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. 3 **February 1, 2020**

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McKay v R, 2019 SKCA 129

Jackson Barrington-Foote Kalmakoff, November 29, 2019 (CA19128)

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

The appellant pled guilty to possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, and two other charges. The charges arose out of the police's discovery of 11.25 kilograms of cocaine in an apartment in Prince Albert and their subsequent investigation of the bank accounts, tax records, cell phones and effects of the appellant and his co-accused common law partner, Ms Bear. She was charged with the same offences and pled guilty. The court accepted the joint submission of counsel and sentenced her to seven years' imprisonment. In addition to pleading guilty, the appellant provided the court with an agreed statement of facts, eliminating the need to prove a substantial part of the aggravated nature of the case against him. At the sentencing hearing, the court heard testimony from a police expert testifying as to the value of the cocaine and received into evidence a Gladue report concerning the appellant. The sentencing judge sentenced the appellant to nine years' imprisonment (see: 2018 SKPC 51). He noted that Ms Bear was sentenced on the basis of a joint submission and that in R v MacLeod, the Court of Appeal made it clear that a sentence given to a co-accused under a joint submission is not evaluated for its fitness and is therefore of limited value as a comparator when sentencing another co-accused. The judge went on to find that Mr. McKay was a "controlling figure" and thus deserved a greater sentence than his

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associates did. The judge observed that the appellant had no prior record involving trafficking. The appellant was 27 years old at the time of the offence and his criminal record included convictions for breach of recognizance, possession of a controlled substance and driving while disqualified, but his longest custodial sentence was seven days. The Gladue report identified that that many of the Gladue factors were present in the background of the appellant. The grounds of appeal were whether the sentencing judge erroneously applied the parity principle by failing to evaluate and compare sentences imposed on similar offenders for similar offences and instead only assessed it with reference to the co-accused's sentence. HELD: The appeal was allowed. The court found that the sentence was unfit and imposed a seven-year sentence in its place. The sentencing judge had erred in principle and that error had had an impact on the sentence. The judge had misinterpreted the principles articulated in MacLeod. He used the co-accused's sentence as a comparator when there had been no independent judicial assessment of its fitness other than as permitted by R v Anthony-Cook. It was not clear how the judge had arrived at the appellant's sentence without using the co-accused's sentence as a floor. In substituting its own assessment of a fit sentence and acknowledging the parity principle, the court noted the aggravating factors were that the appellant participated in a highly sophisticated drug operation that would have a tragic impact on northern Indigenous communities, but that no weapons were involved. The mitigating factors included the appellant's early guilty plea and that the admissions made in the agreed statement of facts saved considerable time in the administration of justice. He acknowledged the harm he had caused and expressed remorse. There were significant Gladue factors present in the appellant's life. The sentencing judge made this finding, but it was not clear how he actualized the principles of s. 718.2(e) of the Criminal Code by arriving at the longest reported sentence given in Saskatchewan for trafficking of cocaine that did not involve importation, firearms or another aggravating feature.

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Starblanket v R, 2019 SKCA 130

Jackson Ottenbreit Whitmore, December 2, 2019 (CA19129)

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

The appellant was convicted of one count of robbery contrary to s. 344(1) of the Criminal Code and after the Crown requested a dangerous offender (DO) hearing, the sentencing judge declared him to be a DO and imposed an indeterminate sentence (see: 2017 SKPC 5). The appellant appealed his conviction and sentence. At the

McKay v R

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time of the sentencing, the courts were interpreting the effect of the amendments to the Code made by the 2008 enactment of the Tackling Violent Crime Act as having narrowed judicial discretion, as the word "shall" had been added to s. 753(1) of the Code, meaning that Parliament intended that courts find dangerousness upon proof of any one of the criteria listed in s. 753(2)(a)(i) – (iii) without considering any aspect of the offender's treatability. In R v Boutilier, the Supreme Court held that the 2008 amendments had not changed the law and set out the principles governing the operation of the provision. As a consequence of that decision, the appellant appealed his sentence on numerous grounds, amongst which were: 1) whether the sentencing judge erred in her interpretation of s. 753(1) of the Code in light of Boutilier. At the time of the appellant's sentencing, both defence and Crown counsel agreed that the judge should designate the appellant as a DO once the criteria of dangerousness had been met under s. 753(1) and their submissions were accepted by the judge; and 2) whether the sentencing judge erred in her interpretation if s. 753(4.1) of the Code in light of Boutilier. The sentencing judge stated the case law held that once a DO designation was made, an indeterminate sentence was presumed to be a fit sentence; 3) if so, should the court exercise its curative power and dismiss the appeal; and 4) if not, what was the appropriate remedy?
HELD: The appeal from conviction was dismissed. The appeal from sentence was allowed and a new hearing ordered. The court found with respect to each ground that: 1) the sentencing judge had erred in law in her interpretation of s. 753(1) of the Code primarily because she responded to the submissions before her that there was no additional step between satisfying the requirements of s. 753(1)(a)(i) and (ii) and the finding of dangerousness. Under Boutilier, trial judges are obliged to consider whether the offender constitutes a future threat in order to meet the criteria set out in s. 753(1)(a), which requires a consideration of the offender's treatability prospects. Failing to proceed in this manner constitutes a legal error. The consideration of the appellant's treatment prospects were a mandatory consideration at the designation stage; 2) the sentencing judge had erred in law in her conclusion to impose an indeterminate sentence. She did not state why a lengthy determinate sentence and a long-term supervision order of 10 years would not adequately protect the public as required by s. 753(4.1) of the Code, as the evidence presented by the two expert witnesses suggested that treatment could reduce the appellant's risk to the community; and 3) it would not exercise its curative power because, based on the evidence, it could not say there was no reasonable possibility that the verdict would have been any different had the errors of law not been made. A thorough inquiry to determine whether the appellant's risk could be adequately controlled in the community had not yet taken place; and 4) a new hearing should be held with respect to both the DO designation and the penalty.

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Androsoff v Waycon Investments Inc., 2019 SKCA 131

Richards Caldwell Tholl, December 3, 2019 (CA19130)

Agriculture – Lease - Interpretation
Civil Procedure – Appeal
Civil Procedure – Mandatory Interlocutory Injunction – Irreparable Harm
Civil Procedure – Mandatory Interlocutory Injunction – Strong Prima Facie Case
Landlord and Tenant – Lease - Renewals

The respondent corporation leased five quarters of agricultural land from the appellants. When the appellants entered into an arrangement to sell the land to a third party, the respondent commenced an action in Queen's Bench Court, alleging a right of first refusal to purchase the land. The respondent obtained an interlocutory injunction allowing it to farm the land pending the outcome of the trial. The written lease included a term that the agreement ended November 1, 2017 with the respondent having first right of renewal on a new rental agreement and a right of first refusal to purchase. The respondent said there was also an arrangement for them to rent the land again for the 2018 growing season on the same terms as those of the written lease. At some point in 2018, the appellants decided to sell the land. When the respondent talked to one of the appellants' spouses about renting the land for 2019, it was told that the land would not be rented to it. The respondent argued that it was going to rent the land again in 2019 pursuant to its right to do so in the lease. In January 2019, the appellants executed an agreement to sell the land to a third party. The respondent registered a miscellaneous interest on the land and then commenced the action for a "right of first refusal to renew the lease" of the land and "a right of first refusal to purchase the [land]". They also applied for an interlocutory injunction allowing them to farm the land until the action was determined. The chambers judge found a strong prima facie case because she concluded the lease for 2018 was a continuation of the written lease that contained the right of first refusal term. The irreparable harm in not granting the injunction was that the respondent owned adjacent land with easy access and that it had long term drainage plans for its existing land and the land. The appellants argued that the chambers judge erred concerning her strong prima facie case conclusion and her irreparable harm conclusion.
HELD: The appeal was allowed. The injunction was set aside. The chambers judge made reversible errors in her assessment of the strength of the respondent's case and on the issue of irreparable harm. The appeal court found that the chambers judge's assessment of the strength of the respondent's case could be challenged on several fronts. The appellants did not simply accept a rental payment from an overholding tenant and thereby create a year-to-

year tenancy. There were discussions between the parties about whether the respondent would lease the land in 2018, or whether it would be sold, etc. The evidence suggested that there was a one-year fixed-term lease covering the 2018 growing season. There were considerations pointing in favour of a right of first refusal being in the 2018 lease and in favour of it not. The appeal court also pointed out that even if the lease was found to be a year-to-year lease, it would not necessarily be determined that the right of first refusal was automatically incorporated into the terms of the year-to-year tenancy. The appeal court also found that there was no aspect of irreparable harm if the evidence was accepted that the respondent could not access 23 acres of currently owned land in wet years without crossing the land. The damages for not accessing land in a wet year would be reasonably straightforward to calculate. The chambers judge was also found to err in concluding that there was irreparable harm because the respondent would incur more cost and time in moving machinery in both seeding and harvest. There was nothing in the evidence to support the chambers judge's conclusion. The finding of long-term drainage plans as irreparable harm was also a reversible error. The evidence only showed that the respondent had a long-term plan to improve water management. There was no evidence that the long-term drainage plan would degrade or deteriorate pending trial if the respondent did not farm the land. Any losses associated with good farming practices or pre-purchased inputs to farm the land could also be easily quantified as damages if the respondent was successful at trial. The injunction was set aside, and the appellants were entitled to costs on Column 2.

