his acquittal reinstated. His grounds of appeal were whether: 1) the appeal judge correctly identified and applied the standards of appellate review. He argued that the appeal judge unreasonably took a different view of the facts regarding whether the police officer had formed a suspicion without first finding the trial judge had made a palpable and overriding error of fact; and 2) the appeal judge correctly interpreted s. 10(a) of the Charter in his statement of the law.
HELD: Leave to appeal was granted and the appeal allowed. The court ordered a new trial. It found with respect to each issue that: 1) the appeal court judge had not erred. He had not altered any of the facts as found by the trial judge and regarded what appeared to be a question of fact, whether the officer had reasonable grounds to suspect the appellant had alcohol in his blood, as a question of law. Consequently, he was entitled to substitute his opinion. However, his conclusion that the appellant was lawfully detained was incorrect. There could be no lawful detention under s. 254(2) of the Code because the officer lacked the required subjective belief. Neither the trial nor the appeal judge addressed the issue of whether, as an investigative measure in a lawful detention, the police had lawfully exercised their authority under s. 209.1(1) of The Traffic Safety Act by isolating a detained motorist to ascertain whether an odour of alcohol was emanating from him. The matter would be remitted to Provincial Court; and 2) the appeal judge had correctly interpreted s. 10(a).

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Schroeder v Jackson, 2019 SKCA 119

Caldwell Schwann Leurer, November 18, 2019 (CA19118)

Real Property – Easements – Registration – Appeal

The appellant appealed the decision of a Queen's Bench chambers judge that dismissed her action alleging that she owned the dominant tenement under an easement and that it afforded her right-of-way access over the respondent's land (see: 2017 SKQB 238). The appellant argued that the chambers judge had erred in law in his interpretation of the land titles office transfer document that created the easement. He found that it did not apply to her land because the notice of the easement was registered on all subsequent titles issued for the other lots in question, but no such notices were registered on the title to her lot.
HELD: The appeal was dismissed. The court found that the chambers judge's findings of mixed fact and law revealed no palpable or overriding error and that he correctly interpreted the instrument that created the easement.

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Boechler v Boechler, 2019 SKCA 120

Richards Caldwell Tholl, November 18, 2019 (CA19119)

Family Law – Settlement Agreement – Disclosure Obligations
Family Law – Division of Family Property

The appellant appealed from the decision of a Queen's Bench chambers judge to grant the respondent's application for an order reflecting the terms of the parties' family property and spousal support agreement on the basis that it was a binding agreement and dismissing the appellant's application for an order setting the matter down for trial. Following the issuance of the petition in 2014, four years of litigation followed with each party retaining lawyers, accountants and business valuators to conduct negotiations regarding the family property and its value. At the time of the petition, the respondent was operating two businesses: a corporation (Eldorado) and a sole proprietorship (VacDaddy) and they were to be valued as at January 28, 2014, the date of petition. Eldorado's fiscal year end was June 30 and VacDaddy's was December 31. There was generally a delay between VacDaddy accruing the management fees owed to Eldorado and the payment of those fees. The fees were categorized as an account payable for VacDaddy and an account receivable for Eldorado. However, for the fiscal year ending June 2014, the respondent's accountant changed the manner of accounting for the management fees, decreasing the "due to shareholders" liability account by $310,000 to account for the management fee owing from VacDaddy to Eldorado which resulted in in the latter's account receivable asset account being set out at $310,000 less than it would have been if the same accounting method had been used for the 2014 financial statement as had been used in previous years. This difference in presentation created some confusion when it came to valuing Eldorado and the associated shareholder's loan. The appellant hired a business valuator to provide only a valuation of VacDaddy but not of Eldorado or any shareholder loans. The appellant's valuator disagreed significantly with the respondent's valuator regarding the value of VacDaddy but valued it on the common understanding that the one of its debts was the amount owed to Eldorado and decreased VacDaddy's value accordingly. Just before trial, the parties exchanged formal offers to settle containing differences in their valuations of the business assets, but each presented the shareholder's loan asset in the respondent's possession as being valued at $374,100. The parties reached a settlement and cancelled the trial dates. Two weeks later, the appellant claimed that the agreement had been vitiated because an asset worth $310,000 in the respondent's possession had not been accounted for in the settlement, alleging that this had occurred as a result of an alleged misrepresentation by the respondent. She

demanded that negotiations be re-opened in order to take the correct value of Eldorado, including the $310,000 owing from VacDaddy, but the respondent refused and made the application for an order confirming the agreement. At the hearing, the appellant did not provide any explanation of how she came to the realization regarding the value of the asset except that when she reviewed the minutes of settlement, she recognized the 2014 financial statement was a misrepresentation of the true value of Eldorado. She argued that the discrepancy had not been apparent because of the different presentation in 2014 and alleged that the respondent made inadequate disclosure and she had been misled. The chambers judge decided that the respondent had made full disclosure and there had been no exploitation by him. If a mistake had occurred, it was unilateral and made by the appellant. The judge reviewed the history of disclosure related to the asset in question. He examined an email exchange between the appellant's valuator and the respondent's accountant wherein the latter explained how and why he changed the presentation of the shareholder loan account in 2014. Based upon that explanation, the judge found that the disclosure had not been incomplete, nor was it misleading, because the accountant's email was assessed by the appellant's lawyer and valuator before the settlement. If the appellant had not understood it, she should have inquired further. Additionally, she could not explain why she had not retained the valuator to perform a valuation of Eldorado. The grounds of appeal were whether the chambers judge had erred in: 1) determining that the respondent had met his disclosure obligations and thus erred in not setting aside the settlement agreement; and 2) in refusing to set aside the agreement on the basis of unilateral mistake and failing to consider mutual or common mistake.

HELD: The appeal was dismissed. The court found with respect to each issue that the chambers judge had not erred in determining: 1) that the respondent had met his disclosure obligations in the context of a negotiated property settlement. The appellant was aware of the shareholder's loan valuation problem before the agreement was reached; and 2) that the doctrine of unilateral mistake was not available in this case. The alleged mistake was not the type of mistake that can be addressed through the principles of unilateral mistake. There was no evidence of an inadvertent drafting error or omission in the agreement, that the respondent was aware of the appellant's alleged mistake or that he ought to have been aware of it. The agreement was reached, despite disagreement about the total value of each asset, because they were able to agree on a total payment that they were each willing to accept. The settlement agreement resulted in a global settlement that took all the differences in valuation positions into account. This was not the type of situation where the chambers judge could have set aside the settlement agreement on the basis of common mistake either.

