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R v Faucher, 2020 SKCA 27

Ottenbreit Whitmore Ryan–Froslie, March 18, 2020 (CA20027)

Criminal Law – Manslaughter – Acquittal – Appeal

The Crown appealed from the acquittal of the respondent by a Queen's Bench judge after the trial on the charge of manslaughter. He had been charged after the victim, his common law spouse, died as a result of a bilateral subdural hematoma resulting from blunt force trauma to the head. The Crown alleged that the trial judge erred in law in dealing with the evidence. At his trial, the respondent had testified that his wife had gotten out of bed in the early morning and when returning to it, had stumbled and fallen, hitting her head on the wall above her pillow. There was a hole in the drywall that corresponded to the size of her head. His wife had vision and balance problems resulting from head injuries that she had suffered in the past that had caused brain damage. The autopsy revealed significant contusions on various parts of the body. The respondent explained that the victim had recently stumbled and fallen on the stairs outside the house. The Crown argued that the respondent's wife was a victim of domestic violence and that the respondent had assaulted her either intentionally causing the injury that led to her death or by pushing or throwing her into the wall where she struck her head. The only direct evidence of domestic violence consisted of the testimony of the victim's eight–year–old daughter. She testified that on the night before she died, the respondent had assaulted her mother. On the night of her death, the daughter heard her mother and the respondent fighting and several hours later heard a loud noise consistent with the sound of something hitting the wall. The medical evidence provided by doctors qualified as experts for both the Crown and the defence established that the victim's death was caused by trauma that

occurred during the preceding 24 hours and that her previous head injuries would have had some effect on her vision and balance and reduced the amount of force necessary to produce the trauma that caused her death. The expert opinion conflicted as to whether the victim's other injuries were caused by blows received from the respondent or from a fall. The trial judge concluded that the pathologists' evidence was not clear enough to contradict the respondent's version of events. He considered the conflicting evidence given by the respondent and the victim's daughter and concluded that he was left in reasonable doubt by the former's evidence. Although the daughter was a credible witness, the judge found her testimony concerning the fight to be unreliable. Given the evidence he did accept, the trial judge found he was not convinced beyond a reasonable doubt that the respondent had used force to propel the victim into the wall causing her death. The Crown's grounds of appeal related to the manner in which the trial judge dealt with the evidence and included the issue of whether he erred in law by failing to appreciate the relevance of certain evidence with respect to recent domestic abuse perpetrated by the respondent against the victim. The judge used the evidence only to assess the credibility of the respondent instead of considering its relevance to his animus towards her.
HELD: The appeal was dismissed. The court found that the judge had not erred in his handling of the evidence and, specifically, the Crown had not shown that he failed to appreciate the evidence. He took his approach to the evidence regarding prior domestic abuse based upon the Crown's argument that any of the evidence indicating prior domestic violence was part of the actus reus itself and that the key issue for determination was credibility. The judge's credibility assessment was thus determinative of the prior domestic violence issue.

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Lorencz v Talukdar, 2020 SKCA 28

Caldwell Schwann Leurer, March 20, 2020 (CA20028)

Statutes – Interpretation – Medical Profession Act, 1981, Section 72
Statutes – Interpretation – Fatal Accidents Act, Section 6

The wife (T.L.) and son (J.L.) of a man who died in February 5, 2005 commenced their action on January 24, 2007 against two doctors, whom they alleged caused his death through their negligence. The action was brought within the two–year limitation period prescribed by s. 6 of The Fatal Accidents Act (FAA). The doctors argued that the plaintiffs were barred by s. 72 of The Medical Profession Act, 1981 (MPA) because the action was not commenced within 24 months of the dates at which each of them had last treated the deceased. The reform of limitations in the province was affected by the coming into force of The Limitations Act (LA) on May 1, 2005 that repealed s. 72 of the MPA and substantially amended s. 6 of the

Criminal Law – Evidence – Identification
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FAA. The judge agreed that T.L.'s action was out of time and dismissed her claim. With respect to J.L.'s claim, the judge found that because he had been an infant at the relevant times, he could continue with his action (see: 2017 SKQB 389). T.L. appealed the dismissal and the doctors cross–appealed on the basis that the judge should also have dismissed J.L.'s claim. The issues on appeal were: 1) whether the judge erred by concluding that J.L.'s claim was not statute–barred. The judge determined the question by relying upon the law as it existed prior to May 1, 2005 and based his conclusion on s. 6 of The Limitations of Actions Act (LAA) postponing the operation of s. 72 of the MPA while J.L. was an infant; 2) whether the pre–or post–May 1, 2005 limitations law applied to T.L.'s claim. The judge held that she had discovered her claim prior to May 1, 2005, based upon the evidence and relying upon the statutory presumption created by s. 6(2) of the LA; and 3) whether the judge erred by concluding that T.L. was required to commence her action on or before the two anniversary dates on which her husband last received medical services from them. The judge found that there was a conflict between s. 6 of the FAA and s. 72 of the MPA and resolved it in favor of the MPA's limitation period because it was more precisely relevant to the claim, based upon an implied exception utilizing the principle of generalia specialibus non derogant. This strategy supports the presumption of coherence, that contradictions between provisions in legislation cannot be tolerated.
HELD: The appeal was allowed, and the cross–appeal dismissed. The court found concerning each issue that: 1) the judge had not erred in finding the claim was not statute–barred. The presumption of coherence and the policy reasons that existed for postponing J.L.'s obligation to commence a lawsuit during his infancy correctly resulted in subjecting s. 72 of the MPA to s. 6 of the LAA; 2) the judge had not erred when he found that the evidence did not demonstrate that T.L. did not know any of the four matters listed in s. 6(1) of the LAA by February 5, 2005, or before May 1, 2005, and there was no basis to intervene in his determination that the pre–May 1, 2005 LAA applied in terms of assessing whether her claim was statute–barred; and 3) the judge erred by considering the MPA to be the more precisely relevant legislation. After reviewing the history of the FAA, the court observed that neither the MPA nor the FAA could be said to be more precisely relevant. Rather than regarding the provisions of the legislation to conflict, it was possible to interpret them in a way that achieved harmony with the scheme of both Acts. The appeal court read s. 72 of the MPA as subject to s. 6 of the FAA so that the former did not apply to a claim for damages under the FAA otherwise commenced within the time provided for by s. 6. This interpretation was consistent with the policy and intent of s. 6 and only derogated from, but did not destroy, the purpose of s. 72 of the MPA, allowing doctors to continue to enjoy the protection of a limitation period.