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R v Baillie, 2019 SKPC 6

Jackson, January 22, 2019 (PC19064)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 10(b)

The accused was charged with operating a motor vehicle while over .08. An RCMP officer stopped the accused's vehicle, detected a smell of beverage alcohol when he spoke to the accused and observed one open can of beer and a number of unopened cans in his vehicle. The accused admitted to having consumed a couple of drinks a couple of hours previously. The officer detained the accused in an investigation of impaired driving. In the police cruiser, the accused stated that he had just finished a drink prior to being stopped. The officer made an ASD demand at 1:40 a.m. and decided to wait until 1:50 a.m. to ensure the dissipation of any mouth alcohol. At that time the accused failed the test. He was arrested for impaired driving and given his rights to counsel. When asked if he

understood, the accused replied that "I will call somebody in the morning". The officer testified that he "read the breath test demand verbatim" to the accused and he responded that he understood. The accused was taken to the detachment and no further rights to counsel were given there. He gave two breath samples, both indicating that his blood alcohol content was over the limit. The defence brought a Charter application, alleging that the accused's s. 10(b) Charter rights had been breached and requesting the evidence of the Certificate of Analyses be excluded under s. 24(2). A blended voir dire and trial was held with the admissible evidence to be applied to the trial proper. The issues were whether: 1) the Crown had proven that a lawful breath demand was made in accordance with s. 254(3) of the Criminal Code; 2) the accused's s. 10(b) rights were breached at the roadside by the officer failing to provide the accused an opportunity to contact counsel; and 3) the accused invoked his right to counsel and if so, whether the RCMP breached their implementation duties under s. 10(b) of the Charter when they made no further inquiries concerning counsel at the detachment? HELD: The accused was found guilty of driving while over .08. The court found that there had been no Charter breaches and admitted the Certificate of Analyses. The court found with respect to each issue that: 1) the breath demand was made lawfully. The evidence provided by the officer satisfied the court that he made the demand upon the accused in accordance with s. 254(3) of the Code; 2) in the circumstances of this case and applying the criteria set out in An, the right to contact counsel at roadside remained suspended until the ASD samples were taken. The officer did not know if the accused had a cell phone nor did the accused request to make a call within the 10 minutes available after the demand while the officer waited for mouth alcohol to dissipate; 3) no implementation duties were triggered under s. 10(b) of the Charter because the accused had not indicated a desire to exercise his right to counsel when he told the officer that he would call somebody in the morning.

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R v Roberts, 2019 SKPC 72

Harradence, December 13, 2019 (PC19066)

Criminal Law – Arrest – Reasonable and Probable Grounds
Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine
Criminal Law – Defences – Charter, Section 8, Section 9, Section 10, Section 24(2)
Criminal Law – Evidence – Confidential Informant – Credibility
Criminal Law – Search and Seizure – Warrantless Search

The two co-accused, K.R. and N.D., were the only occupants of a motor vehicle stopped by two officers. A third officer, Cpl. K.,

directed the stop and arrest of the co-accused. He had confidential information from Sgt. D. that N.D. and G.M. would be travelling in the vehicle from one city to another with a large amount of cocaine. N.D. was the girlfriend of a G.M., who was believed to be a member of a street gang and who was the target of an investigation. N.D. was known to drive the vehicle that was stopped. The officers did not have any information regarding K.R. and there was nothing about the driving of the vehicle or the actions of either occupant that led to the arrest. When N.D. was given her rights to counsel, she indicated that she wanted to call a private lawyer. Cst. W. indicated that he intended to give her that opportunity at the detachment but, in the meantime, proceeded to question her about the contents of the vehicle and her purse. There was no cocaine located in the vehicle, but Cpl. K. decided the co-accused should be strip-searched at the detachment. K.R. surrendered a package containing 28 grams of cocaine. Further searches and x-rays at the hospital found no further cocaine. The co-accused were charged with possession of cocaine for the purposes of trafficking. They argued for the exclusion of the cocaine as evidence due to ss. 7, 8, 9, 10(a), and 10(b) Charter violations. The co-accused were given an opportunity to contact counsel after the strip search. Cpl. K. said that he suspended rights to counsel to prevent destruction of evidence. According to Cpl. K., the reason for the co-accused to be taken to the hospital was to ensure the health and safety of the co-accused and to search for evidence.

HELD: The court examined the totality of the evidence to determine whether it satisfied the requirement of a warrantless arrest. The three criteria in DeBot were the focus of the examination. The court found that there was information missing from that given to Cpl. K. by Sgt. D. Sgt. D. did not testify. The court found that there was no evidence on which to assess the veracity, reliability, or credibility of the source. The experience of Cpl. K. had to be taken into consideration. The source information was incorrect regarding the occupants of the vehicle. The court concluded that, after considering the three-pronged DeBot test, the source information fell short of compelling. The warrantless arrest of the co-accused was unlawful and arbitrary within the meaning of s. 9 of the Charter. The searches were unreasonable and violated s. 8 of the Charter. The reasons given for the strip search raised suspicion rather than a credibly based probability justifying a strip search. The further detention and the invasive searches conducted at the hospital were unjustified and continued violations of the ss. 8 and 9 rights of the co-accused. The questioning of N.D. by Cst. W. after N.D. indicated that she wanted to contact counsel at the roadside was inappropriate. The Crown did not seek to enter the results of the questioning in evidence. There was a window to the phone room to monitor behaviour in the phone room. The court concluded that the delay in providing an opportunity to contact counsel resulted in a violation of the accused's s. 10(b) rights. The court undertook a Grant analysis to determine whether evidence should be excluded as a result of the Charter breaches. The police violated multiple rights of the accused.

That Sgt. D. did not provide evidence compounded the seriousness of the violations. The seriousness of the police conduct was high. Cpl. K. was found to be blinded by his desire to make an arrest and seizure. Both accused were treated the same, even though K.R. was unknown to police. The effect of the breaches on both accused was significant. Trafficking in cocaine was a particular problem in the area at the time. The case, however, was not found to be close to the line. There were blatant and repeated violations. The court concluded that society would not tolerate such police conduct for the sake of prosecution. All three Grant factors were found to point to the admission of the evidence bringing the administration of justice into disrepute. The cocaine was excluded from evidence at the trial.

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Tucker v Tucker, 2019 SKQB 317

Wilkinson, December 10, 2019 (QB19292)

Family Law – Child Support – Determination of Income – Corporate Dividends
Family Law – Child Support – Imputing Income
Family Law – Child Support – Interim Application – Retroactive Support
Family Law – Custody and Access – Interim
Family Law – Custody and Access – Shared Parenting
Family Law – Division of Property – Interim Distribution
Family Law – Spousal Support – Interim Application

The parties were married in 2005 and separated in 2016. They had three children, aged 15, 13, and 11. The petitioner was a licenced practical nurse (LPN) but was principally a "stay at home" parent during the marriage. She did return to part-time work after separation, earning approximately $53,000 per year. The respondent was the sole shareholder of a corporation that he bought from his parents for $1 million over the five years 2013 to 2018. He paid them $200,000 per year, ending August 1, 2018. In December 2016, the parties entered into an interim agreement whereby they had joint custody of the children with shared parenting alternating weekly. Global support was set at $2,500 per month. The proper quantum to be paid was to be agreed upon by June 1, 2017 after an exchange of financial information. The petitioner also received an interim distribution of property of $45,000. The respondent paid the $2,500 of monthly support from corporate earnings and recorded them as "loan receivable". The petition date was May 25, 2017. A consent order issued in August 2018 requiring financial disclosure by the respondent. The respondent's taxable dividend income for 2018 was $446,830 and $528,107 for 2017, with his actual cash dividend being $407,300 and $459,224 for 2017 and 2018, respectively. There was

evidence that the respondent's language directed at the petitioner was coarse and vulgar in the children's presence. The respondent also pointed to inadequacies in the petitioner's behaviour and parenting. The issues on the interim application were: 1) whether to alter the interim agreement for shared parenting; 2) the respondent's income; 3) whether the petitioner was underemployed; 4) child support, retroactive to the date of petition; 5) payor income over $150,000; 6) spousal support; and 7) an interim distribution of family property in the amount of $100,000.

