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. 11 **June 1, 2020**

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Bear v R, 2020 SKCA 47

Jackson, April 21, 2020 (CA20047)

Criminal Law – Judicial Interim Release Pending Appeal – COVID-19

The applicant applied for judicial interim release pending his appeal pursuant to s. 679 of the Criminal Code. He was convicted of assault and sexual assault in October 2018 and sentenced to three years and nine months in prison. He immediately appealed his conviction on the ground that his trial counsel had not represented him competently. In July 2019, he applied for judicial interim release. The application was dismissed on the first ground in s. 679, that his appeal was frivolous regarding his allegation of ineffective representation, and the tertiary ground. The applicant subsequently filed his affidavit in support of his claim regarding ineffective representation. In this application, he argued that he should be released because of the pandemic. He had been on electronically monitored release for 22 months prior to his sentencing and was classified as at low risk to reoffend. He intended to live with his partner who was supporting him.
HELD: The application was denied. The court found that the applicant had not satisfied the second criteria set out in Daniels of showing a material change in circumstances since the decision in his initial application that could alter the initial assessment of one or more of the statutory factors in s. 679(3) of the Code. His affidavit had not demonstrated that his appeal was not frivolous and the pandemic had not altered the law in relation to judicial interim release pending appeal. If the court were to address the impact of the COVID-19 on the applicant, it would have required him to provide more with respect to his plan for release given the nature of

the offences for which he had been convicted. Further, the court remained concerned that the applicant was not pursuing his appeal expeditiously.

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Goodman v Saskatchewan (Community Operations), 2020 SKCA 51

Leurer, April 1, 2020 (CA20051)

Civil Procedure – Court of Appeal Rules – Rule 15 – Stay Pending Appeal
Regulatory Offence – Community Safety Order – Appeal
Statutes – Interpretation – Safer Communities and Neighbourhoods Act

The applicants (owners) sought leave to appeal a Queen's Bench chambers order (order) made under The Safer Communities and Neighborhoods Act. They sought leave to appeal pursuant to Rule 15 of The Court of Appeal Rules. The owners were the registered owners of residential property (property). In January 2019, the Safer Communities and Neighbourhoods program (SCAN) received complaints about possible drug activity occurring at the property. SCAN investigated for a year and then made an originating application pursuant to s. 8 of the Act. The respondent sought closure of the property for 90 days. The chambers judge granted the order and terminated any tenancy agreement. The owners filed their motion seeking leave and a stay on March 13, 2020, before the written reasons but after the oral fiat. The property was boarded shut on March 17, 2020 and the chambers decision was released on March 24, 2020. The issues were: 1) whether the owners identified issues of law upon which leave to appeal should be granted; 2) if leave to appeal were granted, should a stay be ordered; and 3) whether an order should be made referring to the owners and others by initials only.
HELD: The issues were dealt with as follows: 1) any question of law must be of sufficient merit and of sufficient importance to warrant determination by the Court of Appeal. The two grounds of appeal were: a) whether the chambers judge erred in law by relying on hearsay evidence from anonymous complainants. Section 8(1)(a) of the Act requires habitual use of the property that adversely affects the community or neighbourhood. The chambers judge rejected the owners' argument that habitual use had not been shown, based partly on accepting the anonymous complaints as truthful. Section 32 of the Act requires that the identity of complainants be protected. The appeal court found that the potential ambiguity surrounding the proper interpretation and application of s. 32 created an issue meriting the court's review. The first issue was also important because the appeal court had never considered the admissibility of

the evidence from complainants; and b) whether the chambers judge erred in law by relying on opinion evidence of the principal SCAN investigator. The owners pointed to five areas of opinion offered by the investigator. There was merit to the proposed ground of appeal, and it was of sufficient importance. Leave to appeal was granted on both questions of law; 2) Rule 15(1) indicates that "unless otherwise ordered," the filing of a notice of appeal does not stay the execution of a judgment or order granting an injunction. The court applied the three-part test from RJR-MacDonald Inc.: (i) there must be a serious question to be determined on the proposed appeal; (ii) the appellants would experience irreparable harm if a stay were not granted; and (iii) the balance of convenience weighs in favour of granting the stay. There was a serious question to be determined. The property was already boarded shut. The tenants were also vacated. The order had not yet been fully "executed." If the order were stayed, the owner could re-lease the property pending the appeal. The appeal court considered whether the stay should be ordered without regard to the property being shuttered, in part because the owners were limited in their ability to proceed with the application for leave to appeal while waiting for the chambers decision. The appeal court was not convinced that the objectives the order sought to achieve could not be attained if it were implemented after the conclusion of the owner's appeal. The balance of convenience required that a stay should be granted; and 3) the owners sought an order that they and the tenants only be referred to by their initials because there was no police investigation against them. There was potential prejudice in not redacting the names. The owners did not provide any authority for their position. The appeal court did not find any compelling reason to grant the order but did avoid naming the tenants.