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LePage Contracting Ltd. v Saskatchewan (Employment Standards), 2020 SKCA 29

Barrington–Foote, March 20, 2020 (CA20029)

Appeal – Leave to Appeal
Statutes – Interpretation – Saskatchewan Employment Act, Section 2–37

The applicant, LePage Contracting, applied for leave to appeal the decision of the Saskatchewan Labour Relations Board (board) that dismissed its appeal of a wage assessment by an adjudicator in favour of the prospective respondent, L.M. (see: 2020 CanLII 10515). The applicant's application was made pursuant to s. 4–9 of The Saskatchewan Employment Act, which permits an appeal on a question of law with leave of a judge of the Court of Appeal. The issue in the case related to public holiday pay and vacation pay. At the time of hiring of L.M., the applicant testified that he was asked whether he wished to be paid $28 per hour plus vacation pay or $30 per hour including vacation pay, and he chose the latter. L.M. denied that this had been the arrangement at the adjudication and said that his rate of pay was $30 per hour and he was not paid vacation pay. The adjudicator found that since vacation pay was not included in L.M.'s statement of earnings as required by s. 2–37 of the Act, and there was no evidence to the contrary, vacation pay was deemed not to have been paid. The board found that the adjudicator's decision was deficient in that he had not provided an assessment of credibility of the witnesses that would support his conclusion that there was no evidence to the contrary. The board decided that what had to be determined in this case, however, was whether the legislation permits an employer to increase the rate of pay in lieu of setting out the amounts for public holiday pay and vacation pay as per s. 2–37. It held that it could not, and if there were such an agreement, it would be invalid. Thus, even if the adjudicator's reasoning was deficient, the result was correct. The applicant's proposed ground of appeal on this point was that both the adjudicator and the board had asked the wrong question. The issue was whether it had paid L.M. public holiday and vacation pay. It alleged that it had established the contrary through its evidence and the presumption in s. 2–37 of the Act did not apply.
HELD:The application was allowed. Leave to appeal in relation to the ground of appeal described as well as others was granted. The ground was not destined to fail and was of sufficient importance to warrant determination by the court.

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Lonsdale v Evans, 2020 SKCA 30

Schwann Barrington–Foote Kalmakoff, March 24, 2020(CA20030)

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Family Law – Child Support – Appeal – Determination of Income
Family Law – Child Support – Undue Hardship
Family Law – Division of Family Property – Valuation
Family Law – Spousal Support – Compensatory – Non–Compensatory

The parties' spousal relationship began in 2007. They moved to Saskatchewan in 2008 so that the respondent could manage a hardware store (corporation) owned by his parents. The parties had two children. The respondent was not a director or shareholder of the corporation, but the corporation had declared substantial bonuses payable to him in 2013, 2014, and 2015. The appellant argued that the bonuses were family property even if the respondent did not actually receive them. The trial judge concluded that the respondent did not have any ownership interest in the corporation; the bonuses were neither income nor a debt owing to him. The trial judge found the respondent's income to be $65,000, which was his salary. Expenses of the respondent paid by the corporation were not included in his income. The trial judge imputed an annual income of $22,300 to the appellant. It was determined that the respondent did not have the children in his care for 40% of the time so s. 9 of the Federal Guidelines did not apply. The respondent was not ordered to pay retroactive support and ongoing child support was temporarily suspended because undue hardship was established. The undue hardship argument was successful because the respondent was responsible for paying most of the parties' debts. Spousal support was not ordered because of the undue hardship finding and because the appellant did not establish entitlement. The respondent was awarded costs at trial, which included an additional $1,000 because the appellant failed to comply with disclosure obligations, and she provided false and misleading financial information. The four issues on appeal were: 1) whether the trial judge erred by failing to find that the bonuses were family property subject to division; 2) whether the trial judge erred in finding that the respondent's income was $65,000; 3) whether the trial judge erred in determining that the respondent should be relieved of paying child support on the basis of undue hardship; and 4) whether the trial judge erred in determining that the appellant was not entitled to spousal support.
HELD: The appeal was allowed in part. The issues were determined as follows: 1) the respondent's income tax return showed incomes of $351,760, $479,495, and $442,917 for the years 2013, 2014, and 2015. He testified that the only income he actually received was his $65,000 salary. The rest was income reported at his father's request for the purpose of tax savings in the corporation. The respondent's father swore an affidavit to that effect. The appeal court found merit in the appellant's argument that the bonuses were a debt owing to the respondent from the corporation and thus should be included in family property division. There was no evidence that the corporation ever paid the respondent the bonuses that were declared on is income tax return. The trial judge was found to have erred in determining that the appellant did not meet the onus of establishing that the declared but unpaid bonuses were a debt owing by the corporation to the respondent. The appellant testified that she believed the respondent would take ownership of the corporation once his parents

retired. She said that the declared bonuses represented money put back into the corporation for that purpose. The trial judge failed to appreciate the significance of what the tax returns revealed in relation to other evidence. The evidence suggested that the declared bonuses were income that was payable to the respondent, but the amount in excess of the income tax deducted at source was not payable immediately. A new trial was required on the issue. The new trial also had to deal with the issue of limitation period; 2) the trial judge found the respondent's income to be $65,000. He did not include any unpaid portion of the declared bonuses in the respondent's income. The trial judge did not err in that regard. There was evidence that the corporation paid a number of the respondent's ongoing expenses, such as a personal vehicle and cellphone. The appeal court agreed with the appellant that those amounts should have been included in the respondent's income. The respondent's income was increased by $19,014 annually. The respondent's child support obligation was $1,150 per month from September 1, 2016 to December 1, 2017 and to $1,175 per month after that; 3) the appeal court found that the evidentiary record did not allow it to determine the undue hardship claim because new evidence might be required due to the passage of time since the trial. The matter was remitted back to the trial court; and 4) the appellant argued that the trial judge should have found that she was entitled to spousal support on a compensatory and non–compensatory basis. Deference was owed to the trial decision. The appeal court found that it was open to the trial judge to conclude that the appellant failed to establish that she had suffered the economic disadvantage required for compensatory spousal support. Further, the appeal court did not accept the appellant's assertion that the trial judge ignored relevant evidence in denying non–compensatory support. The trial judge made specific reference to considering the applicant's financial resources and assets. He also compared the parties' standards of living. The trial judge did not err by failing to specifically reference expenses in the appellant's financial statement. The appeal with respect to spousal support was dismissed. The appellant was entitled to costs on the appeal because she was largely successful.

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Kennedy v Carry the Kettle First Nation, 2020 SKCA 32

Ryan–Froslie Barrington–Foote Kalmakoff, March 25, 2020 (CA20032)

Aboriginal Peoples – Jurisdiction of the Courts
Administrative Law – Judicial Review – Jurisdiction
Judges and Courts – Federal Court
Statutes – Interpretation – Federal Court Act, Section 18, Section 18.1

The appellants, J.K. and T.C.–L., were members of an election tribunal (tribunal) established by a Custom Election Act (Code). The

appellants, along with the respondents, R.P., A.H., and M.S. (opposing members), were appointed as tribunal members by the Chief and Council of the respondent First Nation (Nation) in 2018. The Code provides that the tribunal shall have five members. The appellants made orders at three meetings that the opposing members refused to attend. The orders passed on January 11 and February 13 dealt with procedural issues relating to the election appeal that had been commenced. They also included orders requiring the Nation to pay legal fees. The opposing members were removed from the tribunal in 2019 when the elders and appellants made a resolution (elders' resolution) to remove them. The Nation applied to the court for judicial review, challenging the orders and the elders' resolution (application). The chambers judge quashed the orders and elders' resolution. She held that the Nation had standing to bring an application for judicial review, as it had a direct interest in ensuring its elections were conducted in accordance with the Code and that the tribunal acted fairly. The appellants argued that the tribunal and the elders' meeting were federal boards, commissions or tribunals within the meaning of s. 18 of the Federal Court Act (FCA). The chambers judge did not deal with that argument; she decided that she had jurisdiction pursuant to s. 22 of the Code, which dealt with contested elections. She concluded that the Code required that a quorum of a majority of the members be present for the tribunal to conduct votes. The orders were therefore "invalid, null and void". The elders' resolution was also found to be a nullity because the tribunal did not have the authority either to amend or to determine a process for amending the Code. The chambers judge found that the issue of whether the Elders' Meeting had the authority to amend the Code was not before her. The issues for the appeal court were: 1) whether the chambers judge erred by deciding that the Court of Queen's Bench had jurisdiction to hear the application pursuant to s. 22 of the Code; and 2) whether the chambers judge erred by failing to decide that the Federal Court had exclusive jurisdiction to hear the application pursuant to s. 18 of the FCA.