HELD: The respondent's behaviour was found substantially more flagrant than the petitioner's. The court determined the issues as follows: 1) it did not change the existing parenting arrangement that had been in place for almost three years. 2) The petitioner argued that the respondent's income for 2017 and 2018 should be the cash dividend amount he received from his corporation pursuant to s. 5 of the Federal Child Support Guidelines (Guidelines). The respondent argued that his income should be $319,294 pursuant to s. 18 of the Guidelines because that was the figure of his shareholder loan withdrawals between September 1, 2018 and August 31, 2019. Alternatively, the respondent suggested using a three-year average of the actual value of his dividends, which he says was $351,828. The respondent also indicated that he was required to declare dividends in excess of pre-tax corporate income in most years to repay his parents for the share purchase. He said that he had not been able to retain a significant amount of net earnings in the corporation. The respondent was able to pay the full $1 million purchase price from corporate earnings and increase the retained earnings in the corporation from $481,284 to $575,391. There was found to be approximately $60,000 a year in pre-tax corporate funds available to the respondent for family purposes. The respondent argued that the corporation had experienced some difficulties since August 2018, when he paid off the share purchase. The court disagreed, pointing out that gross revenues were up for 2019 as per the financial statements. The expenses did, however, increase compared to the prior year. One such expense was the installation of artificial ice in the back of the store to offer goalie and hockey schools. There were also significant corporate donations to pay for the children's hockey. The court left those matters to be determined at trial. A three-year average of taxable dividends was not used for the respondent's income for numerous reasons. The court focused on the corporation's pre-tax income for the most current year and attributed that income in its entirety to the respondent ($367,174). 3) The factors relating to the petitioner that the court considered were age, education, experience, skills, health, past earning history, and the amount of income that she could earn. The petitioner had never worked full-time during the marriage due to her child-related obligations, and she now worked part-time at a senior's residence, not a hospital. The court found that it may not be realistic or fair for her now to have to work full-time in a hospital. The court used the petitioner's 2018 income of $52,535 as her income; 4) the court looked at the four factors for retroactive support from DBS. The

parties had not reviewed the interim arrangement for support by June of 2017, as was agreed. The petitioner issued her petition in May 2017. There was insufficient evidence to support an award of retroactive support earlier than June 1, 2019, i.e. the month following the provision of the mother's income information; 5) deviation from s. 3 of the Guidelines was not found to be warranted. The respondent's net obligation was found to be $5,162.00 per month commencing June 1, 2019. The court did not address the s. 7 expenses, which had been paid by the corporation as corporate donations. 6) The petitioner would have net annual cash of $113,604 available to her with the addition of the child support. She indicated that her expenses were $162,579; however, there was some doubt regarding those expenses. The petitioner could meet her annual expenses without spousal support. There was, however, the compensatory support issue. The Spousal Support Advisory Guidelines suggested a range of spousal support from $3,348 to $6,870. The court determined that interim support should be ordered at the low end, $3,000 per month. 7) The petitioner argued that she required an additional interim distribution of $100,000 to fund her litigation, including $14,000 for a business valuation of the corporation. The most important factor to consider was whether the net assets for distribution far exceeded the amount of the interim distribution requested. The most significant family assets were the corporation and the family home that was occupied by the respondent. The parties' property statements had not been updated in a long time, and many of the entries were "unknown". The court ordered an interim distribution of $15,000 to enable the petitioner to obtain the necessary business valuation.

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R v Kay, 2019 SKQB 318

Keene, December 11, 2019 (QB19294)

Criminal Law – Assault – Sexual Assault

The accused was charged with sexual assault contrary to s. 271 of the Criminal Code. The complainant testified that she met the accused for the first time just prior to the offence while they were at a party at the complainant's sister's apartment. She agreed to give the accused a ride to his residence. The complainant said that she went into his house to use the washroom and then the accused invited her into his bedroom, whereupon he began removing her clothing and had intercourse with her. She testified that she froze because of previous trauma but did tell him repeatedly "no" and to "stop". She spoke in a normal voice because there were children in the house, but she said she was crying softly. The accused stopped and she put on her clothes and left the house. The complainant said that she had never said to the accused that she wanted to engage in

sexual activity and did nothing by her actions to suggest it. After returning to her sister's place, she told her what had happened. She saw the accused again when she had to go to her car and he asked her to take him to the bank. She told him to leave, he did, and she called the police. The complainant's sister testified and corroborated her version of what had happened at her party and that when the complainant returned from the accused's home, she was crying hysterically. The police constable who responded to the complainant's call testified that she appeared to have been crying as well and described her as hung over, but not intoxicated. The accused testified regarding the party and what followed. He recounted that he did not notice the complainant had passed out during the party and said that when they were in his room, they were both involved in fondling and kissing. He could not remember if there was any penetration and he stopped everything when another person who lived in the house entered the room. In cross-examination, the accused said that the complainant was just lying there when he took her clothes off and said: "I figured it was mutual". He later changed his testimony and said that penetration had occurred and admitted that he had intentionally lied to the investigating officer. Further, he agreed that the complainant had not started the sexual activity, had said nothing that would lead to sexual activity and said nothing to him while he was having sex with her.
HELD: The accused was found guilty. The court found that the Crown had proven that the complainant had not consented and that the accused knew that the complainant had not consented to the force being applied. He had taken no reasonable steps to ascertain the complainant's consent and could not rely on the defence of honest but mistaken belief. Under the D.W. analysis, the court stated it believed the evidence of the complainant, her sister and the police constable and did not believe the accused.

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Pennington v R, 2019 SKQB 319

Tochor, December 10, 2019 (QB19293)

Criminal Law – Child Pornography
Defences – Charter of Rights, Section 11(b) – Stay of Proceedings

The accused was charged with an offence contrary to s. 163.1(4) of the Criminal Code (possession of child pornography) in August 2016. In February 2018, the first indictment was filed and in July 2019 a direct indictment was filed. Both indictments alleged the same offence. However, the direct indictment expanded the time frame from one day to a period of over six months. The trial on the first indictment was scheduled for December 16 to 20, 2019, which was 40 months after the swearing of the information. The accused

brought an application to have the proceedings stayed for a breach of his s. 11(b) Charter rights.
HELD: A stay was entered on the first indictment and the matter of the direct indictment was remitted back to the pre-trial conference judge. The court applied the Jordan framework. The total delay was 39 months and 25 days. The admitted defence delay amounted to 4.5 months. There was a period of contested delay of 5 months and 8 days. A preliminary hearing date was set for August 16, 2017 and further disclosure was provided to the accused on June 12, 2017, two months and four days prior to the scheduled preliminary hearing. The accused sought and received an adjournment of the hearing. The accused argued that the adjournment was necessary due to late disclosure. The disclosure contained additional evidence against the accused and had the effect of changing the Crown's case. The court concluded that the delay for the period was not the responsibility of the defence and should not, therefore, be deducted from the total delay. The defence had taken its actions legitimately. One reason given by the accused for wanting the two-month adjournment was so that he could consult with an independent forensic analyst based on the new disclosure. The Crown also consented to the adjournment request. The court agreed with the accused that disclosure ordinarily ought to occur before he is called upon to elect a mode of trial or enter a plea. Legitimate steps are not defence delay. The presumptive ceiling was exceeded. None of the contested delay was attributable to the defence. The net delay to be considered by the court was 35 months and 10 days. Even if the court deducted the entirety of the contested delay and subtracted 5 months and 8 days from the 35.333 months of net delay, the presumptive ceiling had been breached. The court examined whether there were exceptional circumstances: either discrete events or a particularly complex case. The Crown argued a discrete exceptional circumstance occurred with the "last minute-appearance" of new disclosure prior to the originally scheduled trial date. An investigating officer testified on the application as to the various steps taken in the investigation after four hard drives were seized from the accused on August 24, 2016. He testified to several factors that delayed the investigative work, which the court found were that the investigators had inadequate resources to complete investigations within the Jordan timelines. Also, some of the exhibits had to be sent to other units for analysis. Only two of the exhibits had been analyzed by the time of the hearing application, which was more than three years after they were seized. The court did not find that the explanations provided by the investigating officer constituted discrete events as described in Jordan. Jordan specifically dispensed with inadequate resources as being an exceptional circumstance. The Crown also argued that the case was particularly complex. At least one of the hard drives seized from the accused was encrypted, which created a roadblock for investigators. The Crown argued that the accused should not be able to benefit from the roadblock. The Crown also argued that the type of case was inherently complex in nature. After considering what the court

had held in Jordan about a particularly complex case, the court concluded that this case did not qualify as complex. A stay was ordered.