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J.P. v R, 2020 SKCA 52

Schwann Leurer Kalmakoff, April 30, 2020 (CA20052)

Criminal Law – Robbery – Armed Robbery – Sentencing – Appeal
Criminal Law – Aboriginal Offender – Sentencing – Gladue Report

The appellant appealed his sentence. He was convicted of being a party to two armed robberies (see: 2016 SKQB 392) and pled guilty to many other offences that included: two charges of theft of property of a value not exceeding $5,000, breaking into and entering a dwelling house and committing an indictable offence, and breach of recognizance. The sentencing judge constructed a sentence of 17 years' imprisonment, comprised of seven years' imprisonment for each robbery to run consecutively, two years' imprisonment for housebreaking to run consecutively and 12 months concurrent for the remaining offences, running consecutively to the robbery and

J.P. v R

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housebreaking offences. Based on the totality principle, the judge reduced the total sentence to a global sentence of ten years less credit for time spent on remand (see: 2018 SKQB 96). At the time of the commission of the offences, the appellant was 37 years old and had an extensive criminal record of over 70 convictions. As he was of Aboriginal ancestry, a Gladue report was prepared to assist the judge in his sentencing. The report described the appellant and his family members as suffering from alcoholism, drug addiction, violence and poverty. While the writer prepared the report, it was identified that the appellant suffered from FASD. A psychologist and a physician conducted two assessments. They reported that his intellectual ability was extremely low and that FASD was the primary cause of his difficulties. The sentencing judge addressed the appellant's Gladue circumstances and diagnosis of FASD separately. He was satisfied that there were systemic and background factors that had contributed significantly to the appellant's circumstances and involvement with crime and that there was no doubt as to the accuracy of the FASD diagnosis. The judge then stated that the extent to which these factors had a bearing on the appellant's blameworthiness for the offences was much more difficult to assess. There had been no analysis in either the Gladue report or the defence counsel's submissions that would assist him in assessing the impact of systemic and background factors against the purpose and principles of sentencing. Regarding the FASD diagnosis, the judge stated that because the expert opinions seemed to express a lack of optimism concerning the appellant's prospects for rehabilitation, he would place more emphasis on the sentencing objective of public protection. The issues on appeal were: 1) whether the judge erred in principle by failing to determine his level of culpability in light of his FASD and other Gladue factors; 2) if so, did that have an impact on the sentence imposed by the judge; and 3) if so, what was a fit sentence?

HELD: The appeal was allowed. The appellant's sentence was varied to five years' imprisonment on each robbery charge, with each of the sentences to be served concurrently. The remainder of the appellant's sentence was confirmed, resulting in a global sentence of eight years' imprisonment less credit for time spent on remand. The court found with respect to each issue that: 1) by failing to determine the appellant's level of culpability in consideration of the Gladue factors and FASD diagnosis, the sentencing judge had erred in principle. The judge recognized the appellant's reduced moral culpability but refused to accept that Gladue considerations should operate to mitigate the appropriate sentence because a penitentiary sentence was required. The Supreme Court established in Gladue that where a penitentiary sentence is required, that requirement is not a reason to set aside the Gladue consideration under s. 718.2(e) of the Criminal Code. The Supreme Court's decision in Ipeelee held that there was no requirement for an offender to establish a causal link between background factors and the commission of the offence before the sentencing judge could consider those matters. A combination of

Gladue factors and FASD often serves to reduce an offender's moral culpability in consideration of the proportionality principle. 2) The judge's failure to account for the appellant's reduced moral culpability had a decisive impact on the sentence he imposed regarding the two robbery charges. He mistakenly followed the approach taken in Rudolph, wherein the seriousness of the offence of robberies dictated that sanctions other than imprisonment were not appropriate, without recognizing the critical differences between the moral culpability of the accused in that case and the appellant; and 3) a fit sentence, in this case, placed in the context of similar robbery offences committed by similar offenders, would be between five and seven years. However, in light of the appellant's FASD and other Gladue factors, his sentence should fall at the low end of the range at five years, and the sentences should be served concurrently.

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Piche v Saskatchewan Government Insurance, 2020 SKCA 53

Ottenbreit Schwann Tholl, April 30, 2020 (CA20053)