HELD: The appeal was allowed because the Federal Court of Canada had exclusive jurisdiction to hear the judicial review application. The standard of review was correctness because the issues were questions of law. The issues were determined as follows: 1) the appeal court agreed with the chambers judge that the modern principle of statutory interpretation was the correct approach. The appeal court concluded that the chambers judge allowed purpose to overwhelm the language of the Code. The chambers judge said that a system of appellate review that might lead to parties pursuing different remedies in different courts "could not have been what was intended." The appeal court interpreted s. 22 to be about electors contesting the results of elections. There is no provision for applications by the Nation. Only an elector can make an application to a court of competent jurisdiction, and that only after the tribunal has made a decision on an appeal as to the results of an election. The conditions necessary to engage the right to apply pursuant to s. 22(3) had not been met. The application was filed by the Nation before the tribunal had made a final decision as to the results of the election. The chambers judge did not have jurisdiction to hear the application pursuant to s. 22 of the Code; and 2) the parties agreed that the

application sought relief in the nature of that specified in s. 18(1) of the FCA. The appeal court then had to determine if the tribunal and the elders' meeting were federal boards, commissions, or other tribunals within the meaning of ss. 18 and 18.1 of the FCA. The appeal court found that the elders' meeting and the tribunal were both federal entities. The chambers judge erred by failing to decide that the Federal Court had exclusive jurisdiction to hear the application pursuant to s. 18 of the FCA. The appeal was allowed with the appellants having one set of costs in Queen's Bench and one set of costs on the appeal.

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Porcupine Opportunities Program Inc. v Cooper, 2020 SKCA 33

Calwell Schwann Tholl, March 25, 2020 (CA20033)

Employment Law – Wrongful Dismissal – Moral Damages
Employment Law – Wrongful Dismissal – Mitigation of Damages

The respondent was successful in his claim for wrongful dismissal and moral damages against the appellant employer and its board of directors (board). The employer appealed the finding that the respondent reasonably mitigated his losses and that moral damages were warranted. The employer did not appeal against the 18 months of pay in lieu of notice awarded by the trial judge. The respondent had been employed with the employer for 33.5 years. In 2013, the general manager advised the board that he thought the respondent was stealing from the employer. He also recommended a new vision for the employer with the respondent's job being eliminated. The board resolved to dismiss the respondent. He was dismissed the next day. The respondent was given eight weeks' pay in lieu of notice. In December 2013, the general manager gave the respondent notice pursuant to The Trespass to Property Act that he would not be allowed on the property owned by the respondent because he had been allegedly been attempting to communicate in an inappropriate and threatening manner with program participants, board members, management and staff of the employer. At dismissal, the respondent was 53 years old and he had a grade 7 education. The respondent fabricated products out of his garage for the first three months following dismissal. He then received employment insurance benefits. The respondent monitored the newspaper for jobs, and he inquired with a trucking company about employment. According to the respondent, most employment opportunities require a grade 12 education. The respondent worked operating a gravel truck from January to February 2015. In May 2015, he worked in a seasonal position. The trial judge found the appropriate notice period was 18 months or $126,481.68. The trial judge found that the respondent had taken the appropriate and sufficient steps reasonably necessary to mitigate his loss and only deducted the income the respondent actually received. The trial judge also found that the employer breached its duty of good faith and fair dealing in the course of

dismissing the respondent. The respondent was awarded $20,000 in moral damages. The moral damages were based on the cumulative effect of a) the false allegation of theft; b) the false explanation that the respondent's position had been eliminated; and c) the false allegation of inappropriate, threatening communications. The employer argued the trial judge erred by 1) finding the respondent had reasonably mitigated his losses and by failing to reduce the damages award accordingly; and 2) awarding moral damages or, if not awardable, by fixing moral damages at $20,000.
HELD: The appeal was dismissed with costs to the respondent. The issues were determined as follows: 1) the employer did not point to any error of law or palpable and overriding error of fact that would merit interference with the trial judge's assessment of the respondent's mitigation efforts as being reasonable. The employer did not challenge the particular findings of fact made by the trial judge but wanted a trial de novo on the evidence on reasonableness of efforts; and 2) the employer argued that there was not a sufficient basis to award moral damages, and further, that the quantum of damages was not supported by the evidence. The employer relied on the Court of Appeal's judgment in Capital Pontiac Buick Cadillac GMC Ltd. v Coppola, arguing that there would have had to be public dissemination of the theft or trespass allegations for moral damages to be awarded. The appeal court was not persuaded that the trial judge committed a reversible error in awarding moral damages or in fixing the quantum of damages. Because moral damages are compensatory, a breach of duty of good faith and fair dealing does not on its own warrant an award of damages. The employee must connect the breach to a quantifiable loss or harm. The appeal court found that the trial judge correctly identified and understood the law of moral damages and that moral damages are compensatory. The employer's arguments were found to have overlooked the reasons why the trial judge found the employer had breached its duty of good faith and fair dealing. The employer's arguments did not challenge or undermine what the trial judge found to be the facts of the termination. The respondent testified at trial that he learned about the allegations of theft only days after the in–camera board meeting. The appeal court found that it was open to the trial judge to find that the respondent had suffered more than normal distress and hurt feelings that result from dismissal. Medical evidence was not necessary. Case comparisons as to damage amounts are rather unhelpful. The range of damages would be between $5,000 and $25,000. The appeal court was not persuaded to interfere with the trial judge's exercise of judicial discretion to fix the award at $20,000. The award was on the high end of the range, but it was not inordinately high. Costs were awarded to the respondent in the usual manner.