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Moose Jaw Co-operative Association Ltd. v United Food and Commercial Workers, Local 1400, 2019 SKQB 321

Richmond, December 11, 2019 (QB19299)

Administrative Law – Appeal – Labour Standards Act
Administrative Law – Judicial Review – Labour Standards Act – Standard of Review
Employment – Labour Relations – Strike – Leafleting
Labour Law – Appeal
Labour Law – Judicial Review – Labour Relations Board
Labour Law – Unfair Labour Practices
Statutes – Interpretation – Trespass Property Act

The applicant employer applied for judicial review of the Saskatchewan Labour Relations Board (board) decision of March 2019. The decision determined the respondent union's application alleging an unfair labour practice pursuant to s. 6-62(1)(a) of The Saskatchewan Employment Act. The union served strike notice in September 2018 and began striking a few days later. A union member was picketing and began handing out leaflets on the employer's business premises. The police were called and informed the union that the employer was asserting a trespass and that they would need to vacate. The next day, the employer served notice pursuant to The Trespass to Property Act (TPA) on the person handing out the leaflets, which notified her that she was prohibited from entering the business and threatened law enforcement involvement if she refused to vacate or accessed the premises in the future. As a result of the notice being served, the union applied to the board for a finding of an unfair labour practice. Their application was successful. The employer raised the following issues on appeal: did the board make a reviewable error 1) by allowing the union to argue regarding the constitutionality of the TPA's application to the facts when the union had not served notice of constitutional question pursuant to The Constitutional Questions Act; 2) by holding that the TPA did not enable the employer to limit the union's ability to leaflet on its business premises; and 3) by holding that the conduct of the employer constituted a contravention of s. 6-6.2(1)(a) of The Saskatchewan Employment Act?
HELD: The parties agreed that the standard of review regarding the board's discretion not to require notice under The Constitutional Questions Act, 2012 and the application of The Saskatchewan Employment Act was one of reasonableness. The court did not agree

with the employer that the standard of review respecting the board's interpretation of the scope of the TPA was correctness. It was reasonableness. Therefore, deference to the board was required on all issues. The issues were determined as follows: 1) the employer argued that notice should have been given to allow the provincial government an opportunity to present its views on how the TPA would and should be interpreted and applied. The employer did concede that there is no procedural requirement to serve notice. The board did have discretion to require notice. However, the court concluded that the board did not improperly exercise its discretion. The board kept Charter values in mind. Also, the court did not agree that the board read down the TPA because the act does not define when a trespass occurs. The court found that the board was not assessing the constitutionality of a law but was rather considering whether a trespass occurred. The court concluded that it was reasonable not to require notice; 2) the employer argued that leafleting is not an exception to trespass. The court found that the board's decision that leafleting is a right conferred by law was thoroughly reasoned and explained. The leafleter did not resort to public intimidation and was carrying out the leafleting activities peacefully, so had not lost the protection of the law. The court held that it was not unreasonable for the board to conclude that the TPA did not apply to the particular leafleting; and 3) the employer should have known that leafleting is a permitted and protected activity unless and until the person leafleting does something to lose that protection. The decision of the board was found to be justified, transparent, intelligible and within the range of acceptable outcomes. The employer argued that their notice was appropriate because they relied on advice from third parties, the Crown and police, and were not using a superior economic position to improperly control or coerce employees. The union argued that there was nothing unreasonable in concluding that employees were intimidated, threatened, and interfered with. The court found that the decision fell within the range of what was acceptable and defensible on the facts before it. The application was dismissed, and the union was given its taxable costs.

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Larson Estates, Re, 2019 SKQB 324

Danyliuk, December 17, 2019 (QB19300)

Statutes – Interpretation – Survivorship Act7
Wills and Estates – Estate Administration – Joint Property
Wills and Estates – Estate Administration – Mirror Image Wills – Spouse Dies within 30 Days
Wills and Estates – Wills – Interpretation

There were two related applications for probate. The deceased husband and wife died 27 days apart, with the husband dying first. The question arose as to how to properly deal with probate. The husband's will named his wife as his executor and his daughter, the applicant, as alternate executor. The rest and residue of the estate was left to his wife. There was also a clause in the husband's will that if his wife predeceased him or died within 30 days of his death, the residue of his estate would pass equally to his three children. The wife's will mirrored her husband's. In October 2019, the applicant contemporaneously filed probate applications for both husband and wife. Additional information was required because the property statement indicated that the wife held property jointly with her husband at her death, which could not have been the case, since he had already died. The applicant then equally apportioned the joint assets between the two estates. The applicant's lawyer indicated reliance on The Survivorship Act, 1993 for the way the assets were divided. The issues were: 1) the proper law to apply to each will; 2) how the application for probate should be adjudicated; and 3) how the estates should be administered.
HELD: The court did not agree with the applicant's submissions. The issues were determined as follows: 1) assets that are jointly owned do not pass through the will and are not dealt with by a grant of letters probate or letters of administration. The applicant ignored the fact that as soon as the husband died, ownership of the property he held jointly with his wife vested in her. By the time the wife died, there was no more joint ownership. The 30-day clause was not relevant to the jointly held property. The applicant argued that the husband and wife passed away in such proximity in time that it should be deemed that they died at the same time, thereby triggering provisions of The Survivorship Act. According to the applicant, The Survivorship Act would override any right of survivorship of the jointly owned property. The court concluded, however, that it was legally impossible for the wife to still own property jointly with the husband on the day she died. The wife solely and exclusively owned all joint property on the date of her death. Therefore, that property passed to the children solely through the wife's will. The legislation does not apply to situations wherein it is clear which of two spouses died first. The Survivorship Act applied to situations of uncertainty and ambiguity; 2) and 3) regarding the husband's estate, the applicant had a decision to make. The estate had roughly $5,000 left once the joint assets were removed so an application could be made under s. 9 of The Administration of Estates Act to deal with those assets by way of order, without the need for a full probate application. Alternatively, if the probate application were renewed on the husband's estate, the jointly held assets should not be included in part I but would be set out in part II of the statement of assets. With respect to the wife's estate, all of those assets that were previously held jointly were owned solely by her at her death and should have been included in part I of her statement of assets. Leave was granted to refile both applications.

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Wenkoff v Wenkoff Estate, 2019 SKQB 325

Robertson, December 17, 2019 (QB19298)

Real Property – Statute of Frauds
Civil Procedure – Queen's Bench Rules, Rule 7-5

The plaintiff applied for an order granting summary judgment in his claim against the defendant, the administrator pendente lite of the estate of the plaintiff's deceased father, who died intestate in May 2018. He sought a declaration that the agreement between him and his father (the deceased) with respect to the sale and gifting of the latter's farming operation to him was effective and enforceable as well as judgment for specific performance obliging the defendant to complete and perform the terms of the agreement. The evidence was submitted by affidavits sworn by the plaintiff, the lawyer who had reviewed the terms of the oral agreement between the plaintiff and the deceased and the deceased's other children as well as exhibits containing medical records. The parties' evidence was contradictory in significant respects. The deceased had five daughters with his first wife and one son, the plaintiff, with his second partner. He owned and farmed four quarters and raised cattle. The home quarter had been left to him by his mother on the condition that if he sold it, his daughters would have the right of first refusal. The plaintiff, who had lived elsewhere, returned to the province in 2012 and in March 2015 began working full-time on the farm under an unwritten arrangement that the plaintiff would pay for costs of operation and retain all revenues from the grain operation and sale of calves. In October 2017, the plaintiff and the deceased met with Mr. Neil, a local lawyer, to review the terms of sale of the farm for $300,000 payable without interest by $30,000 annual instalments. The deceased would give the home quarter and another quarter to the plaintiff by gift to avoid triggering the option to purchase. Mr. Neil recommended that the deceased obtain independent legal advice before signing any agreement. Mr. Neil required more information to reduce the agreement to writing, but the plaintiff did not provide it until May 2018. By that time, the deceased's health had seriously declined and the plaintiff attempted to arrange for another lawyer to see the deceased but he died before that could happen.
HELD: The application was dismissed. The court found that the evidence introduced by affidavits and agreement was sufficient to determine the Statute of Frauds issue. Regarding the doctrine of part performance, the first requirement of proof of an enforceable oral agreement, it found that the plaintiff had established that there was an oral agreement, but it was contingent on the deceased obtaining independent legal advice and thus the agreement had not been finalized. The plaintiff had not established that he performed acts

showing his reliance on the agreement to his detriment. If the court had found otherwise, it would not have granted specific performance to transfer the farm to the plaintiff because the evidence supported a finding of presumption of undue influence as pled by the defendant. A trial would be required to allow the plaintiff to call evidence to rebut this presumption.