Automobile Accident Insurance Act – Income Replacement Benefits – Appeal

The appellant appealed the 2017 decision of the Automobile Injury Appeal Commission to uphold the 2014 decision letter of Saskatchewan Government Insurance (SGI) in which it terminated his income replacement benefits and other benefits that had been paid to him pursuant to The Automobile Accident Insurance Act (AAIA) (see: 2017 SKAIA 39). The appellant had been involved in a motor vehicle accident (MVA) in 2012. He sustained several injuries and suffered aggravation of other pre-existing injuries. After the accident, the appellant consulted with his family physician and two orthopedic surgeons. In July 2013, SGI referred him to the Wascana Rehabilitation Centre for an assessment because eight months after the MVA, the appellant had still not returned to work, nor had he taken the physiotherapy treatments recommended for his injuries. The appellant underwent several assessments at the Centre, and eventually, 17 conditions were identified. Six of these were considered injuries related to the MVA. An MRI of the appellant's spine showed only degenerative changes. After reviewing the MRI results, the two orthopedic surgeons provided follow-up reports, confirming that there were no injuries that required surgery. In 2014 SGI terminated the appellant's benefits because his medical conditions were not the result of his MVA based upon the medical reports he had provided to it. The appellant underwent further treatment and testing, and SGI requested its consulting physician to review the additional medical information. He concluded that there was still no evidence of causation. At the hearing before the commission, only the appellant and the consulting physician

testified. The physician testified that he disagreed with the Wascana rehab report as to the MVA-related injuries. The commission addressed the issue of causation and noted that the parties had agreed there was no causation opinion from any of the appellant's medical practitioners supporting his position that the MVA caused his current conditions. The record of when and to whom the appellant had complained about injuries was inconsistent. He argued that his medical record was not complete, that the court should prefer the evidence he presented at the hearing over what was in the medical reports, and that the list of injuries set out in the Wascana report should be preferred over the testimony of the consulting physician, as the latter had neither examined nor treated him. Based on the medical information provided, the commission found that the appellant's current medical conditions were not caused by the MVA and dismissed his appeal. The appellant raised numerous grounds of appeal, including that the commission erred: 1) by reversing the burden of proof. He submitted that the commission placed the burden on him by focusing on his purported failure to provide enough evidence to continue his benefits; and 2) by admitting the evidence of SGI's consulting physician. The appellant submitted that s. 196.3 of the AAIA and s. 89 of The Personal Injury Benefit Regulations did not permit the commission to use a lower standard for the admission of expert evidence. It erred by relying and basing its decision on the evidence of the consulting physician because he had not been properly qualified as an expert according to the threshold criteria for admission of expert evidence established in Mohan.
HELD: The appeal was dismissed. The court found concerning the aforementioned issues that the commission had not erred: 1) by placing the burden of proof on the appellant. It examined every injury and the issue of causation based upon the appellant's testimony, the medical information provided by him and the evidence of SGI. It spent considerable time weighing the evidence in coming to its conclusion. In the absence of other compelling evidence, the commission preferred the evidence of SGI that there were no objective findings in the appellant's medical reports to support his claim for causation; and 2) the appellant's counsel had not objected to the admissibility of the SGI's consulting physician or the issue of his qualification as an expert. This failure prevented the appellant from making the argument for the first time on appeal. Further, under s. 196.3 of the AAIA, the commission is not bound by the rules of evidence and has flexibility in determining admissibility. Moreover, the evidence of SGI's consulting physician met the essential elements of the Mohan criteria examined in the context of s. 196.3 of the AAIA.

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Stacey Estate v Lukenchuk, 2020 SKCA 55

Ottenbreit Schwann Kalmakoff, May 1, 2020 (CA20055)

Statutes – Interpretation – Fatal Accidents Act, Section 3(1)

The appellant appealed the decision of a Queen's Bench chambers judge that struck her claim under The Fatal Accidents Act (FAA) (see: 2019 SKQB 41). The appellant, the executrix of her husband's estate, continued an action that he had commenced against the respondent, an optometrist. Between 2010 and 2014, the deceased had consulted the respondent on six occasions regarding a problem with his eye. In 2014 the respondent referred the deceased to an ophthalmologist who diagnosed the presence of a cancerous tumour. Although it was successfully removed, the deceased died in 2016 as the cancer had spread. Before his death, the deceased commenced a claim in May 2015, alleging that the respondent had been negligent. After her husband's death, the appellant amended the claim to reflect that she was advancing it under the FAA. Before trial, the respondent applied under Queen's Bench rule 7-1 to determine the legal question of whether the appellant was entitled to bring a claim for recovery for damages for a less favourable life expectancy or decreased survival rate under the FAA. The appellant argued that the issue was the nature of the causal link that must be established between a tortfeasor's negligence and the death of the original plaintiff by applying the usual "but for" tort law test for causation. The chambers judge concluded that the correct interpretation of the words "caused by" in s. 3(1) of the FAA would not include someone who contributed or facilitated death. In this case, the judge concluded that cancer caused the death, and that would not sustain the action against the respondent under the FAA. The appellant argued on appeal that the judge erred by interpreting the words in s. 3(1) too narrowly in failing to properly consider and apply the legislative purpose and intent of the FAA and to give them a large and liberal construction.
HELD: The appeal was allowed. The court set aside the judge's decision and his order striking the appellant's claim. It found that the judge incorrectly answered the question before him on the application made under Queen's Bench rule 7-1 regarding the proper interpretation of s. 3(1) of the FAA. It held that a plaintiff is entitled to bring a claim for recovery of damages under that section where the necessary causal connection between the wrongful act, neglect, or default of the defendant and the death of the deceased is established. Whether the necessary causal connection has been established is a question for the trier of fact, to be determined by applying the appropriate legal test for causation: the "but for" test applicable in tort law to the evidence before it.