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Saskatchewan v Good Spirit School Division No. 204, 2020 SKCA 34

Jackson Ottenbreit Caldwell Whitmore Schwann, March 25, 2020 (CA20024)

Appeal – Fresh Evidence
Constitutional Law – Charter of Rights – Education – Separate School Funding
Charter of Rights – Section 2(a), Section 15
Constitutional Law – Denominational Aspects Test
Constitutional Law – Charter of Rights – Practice – Standing

St. Theodore School (the school) in the village of Theodore (village) was a school under the jurisdiction of the public school division until the summer of 2003. The majority of the students that attended the school were non–Catholic students, and a minority were Catholic students. The public school division closed the school. Parents arranged for the school to be opened as a catholic school under the jurisdiction of the separate school division. The ratio of Catholic to non–Catholic students was the same as when the school was operated by the public school division. The public school division brought an action against the government and the Catholic school division seeking a declaration that the school was not a valid, separate school. The legislation that was involved in the applications was the Constitution Act, 1867 (s. 93); The Saskatchewan Act (s. 17); the North–West Territories' 1901 School Ordinance; and The Education Act, 1995 (EA). The public school division sought a declaration that ss. 53, 85, 87, and 310 of the EA and ss. 3 and 4 of the Regulations were unconstitutional to the extent they provide funding to educate non–minority faith students attending a denominational separate school. The trial judge made the following findings: 1) the public school division had standing to seek judicial review of the government's action in funding the non–minority faith students in separate schools in Saskatchewan; 2) the school was a separate school, properly constituted, within the meaning of the EA; 3) the Constitution Act, 1867 does not provide a constitutional right to separate schools in Saskatchewan to receive funding for non–minority faith students because that is not a denominational right of separate schools; 4) s. 17(2) of The Saskatchewan Act only protects separate schools to the extent that they admit students of the minority faith; 5) provincial funding of non–minority faith students attending separate schools was a violation of the state's duty of religious neutrality under s. 2(a) of the Charter; 6) the funding was also a violation of equality rights under s. 15(1) of the Charter; and 7) the Charter violations were not reasonable limits that could be demonstrably justified in a free and democratic society. Therefore, the trial judge concluded that the provisions of EA and the Regulations were of no force and effect to the extent that the government has provided funding grants to separate schools respecting students not of minority faith. The government and Catholic school division appealed the decision and costs award. They also applied to adduce fresh evidence and to strike a portion of the public school division's sur–reply factum. The issues discussed by the appeal court were: 1) the public interest standing; 2) the fresh evidence application and application to strike part of the public school division's sur–reply factum; 3) the trial judge's reliance on

extraneous tests; 4) constitutional interpretation; 5) interpretation and application of s. 93 and s. 17(2); 6) infringement under s. 2(a) or s. 15(1); and 7) s. 1 analysis.

HELD: The appeal was allowed. The trial judge's declaration of constitutional validity was set aside, as was the cost decision. No order for costs was made in the appeal court or lower court. The issues were discussed as follows: 1) the appeal court concluded that the trial judge committed three errors in granting public interest standing to the public school division for the purposes of arguing the legislative framework infringed ss. 2(a) or 15 of the Charter. The appeal court concluded that the trial judge erred by granting the public school division interest standing to assert a breach of ss. 2(a) or 15; 2) the fresh evidence application of the government was granted. The trial judge referred to a book by Professor Bill Waiser in his reasons. The fresh evidence sought to be adduced was an affidavit of Bill Waiser. Neither the book nor the author's testimony were included in the evidence at trial; therefore, the government could not have anticipated the need to provide the fresh evidence. The evidence was relevant to determine whether the trial judge erred by relying on the book. The appellants also sought to strike material from the public school division's sur–reply factum. The application was granted. The material was in an appendix that included a complete chapter from Professor Waiser's book; 3) the appellants argued that the trial judge erred by conducting independent research into Saskatchewan's history and in relying on evidence not tendered by the parties at trial. The public school division said that the trial judge did nothing more than take judicial notice of notorious facts. The trial judge referred to a text and two articles that did not form part of the evidence at trial. The material did not meet the requirements necessary for judicial notice. The appeal court chose to analyze the trial judge's interpretation of the applicable constitutional provisions without support from the additional sources; 4) the trial judge set out eight interpretive principles that he found germane to the question of whether the funding of non–Catholics attending Catholic schools was protected by s. 93. The appeal court concluded that the comments used by the trial judge should not be used to determine what s. 93 or s. 17(2) guaranteed to the minority faiths as of 1905 or the present day. The trial judge did not give effect to the principle that separate school rights are also a Charter right. The trial judge erred in developing his own interpretive principles, rather than following the prevailing jurisprudence with respect to the interpretation of s. 93 and s. 17(2). The trial judge also did not give effect to decisions from the Supreme Court of Canada that focused on ss. 93(1) and 93(3), nor did he give effect to the evolving jurisprudence from the Supreme Court with respect to the protection of minority rights; 5) the overarching issue was whether the legislative framework contravened ss. 2(a) and 15 of the Charter. The trial judge concluded that the government's approach to funding school divisions would not contravene the Charter if that approach were protected by s. 93 or s. 17(2). The trial judge should have begun his analysis with a consideration of s. 17(2) rather than s. 93. The trial judge concluded that he had to first determine whether separate schools had a right to receive funding for non–Catholic students in order to determine whether the legislation in question

contravened s. 17(2). This required the application of the denominational aspects test. The appeal court found that the trial judge made errors in his s. 17(2) analysis. He imported the denominational aspects test into its interpretation. He concluded that s. 17(2) guarantees funding for minority faith children only. The appeal court found that the arguments the trial judge used to make the conclusion did not address how s. 17(2) should be interpreted and applied in the case. There is no denominational aspect to s. 17(2): it applies to schools of any class. The appeal court found that the appeal could be resolved on the basis of s. 17(2). The only question for the trial judge was whether the legislative framework was fair or proportional in its application to public and separate school divisions alike. The legislative terms do not draw a distinction between public school divisions and separate school divisions. The appeal court went on to consider s. 93. The trial judge held that "legislation under ss. 93(1) and 93(3) can be Charter–immune but to gain this immunity the legislation must be equally subjected to the denominational aspect test." He concluded so for four reasons. The trial judge erred in drawing a line around separate school rights for the purpose of defining an area that would be subject to Charter oversight. The error affected his analysis in relation to ss. 93(3) and 93(1). The appeal court disagreed that the denominational aspects test applied to s. 93(3). The aspects test had only been applied to s. 93(1) in the jurisprudence. The cases referred to by the trial judge were not found to support his hypothesis that the denominational aspects test is necessary to prevent governments from passing Charter–offending laws regarding education funding and thereafter justifying those laws under its plenary power. The appeal court concluded that the denominational aspects test does not apply to s. 93(3). The issue was whether the legislative framework was a valid exercise of the government's plenary power or, in other words, was consistent with the guarantees granted to separate schools by s. 93 and s. 17(2). The legislative framework provides for funding to separate and public boards on the same footing, based on enrolment, regardless of the religion of the student. The Legislative Framework was a valid exercise of the legislative authority conferred by those provisions and therefore is protected from Charter scrutiny. The appeal court then looked at s. 93(1) and whether it acts as a curtailment of the plenary power conferred by the opening words of s. 93. The legislative framework draws no distinction between separate and public schools. Section 93(1) can play no role because no one is suggesting the legislature is taking away any right or privilege guaranteed as of 1901. The trial judge erred by considering the Catholic doctrine when determining whether the 1901 Ordinances included a right or privilege for Catholic schools to admit and receive funding for non–Catholic students. The appeal court found that the question was whether it was a denominational right to admit non–Catholic students to Catholic schools. After Vatican II, Catholic doctrine did change to embrace the teaching of non–Catholics in Catholic schools. The trial judge's eight principles to interpretation were found to restrict the ambit of s. 93(1). The appeal court concluded that the legislative framework was consistent with the constitutional guarantees provided by s. 93; 6) given the appeal court's finding that the legislative framework was a valid exercise of