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Poworoznyk v Said, 2019 SKQB 326

Robertson, December 19, 2019 (QB19301)

Family Law – Child Support
Family Law – Custody and Access – Best Interests of the Child
Family Law – Custody and Access – Children's Law Act
Family Law – Custody and Access – Joint Custody
Family Law – Custody and Access – Shared Parenting

The parties had a nine-year-old boy. The petition for custody was filed in January 2017. In September 2017, a fiat was issued granting the petitioner mother interim custody with interim access to the respondent every other weekend and every Tuesday and Thursday from 4 pm to 8 pm. Interim child support was set at $169 per month. The issue of custody was not resolved at the pre-trial. The respondent maintained his desire for a shared parenting arrangement. The petitioner had another child from a previous relationship, born March 2009. The child in this case was born in October 2010. In 2016, an emergency intervention order had issued when the petitioner thought the child was left at home alone while the respondent was working. The respondent said that he left the child with his roommate. The petitioner was employed at a hotel. She was the primary caregiver of the child except during six weeks in April/May 2016. The respondent tried to maintain employment, usually working in minimum wage jobs. The issues were: 1) the parenting arrangement; and 2) financial support.
HELD: The issues were discussed as follows: 1) the child had a healthy relationship with both parents. The child was happy and active. Both parents were attuned and responsive to the child's needs. The court did not find the incident resulting in the emergency intervention order as relevant to the ability of the parents to care for the child, so it was not taken into account by the court. The petitioner had a proven track record regarding her capacity to care for the child, with support from her sister and friend. The respondent, on the other hand, answered questions vaguely. The parties had a history of difficulty communicating with each other. The court found both parties were responsible for the conflict. The court concluded that it was in the best interests of the child to support the respondent's involvement in his life by ordering joint custody. Both parents should discuss and make significant

decisions about the child together. The petitioner could continue to make day-to-day decisions when the child was with her and the respondent could make the decisions when the child was with him. The court concluded that the petitioner was successful in convincing the court that a shared parenting order would not be in the child's best interests. The reasons to keep primary residence with the petitioner were: the status quo; the petitioner provided stability for her children, whereas the respondent changed jobs and residences many times; the court found that it was not apparent that the respondent had considered the demands on him that would be required if there were a change to shared parenting; and the child was close to his older brother, and their relationship could be impaired if a shared parenting order were made. When discussing access, the court noted that the respondent had a desire to share his culture and language with his son. The desire was warranted and should be encouraged. The court ordered reasonable and generous access to the child with an access schedule set out in the judgment. The court also ordered that the parties may agree, in writing, to deviate from the ordered schedule; and 2) the respondent's 2018 income was $24,160 and the petitioner's income was $25,298. The Federal Child Support Guidelines indicate a monthly payment of $191.06. The court ordered the monthly payment of $191 per month. The parties were ordered to exchange their annual tax information. No order for costs was made.

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R v Gamble, 2019 SKQB 327

Danyliuk, December 20, 2019 (QB19311)

Criminal Law – Sentencing – Aboriginal Offender – Gladue Report

The accused was found guilty of aggravated assault contrary to s. 268(1) of the Criminal Code and unlawful confinement contrary to s. 279(2) of the Code. The accused, an Aboriginal man, applied for an order that a Gladue Report (GR) should be prepared and filed before sentencing and that Court Services should pay for it as the accused had no resources. Court Services opposed the granting of such an order, taking the position that sufficient information was available through a series of Pre-Sentence Reports (PSRs) already filed and that there were other means of putting the information before the court. The defence argued that the PSRs filed in this matter were inadequate and a full state-funded GR was required. In support of the application, the accused deposed in an affidavit that he is a status Aboriginal man with membership in the Thunderchild First Nation and that he had experienced numerous circumstances in his life considered to be Gladue factors that would be of interest to the court in his sentencing. He did not set out in his affidavit the exact circumstances that suggested a GR was required. In another

affidavit, a deponent described herself as "an approved GR writer" for Saskatchewan but did not say by whom she was approved. She indicated that she knew the difference between PSRs and full GRs and that the latter were preferable. In cross-examination, she noted that a PSR is mainly a predictor of future risk of re-offending and offered limited insight into the reasons behind an offender's conduct. The authors of PSRs spend limited time with the subjects and are limited to one paragraph of Gladue information. Another witness called by the defence was qualified as an expert regarding the training and education of GR writers, but she had little experience with PSRs. After reviewing the PSRs in this case, however, she felt that there had been an incomplete exploration of Gladue issues such as information regarding intergenerational family details, especially regarding parents and grandparents who had attended residential school and the community of origin.
HELD: The application was dismissed. The court noted that s. 718.2(e) of the Code required it to consider Gladue information but was silent as to how to obtain the information. It held that it had the jurisdiction to order a state-funded full GR as sought by the defence, but it was not satisfied that this was one of the truly exceptional situations in which to do so. The court found that, based on the evidence submitted, GRs are not inevitably superior to PSRs. There are no national standards, and there is no overall consistency regarding their preparation. It could not infer that PSRs are generally inadequate to set out the proper Gladue information, nor that the PSRs prepared in this case were inadequate. The accused was unable to articulate what was wrong with the PSRs. If the accused wanted to augment the information before the court, he should do so through counsel or otherwise.

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Rumbold v Rumbold, 2019 SKQB 329

Robertson, December 20, 2019 (QB19312)

Statutes – Interpretation – Power of Attorney Act, 2002, Section 18

The applicant gave his son, the respondent, power of attorney (POA) in 2016. In 2019, the applicant revoked the 2016 POA and appointed new powers of attorney to other people. The respondent brought an application challenging the appointment, alleging that the applicant was now mentally incompetent. That matter had been heard but the decision reserved just prior to the hearing of this application that sought an accounting from the respondent of his exercise of the POA. The issues were whether: 1) the respondent was required to provide the accounting; and 2) the applicant was entitled to an order compelling the respondent to perform his statutory duty.
HELD: The application was granted. The court found with respect to each issue that: 1) under s. 18 of The Powers of Attorney Act,

2002, the applicant was entitled to request an accounting and the respondent was under a duty to provide it; 2) it had jurisdiction to grant the application under s. 18.1 of the Act. The POA had been terminated, the applicant requested an accounting and the statutory period within which to provide an accounting had expired. In addition, the court could grant the order under its inherent jurisdiction.

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R v Robertson, 2019 SKQB 330

Mitchell, December 20, 2019 (QB19303)

Criminal Law – Appeal – Acquittal
Criminal Law – Arrest – Reasonable and Probable Grounds
Criminal Law – Costs – Criminal Code, Section 826
Criminal Law – Defences – Charter of Rights, Section 9, Section 24(2)
Criminal Law – Driving over .08
Criminal Law – Impaired Driving

Cst. G. pulled over a vehicle after she observed it travelling on a highway in the wrong direction. The respondent was the driver and lone occupant of the vehicle. Cst. G. observed that the respondent had difficulty retrieving the vehicle registration, had "petite pinpoint pupils", "glassy eyes", and there was an odour of alcohol. Cst. G. arrested the respondent for impaired driving contrary to the then s. 253(1)(a) of the Criminal Code. When Cst. G. second guessed herself as to whether she had stopped the right vehicle, she administered an ASD on the accused, which he failed. The respondent was then arrested for impaired driving a second time and was again advised of his right to counsel. At the detachment, the respondent's breath results were over .08. He was then charged with driving while over .08, contrary to the then s. 253(1)(b) of the Criminal Code. The respondent was acquitted of both charges after trial. The trial judge determined that the respondent's s. 9 Charter rights were breached and the breath test results were excluded pursuant to s. 24(2) of the Charter. The Crown appealed the acquittals. The issues were: 1) whether the Crown could recant its concession on appeal; 2) whether the trial judge erred when he found a violation of s. 9 of the Charter; 3) whether the trial judge erred when he excluded the breath test results pursuant to s. 24(2) of the Charter and acquitted the respondent of the charge of driving over .08; 4) whether the trial judge erred by acquitting the respondent of impaired driving; and 5) whether costs should be awarded against the Crown on the appeal.
HELD: The Crown's appeal was allowed. The issues were determined as follows: 1) at trial, Crown counsel conceded at the outset that Cst. G. lacked subjective grounds to believe the