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101211532 Saskatchewan Ltd. v Crapshooter's Professional Corral Cleaning Ltd., 2020 SKQB 85

Tochor, March 31, 2020 (QB20096)

Torts – Fraudulent Misrepresentation

The plaintiff corporation brought an action for damages against the defendants. The operator of the plaintiff and the defendant, R.C., the sole shareholder of the corporate defendant, met in 2012 to discuss the possible purchase of the defendants' corral cleaning business. Six months later, both parties retained counsel to advise them concerning agreements. One agreement dealt with the plaintiff's purchase of equipment and a customer list from the defendant for the sum of $315,000. The second agreement was a covenant not to compete wherein the defendant agreed not to solicit work from any of the specified customers on the list attached to the first agreement. The plaintiff began operating its business in 2012, but in 2015, it commenced this action for damages against the defendant for fraudulent misrepresentation. The plaintiff argued that at the meeting, R.C. fraudulently misrepresented that he would refrain from contacting a specific customer. The plaintiff's representative stated that although that customer's name was not included in the list appended to the first written agreement, R.C. told him at the meeting that he would not contact the customer. This alleged oral representation made at the meeting induced the plaintiff to enter into the written agreements. The plaintiff relied on the exception to the parol evidence rule set out in Gallen. The defendants denied that they had made any misrepresentation, fraudulent or otherwise, or that any oral agreement existed between the parties that was inconsistent with the written agreements. Further, they pointed out that there was no evidence that they had breached the agreements nor that the plaintiff had suffered any damages. All of the witnesses testified that they did not feel they had reached an agreement at the meeting.

HELD: The plaintiff's action was dismissed. The court found that there was no oral agreement and that the defendants had not made any misrepresentations or any fraudulent ones. The defendants had not breached the written agreements. The evidence established that there were written agreements between the parties, and the terms were clear and unambiguous. The plaintiff's counsel drafted them, and the plaintiff did not tell him to include the alleged oral agreement. The fact that the plaintiff did not read the agreement before signing did not permit him to disavow it. There was no evidence to support that an oral agreement had been reached, that the defendant made a fraudulent misrepresentation, or that the plaintiff was induced to enter the agreements due to any kind of misrepresentation. The defendant did not breach the non-competition agreement because he did not solicit work from the customer, but rather, it sought out his services.

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Fedak v Mlynarski, 2020 SKQB 93

Brown, April 2, 2020 (QB20097)

Family Law – Child Support – Adult Child

The petitioner mother applied for an interim order that would set the amount of child support, present and ongoing, payable by the respondent reflecting the parenting arrangements and incomes of the parties and for retroactive child support. The petitioner also sought a declaration that the oldest child continued to be a child of the marriage within the meaning of the Divorce Act. The three children of the marriage were aged 21, 18 and 15 at the time of the application. The two youngest children had changed their primary residence to be with the petitioner in 2017 and 2019 respectively, but the respondent refused to change the existing child support regime to reflect those changes. The oldest child began attending university in Regina in 2017 and as the petitioner resided in Weyburn, had to acquire an apartment. She received a scholarship and student loans that covered her tuition and had received employment income which ended when she injured her foot and suffered pain and loss of mobility in 2017. The petitioner estimated that the child's expenses were $42,900 and she contributed $19,300 annually to those expenses. The respondent submitted that he did not have sufficient income to support this oldest child, that her living expenses were too high and that the petitioner should not have purchased a vehicle for her. When the respondent did not appear at the hearing, the chambers judge ordered him to file materials within two weeks and the respondent only provided his 2019 tax return summary, showing his line 150 income as $64,000, and failed to provide evidence supporting his claim to have significant expenses. HELD: The respondent was ordered to pay interim child support in the amount of $1,177 per month based on his 2019 income and the Table amount set for three children, commencing in September 2019 and continuing until further order or agreement of the parties. When the middle child turned 18, the amount would change to the two-child rate of $892 unless another application was brought. The respondent was also ordered to pay retroactive support from 2017. The court determined that it would base the amount by imputing income to the respondent relying upon his 2019 income. Repayment of the arrears would be at the rate of $250 per month until they were retired. The arrears from 2019 to the present was to be paid by lump sum. Any adjustments could be made at pre-trial or trial. The court declared the oldest child to be a child of the marriage as it found that she was unable to withdraw from the charge of her parents. The petitioner had demonstrated that the child was diligently pursuing a reasonable course of post-secondary education and would likely obtain employment upon completion. The court found that her expenses were high and set a reasonable amount at $35,000. The presumption that s. 3(2)(a) Guidelines amount applied was not displaced because the child did not have employment income due to her injury.