legislative power conferred by s. 93 and s. 17(2) meant that the framework was immune from Charter scrutiny. The appeal court, nonetheless, assumed the contrary to consider the issues raised by the public school division in relation to ss. 2(a) and 15(1). The trial judge found that the public school division could assert a claim under s. 2(a) for three reasons. The appeal court found that there was no support for those reasons. There was no breach of the state's obligation to remain religiously neutral in the case. The appeal court concluded that the legislative framework respects the state's duty of religious neutrality and there was no evidence of a breach of any individual's rights under s. 2(a). The appeal court found that the trial judge did not give due effect to the Supreme Court jurisprudence under s. 15 of the Charter. This was an error. There was no proof that the funding of non–Catholic students in Catholic schools perpetuates prejudice, disadvantages or negatively stereotypes individuals or groups. The legislative framework was not found to infringe s. 15(1) of the Charter; 7) the appeal court set aside the trial judge's s. 1 analysis and replaced its own. The government's objective of providing equitable funding to all students attending schools protected by s. 93(1) without tying it in any way to their religion was pressing and substantial. The appeal court found a rational connection between the legislative objective and the action taken. Further, the government showed that there were not less drastic means of achieving its legislative objective. The appeal court found proportionality was achieved between the effects of the measure and the stated legislative objective. The benefits of the government's approach to funding students in separate schools were found to outweigh the harms caused by the infringement and the potential harm caused by any of the other options suggested. The legislative framework was found not to infringe ss. 2(a) or 15. If that was an error, the appeal court would nonetheless have held up the legislative framework as a reasonable limit on religious freedom and one that was demonstrably justified in a free and democratic society. No order for costs was made because the fundamental source of funding for all parties came from the taxpayers of the province.

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Goodman v R, 2020 SKQB 45

Tochor, Febrary 25, 2020 (QB20044)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Conviction – Appeal

The appellant was convicted after trial in Provincial Court of driving while his blood alcohol content exceeded the legal limit, contrary to s. 253(1)(b) of the Criminal Code. The appellant had made a Charter application to exclude the evidence against him because of two alleged violations: first, he was not immediately provided with the reason for his detention or rights to counsel; and second, the breath samples he provided were not taken as soon as practicable. The trial

judge agreed that the appellant's s. 10(a) right was breached but dismissed his application to exclude the evidence pursuant to s. 24(2) after conducting the Grant analysis. He found that the breach had been technical and was corrected within minutes, the evidence was obtained in a non–intrusive manner and that the evidence was highly reliable and essential to the Crown's case. Regarding the alleged breaches of appellant's s. 8 and s. 9 Charter rights arising from the 21 minutes of delay in taking the appellant's breath samples because the police were waiting for a tow truck, the trial judge found that the samples were taken within a reasonably prompt time under the circumstances. The grounds of appeal were whether the trial judge erred: 1) in failing to exclude the evidence of the breach samples after concluding a breach of s. 10(a) of the Charter had occurred; and 2) in holding that the breath samples were taken as soon as practicable.
HELD: The appeal was dismissed. The court found with respect to each issue that: 1) the trial judge had not erred in his refusal to exclude evidence under s. 24(2). Such a decision was entitled to appellate deference. The judge properly identified the Grant factors and engaged in the balancing exercise; and 2) the trial judge had not erred in his finding that the breath samples were taken as soon as practicable.

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J.L.R. v M.V.H., 2020 SKQB 49

Tochor, February 26, 2020 (QB20048)

Civil Procedure – Affidavits

The parties applied to remove affidavits sworn by the petitioner from the court file and file a draft consent order that the affidavits be returned to the respective counsel who filed them. The affidavits in question were submitted in support of three applications made by the petitioner, including her application seeking exclusive possession of the home, all of which were granted by the courts. Some time thereafter, the parties were able to resolve their outstanding issues.
HELD: The court declined to grant the consent order. It reviewed the factors set out in P.G. v L.S.G. and found, as the affidavits had been placed before and used by the court and relied upon by three different judges in making three separate orders, that was sufficient reason for it to exercise its discretion to dismiss the application to withdraw the petitioner's affidavits. Additionally, the integrity of the court record should be preserved in the event it was ever necessary for either of the parties to make some reference to the court file in the future.

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R v Tatum, 2020 SKQB 61

Mitchell, March 10, 2020 (QB20060)

Criminal Law – Armed Robbery
Criminal Law – Evidence – Alibi
Criminal Law – Evidence – Credibility – Appeal
Criminal Law – Evidence – Identification
Criminal Law – Evidence – Recognition Evidence

The accused was charged with armed robbery, contrary to s. 348(1)(b). The issue was identity. A voir dire was conducted to determine whether the Crown could tender a video tape from the security video camera at the building where the victim resided in at the date of the offence. One civilian witness and three police officers testified on the voir dire. The civilian witness was the caretaker of the building. She testified that the cameras were motion activated. Cst. S. testified that he received a call at 2:29 am about a possible home invasion. The victim advised the police that the intruders had taken some of his medication from his bedroom. A few days later, Cst. S. received a call from the victim advising that he had been told that the accused was one of the four individuals. The accused's home was searched pursuant to release conditions authorizing a search. One of the pictures from the search showed a jacket with the word "Brooklyn" on the front. There was also a picture of a prescription bottle with the name of the victim. A fourth picture showed a plastic replica of a revolver. Cst. S. acknowledged that the video was "a bit fuzzy" and "a little pixelated." Cst. B. also testified. He was able to identify the accused on the video from his facial features, his stance, and how he walked. Cst. B. said that he was familiar with the accused from numerous interactions with him since 2010. He had recently interacted with the accused when he was in custody a month prior to the charges. He explained the other previous encounters he had with the accused. Cst. T. assisted Cst. B. in the investigation. He said that he recognized the accused in the video. Cst. T. had interacted with the accused five or six times previously. Cst. T. identified the accused in open court.
HELD:The court considered whether the video was admissible. There was no issue with the video being authentic. The court found that the video was overall sufficiently clear to allow the viewer to discern the features and other distinguishing elements of the persons shown on it. The court concluded that the video could be admitted into evidence. The court next considered whether the recognition evidence was admissible, and specifically whether the threshold degree of familiarity for the reception of recognition evidence was met on a balance of probabilities. Cst. B. came to learn of the accused in 2010. He had contact with him through the years, including extensive interaction with the accused a few weeks before the home invasion. Cst. B. readily identified features of the accused that he was familiar with. Cst. T. had more limited knowledge of and interactions with the accused. He first encountered the accused in 2014 and then five or six times after that. Cst. T. indicated that he could highlight the same attributes of the accused as Cst. B. He said he could also see the accused's teardrop tattoo under his eye, which