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McCorriston v R, 2019 SKCA 121

Richards Barrington-Foote Tholl, November 18, 2019 (CA19120)

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

The appellant appealed her conviction for possession of fentanyl, methamphetamine (meth) and cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act (see: 2018 SKPC 10). The RCMP executed a warrant to search a mobile home in Kindersley occupied by the appellant and J.O. The appellant was not present during the search, but J.O. was arrested on site after the police found small quantities on J.O.'s person and in the trailer, totaling 10.5 grams of cocaine, 11.3 grams of meth and 23.5 tablets of fentanyl. He was charged and later pleaded guilty to the same offences with which the appellant was charged. The police seized a surveillance video recorder, drug paraphernalia, digital scales, zippered plastic bags, scoresheets, a laptop, a tablet, a rifle, throwing knives, five cellular phones, $1,700 in cash and additional fentanyl, meth and cocaine. At trial, evidence was presented that both the appellant and J.O. were heavy drug users. An RCMP officer, qualified as an expert witness on drug usage and trafficking, testified to the amounts of cocaine, fentanyl and meth per day that a user would keep on hand and commented that, generally, as these drugs are readily available, users would not risk having amounts such as those found in the trailer and on J.O. for fear of being of accused of possession for the purpose of trafficking. He agreed that the quantity found was not a significant surplus for a typical drug user and that he was not aware of availability of these drugs in Kindersley because his experience was with drug users in Saskatoon. The police reviewed the videos taken by the surveillance cameras outside the trailer that revealed multiple visits of short duration by third parties. They also found numerous text messages on one of the seized cellphones and some of them were to or from a person named "Kitty" or "K". In the opinion of the expert witness, the text messages related to drug trafficking. J.O. did not confirm that the cellphone from which the messages were recovered belonged to him. There was no evidence that the appellant had a cellphone or what her number was. J.O. testified that he used both "Kitty" and "K" as nicknames for the appellant. Evidence was also given from another witness who testified that J.O. and the appellant were involved in illicit sales of meth, fentanyl and cocaine and that he had personally purchased drugs from the appellant. The trial judge found that the Crown had proven beyond a reasonable doubt that the appellant and J.O. had acted in concert in a common enterprise to traffic in illicit drugs on the basis of the nature, quantity and quality of the drugs seized, the other items, the surveillance recordings, the expert's opinion and the evidence of J.O. and the drug purchaser. The drugs were possessed jointly by

the appellant and J.O. for the purpose of trafficking. Among the grounds of appeal were whether the trial judge erred in law by: 1) admitting the evidence of the text messages when their interception was not authorized by or pursuant to Part VI of the Criminal Code; 2) relying on the content of the text messages to and from "K" as messages to and from the appellant; and 3) misapprehending the expert witness' evidence as to the availability of specific drugs in the Kindersley area.
HELD: The appeal was dismissed. The court found that the trial judge had not erred in law with respect to: 1) admitting the text messages. The searching of a cellphone for text messages is not an interception pursuant to s. 183 of the Code and, therefore, authorization pursuant to Part VI is not required; 2) relying on the content of the messages as evidence that the sender or recipient was the appellant, because it was not the only evidence relevant to the identification of "K", which included the video recordings and the drug purchaser's evidence; and 3) misapprehending the evidence. His judgment referred to the fact that the witness testified that he was not as familiar with Kindersley and he was entitled to consider the evidence of availability in the context of the other evidence relevant to the question of whether the appellant and J.O. were engaged in a joint trafficking operation.

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M.H. v H.S., 2019 SKCA 122

Caldwell Barrington-Foote Tholl, November 13, 2019 (CA19121)

Family Law – Custody and Access – Interim

The appellant appealed the decision of a Queen's Bench chambers judge who granted the respondent's application for an interim order that the parties' five-year-old son should attend kindergarten in the town in which she lived. After the parties' relationship had ended, the respondent resided in a town about 100 kilometres from the home of the appellant father. Until the time of the application, the parties had a shared parenting arrangement for several years, but when their child was eligible to start kindergarten in September 2019, they were unable to agree on parenting and school arrangements. The judge's decision that the child should continue to attend kindergarten in the respondent's town with scheduled parenting time for the appellant had the effect of changing the equal shared parenting regime to the child having his interim primary residence with the respondent for the school year. The judge found that for a variety of reasons, including that the child had attended pre-kindergarten and participated in extra-curricular activities when residing with his mother and had a community of friends in her town as a result, it was in his best interests that he should stay there and not be put a year behind his friends. The appellant appealed the

decision and requested that the court substitute an interim order requiring the child to reside primarily with him and attend kindergarten in his city. He argued that the chambers judge overlooked or misapprehended key evidence and committed an error in principle. Both parties applied to adduce fresh evidence. HELD: The appeal was dismissed. The application to adduce fresh evidence was dismissed because the affidavit evidence submitted was not potentially decisive as to the child's best interests. Noting that the court will not intervene in interim parenting orders unless the chambers judge erred in principle or overlooked or misapprehended relevant evidence, it found that he had not done so. The judge had reviewed all the evidence and it was sufficient to support all of his key findings. The parties were urged to act expeditiously in having the matter set down for pre-trial conference as they would be facing the same dilemma when the existing order expired upon the child's completing kindergarten.