respondent was driving while impaired by alcohol. On appeal, Crown sought to recant the concession because it was wrong in law. The respondent opposed the recantation because the concession amounted to an admission, so it could not be withdrawn on a subsequent appeal, and because it would allow new issues to be raised for the first time on appeal. The concession was a concession of law, not fact: therefore, it did not bind the trial judge, nor the appeal court. The appeal court found that the issue was not a new one, but involved in the s. 9 Charter issue. Further, the evidentiary record was sufficient for a reviewing court to address the issue, if it were new. The Crown's concession that s. 9 of the Charter had been infringed was recanted; 2) there was no dispute that the respondent was initially detained and, shortly thereafter, arrested. Therefore, the first stage of the s. 9 analysis was satisfied. The next question concerned the arbitrariness of the detention, and specifically the legality of the arrest. The trial judge concluded that Cst. G. lacked subjective and objective grounds to believe that the respondent was driving his vehicle while impaired. The appeal court found that the trial judge had erred in coming to the conclusions as a matter of law. It was clear that Cst. G. honestly believed she possessed subjective grounds to arrest the respondent. The Crown's concession of law was wrong and should not have been accepted by the trial judge. Viewed objectively, Cst. G.'s subjective belief was reasonable. The respondent's initial arrest was supported and legal. The trial judge also erred by finding that Cst. G. used the ASD to substantiate her belief that the respondent was impaired. She was using the ASD to satisfy herself that she had pulled over the vehicle with the abhorrent driving. The trial judge erred in finding a s. 9 Charter breach; 3) the court nonetheless addressed s. 24(2) and found that the appeal could also be allowed on that basis. The trial judge overemphasized the seriousness of the allegedly Charter-infringing state conduct and the effect of the breach on the respondent's Charter-protected rights. The trial judge also erred in law by equating reasonable grounds to arrest with a reasonable bases to convict the respondent when considering the third arm of the Grant test; 4) the Crown also appealed the trial judge's decision to acquit the respondent of the impaired driving charge on the bases that he erred in law when he assessed the degree of proof required for impaired driving and his decision was inadequate. The trial judge's decision regarding the impaired driving charge was only one sentence. The appeal court found that the trial judge's determination on the impaired driving charge could be judicially scrutinized. The appeal court did not, however, find that the trial judge's decision was correct. The acquittal was set aside, and a conviction was entered. The trial judge only focused on the odour of alcohol and ignored the other indicia of impairment Cst. G. had observed. The judge must consider the constellation of factors; and 5) the appeal court rejected the respondent's submissions that the Crown's conduct of withdrawing its "admission" warranted a costs award in his favour. The respondent was convicted of driving over .08 and

impaired driving. The matter was remitted back to Provincial Court for sentencing.

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R v Delorme, 2019 SKQB 333

Scherman, December 23, 2019 (QB19313)

Constitutional Law – Charter of Rights, Section 8, Section 9

The accused, M.D. and J.K., were each charged with possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. M.D. was also charged with unlawfully possessing ammunition while prohibited to do so contrary to s. 117.01(3) of the Code. Both accused brought a Charter application alleging that because there had been a breach of their ss. 9 and s. 8 rights, the evidence obtained by the police following their detention, arrests and a search of their vehicle should be excluded under ss. 24(1) and (2) of the Charter. A voir dire was held with the agreement that if the Charter applications were not successful, the evidence presented would be accepted as Crown evidence in the trial proper. The circumstances that led to the charges included that the RCMP had information that M.D. was a drug trafficker known to carry firearms and to be violent. A confidential informant advised an officer (S.) that M.D. was known to be in possession of a firearm. M.D. was under three separate s. 109 Criminal Code prohibition orders prohibiting him from possessing firearms or ammunition for life. S. learned that M.D. might be travelling in a white Dodge truck. He advised other officers on shift that if they encountered the vehicle, they should use caution because of M.D. could be carrying a firearm. When one of the officers spotted the truck, she pulled it over intending to conduct a vehicle/driver check pursuant to her authority under s. 209.1 of The Traffic Safety Act. She placed a police radio call for assistance and also checked the registration of the vehicle. When another officer arrived, they approached the vehicle. Neither of them saw a firearm. One officer obtained the driver's licence from J.K. and ran a check on it, and the other officer asked the passenger, M.D., whether he was on any conditions. M.D. answered no. S. then arrived at the scene and, after running a CPIC check, arrested M.D. on an outstanding Manitoba warrant. M.D. was handcuffed and placed in S.' vehicle, where he received his rights. During this time, the other officers asked J.K. if there was anything in the vehicle, and she said no and told them they couldn't look in it. They could not see into the vehicle nor smell anything. S. returned to the truck and shone his flashlight into it, observed a box of ammunition in the backseat and noted a smell of marijuana. He advised J.K. she was under arrest for possession of marijuana and placed her in the police vehicle. Upon opening the back door of the truck, S. found a bag containing a significant quantity of fresh

marijuana. He then informed M.D. that he was now under arrest for possession of marijuana for the purposes of trafficking and for being in possession of ammunition when prohibited. The officers undertook a further search of the truck and found cocaine. They informed J.K. that she was now under arrest for possession of marijuana and cocaine for the purpose of trafficking. The issues were: 1) whether the vehicle stop constituted arbitrary detention for lack of a purpose permitted by s. 209.1 of the Act, or whether the detentions were permitted for a purpose other than those permitted by the Act; 2) whether the arrest of M.D. on the Manitoba warrant was lawful, as the warrant had not been endorsed to be executed in Saskatchewan; 3) was the arrest of J.K. for possession of marijuana lawful? The initial arrest of J.K. was arbitrary because S. did not have a subjective belief that reasonable and probable grounds existed that she had committed the crime of possession, and if he had held it, it was not objectively reasonable because the other officers testified that they had not smelled marijuana; 4) whether the arrests of M.D. for possession of marijuana and/or possession of ammunition in breach of prohibition were lawful; 5) was the search of the vehicle following the arrests a proper search incidental to lawful arrests; and 6) if not, should the evidence obtained be excluded by reason of the Charter breaches involved?
HELD: The application was dismissed. The court found that there had been no breach of ss. 8 and 9 of the Charter. The evidence disclosed by the vehicle searches was properly admissible on the trial of the charges against the accused. It found that: 1) the officer had a reasonable suspicion to undertake an investigative detention and thus stop the vehicle apart from a purpose in s. 209 of the Act. The targeted stop was made based upon the officer's reasonable suspicion that M.D. was in the vehicle and potentially in possession of a firearm in breach of the prohibition orders. Her subjective suspicion was objectively reasonable based upon the knowledge that the RCMP had regarding M.D.'s criminal activities in the past, the prohibition orders, and the recent information from the informant that M.D. was in possession of a firearm. As the investigative detention proceeded, the officers' reasonable suspicion of the crime of breach of a prohibition against possession of a firearm was overtaken by additional information. S. believed his observations provided him grounds to arrest both accused, being informed of the existence of a Manitoba warrant, his observing ammunition in truck occupied by M.D. and his smelling fresh marijuana from within the truck. The detention of J.K. was not arbitrary as it was justified as part of the investigative detention of M.D. and the officer's right to check her licence. 2) It did not matter whether the Manitoba warrant was one that the officer was entitled to arrest upon because what occurred before M.D.'s initial arrest was and continued to be a proper investigative detention. Any improper arrest under that warrant was replaced or supplemented by the subsequent justified arrest of M.D. for breach of his prohibition order. No search of the vehicle occurred until after the officer observed, in plain view, ammunition in the vehicle and as

part of the scope of the investigative detention. Once the officer smelled marijuana, he arrested J.K. and the search that ensued was incidental to it. Alternatively, the officer could have searched the vehicle incidentally to his arrest of M.D. for breach of his prohibition order. 3) It accepted S.'s evidence that he both saw the ammunition and smelled marijuana. The observations resulted in the officer's reasonable belief that J.K. was in possession of marijuana, for which he was entitled to arrest her. 4) Based on the officer's reasonable belief that M.D. was in possession of ammunition, he was entitled to arrest him for that as well as possession. 5) Upon the arrests of either J.K. or M.D., the police were entitled to conduct appropriate searches incidental to such arrests. 6) If it were wrong in its conclusion that no breaches of the Charter had occurred, the court would have admitted the evidence after conducting a Grant analysis.

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Peter Ballantyne Cree Nation v Canada (Attorney General), 2019 SKQB 334

Konkin, December 23, 2019 (QB19306)

Aboriginal Law – Reserves

The individual plaintiffs and the Peter Ballantyne Cree Nation (PBCN) commenced their action against the defendants in 2004 and numerous applications and an appeal had followed (see: 2014 SKQB 327; 2016 SKCA 124; 2018 SKQB 250). The gist of the action in continuing trespass was that reserve lands (Indian Reserve 200, described as the Southend lands), held by PBCN and situated on Reindeer Lake, had been flooded and continued to be flooded, after the construction of the Whitesand Dam in 1942 by the predecessor to the defendant, Saskatchewan Power Corporation (SPC). In this application made by SPC and the defendant Government of Saskatchewan pursuant to Queen's Bench rule 7-2 for summary judgment, they sought dismissal of PBCN's claim for continuing trespass and an order dismissing its claim for damages. The ground of their application was that the land in question was not an Indian Reserve. They argued that for the lands to be an Indian Reserve, they either had to be a reserve prior to October 1, 1930 or at least "selected and surveyed" such that they would have remained in the possession of the federal government pursuant to s. 10 of the Natural Resources Transfer Agreement, 1930 (NRTA). Both the PBCN and the Government of Canada (Canada) conceded that the Southend lands had not been confirmed as a reserve on or before October 1, 1930, but argued that those lands had been "selected and surveyed" prior to October 1, 1930 and therefore fell within the ambit of s. 10 of the NRTA. The parties agreed that the matters before the court could be addressed by the summary application