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Johnson v Kvaale, 2020 SKQB 95

Richmond, April 2, 2020 (QB20098)

Contracts – Breach – Judgment – Pre-Judgment Interest
Contracts – Share Purchase Agreement – Breach – Damages

The plaintiff claimed against the defendant for an unpaid debt. The plaintiff established a restaurant for her son to operate. The parties reached an agreement whereby the defendant purchased the business from the plaintiff. They went to a lawyer and signed a share purchase agreement on August 13, 2012. The plaintiff transferred the shares of the corporation for $1.00 and the defendant was to assume and indemnify several liabilities, including a line of credit with a bank and a $28,000 loan owing to the plaintiff. In March 2014, the restaurant was destroyed by fire. The defendant transferred the plaintiff $10,000 in November 2014. The plaintiff sent the defendant a demand letter in December 2014, demanding the remaining $18,000. The defendant replied that she would pay the debt when she received the final insurance payout. A statement of claim issued January 15, 2015. The defendant was initially noted for default. An order set aside the default judgment in January 2016, and a statement of defence was filed wherein it was stated that the plaintiff paid herself the monthly payments while she continued to do bookkeeping for the business. The plaintiff said that the payments were to the line of credit. The line of credit had a balance of $20,000 at the date of purchase. The plaintiff received cheques totalling $13,093.86 following the sale, and they appeared to have been applied to the line of credit. The plaintiff also continued to receive deposits from the debit machine following the sale. The total deposits were $17,136.66.
HELD: The plaintiff received a total of $30,230.52 following the sale to the defendant. The sum of $20,000 would have been applied to the line of credit. Therefore, $10,230.52 should have been applied to the loan due to the plaintiff. The plaintiff was awarded judgment for $7,769.48, being the amount left owing on the loan (she received $10,230.52 from the debit machine deposits and $10,000 from the defendant). The court declined to order costs or pre-judgment interest, given the substantial expense the defendant had to address the default judgment and action in the Court of Queen's Bench when only a nominal sum of money was owing.

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T.D.L. v S.D.S., 2020 SKQB 97

Labach, April 3, 2020 (QB20092)

Family Law – Child Custody and Access – Variation
Civil Procedure – Court of Queen's Bench – Directive Respecting Family Law and Child Protection Proceedings – COVID-19

The respondent father applied to vary a custody and parenting order made in December 2014. The return date for the application was March 25, 2020 but on March 20, the Court of Queen's Bench issued a directive suspending all regular operations due to the COVID-19 pandemic. Pursuant to the directive, all family law chambers applications were to be adjourned unless they were determined to be urgent or an emergency. The respondent sought to have his application proceed on the basis that it was an urgent matter. The 2014 consent judgment had granted the parties joint custody of their two children with their primary residence being with the petitioner and the respondent sought to vary the order so that the children would reside with him. He made his initial application to vary on various grounds and argued that those that required his application to be heard as an urgent matter were that: 1) the safety of the children was in question as a result of the petitioner's mental health issues; 2) the well-being of one child was in issue because the petitioner was not facilitating the child's testosterone regime as the child was transitioning from female to male; and 3) the petitioner had refused to facilitate his parenting time with the other child as a result of the COVID-19 pandemic. The petitioner filed her affidavit deposing with respect to each ground that: 1) her mental health problems were resolved in January 2020 because she resumed taking her medications and receiving psychiatric treatment; 2) the child's testosterone injections had not yet commenced; and 3) she realized that the despite her COVID-19 concerns, she must facilitate the respondent's parenting time and had done so.
HELD: The court found that the application did not meet the urgency of emergency threshold set out in the Court's directive and the respondent's request to have it placed back on the chambers list was dismissed. The application was adjourned to June 2020 in accordance with the directive. It found that the evidence did not support the respondent's contention that the petitioner's mental health issues compromised the children's safety. There was no evidence that the testosterone regime was an essential medical treatment nor that the child had even begun treatments yet. The respondent's strongest argument, that the petitioner had denied him parenting time due to the pandemic, had been resolved by the petitioner changing her mind and facilitating his parenting time.