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Stone v R, 2019 SKCA 123

Caldwell Schwann Kalmakoff, October 15, 2019 (CA19122)

Criminal Law – Robbery – Armed Robbery – Conviction – Appeal
Criminal Law – Robbery – Armed Robbery – Sentencing – Appeal
Criminal Law – Evidence – Circumstantial Evidence

The appellant appealed his conviction and his sentence. He was convicted after trial on two counts of robbery with a firearm contrary to s. 344(1)(a) of the Criminal Code and one count of unlawful possession of a firearm contrary to s. 91(1) of the Code. He received a sentence of seven years' imprisonment on each of the robbery charges and six months' imprisonment on the unlawful possession offence, all to run concurrently. The offences involved two other co-accused: W.W. and J.L. W.W. pleaded guilty to the charges and the trial proceeded against the appellant and J.L. None of the accused testified. Another person who was involved in the robbery as the driver of the getaway vehicle, H.R., became a Crown witness. The victims of the robberies testified that two men forced their way into their apartment and they identified W.W. as one of the assailants, but were unable to identify the appellant or J.L. as the other person who entered their apartment brandishing a machete because his face had been obscured by a bandana. W.W. carried a sawed-off shotgun during the robbery. He took a number of items from the victims and left the apartment first. The second individual removed other items, stuffed them into a backpack and left after W.W. H.R. testified that the three accused left the vehicle and went to the back of the house, but only W.W. and J.L. returned to the vehicle after the robbery. They asked her to drive around so they could look for the appellant: they were concerned about him

because he had the money. When the police stopped and searched the vehicle, they found the items taken by W.W. but none of the property taken by the other individual who had been armed with the machete was found, nor were the items ever recovered. The appellant argued at trial that the Crown had failed to prove that he had participated in the robbery and suggested that it was possible that he left the scene before it was committed. J.L. argued the evidence established that it was the appellant and not he who had accompanied W.W. into the apartment. The trial judge accepted the testimony of the H.R. and the victim. She found as a fact that all three accused had formed a common intent to rob the victim and that both the appellant and J.L. knew that W.W. was armed with a shotgun. From the evidence and the inferences she drew from it, the judge concluded that the appellant was the other individual accompanying W.W. and found him guilty of the three counts. Her finding was largely based on circumstantial evidence. In sentencing him, the judge noted that the appellant was an active participant in a home invasion carrying a weapon with which he threatened the victims. His lengthy criminal record and membership in a street gang were also aggravating factors. She considered as mitigating that the appellant's personal circumstances involved Gladue factors and that his offending behaviour was rooted in addiction and thus reduced his moral blameworthiness to some extent. As the sentencing range for home invasion robbery was between four and 15 years' imprisonment, the judge reduced the robbery sentence to seven years. In addition, the judge identified the mandatory minimum five-year sentence prescribed by s. 344(1)(a) of the Code because this robbery involved the use of a prohibited weapon. The grounds of appeal regarding the conviction were that the trial judge erred by convicting him on circumstantial evidence alone, without any direct participation in the robbery, and that the judge should not have accepted H.R.'s testimony as she was not credible. The appellant contended that if his conviction appeal were unsuccessful, he appealed his sentence as demonstrably unfit and argued that he should receive five years on the robbery charges.
HELD: The appeals against conviction and sentence were dismissed. The court stated that the standard of review of trial judges' findings regarding credibility was one of deference and found that she had not erred in determining that the driver was a credible witness and accepting her testimony. It could find no error on the part of the judge involving her identification and application of the law regarding circumstantial evidence. That evidence was reasonably capable of supporting an inference of guilt. The court found that the sentence imposed was not demonstrably unfit in light of the gravity of the offences, the use of a weapon during a home invasion and the appellant's lengthy and violent offending history.

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Napope v R, 2019 SKCA 124

Caldwell Schwann Kalmakoff, November 20, 2019 (CA19123)

Criminal Law – Sentencing – Dangerous Offender – Appeal
Criminal Law – Sentencing – Indeterminate Sentence – Appeal

The appellant appealed from his conviction and his designation as a dangerous offender and against the indeterminate sentence of imprisonment imposed upon him by the trial judge.
HELD: The appeal against conviction was dismissed. The appeal against the designation was allowed and the designation set aside. The appeal against the indeterminate sentence was allowed and a new hearing ordered under s. 759(3)(a)(ii) of the Code. The court found that the trial judge had not erred in convicting the appellant on charges of sexual assault and aggravated assault based upon the transcript and court record. The Crown acknowledged error on the part of the judge when he found the appellant a dangerous offender under Part XXIV of the Code on the basis of the appellant's concession that he was. The concession did not relieve the judge from his statutory duty to evaluate the evidence and to be satisfied that the accused had met the criteria for designation. The judge committed a similar error when he imposed the indeterminate sentence on the appellant based upon his concession that he would "follow" one. He failed to fulfill his statutory duty under s. 753(4.1) of the Code to consider whether there was a reasonable expectation that a lesser measure would adequately protect the public against the offender's potential commission of murder or a serious personal injury offence.

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R v 654963 Alberta Ltd., 2019 SKPC 12

Jackson, February 8, 2019 (PC19057)

Public Welfare Offence – Occupational Health and Safety
Regulatory Offence – Strict Liability – Defence of Due Diligence

The defendant company, a family business, operated an on-site industrial vacuum truck service to oil well operations to remove water and mud debris from drilling operations in the oil fields. It was charged with two offences under The Occupational Health and Safety Regulations, 1996 as a result of the injuries suffered by an employee to his right hand when it became entangled in a chain-driven assembly that formed part of an agitator unit mounted on the truck. He put his hand down and under the safeguard to check an oil seal leak and his hand became caught in the rotating gears. The charges were that the defendant failed: 1) to provide an effective safeguard as required by s. 137(1)(a) of the Regulations, contrary to s. 3-78(g) and s. 3-79 of The Saskatchewan Employment Act; and 2)

failed to ensure that before a worker undertook maintenance or repair, the machine is locked out during that activity as required by s. 139(1) of the Regulations, resulting in a serious injury to the worker contrary to s. 3-78(g) and s. 3-79 of the Act. Regarding the first charge, the Crown argued that the incident itself was proof of the actus reus, that the safeguard was not effective, submitting that the concept of "accident as prima facie breach" in strict liability cases had been accepted as the prevailing law in Saskatchewan. The defence asserted that under s. 3-80 of the Act, the Crown had to prove beyond a reasonable doubt that the company did not have an "effective safeguard" and the fact that an incident occurred did not necessarily mean that the safeguard was not effective. It conceded that the Crown had proven the actus reus of the second count. HELD: The defendant was found not guilty of either charge. The court found with respect to the first charge that the defendant provided an effective safeguard and no injury would have occurred but for the misguided efforts of the employee to circumvent the safeguard's protection and neutralize its efficacy. It rejected that Crown's position that the concept of accident as prima facie breach applied because the Crown had particularized the offence and therefore the case fell outside the category of general duty offences, to which the concept applied. Consequently, the court examined the nature and quality of the safeguard and the circumstances of the incident and made the finding that the safeguard was effective. If that finding was incorrect, the court determined that defendant had established the defence of due diligence on the balance of probabilities. It had taken all reasonable steps to prevent the incident and the employee had circumvented the safety protocols in which he had been trained and tested. This defence was also available to the defendant on the second charge. It was not reasonably foreseeable that the employee would try to repair the leak himself as he had been expressly instructed not to do so.