Cst. B. said he could not see. The court was satisfied that both officers could provide recognition evidence to assist the court in identifying the accused. The court went onto the trial proper. N.C. testified. He was on remand at a correctional centre at the time of trial. He resided in the basement at the accused's residence at the time of the offence. N.C. testified that he went to the kitchen on the offence date and there were four people there planning a home invasion to rob an "older guy in a wheelchair" of his morphine pills. N.C. testified that the accused had purchased morphine pills from the victim before. The witness also admitted to trading pills for drugs with the victim. At 6:00 am, N.C. said he went upstairs and saw the four individuals dividing up some pills. N.C. said he gave a statement to the police about the offence because he wanted to turn away from his life of crime. N.C. identified the individuals on the video. N.C. admitted to daily drug use during the offence period but said that the drug habit did not affect his memory of the events. He did not receive any benefit for his statement. The accused testified that he had been at a hotel playing VLTs the night of the offence. He then went home, got high, and passed out until the next morning. He admitted to owning the jacket with the word "Brooklyn" written on it. The accused said the he had the pill bottle with the victim's name on it because he had purchased drugs from N.C., and they came in that bottle. The accused had not given the Crown notice of his alibi evidence. The court considered the credibility and reliability of witnesses. The victim was found to be a credible and reliable witness for the most part. The accused argued that N.C.'s evidence should be rejected because it was not tendered as part of the voir dire as required by Leaney. Alternatively, the accused said the testimony should be discounted because N.C. had a motivation to lie and his statements to police came late in the day. The court did admit N.C.'s evidence for two reasons: the accused's cross–examination questioning was virtually identical to the questions he put to various witnesses in cross–examination during the voir dire, and even though the voir dire had technically ended, no decision regarding the evidence had yet been made. N.C. was credible and reliable. If an accused does not give notice of an alibi, the trier of fact may draw an adverse inference when weighing the alibi evidence. The accused's counsel indicated that it was his first trial and he did not know that he had to disclose the alibi to Crown. The Crown did not have an opportunity to investigate the alibi. An adverse inference would be drawn. The court rejected the accused's testimony in its entirety after finding it neither credible nor reliable. The Crown met its burden of satisfying the court that the accused was the person who committed the home invasion with which he was charged. He was found guilty.

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Morin v Métis Nation – Saskatchewan, 2020 SKQB 63

Meschishnick, March 9, 2020 (QB20061)

Administrative Law – Judicial Review
Judgments and Orders – Declaratory Judgments
Civil Procedure – Delay – Laches
Civil Procedure – Originating Notice
Employment Law – Resignation

The applicant applied for a declaratory judgment that she remained to be: the Treasurer of the Saskatchewan Provincial Métis Council (PMC); a Director of the Métis Nation – Saskatchewan Provincial Secretariat Inc. (MNS) and a member of the Saskatchewan Métis Nation Legislative Assembly (MNLA). She also applied by way of judicial review for various other orders. There was a question as to whether the applicant resigned from her position as treasurer of PMC. The respondents argued that the application should be dismissed due to delay. In September 2017, the applicant sent an email to the PMC president that was interpreted by the president to be the applicant's resignation. The resignation was accepted by PMC. The applicant sent communications between September 12, 2017 and September 23, 2017 indicating that she had not resigned. She continued to attend events and held herself out as the treasurer. The respondents applied for an injunction to prevent her from doing so. The MNLA amended its election legislation to allow for the election of a new treasurer.
HELD: The court had jurisdiction to make declaratory judgments in these circumstances pursuant to s. 11 of The Queen's Bench Act, 1998. A determination of whether the applicant remained the elected treasurer of PMC would resolve the question of whether she continued to hold the other two positions. The application was not dismissed for delay. The court determined the issue presumed that the declaration the applicant sought was an equitable one. The defence of delay to an application for relief by way of declaration has different foundations than if the defence is raised in an application for judicial review. Section 15 of The Limitations Act stipulates that there is no limitation period with respect to a proceeding for a declaration if no consequential relief is sought. The equitable defences to a claim for declaration are preserved by s. 22. The defence of delay concerning relief sought by way of judicial review is recognized in The Queen's Bench Rules, Rule 3–56. Undue delay and an explanation for the delay do not seem to be factors considered in the application of laches. The court considered Rule 3–56 and determined that test was limited to situations where an originating application for judicial review was made. The applicant was not asking for a review of any decision, act or omission when she sought a declaration that she was and remained to be the treasurer of PMC. The doctrine of laches was applied to determine if delay would result in the dismissal of a claim for declaratory relief. The respondent argued that the delay resulted in a situation that would be unjust to disturb. The court disagreed. The court next considered whether the applicant was still the treasurer. There was no applicable legislation. The matter had to be determined based on the common law. The principles to determine whether a resignation has occurred are as follows: 1) a resignation is effective at the later time of when it is received or when it is specified to be effective; 2) once a resignation is submitted, it cannot be withdrawn except with the

agreement of the entity receiving it; and 3) a resignation need not be accepted by the entity receiving it to be effective. For a resignation to be effective (which 1) above requires), it must be unequivocal and capable of objective verification. The email the applicant sent to some members of PMC was entitled "Motion for Next Board Meeting." In her affidavit, the applicant explained that she did not intend to resign. She was threatening to resign with hopes that the members of PMC would understand the seriousness of the situation involving disclosure and accountability of Métis matters. There were two conditions: that PMC accept the resignation and that PMC accept it on her motion. PMC never actually dealt with the applicant's motion. The court was unable to verify that the applicant unequivocally resigned. The court declared judgment in favour of the applicant. She did not resign. The declaratory judgment was made in favour of the applicant. The court did not have to determine whether the applications for judicial review should be dismissed for delay, whether judicial review was available in the circumstances, or whether any of the orders sought by way of judicial review should issue. Whether the respondent acted in bad faith could not be determined on affidavit evidence. The applicant was given leave to serve the respondents with a draft order setting out the procedure to pursue costs on other than a taxable basis if she so chose. The applicant was awarded costs.

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R v Herman, 2020 SKQB 69

Hildebrandt, March 3, 2020 (QB20063)

Criminal Law – Assault – Assaulting a Police Officer

The accused was charged with assaulting a peace officer contrary to s. 270(2) of the Criminal Code, assaulting a peace officer and causing them bodily harm contrary to s. 270.01(1)(b) of the Code, resisting arrest contrary to s. 129(a) of the Code and uttering a threat to police officers contrary to s. 264.1(1)(a) of the Code. The charges arose after two RCMP officers saw the accused and a group of people carrying open cans of alcohol on the street at 3:30 am. One of the officers told them to empty the cans, but the accused did not comply. The officer left the police cruiser to arrest the accused for violating The Alcohol and Gaming Regulation Act, 1997 (AGRA) and he struck her head with his fist and then tried to initiate a fight with her. The other officer got out of the vehicle and was about to tell the accused he was under arrest for assaulting a police officer when the accused struck him in the face and continued to rain blows on his head as the officer tried to wrestle him to the ground. The officer suffered a concussion. When the accused was being taken to the detachment he said to one of the officers: "You’re done."
HELD: The accused was found guilty on two of the charges. With respect to the first charge, the court found that the officer was not engaged in the context of a lawful arrest as required by s. 270(1)(a)

of the Code. The officer did not know whether the can that the accused was carrying contained alcohol and because the accused had not displayed any signs of intoxication, the officer did not have sufficient evidence to establish the degree of intoxication required before having the power to arrest him under either s. 126 of AGRA or ss. 52 and 53 of the Summary Offences Procedures Act. However, it found that the accused was guilty of the included offence of common assault under s. 266 of the Code because the actions he took in resisting a lawful arrest were not reasonable in the circumstances. The officer was a petite woman and the accused was over six feet tall and very strong. The accused was found guilty of the charge under s. 270.01(1)(b) because he clearly assaulted the officer and caused him bodily harm while he was engaged in the execution of his duty in seeking to arrest the accused for having assaulted the other officer. The accused was acquitted on the third charge because of the court's determination that the officer had not been acting in the execution of her duty when she tried to arrest him. He was also acquitted on the fourth charge because the accused's words were ambiguous and unclear.