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Maras v Thomson Estate, 2020 SKQB 98

Dawson, April 3, 2020 (QB20093)

Wills and Estates – Testamentary Capacity
Wills and Estates – Undue Influence
Aboriginal Law – Status Indians – Wills and Estates

The plaintiff, the daughter of the deceased, Beverley Thomson, and the defendant, the executrix of the estate of the deceased, each brought applications related to their dispute regarding the deceased's testamentary intentions. The deceased was a member of the Carry the Kettle Band and after her death in September 2018, a Ministerial Order was granted pursuant to s. 44(1) of the Indian Act consenting to the transfer of jurisdiction over the estate to the court that would have had jurisdiction if the deceased had not been an Indian. The order was made as a result of the dispute between the parties. The deceased had become very ill in June 2016 and was taken by the plaintiff to the hospital, where medical staff described her as being very confused. When the plaintiff objected to her being discharged, the deceased became angry. They became estranged and the defendant became involved in helping the deceased. The defendant arranged with her lawyer to meet with the deceased in July 2016 to prepare her will. The lawyer deposed that the deceased was competent when she executed the will that left her estate to the defendant and gave her power of attorney. In March 2017, the plaintiff and the deceased reconciled and the former moved into her home to care for her. In December 2017, the deceased gave instructions to another person who filled out a wills checklist form. The deceased indicated that she did not have another will and that the plaintiff was her executrix and sole beneficiary. The form was signed by two witnesses. The evidence presented by the defendant in her application was that of a letter that the testatrix had written in September 2018 and presented to another relative that stated that the defendant was her executrix and sole beneficiary. The testatrix signed the letter and the relative and another person affixed their signatures. On November 28, 2019, the defendant applied for and was granted letters probate and named as executrix under the 2016 will. On November 22, 2018 the plaintiff applied for and was granted letters of administration in error because the court was unaware of the previous grant. The plaintiff brought this application in which she sought: 1) an order pursuant to Queen's Bench rule 16-47(1) that the grant of letters probate be revoked; 2) an order pursuant to s. 16(b) or (c) of The Wills Act, 1996 or s. 46(1)(a) or (b) of the Indian Act that the July 2016 will was revoked by the December 2017 testamentary document; 3) an order stating that that document was the deceased's will in accordance with The Wills Act, 1996 and s. 15 of the Indian Estates Regulations or s. 45(2) of the Indian Act; and 4) an order that the plaintiff be granted letters probate. In the alternative, the plaintiff sought a trial of the issues that the July 2016 will be proven in solemn form to determine whether the will should be declared invalid due to incapacity of the deceased at the time of the execution of the will or declared invalid due to undue influence by the defendant. The defendant applied for

an order that a letter written by the deceased in September 2018 revived the 2016 will.
HELD: The court was satisfied that the evidence supporting the plaintiff's application, if accepted at trial, would tend to negate the deceased's testamentary capacity and that there was genuine issue to be tried on the issue of undue influence. It ordered that grant of administration to the plaintiff be revoked, that the deceased's will of July 2016 be proven in solemn form and that a trial be held for that purpose. The court ordered three trials on the following issues: 1) whether the testatrix had testamentary capacity at the time of the 2016 will and whether she was subject to undue influence in its creation and execution; 2) whether the December 2017 document was the will of the testatrix in accordance with The Wills Act, 1996 and/or a document setting out her testamentary intentions in accordance with s. 15 of the Indian Estates Regulations or s. 45(2) of the Indian Act, such that it revoked the 2016 will and probate should be granted to the plaintiff; and 3) whether the deceased's letter of September 2018 was a valid testamentary document in accordance with the aforementioned legislation such that probate should be granted to the defendant.

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George v Penner, 2020 SKQB 99

Danyliuk, April 3, 2020 (QB20099)

Family Law – Trial – Costs
Civil Procedure – Queen's Bench Rules, Rule 4-26, Rule 11-1, Rule 12-4, Rule 12-13, Rule 13-4, Rule 15-25

The respondent father brought an application following trial of the issues of custody and access and spousal support for costs to be awarded in his favour. The issues raised by the respondent were: 1) although success was mixed, the primary focus of the trial was parenting and the respondent was successful on that issue; 2) which column applied. The respondent conceded that Column 1 was the appropriate column of the tariff; 3) whether the petitioner's success respecting support should result in a discount in the costs she should pay; 4) whether fees for the respondent's second counsel ought to be awarded to him; 5) whether the respondent should receive double costs because the petitioner refused his formal offer to settle and it was substantially what was ordered in the judgment. The petitioner argued that she should not have to pay costs because she resisted the respondent's application to vary the existing parenting arrangements in the best interests of the parties' daughter. Success was mixed at trial since she continued to receive support. Any cost award, especially double costs, would cause her hardship, as she was a full-time student and did not have the resources to pay a cost award, regardless of the merits. HELD: The respondent's

application was granted in part. The court awarded lump-sum costs to him in the amount of $12,000, pursuant to Queen's Bench rule 11-1, because it obviated the need for assessment and allowed it to consider such things as the complexity and nature of the issues, the parties' positions and the written offer to settle and the issue of hardship on the petitioner. It found with respect to each issue that: 1) the main point of the trial was parenting; 2) Column 1 of the tariff was appropriate as the case was not difficult; 3) the parenting issue comprised 80 to 90 percent of the time spent on the case. Therefore it would reduce the respondent's award by 15 percent as a result of the petitioner's success regarding support; 4) this case did not require a second counsel, and the fees were not allowed to be included in the respondent's award; and 5) double costs were not available to the respondent because his offer had not been valid. The offer was sent by email and no acknowledgement of receipt was placed on the court's file, which it determined was required by Queen's Bench rule 12-4(6) and rule 12-13(6). Even if the offer was validly served, it was not valid on the basis that it was not open for 30 days as required by Queen's Bench rule 4-26(3)(a). The court decided to assess the offer under Queen's Bench rule 15-28(8) instead. The petitioner's position that an award of double costs would pose a hardship for her was not supported by any evidence, but her concern would be taken into account in fixing costs under rule 11-1(3)(b).