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CAN Supply Wholesale Ltd. v Sirota, 2019 SKPC 21

Jackson, March 25, 2019 (PC19058)

Contracts – Interpretation
Small Claims – Breach of Contract
Small Claims – Costs

The plaintiff claimed approximately $10,000 in relation to renting and replacing a post-driver. The defendant denied any responsibility and added a third party to the claim. The defendant also counterclaimed for material shortage and transportation costs in the sum of $839. The plaintiff business supplied vinyl fencing. The defendant and third party purchased fencing materials from the plaintiff to erect fences at their residences. The plaintiff argued that

it was agreed that a post-driver would be rented for $100 per day. The defendant said that the rate for the post-driver was a total of $100. A handwritten contract was drawn up when the post-driver was delivered. The defendant acknowledged that he signed the document but said that the "/day" portion was not on the original contract and must have been added. The plaintiff denied any change or alteration to the original document. The defendant and third party were concerned that they were shorted material and overcharged. The third party advised the plaintiff that the post-driver would not be returned until there was some compromise on the bill. They estimated the overcharge to be between $500 and $600. The plaintiff was required to rent a new post-driver (one intended for sale) to another customer because the defendant and third party would not return the other one. The plaintiff's registered mail to the defendant was returned, marked "return to sender". The plaintiff did return the post-driver shortly after being served with the Small Claims summons.

HELD: The rental rate of the post-driver was found to be $100 per day. The court was concerned that the defendant at no time prior to the trial asserted that the rental rate was a flat rate of $100 per day or that the written contract had been altered. The defendant's response when questioned in that regard was that "he must have overlooked it". The court found the rental rate to be the most important aspect of the plaintiff's claim. The defendant lacked credibility in that regard. Mitigation did not apply because the plaintiff did not have possession of the post-driver at all. The court also found that the defendant's explanation that he was not the one responsible for returning the plaintiff's mail was incredible and rejected by the court. The plaintiff was entitled to 92 days of rental plus taxes. The plaintiff was not entitled to $2,700 as claimed for the new post-driver pressed into rental service. The counterclaim included $739, which was an estimate of overcharge, and $100 for gas costs to make extra trips to the plaintiff's business. The amount of the shortage was not conveyed to the plaintiff when the defendant and plaintiff met. The plaintiff argued that the length of a fence could not simply be divided by 8-foot sections (the amount in a bundle of fencing) because there had to be cuts made and accommodation for corners and offsets. The defendant's counterclaim was dismissed. The third party confirmed that he and the defendant acted as one throughout. He said that he did not know anything about the returned mail or emails that the plaintiff sent to the defendant. He thought that the plaintiff was content to rack up the rental costs. The court found that the defendant established that the third party should bear responsibility for one-half of the rental cost. The actions of the defendant and the third party were found to be unreasonable and high-handed throughout. The court found this to be a case where costs should apply against the defendant and third party pursuant to s. 36(e) of The Small Claims Act, 2016 and s. 6(3) of The Small Claims Regulations, 2017, which the court fixed at $750. The plaintiff was awarded a judgment of $11,216.75. The defendant was awarded

half of the rental costs ($5,106) and a third of the costs ($250) against the third party.

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The Art of Painting by Antonio Inc. v Anderson, 2019 SKPC 57

Kovatch, October 29, 2019 (PC19059)

Contract – Interpretation

The plaintiff, a residential painting company, brought a small claims action against the defendants, who had hired the plaintiff to paint the interior of their home. When the work was completed, the principal of the plaintiff presented a final invoice, but the defendants refused to pay, saying the job had not been completed. After the plaintiff commenced the action, the defendants brought a counterclaim alleging that the plaintiff's work was not done in a workmanlike fashion and sought damages for the additional work that would be required. Because the plaintiff's principal's ability to speak English was limited, he gave his evidence with difficulty. The original price for the painting work required by the defendants was provided by another painter who gave a quote to the defendants of $2.25/square foot for walls and $900 for railings. This man had died before the trial took place. Later the defendants asked the plaintiff's principal to paint doors and the interior of closets and he quoted them $900, $1,000 and $3,500 respectively for the extra work. The defendants asserted that none of the doors closed properly after being painted. The plaintiff's counsel did not raise whether there a contract or what the exact terms of it were, but rather argued that the plaintiff had done a large amount of work over a three-month period and requested that the court put a fair price on the work performed. The defendants' counsel argued that there was a binding contract between them and the other painter, that there may have been an assignment of the agreement by the latter to the plaintiff, and that the plaintiff could not be put in a better position than the original party to the contract.
HELD: The plaintiff was given judgment for $6,000 for the amount of work done less the costs borne by the defendants of cleaning up. The court found that there was a contract between the parties based only on the original quotes for the square footage and the railings given by the other painter and they were accepted by the defendants. The defendant's counterclaim was dismissed. The evidence was insufficient to prove that the painting of the doors had been done in an unworkmanlike fashion that caused them to stick.