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R v Pahl, 2020 SKQB 75

Mitchell, March 16, 2020 (QB20064)

Constitutional Law – Charter of Rights, Section 10(b)

The accused was charged with operating an aircraft while impaired by alcohol and causing bodily harm to his passenger, contrary to s. 255(2) of the Criminal Code, and operating an aircraft while his blood alcohol level exceeded .08, contrary to s. 255(2.1) of the Code. Prior to trial, the defence brought a Charter application alleging that the accused's s. 10(b) Charter rights had been breached and requesting that the result of the Intoxilyzer tests be excluded from the evidence under s. 24(2) of the Charter. A blended voir dire and trial was held with the evidence from the former being applied to the latter. The RCMP officer who arrived at the scene of the accident testified that after the accused failed the ASD test, he arrested him on the impaired charge and made a formal demand for breath samples, advised him of his right to counsel, and cautioned him. The accused stated that he wanted to call a lawyer, indicating that he wanted the number of Legal Aid. After arriving at the detachment, the officer placed the accused in an interview room because the telephone in the telephone room was not working. The officer provided him with his personal cell phone so that he could call Legal Aid. In cross–examination, the officer said that he advised the accused that he could have access to resources in order to call any lawyer, but the accused wanted to speak to Legal Aid. The officer left the room but when he saw that the call had ended and that the accused was then speaking on his own cell phone, the officer entered the room and told him to end the call. When he asked the accused if he had received

legal advice, he replied: “not much.” The officer testified that he never discussed legal advice with a detainee and that the accused gave the usual response to the question. The accused testified for the purpose of the voir dire only. He stated that the arresting officer had taken him to an interview room and after he had spoken to duty counsel, he called his mother on his cell phone to ask her for the name of the lawyer who had represented him in past family matters. The officer entered the room and told him to end the call. The officer did not provide him with a telephone book, a list of local lawyers or an opportunity to search the internet, although he admitted that he never asked for them, nor did he advise the officer that he wanted to speak to another lawyer or the reason why he called his mother. He also acknowledged that he had received a second police caution from the breath technician before he provided breath samples.
The application was dismissed. The court found that the accused had not proven on a balance of probabilities that his s. 10(b) Charter right had been violated and there was no need to consider whether to exclude the Intoxilyzer evidence. The officer had met both the informational and implementational duties under s. 10(b). Regarding the implementational duties, the court accepted the officer’s evidence that he had informed the accused about the resources available to him to find a lawyer, despite the fact that he hadn’t recorded it in his notes. It is not a constitutional imperative that failure to provide such resources amounts to a prima facie breach of s. 10(b) of the Charter. The officer had not interfered with the accused’s exercise of the right to counsel when he entered the interview room and the accused had not informed him why he was speaking to his mother. Further, the accused did not clearly express his dissatisfaction with the legal advice he received and there was no obligation on the officer to facilitate a call to another lawyer.

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Saskatchewan (Attorney General) v Bain, 2020 SKQB 78

Mills, March 24, 2020 (QB20066)

Criminal Law – Sex Offender Information Registration Act Order – Incorrect Duration

The accused pleaded guilty to two counts of sexual assault in Provincial Court. A joint submission made by counsel to the court included a request to impose a 10–year order under the Sex Offender Information Registration Act (SOIRA) on the first count and a 20–year SOIRA order on the second count. The court accepted the joint submission on sentencing and imposed the SOIRA order as requested. The Crown and defence counsel acknowledged that order made pursuant to s. 490.013(2) of the Criminal Code makes mandatory the imposition of a lifetime SOIRA order. The Crown brought the matter back before the Provincial Court pursuant to s. 490.012(4) of the Code but the judge, relying on the decision in R v Perkinson, ruled that she had no jurisdiction under that provision to

reconsider the duration of the SOIRA order she had made against the accused and as the order was part of the sentence, she was functus officio after it was rendered. The Crown brought this originating application to seek an order of mandamus with certiorari in aid requiring the Provincial Court judge to impose the mandatory lifetime SOIRA order required under the Code.
HELD: The application was granted. The court quashed the order below and remitted the matter to the Provincial Court with a direction that the court impose the mandatory lifetime SOIRA order. It found that the Provincial Court judge was not functus. Any correction to the order did not amount to a reconsideration of the sentence and the judge had the residual discretion to correct the mandatory non–discretionary SOIRA orders.

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R v Dorey, 2020 SKQB 81

Klatt, March 24, 2020 (QB20067)

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

The accused was charged with possession of methamphetamine and cocaine for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, possession of oxycodone contrary to s. 4(1) of the Act and possession of a weapon, a machete, dangerous to the public peace contrary to s. 88 of the Criminal Code. The accused had been a passenger in a vehicle that was driven by C.J. at the time the RCMP stopped the vehicle. C.J. was also charged and then convicted after a trial held prior to that of the accused. She was found guilty of possession for the purpose of trafficking (see: 2019 SKPC 18). At the accused's trial, Crown and defence counsel agreed that evidence taken at C.J.'s trial would be admitted, including her testimony and that of RCMP officers involved in the arrest as well as that of an officer testifying as an expert that the amount of drugs found in the vehicle was typical of trafficking. C.J. also testified at the accused's trial. She admitted that she was a daily user of methamphetamine and that the accused often supplied her with drugs when he visited her in Edmonton. She said that the accused and his girlfriend drove her to Manitoba and back to Saskatchewan, using drugs en route that she believed were provided by one or the other of them. C.J. said that she did not know that drugs were in the vehicle at the time the officer stopped the vehicle because if she had known that, she would have used them. C.J. testified that when the police stopped the vehicle, the accused panicked and stuffed many items of drug paraphernalia into her purse. When the accused testified, he claimed that he had not met C.J. before the road trip and denied even knowing that any of the drugs or paraphernalia found in the vehicle were there. He said that the machete and an axe were in the back seat because he removed them from his parents' house to keep them away from his children

when they visited. He was conveying them to a friend's place for storage. The issue was whether the accused was in possession of the controlled substances because he knew that they were in the vehicle. The accused was found guilty of all charges. The court assessed the credibility of the accused under the test set out in D.W. and found that it did not believe his evidence and that C.J. was a credible witness. As there was no direct evidence that the accused knew the drugs were in the vehicle, it was convinced beyond a reasonable doubt that he was guilty in the context of the circumstantial evidence. The most likely inference to be drawn was that the accused often drove to locations in Alberta and Saskatchewan to transport drugs obtained from his girlfriend. Further, he possessed the machete as means of protection and or intimidation as part of his drug trade.