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Caisse v Saskatoon Correctional Centre, 2020 SKQB 105

MacMillan-Brown, April 7, 2020 (QB20100)

Administrative Law – Judicial Review
Statutes – Interpretation – Correctional Services Act, 2012, Section 73

The applicant applied for judicial review of the decision of the Director of the Saskatoon Correctional Centre (SCC) that dismissed his appeal from the decision of a disciplinary panel. The applicant, a sentenced inmate at SCC, had been found guilty by the panel of the offence of disobeying a lawful lockdown order given by a SCC staff member. It imposed a sanction of 10 days' segregation and 15 days' loss of telephone privileges. The applicant's appeal of the panel's decision was based on his contention that he had been denied procedural fairness by the panel when it failed to disclose documents he had requested in order to mount his defence: any records of his history of disciplinary offences and any video surveillance of the alleged disciplinary offence. He argued that the video might have verified his version of his actions after the lockdown order was given. The sentence was overly harsh and the failure to disclose his disciplinary record made it impossible to

determine whether it could underpin such a penalty. In dismissing the appeal and upholding the decision of the panel, the Director found that the applicant had received the summary of the evidence, which was all that was required under s. 56(1)(b) of The Correctional Services Regulations. As far as the request for disclosure of the video, the Regulations did not require that an inmate be provided with all of the evidence before the hearing. HELD: The application was allowed and the matter remitted to the Director to re-hear the appeal. As the application was based upon a breach of procedural fairness, the standard of review was correctness. The court found that the Director erred by failing to address the question of whether the panel erred when it denied the applicant's request for disclosure by concluding that he had been provided with the Notice of Charge, which was all that was required under s. 73 of The Correctional Services Act, 2012. The Director should have asked the question whether additional disclosure should have been provided to the applicant in the particular circumstances of this case. There was a common law duty of disclosure that existed outside The Correctional Services Act, 2012 and Regulations, and the applicant's request for disclosure was not contrary to the statutory procedure. The court rejected the Director's position that that under s. 73 of the Act, nothing more than the Notice of Charge was required. It held that what disclosure was necessary would depend on the circumstances of each case.

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Royal Bank of Canada v Pearl Boutique Ltd., 2020 SKQB 106

Robertson, April 9, 2020 (QB20101)

Mortgages – Judicial Sale – Application to Confirm Sale

The plaintiff bank applied for an order confirming the judicial sale of the real property. The property consisted of two city lots in the Town of Carlyle on which was located a 4,000 square foot building constructed in 1964. The property's corporate owner, Pearl Boutique (Pearl), operated a retail shop and each lot was valued at $172,500. In March 2013, Pearl arranged a collateral mortgage for $339,000 with the plaintiff and it was registered against the titles to the property. Pearl's two directors and shareholders signed personal guarantees of the debt in the amounts of $77,800 and $35,000. After Pearl fell behind in its payments, the plaintiff issued a statement of claim in November 2017 in which it sought judgment against Pearl in the amount of $206,000, foreclosure of the mortgage, sale and possession of the land. The claim was noted for default in December 2017. The assessed value of the property at that time was $261,000 and three opinions regarding its current market value ranged from $215,000 to $270,000. Pearl gave up possession in March 2018 and did not defend or oppose the plaintiff's applications. In April 2018,