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R v Gordon, 2019 SKPC 58

Bazin, December 9, 2019 (PC19062)

Criminal Law – Controlled Drugs and Substances Act – Trafficking – Sentencing – Joint Submission
Criminal Law – Aboriginal Offender – Sentencing

The accused pleaded guilty to trafficking in hydromorphone contrary to s. 5(1) of the Controlled Drugs and Substances Act, an offence for which a conditional sentence is no longer available. The Crown and defence counsel made a joint submission to the court requesting it impose a sentence of 16 months in jail. The usual range for the offence is between 18 months and four years. Their submission of a lower sentence took into consideration the accused's circumstances and the facts of the offence. The accused was arrested in July 2018, held in remand for four days and then released on onerous conditions, including a 24-hour curfew. In September 2018, she pleaded guilty and the judge reviewed s. 606(1.1) of the Code with her to establish that she knew the effect of her plea and confirmed with her that she had personally agreed to a 16-month jail sentence. The matter was adjourned several times so that she and her partner could arrange for his care while she served her sentence. The partner suffered from schizophrenia, controlled by medication. The joint submission was presented to the court in February 2019. At the hearing, the court inquired whether the accused was of Aboriginal ancestry and she indicated that she was and had attended residential school. Neither the defence nor the Crown were aware of this when her sentence was negotiated. The court ordered a Pre-Sentence Report (PSR) specifically to address the accused's Gladue factors and her cognitive status, learning disabilities and the correctional system's ability to deal with her multiple medical conditions. Upon receipt of the report, the judge advised that he had concerns with the joint submission and counsel argued in support of it in July 2019. The matter was adjourned to August 2019 for decision. The accused committed the offence after an acquaintance at the Salvation Army had told her that she needed downers to resolve her pain. While dumpster-diving, the accused found some medication and because she and she husband needed money for food and rent, she decided to sell three pills to the acquaintance. After taking the medication, Gabapentin, the acquaintance had an adverse reaction and was hospitalized, but did recover. The accused was arrested the next day. The PSR described that the accused and her partner had been living in destitute circumstances prior to the offence and were sheltering in a tent in someone's yard. The accused and her partner lived on social assistance. At 41, the accused had no employment history. She believed that that she received a grade 12 diploma but the PSR author discovered that her schooling ended at grade 9. An IQ test showed her to be in the twenty-first percentile. The accused's mother was German and her father was Indigenous. After her parents separated when she was two, she was raised by her maternal grandmother, who physically abused her and involved

her in shoplifting. She began drinking when she was nine and using marijuana at 16. She then developed an addiction to hard drugs. Since 2005, the accused had been on the methadone program but had continued to abuse alcohol until she was charged, at which time she stopped using alcohol and marijuana. Through her father, the accused was a member of the Gordon First Nation, but had only lived on the reserve when she attended the Gordon Residential School (GRS) for six months when she was 14 because she was having difficulties in the school she was attending. Many previous generations of the accused's family, including her father, had been students at the GRS. She had to leave the GRS and then attended Maryville Residential School but had to leave there too as she required alternate programming. The accused reported that she was sexually abused while at residential school and thereafter began obtaining money or substances in exchange for sex. She became a prostitute at 17 and worked as such until she was 27 when she met her partner. The accused had been diagnosed with having emphysema, hepatitis and other maladies for which she took 11 different medications daily. If she received an carceral sentence to be served at Pine Grove Correctional Centre, it would be able to meet her health needs, but the defence counsel advised that Pine Grove had been known to forcibly remove inmates from methadone treatment. Her physician informed the court that the accused would suffer severe withdrawal symptoms should she miss any doses of methadone. The issues regarding the sentencing of the accused were: 1) whether the joint submission could stand when counsel had not considered Gladue factors in arriving at it; and 2) what was an appropriate sentence in the circumstances?

HELD: The court held that a jail term was not required. It imposed an 18-month suspended sentence on the accused. The accused was given 18 months' probation with numerous conditions, including staying at her residence 24 hours a day for the first 12 months unless her probation officer gave her permission to be elsewhere, not to consume alcohol or drugs and to participate in programming for addictions. Taking into account her previous recognizance, the accused was granted a one-year credit to this suspended sentence/probation order and had satisfied the 24-hour curfew portion of the order, leaving six months to be served. It found with respect to each issue that: 1) a joint submission could not stand if the Gladue factors had not been considered in arriving at it, following Whitstone; and 2) the aggravating factors it would consider would include that the offence was somewhat planned and the purchaser was harmed and that the use of drugs and trafficking is a major societal problem. The mitigating factors to be considered respecting the offence were that the accused: had not solicited the purchaser to sell the drug; it was a single transaction, not a continuing offence; and she had not engaged in any further criminal activity. She entered an early guilty plea and admitted the offence to the police upon her arrest. Since committing the offence, the accused had stopped using alcohol and marijuana. She complied with numerous significantly restrictive release conditions for 13 months. The court

took into account the accused's personal circumstances and stated that the offence was driven by poverty and addiction. The accused has lower cognitive functioning and suffers from many health issues. She had experienced the impact of many Gladue factors. Following the Court of Appeal's decision in Lever, the court considered the accused's release conditions when fashioning an appropriate sentence. Those conditions were more similar to a sentence than a release order and restricted her liberty for over a year. A number of adjournments were required to allow the accused to put her family and health matters in order and to prepare her husband to be able to care for himself while she was in jail but after discovery of Gladue factors, another six months elapsed for the preparation of reports and further submissions, a period of delay for which the accused was not responsible.

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Perdikaris v Purdue Pharma, 2019 SKQB 281

Popescul, October 31, 2019 (QB19269)

Barristers and Solicitors – Confidentiality – Conflict of Interest – Application for Removal
Barristers and Solicitors – Privilege – Solicitor/Client Privilege
Civil Procedure – Class Action
Class Action – Procedure – Settlement Agreement