procedure, including the introduction of affidavits sworn by experts representing each party. PBCN, a party to Treaty 6, held seven reserve blocks set aside for them around Pelican Narrows, to the south of the Southend land. However, members of the PBCN's Band lived around the south end of Reindeer Lake prior to 1929. In 1930, the federal government's interest in land located in Saskatchewan was to be transferred to the province. Prior to the transfer, it sought to clarify which lands were owed to specific Bands and to survey reserve lands for such Bands to create reserves or to "select and survey" lands that would be withheld from transfer to Saskatchewan under s. 10 of the NRTA. In this case, a surveyor was sent to the area in 1929 to perform a number of surveys on lands identified by the Department of Indian Affairs (DIA) to the Surveyor General, Department of the Interior. The Southend lands were described as being those of the Barren Lands Band, whose population entitled them to 21,376 acres. The surveyor reported that the people he found at Southend were Cree of the Peter Ballantyne Band. Later he submitted his report to DIA as to the survey and included 10,122 acres at Southend. Later investigation of that survey showed mistakes. The evidence submitted by each party and their interpretation of the historical record of whether the Southend lands had received status as either an Indian Reserve or "selected and surveyed" were in conflict. PBCN argued that the defendant could not raise the issue of reserve status for the lands in question in any case, because the issue had been determined in the 2014 Queen's Bench application in which the parties had proceeded by an agreed statement of facts that the land had a reserve in it, and in the subsequent appeal. It was a matter of the doctrine of estoppel per rem judicatem. PBCN also argued that the due to the Treaty Land Entitlement Framework Agreement (TLEFA) negotiations and agreement wherein the Government of Saskatchewan negotiated on the basis that Indian Reserve 200 was not transferred to it by the NRTA , it was now estopped by convention from arguing that the land was not a reserve.

HELD: The defendants' application was granted and the PBCN's claim for continuing trespass was dismissed, as was its claim for damages. With respect to PBCN's argument that the defendants could not raise the issue of the status of the lands in question, the court found that the doctrine of estoppel per rem judicatem did not prevent the defendants from raising it here, as the 2014 summary judgment proceedings were based solely on the issue of whether PBCN's case was statute-barred and the agreed statement of facts was used for the purpose of facilitating the summary judgment process. The court also rejected the argument that Saskatchewan was estopped by convention in the context of the TLEFA, because Saskatchewan was a party to it due to its responsibility pursuant to s. 10 of the NRTA, but it had not participated or cooperated in the calculation of the shortfall acres due to the plaintiffs. By signing the agreement, Saskatchewan could not be said to have endorsed that the lands included in the TLEFA numbers were in fact a reserve. There was no evidence that Canada acted to its detriment in reliance

on Saskatchewan's opinion as to the status of the lands in question being a reserve. Respecting whether the Southend lands were reserve lands based upon "selection and survey", the court reviewed the historical evidence and the conflicting expert opinions and found that the lands had not been properly selected and surveyed such that they were excluded from the transfer of land to Saskatchewan on October 1, 1930 because: 1) no intention had been shown by the surveyor that he was there to create a reserve for the Peter Ballantyne Band, as his role was to survey lands for Treaty 10 and the Barren Lands Band. He had no authority to select reserve lands for the Peter Ballantyne Band; 2) the survey had not been properly and accurately completed in 1929; 3) the survey plans had not been approved by the Surveyor General or DIA officials as required by the Dominion Lands Survey Act. The evidence showed that the only official steps to create the reserve were taken by Canada in 1981 when an order-in-council purporting to create the reserve was backdated to 1929. This step was taken without the approval of Saskatchewan and was invalid. The creation of a reserve after October 1, 1930 would require action and cooperation on the part of both Saskatchewan and Canada.

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Anderson v Saskatchewan Apprenticeship and Trade Commission, 2019 SKQB 338

Mills, December 30, 2019 (QB19315)

Administrative Law – Judicial Review
Statutes – Interpretation – Apprenticeship and Trade Certification Act, 1999, Section 30

The applicant brought an originating application seeking judicial review of the decision of the respondent, the Saskatchewan Apprenticeship and Trade Certification Commission Appeal Committee. The committee had heard the applicant's appeal from the decision of the respondent Saskatchewan Apprenticeship and Trade Certification Commission to cancel the applicant's journeyperson certificate under s. 13 of The Apprenticeship and Trade Certification Act, 1999. The Commission had investigated the applicant and alleged that he had engaged in fraud or misrepresentation when obtaining his certification. Pursuant to s. 40(2)(a)(i)(B) of The Apprenticeship and Trade Certification Commission Regulations, the Commission exercised its authority to suspend the applicant's certification. The applicant appealed to the Commission under s. 29 of the Act and in his notice of appeal, he sought withdrawal of the suspension, damages for lost wages, general damages, and costs on a solicitor-client basis. The committee set aside the sanctions against the applicant and reinstated his certificate. It refused to award damages for lost wages, general

damages and solicitor-client costs, stating that s. 29(4) of the Act prescribed what remedies were available to it and did not provide it with the power to award him damages or costs against the Commission. The applicant requested judicial review of the committee's refusal to consider his ancillary relief for damages and costs.
HELD: The appeal was dismissed. The court dismissed the application because s. 30 of the Act provides a right to appeal from the decision of the committee. There was an alternate adequate remedy, and thus it would not undertake judicial review. However, as the respondent acknowledged that the facts and law advanced by the applicant were identical to the appeal procedure, the court decided it would treat the matter as a notice of appeal under s. 30 of the Act in observance of the Queen's Bench foundational rules. It noted that the standard of review was correctness. With respect to the applicant's claim for damages for loss of wages and damage to his reputation, the court confirmed that under the Act, the committee did not have jurisdiction to grant his request for relief. Regarding the applicant's appeal regarding costs, the court found that the committee did not have specific authority under a review by it to award costs, although the court could in the context of an appeal under s. 30(1)(b) of the Act of the committee's decision. There was nothing in the nature of the hearing or in the conduct of the committee that would justify the awarding of costs on the appeal on a solicitor-client basis.

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Burke v Saskatchewan Human Rights Commission, 2019 SKQB 339

Hildebrandt, December 31, 2019 (QB19309)

Administrative Law – Delay

The applicant was the subject of a complaint lodged with the respondent, the Saskatchewan Human Rights Commission (SHRC), in 2016. He applied for an order granting a stay of the entire proceedings against him because the investigation of the complaint had not yet been completed. When the SHRC initially informed him of the complaint in April 2015, he was advised that the investigation would take nine months. Counsel for the applicant submitted that in British Columbia, the provincial Human Rights Tribunal's average time from complaint to rendering of a trial decision was 1.5 years. In August 2019, the applicant was advised that the investigation was going to continue because it decided to change its focus to determine whether there was a pattern or practice of discrimination. In 2018, the applicant was offered a job elsewhere comparable to his position with the respondent Saskatoon Gallery and Conservatory Corporation. He informed the board that his resignation was

effective at the end of March 2019. However, media reports spread around the world in March 2019 regarding the SHRC proceedings caused the applicant and his prospective employer to agree that he should step down prior to the start of his contract. Despite attempts to find other employment, he had been unable to secure another position and was informed by public relations/recruiting firms that he was effectively unemployable until the proceedings ended. The parties agreed that the issue of delay was one of procedural fairness, and the issue was not reviewable, therefore, on the standard of reasonableness. It argued that the investigation had taken longer than most but the proceedings had been complex and some of the delay was attributable to the corporate respondents (The Saskatoon Gallery and Conservatory Corporation and The Art Gallery of Saskatchewan) and sought to have the application dismissed in its entirety. The issues were: 1) had there been unreasonable delay in the proceedings; 2) had the applicant suffered prejudice as a result of the delay; and 3) had the SHRC exceeded its jurisdiction by expanding the investigation?
HELD: The application was granted and a stay of proceedings ordered. The court found with respect to each issue that: 1) there had been inordinate delay after comparing the length of time taken in this case with that in other investigations. It was not persuaded that the matter had been complex and found it was the SHRC who had increased the complexity by changing the focus of the investigation. There was no evidence that the corporate respondents contributed to the delay; 2) the applicant had showed that he suffered prejudice as a result of the delay; and 3) the SHRC had not exceeded its jurisdiction. However, the timing of its change of focus to explore pattern and practice showed a disregard for the applicant's entitlement to procedural fairness.