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R v McKay, 2020 SKQB 82

Tochor, March 26, 2020 (QB20068)

Criminal Law – Application for Assessment Order – Mental Disorder
Statutes – Interpretation – Mental Health Services Act, Section 2, Section 22
Criminal Code – Not Criminally Responsible – Criminal Code, Section 16

The accused was convicted of second–degree murder in the death of his spouse (see: 2020 SKQB 28). He applied pursuant to s. 672.11(b) of the Criminal Code for a court–ordered assessment of his mental condition so he could advance a defence of not criminally responsible by reason of a mental disorder (NCR) as defined by s. 16(1) of the Code. In the alternative, the accused sought an order for a mental health assessment pursuant to s. 22(2) of The Mental Health Services Act (MHSA).
HELD:The application was dismissed. The court reviewed the principles it was required to consider in a request for an assessment. Based on the principle that it could not consider evidence at the application that was inconsistent with findings made at trial, it decided that it could not order an assessment because although the accused testified that he had been in a dream–like state when he killed his wife, hearing voices telling him to kill her because of the effect of taking anti–depressant medication and consuming alcohol induced a state of alcohol–induced amnesia, the evidence was not accepted. There were no reasonable grounds to believe the accused had a mental disorder or to believe he had a disorder that prevented him from appreciating the nature and quality of his acts or knowing his acts were wrong. The evidence at trial had established that the accused appreciated the nature and consequences of his actions and knew they were wrong. The court would not grant the alternative request for a mental health assessment under the MHSA. That provincial legislation could not be used to supplant the provisions of

the Code. The aims of the MHSA differ from those of the NCR provisions of the Code, as does its definition of mental disorder in s. 2(j). Section 22 is to be used after conviction or during sentencing.

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Robb v R, 2019 SKQB 295

McCreary, November 15, 2019 (QB19323)

Criminal Law – Assault – Sexual Assault
Constitutional Law – Charter of Rights, Section 7, Section 11(d)
Statutes – Interpretation – Criminal Code Section 33.1 – Extreme Intoxication – Sexual Assault

The accused was charged with sexual assault contrary to s. 271 of the Criminal Code. The accused pleaded not guilty and intended to testify at his trial that because he consumed a large amount of alcohol, he performed the alleged sexual acts without having intended to do so and without the requisite voluntariness to hold him criminal responsible for sexual assault. He sought an order that s. 33.1 of the Code, prohibiting the defence of self–induced intoxication for general intent offences that interfere with the bodily integrity of another person, infringed his rights guaranteed under ss. 7 and 11(d) of the Charter. In addition, he sought an order that s. 33.1 was of no force and effect. The issues were: 1) whether s. 33.1 of the Code infringes ss. 7 and 11(d) of the Charter; and 2) if so, is the infringement saved by s. 1 of the Charter?
HELD: The court found that s. 33.1 of the Criminal Code infringed ss. 7 and 11(d) of the Charter, but was saved by s. 1 and was therefore constitutional. The defence of self–induced intoxication was not available to the accused. It held with respect to each issue that: 1) s. 33.1 breaches the rights provided to the accused under ss. 7 and 11(d) of the Charter because it allows for a conviction where there may be a reasonable doubt respecting the accused's mens rea or voluntariness, both essential elements of a general intent offence; and 2) the limit imposed by s. 33.1 of the Code is reasonable and demonstrably justified in a free and democratic society as it met the test set out in R v Oakes. The Crown had proven that the objective of the legislation, to protect the rights of women and children as the victims of violence committed by men who choose to become extremely intoxicated and then commit violent acts. Holding offenders accountable for violent crimes committed while in a state of intoxication continues to be as pressing and substantial a societal objective now as it was when the legislation was passed in 1995. The provision was a proportional response to that objective. The test whether s. 33.1's impairment of ss.7 and 11(d) of the Charter was minimal was met because it qualified as an option within a range of reasonably supportable alternatives. It only limits the extreme intoxication defence for general intent crimes involving violence, and then only where intoxication is self–induced. The salutary benefits of s.33.1 to protect the security rights of women and

children and deterring offenders from committing intoxicated violence outweigh the deleterious consequences for the small number of individual accused who would otherwise rely on the defence of self–induced extreme intoxication.

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R v Kahnapace, 2020 SKPC 9

Kovatch, March 2, 2020 (PC20009)

Criminal Law – Resist Arrest

The accused was charged with assault with a weapon contrary to s. 267(a) of the Criminal Code, breach of probation and resisting a police officer engaged in the lawful execution of his duty by running away contrary to s. 129(a) of the Code. The charges arose out of the same short incident where a member of the public called 911 when he saw a man and a woman pushing each other and throwing a large plastic container at each other. The woman kicked the man and he hit her. Nearby police officers received a call from dispatch of a report of an "assault in progress". As they drove to the location, they saw a man and a woman standing together and the woman had her hands to her face and appeared to be crying. One officer yelled to the male that he was under arrest. The man began running away and one of the officers caught and handcuffed him. When asked why the accused was arrested, the officer said that he had reasonable grounds to believe the accused had committed an offence based on the dispatch and the woman's demeanour, and because he ran away. The officers later learned that the accused was on probation. At trial, the Crown stayed the charge of assault with a weapon. The defence argued that the arrest of the accused had not been effected because the officer had not touched him and thus, as he was not arrested before running from the police, he could not be convicted of resisting arrest. In the alternative, if the accused was arrested, then it was not lawful.
HELD: The accused was acquitted of resisting arrest as the arrest was unlawful and the police were outside the execution of their duty. The court would not admit the submission by the Crown of a certified copy of the probation order because it had not given the defence adequate notice in disclosure as required under s. 28 of the Canada Evidence Act. As it was not properly before the court, that charge against the accused was dismissed. It found that even if an arrest had not been effected, the accused would be convicted if he were fleeing from a lawful arrest. However, the officers did not have reasonable and probable grounds on the basis of the dispatch information to believe that the accused had committed an offence as they did not conduct any investigation. The fact that the accused ran away did not of itself create any exigent circumstances justifying arrest.

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R v Janvier, 2020 SKPC 12

Baldwin, February 21, 2020 (PC20010)

Criminal Law – Manslaughter – Sentencing
Criminal Law – Aboriginal Offender – Sentencing

The accused pled guilty prior to trial to a charge of manslaughter contrary to s. 226 of the Criminal Code. He told the police that he had a loaded rifle with him at the time of the offence because he intended to commit suicide and was very intoxicated. He saw the victim, who he believed had stolen something from him, and fired a warning shot at the victim as he walked away, but instead mortally wounded him and then left him to die. The accused, a Métis man who identified himself as Dene, was 22 at the time of the offence. He had had a happy childhood while being raised by his grandparents, but they died when he was 10. After losing his grandparents, he tried to commit suicide many times. He began drinking at 11. When he began living with his mother in early teens, he also became involved with negative peers and crime. The accused's prior criminal record included convictions for violence and weapons and at the time of the offence he was serving a conditional sentence order in the community for three counts of assault with a weapon, a breach of undertaking and possession of a weapon for a dangerous purpose. His conditions prohibited him from possession of firearms. The author of the pre–sentence report advised that the accused was at medium risk to reoffend. The accused expressed his remorse and his willingness to change and become a positive member of society. HELD:The accused was given a nine–year sentence, reduced by two years as credit at the rate of 1.5 for time on remand. The court found that the accused committed the offence without provocation and by shooting at the victim, and had knowledge of the risk to his life. There was a low degree of planning but it was a deliberate act provoked by the dispute regarding the theft of the accused's property. The personal circumstances of the accused and the Gladue factors reduced his moral culpability. The aggravating factors included that the accused had a criminal record and was serving a conditional sentence at the time of the offence and was not allowed to possess firearms. He shot the victim in the back and left him without notifying anyone. In addition to the Gladue factors, the mitigating factors were that the accused pled guilty early and expressed remorse. In addition, the court considered his youth, relatively short record and that his prospects for rehabilitation were good.

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