The plaintiff attempted for a third time to obtain court approval of a class action settlement agreement pursuant to s. 38 of The Class Actions Act. A number of class actions were commenced relating to the manufacture, marketing, sale, distribution, labelling, prescription, and use of a prescription drug in Canada. There was a national settlement agreement (settlement agreement) that settled all claims upon court approval in this action and three others (Ontario, Quebec, and Nova Scotia). Court approval was obtained in the three others. The first attempt to have the settlement agreement approved in Saskatchewan was denied due to concerns relating to the provisions in the settlement agreement that dealt with the subrogated claims of Provincial Health Insurers (PHIs). The Queen's Bench judge retired and another judge was appointed. The plaintiff reapplied with supplementary material filed. It was also declined. The second judge was appointed to the Court of Appeal. The parties and participants could not agree on how to move forward, so they were all invited to file a "one to three page document outlining their positions respecting a go-forward plan". The court directed that there be a two-day hearing. The issues to be determined at the hearing were: 1) whether the plaintiff's counsel could continue to act in light of the alleged conflict of interest; 2) what affidavit material could be filed in support of the issues identified by the judge hearing the second application and how the issue of privileged

information should be resolved; and 3) whether it was necessary for the plaintiff to establish that new evidence capable of satisfying the concerns raised by the second judge be presented before a continuation could be rescheduled. If so, was there sufficient evidence to justify the resumption of the application?
HELD: The issues were determined as follows: 1) the original claim was amended to include the health care costs on behalf of the PHIs. The settlement agreement, if approved, would extinguish the right of the PHIs to seek further damages from the defendants in relation to any of the causes of action covered in the lawsuit. Provincial legislation obliges plaintiffs who bring personal injury actions alleging negligence or other wrongful acts to seek recovery of health care costs on behalf of the appropriate PHI. It is therefore common for the subrogated claims of PHIs to be included in a plaintiff's claim. There was an issue as to whether the PHIs consented to the settlement agreement. The plaintiff says they did, and the PHIs say that they did not. When the conflict arose, counsel declared themselves to be in a conflict of interest and acknowledged that they could no longer act for the PHIs. Some of the PHIs argued that the plaintiffs' counsel could not just decide to carry on with one client when there was a conflict. According to the Supreme Court of Canada in CNR Co. v McKercher, disqualification is but one remedy when there is a conflict. The first agreement provided for $18 million to class members plus $1 million to the PHIs. The PHIs did not consent, so negotiation recommenced, and the settlement agreement provided for $2 million to the PHIs. When the argument over whether the PHIs consented came to light, counsel withdrew from representing the PHIs. McKercher suggested that disqualification was the appropriate remedy in three circumstances: a) to avoid risk of improper use of confidential information; b) to avoid the risk of impaired representation; and 3) to maintain the repute of the administration of justice. The first two circumstances were not present. The court considered relevant factors and concluded that disqualification was not necessary to maintain the administration of justice. The plaintiff's counsel had to include the PHIs as part of their claim. Plaintiff's counsel was acting in good faith and following the standard accepted practices. The court noted that to disqualify counsel at this late stage would produce an unfair and perhaps disastrous result. The PHIs were well represented without the plaintiff's counsel. The court declined to order that plaintiff's counsel be disqualified due to conflict of interest; 2) the second judge's concerns with the material were whether the PHIs approved the settlement agreement and whether it was "fair, reasonable, and in the best interests of the class". The plaintiff filed additional information. The PHIs objected to its filing because, they said, it contained privileged information. The court reviewed the unredacted copy of the affidavits. Many of the suggested redactions pertained directly to whether the PHIs provided their consent and whether there were communications between the plaintiff's counsel and the person who assumed the role of spokesperson for the PHIs. The court focused on whether there was an implied waiver of the

solicitor-client privilege. All of the proposed redactions related directly to the question of the PHIs' purported consent to the settlement agreement. The court held that fairness dictated that solicitor-client privilege be deemed to be waived on the basis that it would be unfair for the PHIs to retain the benefit of privilege if they had in fact given their consent. It was ordered that the unredacted affidavit be permitted to be filed and considered. The court also found that the unredacted version could be permitted because the instruction to settle was not intended to be a confidential communication between the lawyer and client; and 3) the PHIs' position that the matter had already been settled was found to be contrary to the decision, read reasonably and as a whole. The court concluded that the second judge had not made a final determination. The plaintiff was entitled to again seek to have the settlement agreement approved by the court should they choose to do so. No order was made regarding costs.

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CNS Development Inc. v Lee, 2019 SKQB 296

MacMillan-Brown, November 15, 2019 (QB19273)

Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 7-5, Rule 11-1
Statutes – Interpretation – Builders' Lien Act, Section 55

The plaintiff, a home-building company, sued the defendants for funds they allegedly owed under a contract between the parties for a new house constructed in 2013. The plaintiff submitted affidavits and the contract in evidence. Each of the parties brought applications: the defendants sought an order removing a builders' lien registered by the plaintiff against the house on the grounds that it had expired. They also sought an order dismissing the plaintiff's claim and an award of solicitor-client costs; and the plaintiff applied for summary judgment in the amount of its claim and an order summarily dismissing the defendants' counterclaim and for solicitor-client costs. The lien was registered in 2013 followed by the issuance of the statement of claim a few months later. The defendants filed a statement of defence and counterclaim in 2014. After the parties attending questioning in 2015, the plaintiff's principal gave 110 undertakings. The defendants refused to finish their questioning until all of the undertakings were provided. The plaintiff's lawyer tried numerous times to move the action to pre-trial but the defendants refused. When they received the plaintiff's undertakings in 2016 they would not submit themselves to further questioning until they questioned the principal on his responses. In 2017 they brought an application to amend their statement of defence and to amend the counterclaim to add the principal as a defendant to make allegations of fraud against him personally. The

application to add the principal was denied.
HELD: The plaintiff's application for summary judgment was granted. The court found that it was an appropriate case for the procedure and to summarily dismiss the defendants' counterclaim. It reviewed the contract and the other evidence submitted and found it clearly established the agreement between the parties was a cost-plus contract and the defendants knew it. It also found that under s. 55(2) of The Builders' Lien Act that it would extend the time of the lien beyond the two-year expiry date on the basis that the delay in proceeding to trial within that period had been caused by the defendants. There was no evidence that the defendants would experience prejudice if the registration of the lien were extended. They were the authors of their own misfortune. The conduct of the defendants did not warrant an award of solicitor-client costs against them, but under Queen's Bench rule 11-1, the court exercised its discretion to order enhanced costs on the basis of double Column 3.