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Saskatchewan (Social Services) v P.L., 2020 SKPC 2

Green, January 10, 2020 (PC20002)

Family Law – Child in Need of Protection

The Ministry of Social Services apprehended five children aged fifteen, 8, 6, 4 and 3 years, respectively, in March 2019. The Ministry applied for a long-term order under s. 37(3) of The Child and Family Services Act for the 15-year-old (P.) and a six-month temporary order under s. 37(1)(c) of the Act for the other three children. Two other children, E. and C., turned 16 before the commencement of the proceedings and were living apart from the family. E. alleged that she had been sexually assaulted by the son of the respondent, P.L., before she was 16. Her mother, the respondent R.S., told E. that if she reported it to the police, she could go and live with her brother C. When interviewed, C., E. and P. indicated that they had no

interest in having any access to their parents. They expressed concern that if the younger children were returned to R.S. and P.L., they would do nothing to change their behaviour, the older children would not be there to protect their younger siblings, and the parents would prevent them from seeing their younger siblings. R.S. was the mother of all of the children and P.L. was the natural father of the four youngest children. C.G. was the father of P. and consented to the order sought by the Ministry. R.S. and P.L. opposed the application respecting the four youngest children. They argued that they had been discriminated against and mistreated by the Ministry and that the four youngest children should be returned to them without further involvement of the Ministry. Before the family's arrival in Saskatchewan, the Ministry of Social Services in Alberta had investigated them for ten years, including following up on allegations that P.L. had been physically and emotionally abusive to his former spouse and his children. The Saskatchewan Ministry's involvement started in 2011 and reports were filed in 2013, 2014, 2017 and 2019, including that the family's house was derelict and full of garbage. At one point, there was no running water and electricity was obtained from car batteries or else the house was heated by a wood stove that had no guards around it. The children were cold, dirty and slept on mattresses on the floor. The eight-year-old child could not read or write. They were subjected to physical discipline by P.L. and needed medical care, but P.L. did not believe in doctors. After E. reported the assault to the RCMP, the parents attempted to leave Saskatchewan and were found in Manitoba. They drove there in the family's vehicle, a school bus, without using car seats and P.L. did not have a driver's licence. The Ministry and the two oldest children expressed concerns that P.L. and R.S. would not follow through on any promises they made and would neglect and fail to provide medical care for the children. There was a likelihood of domestic violence and that the parents would leave the jurisdiction to avoid the Ministry.

HELD: The court found that all of the children were in need of protection pursuant to s. 11(b) of the Act and granted a long-term order under s. 37(3) of the Act for P. and a six-month temporary order under s. 37(1)(c) regarding the rest of the children. The latter order was subject to conditions that included that they were required to attend parenting classes, domestic violence counselling and to submit to assessments of their mental health and ability to parent. They would be required to house the children in a safe and suitable environment. The children were to have contact with their older siblings. The parents had shown that they had not followed through with reasonable requests of the Ministry staff, nor were they prepared to take whatever programming the court ordered. This would be their final opportunity to avoid a more intrusive order under the Act.

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Yashcheshen v Saskatchewan (Health), 2020 SKQB 4

MacMillan-Brown, January 8, 2020 (QB20004)

Administrative Law – Judicial Review
Constitutional Law – Charter of Rights, Section 7

The applicant, a self-represented litigant, brought an originating application for judicial review of the decisions by the Ministry of Social Services (MSS) and the Ministry of Health (MH), respectively, to deny the applicant's request for coverage of the cost of her cannabis under the auspices of their legislative mandate. The applicant's physician prescribed cannabis to alleviate the pain she suffered as a result of Crohn's disease. She used cannabis daily in an edible form. In this application, the applicant also requested a declaration that her s. 7 Charter rights had been violated by the MSS and MH when they refused to cover the cost of her cannabis and an order for retroactive damages in the amount of $63,000, representing her out-of-pocket expenses to purchase cannabis. MSS denied coverage on the basis that benefits paid by it are limited to providing basic income support, such as food, shelter and clothing, and that drug coverage falls under the jurisdiction of the MH. The applicant argued unsuccessfully with the MSS that because the cannabis she ingested was edible, the MSS had the discretion under s. 27 of the Saskatchewan Assured Income for Disability Regulations, 2012 to provide additional coverage for "special food items" that would include cannabis. The MH denied coverage on the basis the medical marijuana is not covered under the Saskatchewan Drug Plan and that, regardless of its form, does not qualify for exception drug status.
HELD: The court dismissed the application in its entirety. The standard of review of the decisions of the MSS and MH was one of reasonableness. The court found that the MSS's conclusion that cannabis is a drug and not a food, even if taken in edible form, fell within the realm of reasonableness. It would not interfere in the discretion of the MH to deny coverage on either the basis that cannabis was not in the formulary or that it did not qualify for exception drug status. Regarding the alleged breach of s. 7 of the Charter, the court stated the applicant had failed to establish a violation, as s. 7 does not impose a positive obligation on government to provide services: in this case, coverage for a particular drug. Consequently, the application for damages under s. 27 of the Charter was also dismissed.

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Cherkas v Richardson Pioneer Ltd., 2020 SKQB 7

Brown, January 13, 2020 (QB20005)

Civil Procedure – Trial – Non-Suit
Civil Procedure – Queen's Bench Rules, Rule 9-26
Civil Procedure – Limitation Period
Contracts – Breach of Contract – Parol Evidence Rule

The plaintiff, a grain farmer, commenced an action in August 2010 against the defendant, Richardson Pioneer, for breach of contract. In November 2007, the parties entered into a futures contract for the sale of the plaintiff's canola, whereby he agreed to deliver 1,590 tonnes to the defendant before November 20, 2008. The price of the canola was set on a "basis" price arrangement. This enabled the plaintiff to leave the price open to be fixed when he contacted the defendant and told them to set the price and the amount of canola to which the futures price applied, up to the total canola for which they had contracted. In July 2008, the plaintiff had taken note of falling prices and contacted the defendant's employee in charge of basis contracts and instructed him to sell all of the canola at the July 21 futures price, $585.40 per tonne. The next day, the plaintiff went to the defendant's elevator and was told by the employee to go to the defendant's office and sign papers. At the office, the plaintiff was given on one-page document to sign, the "purchase contract pricing confirmation" in standard form. It stated that the 450 tonnes of canola were being priced at $612.50 per tonne and that 1,140 tonnes were left to price at a later time. The plaintiff testified that he did not ask about the document, nor was it explained to him. He signed it without reading it and left because he was busy at that time on his farm. He only noticed that only a portion of the canola was sold by way of his July 21 communication with the employee when, in late November 2008, he received a printout of the payment he was to receive. The plaintiff advised the defendant's manager that he had arranged with the employee to sell all of his canola at $600 per tonne. The manager said that they would "make it right." However, the grievance was never resolved. At the close of the plaintiff's evidence, the defendant brought a non-suit application based on the parol evidence rule prohibiting the plaintiff's verbal evidence from being the basis for a contract and based on the fact that a limitation period had expired before he commenced his action in August 2010. The issues were whether the plaintiff's action should be dismissed: 1) as he could not prove the oral agreement he alleged given the parol evidence rule; or 2) because the limitation period barred him from proceeding further.
HELD: The defendant's application was granted and the plaintiff's claim was dismissed. The court reviewed the plaintiff's evidence pursuant to Queen's Bench rule 9-26. It found with respect to each issue that: 1) the parol evidence rule applied. The terms of the written July 22, 2007 contract between the parties were clear and unambiguous, and the oral evidence that contradicted it could not be the basis of the contract. That manager's statement that they would "make it right" could not affect the outcome as nothing was agreed to in writing. It was too vague to be of a contractual nature. 2) The claim was statute-barred. The plaintiff could, with reasonable

diligence, have discovered that the defendant only agreed to the futures price of 450 tonnes when he signed the contract or within a few days of signing it.

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The Owners Condominium Corp. No. 101271425 v Family Brown Enterprises Ltd., 2020 SKQB 10

Robertson, January 14, 2020 (QB20006)

Civil Procedure – Queen's Bench Rules, Rule 4-22, Rule 7-2

The plaintiff, the owners of a condominium corporation, commenced an action in negligence and claiming damages for building defects against the defendant, the developer-builder of the condominium building. The defendant applied for an order dismissing the statement of claim under Queen's Bench rule 7-2 on the basis that it was without merit and did not raise a genuine issue for trial and, if unsuccessful, for an order for security for costs. The plaintiffs also applied for an order for security for costs. The issues were whether: 1) this was a suitable case for summary judgment; and 2) if so, should the claim be dismissed?
HELD: The defendant's application for summary judgment and an order for costs was dismissed. The plaintiff's application for security for costs was dismissed. The court found that: 1) this was not a suitable case for summary judgment. The claim was not without merit. The affidavit evidence was conflicting, and there was a genuine issue requiring trial. There was uncertainty in the law regarding the third element of the plaintiff's claim for negligence causing pure economic loss regarding the kind of defects in construction that posed a real and substantial danger to the occupants of the building. The court rejected the defendant's application for security for costs under Queen's Bench rule 4-22 because the amount sought was exorbitant and might discourage the plaintiff's ability to continue the action. Further, the defendant could collect any cost award from the owners pursuant to s. 109 of The Condominium Property Act, 1993. The plaintiff's application was based on a real concern that any award would not be recoverable since the defendant corporation was no longer operating. However, as the defendant's letter of credit for a similar amount was being held as security, there was no need for further court-ordered security.

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