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R v Peroz, 2019 SKQB 298

Danyliuk, November 19, 2019 (QB19274)

Criminal Law – Assault – Aggravated Assault
Criminal Law – Defences – Self-Defence

The accused was charged with committing an aggravated assault by wounding one victim contrary to s. 268(1) of the Criminal Code and committing assault on another victim, contrary to s. 266 of the Code. The charges were laid after the accused and the victim of the assault (F.A.), his former spouse, had been seen and heard arguing outside a nightclub by the victim of the aggravated assault (M.M.) and a group of his friends. M.M. heard A.F. scream and saw the accused pulling her by her arm in a violent fashion. The accused and M.M. scuffled and the police were called. M.M. and his friend (A.G.) left the scene expecting that the police would arrive. A few moments later, M.M. and A.G. saw the accused and A.F. once again and witnessed the accused yelling at A.F. She was crying. M.M. told the accused to remain at the scene to deal with the police. He testified that he put the accused in a bear-hug and that they struggled and fell to the ground. He felt a sharp pain in his arm and his hand and discovered later that the accused had bitten him and taken off part of his finger. A.F. testified that the accused had been angry with her at various points during the night and after she fell, the accused helped her up, but did so in a violent way. Other Crown witnesses who testified said they had seen the first fight and confirmed that A.F. was being pulled and seemed very upset. A.G. testified that she witnessed both fights but did not see the accused bite M.M. The accused was the only defence witness and he stated that he had not

been angry with A.F., nor had he yelled at her. He was trying to help her after she had fallen and was pulling her up. He said that M.M. attacked him out of nowhere and hit him during their second altercation and when they fell to the ground, he was knocked unconscious. When he revived, M.M. had him by the throat, so he bit him. He said that M.M. put his finger in his mouth so he bit him again.
HELD: The accused was found guilty of aggravated assault and assault. The court did not believe his evidence. He was neither a credible nor a reliable witness. His testimony was full of inconsistencies. It accepted the evidence presented by the Crown's witnesses. The court found that there was an air of reality to the accused's self-defence story, but the Crown had proved that the defence was inapplicable under ss. 34(1) and (2) of the Code.

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101100002 Saskatchewan Ltd. v Saskatoon Co-operative Association Ltd., 2019 SKQB 300

Currie, November 21, 2019 (QB19276)

Real Property – Lease – Termination

DIGEST The plaintiff was a business that operated a car wash in a building that it leased from the defendant. The lease term commenced in 2007 and ended in 2027. The plaintiff intended to continue operating in the building until that time, but the defendant terminated the lease in January 2013. The plaintiff brought an action in damages for lost profit from 2013 through 2027 based on the defendant's wrongful termination of the lease and claimed punitive damages because the termination was malicious and high-handed. The defendant acquired ownership of the building in January 2012 and assumed control of the lease with the plaintiff. In the spring of 2012, it became concerned about the state of repair of the building and retained a structural engineer to review its condition. He reported In October 2012 that the load-bearing concrete walls were in very poor condition as it appeared that over the years, water had been allowed to infiltrate the cores of the blocks and damage had occurred. Other similar damage had occurred to the concrete lintels. In his opinion, the building should be demolished but it could be repaired. The defendant delivered a letter to the plaintiff's owner with the engineer's report. It asserted that under the lease, the plaintiff was responsible for remedying the deficiencies and it would be required to do so within a reasonable time. The defendant proposed that the plaintiff agree to close the business immediately pending determination of repair costs and a reasonable time frame. It asked for a response by November 2. The plaintiff's owner advised the defendant that it did not have the money to make the repairs and agreed to immediate closure for safety reasons. The

defendant confirmed this by letter and extended the time for a proposed remedy to November 8. The building was closed on November 2 and a security fence placed around it. The plaintiff did not provide a response to the November 2 letter with a proposal for remedying the deficiencies and did not pay the November rent. The defendant delivered a notice of the breaches to the plaintiff on November 15 relating to non-payment of rent and the building's deficiencies and set deadlines for the plaintiff to remedy. In the absence of any response, the defendant took possession of the leased property and terminated the lease on the basis of the breaches. The plaintiff claimed that it was not in breach of the lease and thus the defendant was not entitled to terminate it. It argued that as the defendant had locked out the plaintiff and shut down the business, it was estopped from requiring payment of rent.
HELD: The plaintiff's claim was dismissed. The court found that the defendant was entitled to terminate the lease on the basis of non-payment of rent based upon its review of the lease. The plaintiff had agreed to the closure and estoppel did not apply. The defendant made it clear to the plaintiff that the lease remained in force so the plaintiff could not argue that it was evicted and entitled to withhold rent. The defendant was also entitled to terminate the lease on the basis of the plaintiff's failure to repair after it received the notice to repair on November 15 and failed to respond. Even if the plaintiff had established the defendant's liability, the court concluded that it had not proven damages because its financial statements were not accurate or reliable and it would not have been entitled to punitive damages either because the defendant had terminated the lease for normal business reasons.

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N.V.R.D., Re (CFSA), 2019 SKQB 302

Megaw, November 21, 2019 (QB19278)

Statutes – Interpretation – Child and Family Services Act, Section 25, Section 63
Statutes – Interpretation – Children's Law Act, 1997, Section 3
Constitutional Law – Charter of Rights, Section 7

The Ministry of Social Services became involved with the applicant mother and her nine-year-old child in January 2018. The court granted the Ministry a temporary wardship order pursuant to The Child and Family Services Act (CFSA). The order was later varied by agreement to a supervision order so that the child was in the care of the applicant mother with Ministry oversight. It remained involved as a result of reports of the applicant assaulting the child and in February 2019, the child was apprehended following the arrest and charge of the mother by the police. Very soon after the apprehension, the child's father contacted the Ministry requesting to

be involved in parenting. The Ministry conducted a home safety check and was satisfied that the child could be placed with her father two weeks after the apprehension. The Ministry proceeded to complete a protection assessment and again was satisfied that there were no longer any child protection concerns and decided to discontinue its involvement with the child and wanted to withdraw the protection application it had commenced at the time of the child's apprehension. The applicant mother challenged the Ministry's unfettered discretion to withdraw such an application and argued that the Ministry must have court permission to do so. She made a Charter application seeking an order that s. 25 of the CFSA was unconstitutional as it violated s. 7 of the Charter or alternatively, that the court should exercise its parens patriae jurisdiction pursuant to the section. The hearing of this matter was delayed by the appeal of the decision of Elson J. in A.H. v Ministry of Social Services wherein he determined the Minister had the unfettered right to withdraw such an application. That decision was made in the face of a pending pre-trial conference and did not contain a detailed analysis of the issue. The Court of Appeal dismissed the appeal, ruling the issue was moot because there was no protection application then pending between the Ministry and the parent. As a result of that decision, the Ministry again indicated that it intended to withdraw the protection application. The mother applied to prohibit such withdrawal until the merits of the matter had been argued. The court granted the application and the Ministry filed a notice of appeal of the order. At the hearing of the application, the Ministry indicated that no further steps had been taken regarding the notice of appeal. The issues in the hearing of the application were: 1) was the order directing the application preventing the immediate withdrawal by the Ministry stayed upon the filing of the appeal? The Ministry submitted that s. 63(5) of the CFSA prevented the mother's application from proceeding; 2) was the court bound by the decision in A.H.? 3) whether s. 25 of the CFSA required court authorization before a protection application might be withdrawn; 4) whether the court was able to exercise its parens patriae jurisdiction regarding s. 25 of the CFSA; and 5) whether an interpretation of s. 25 of the CFSA allowing for the Ministry's unilateral withdrawal of the protection application violated s. 7 of the Charter? The applicant submitted that the violation occurred because she was not provided with either a hearing or disclosure in order to challenge the child's apprehension. The parties agreed that s. 7 of the Charter was engaged in these proceedings as a result of the Supreme Court's decision in Winnipeg Child and Family Services v K.L.W.

HELD: The application was dismissed. The court found with respect to each issue that: 1) the ordinary meaning of s. 63(5) of the CFSA did not apply to this application. The order did not involve custody of the child; 2) it was generally bound by the decision in A.H. However, that decision was rendered in exigent circumstances and did not cite authority for the conclusions reached. In the absence of such analysis, the court was required to consider the issue afresh to

ensure that the arguments could be considered; 3) s. 25 of the CFSA does not require court consent to the Ministry's withdrawal when the child is returned to the parent, or placed with a party entitled to custody. The purpose of the CFSA taken together with The Children's Law Act, 1997 (CLA) creates a legislative framework to allow for the care of children. In this case, no custody order had been made pursuant to the CLA that varied each parent's status as joint legal custodians of the child as provided by s. 3 of the CLA. Both parents had a right to custody of the child. The comprehensive scheme permits the Ministry to return the child to a person who may be someone other than the individual from whom the child was apprehended; that is, the other parent may be an appropriate caregiver. The Ministry's mandate is to act only if there is a protection concern regarding the child and this interpretation permits the Ministry to unilaterally withdraw protection proceedings. The parents' rights to pursue a custodial decision pursuant to different proceedings remains unimpaired; 4) the parens patriae jurisdiction was not available here to insert a requirement of court consent to a withdrawal of protection proceedings; and 5) s. 25 of the CFSA did not violate the applicant's s. 7 Charter right. By withdrawing the application, the Ministry was in effect taking no steps regarding the child's best interests but only with respect to the immediate protection concerns for the child. Ultimate placement and determination regarding custody were left with the court for consideration.

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Birnie v Birnie, 2019 SKQB 303

Megaw, November 22, 2019 (QB19279)

Family Law – Child Support – Adult Child
Family Law – Child Support – Determination of Income

The respondent obtained an interim order for child support (see: 2018 SKQB 87) and after a pre-trial conference, the matter proceeded to trial. Following the parties' separation in 2008 they entered into an interspousal agreement that dealt with the division of family property, parenting, child and spousal support. The respondent was to be responsible for parenting the children and to receive $1,000 per month for child support for the two children. The agreement specified that the parties agreed to exchange income tax returns and all information required by the Guidelines to properly assess their incomes in June 2014 and to review the petitioner's child support. The respondent gave notice to have support reviewed, but the petitioner resisted supplying financial information. At trial, the respondent requested that the court determine the petitioner's income for child support purposes for 2014 and through to the present time. The eldest child of the marriage had turned 18 in

September 2019 and the respondent argued that he should continue to be considered a child of the marriage. He had completed high school but had no plans for further schooling. He earned $1,500 per month from two part-time jobs and continued to live with the respondent. She advised the court that as a child, he was diagnosed as being on the autism spectrum and was taking expensive medication for ADHD but did not submit medical evidence relating to him. The other child of the marriage, 16 years of age, lived with the respondent and was still in high school. The parties disputed how the petitioner's income should be calculated. The petitioner's income was drawn from his farming operation. In 2015, he incorporated it. He sought to have his income determined in accordance with his line 150 T1 general income tax return. The respondent argued that his income should be assessed as a combination of both his personal income and income determined for the corporation and then assigned to him. She sought to add back to his income the entirety of the amortization deducted in the financial statements by the corporation and to add in a percentage of certain expenses paid by the corporation for which the petitioner received a personal benefit. The petitioner called an expert witness to give opinion evidence on his income based on his knowledge regarding accounting information, tax returns, corporate finance matters and corporate tax returns. As the expert was not the petitioner's accountant, neither he nor the petitioner could answer the respondent's specific questions regarding accounting entries.
HELD: The court found that the eldest child was no longer a child of marriage as at September 2019 and the petitioner's obligation to pay child support ceased. There was no independent evidence submitted by the respondent to establish that the child was suffering from any illness, disability or other cause that resulted in him being unable to withdraw from his parents' charge. Regarding the petitioner's income, the court reviewed his evidence and found that the amortization claims for 2015 through 2018 did not bear any relationship to the actual value of the capital assets available for depreciation. It then added 50 percent of the amount of deprecation on an annual basis to the corporate net income. It agreed with the respondent that 10 percent of the petitioner's personal expenses paid by the corporation should be added back to his income directly. The court also added one half of the corporate net income in 2016 and 2017 and all of the corporate net income for 2018 to the petitioner's income to provide an accurate picture of what income was actually available to him, as he could not leave the funds in the corporation to the detriment of the children. The child support payable by the petitioner for each year was determined on this basis and in accordance with the Tables. Child support was payable retroactively to 2013 since the respondent had given notice of her intention to have support reviewed and the petitioner had engaged in blameworthy conduct by failing to properly disclose his income information.

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