the plaintiff was granted an order nisi for judicial sale by tender with an upset price of $200,000, judgment for $208,950 plus interest. The court appointed an employee of an auction and appraisal business to sell the property by tender. The tender was unsuccessful with $95,000 the highest bid received. The plaintiff obtained a second order nisi for judicial sale by real estate listing in September 2018 with a minimum price of $79,200, judgment for $216,275 and the sale to be directed by another employee of the auction company who listed it for sale at $117,000 from October 2018 to February 2019. The property did not sell and the plaintiff obtained an amendment to the second order in June 2019 that extended the listing period and reduced the upset price to $71,000. When no sale occurred, another order nisi for judicial sale was made in November 2019 with the minimum price set at $48,000, judgment for $234,100. The highest bid received was $28,000 from the Town of Carlyle. It and the plaintiff then negotiated the sale price of $45,000, with the Town acquiring title subject to property tax arrears of $29,500. The plaintiff's application without notice for an order confirming the sale was dismissed because there was no proof of service of the order and the proposed order did not conform to the terms of the previous order nisi, including that the sale price was lower than the upset price. Additionally, the court found that the plaintiff had failed to identify whether there was a personal guarantee on the mortgage as required by Taylor. The plaintiff then brought this application with notice for an order confirming sale to the town for $45,000 and leave to apply for judgment against Pearl for any deficiency. The materials filed did not identify whether there was a personal guarantee on the mortgage.
HELD: The application was dismissed. The court reviewed the legal character of foreclosure and judicial sale and described the deficiencies in the plaintiff's conduct of the matter. The court refused to confirm the judicial sale because the sale did not conform to the order nisi made in November 2019 in that the method of sale differed from what was authorized and the sale price was below the upset price. It was not equitable to confirm the sale; the plaintiff had had two years to exercise its remedies and chose judicial sale, and its delay had prejudiced the guarantors. The proposed sale price to be approved was a fraction of the original estimate of value coupled with a judgment for the deficiency against Pearl for which the guarantors would be liable. The plaintiff was given leave to apply for foreclosure.

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Rafan v Rauf, 2020 SKQB 107

Brown, April 9, 2020 (QB20095)

Family Law – Child Support
Family Law – Division of Family Property

The parties were married in June 2016 and separated in April 2017. The only child of the marriage was born in May 2017. The outstanding issues between the parties were the division of family property and the amount of child support owed by the petitioner father. The petitioner issued his application in 2017. During the marriage, he asserted that he had paid all of the household expenses from the income he earned as a salesman. The respondent was the owner and operator of a childcare program in a school. The petitioner claimed that the respondent had never properly disclosed her income from this business and he maintained that it had asset and capital value that comprised family property. During the marriage, each of the parties were attending university part-time but the petitioner could not succeed at his courses while he was working full-time, so resorted to online classes rather than foregoing all income and focusing on his studies. He asserted that the respondent put all her income into their bank accounts which she later withdrew on separation and distributed to family members for debts he contended where not legitimate. In 2017 the petitioner moved to Halifax to attend Dalhousie to gain his computer science degree because it offered classes that the University of Regina did not. Since then he was a full-time student and only was able to work 22 hours per week, earning $11 per hour. The respondent argued that the petitioner was intentionally underemployed as a result of his decision to go to Dalhousie and gave up his position in Regina where he had earned $40,000 annually and that income should be attributed to him. She testified that she stopped operating the childcare program when her maternity leave began in 2017 and that her sister had assumed responsibility for it. The business had minimal assets and no capital value as there was no goodwill. With respect to the bank account, the respondent said she had deposited $18,000 in it before the marriage. The balance had grown to $38,900 when she withdrew all of it in mid-2017. She explained that she paid her $7,500 to her parents for unpaid rent, $19,500 to her sister for unpaid wages as a staff member at the childcare program and $1,700 to her parents for babysitting. She acknowledged that there were no written rent arrangements and that the payment to her sister was based on $20 per hour for her work at the daycare. She acknowledged that the petitioner had paid the rent on their apartment during their cohabitation.

HELD: The court determined that that petitioner owed $6,595 to the respondent in s. 3 child support based upon his 2017 income of $46,300 and income of $19,560 per year it imputed to him as at June 2018. However, as the petitioner had paid $395 per month from August 2018 to March 2020, he had overpaid by $1,305. It found that the family property consisted of the childcare business and the bank account. It found that the former had no value. With respect to the bank account, the court granted the respondent an exemption in the amount of $18,000 under s. 23 of The Family Property Act. The funds remaining constituted family property because the respondent had not proven that any of the payments she made to her family were legitimate expenses, except it permitted the amount

attributed to her sister's wages to be $2,500. Thus, the respondent owed the petitioner an equalization payment of approximately $9,500.

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Eurotrend Fine Cars v Li, 2020 SKQB 108

Crooks, April 13, 2020 (QB20110)

Contract – Breach – Damages
Civil Procedure – Summary Judgment

The plaintiff brought an action against the defendants, claiming damages for their breach of a sales agreement for a vehicle that included a prohibition of export of the vehicle outside Canada within one year after its purchase. The vehicle was exported to China for resale within five months of its purchase. The plaintiff brought an application for summary judgment pursuant to Queen's Bench rule 7-2. The defendants filed their statement of defence, but only one defendant, Z.L., filed an affidavit that was consistent with the plaintiff's evidence. The two other defendants did not file material in response. The evidence was thus uncontroverted. The plaintiff operated and carried on business as Mercedes-Benz Saskatoon, a dealership with an approved distribution network for Mercedes-Benz vehicles for all Western Canada and specifically Saskatoon and surrounding area. It provided evidence that Mercedes vehicles were often purchased and resold for significant profit outside of the dealership's approved distribution network to satisfy the "grey market" demand for luxury vehicles in China. The plaintiff's dealership agreement with Mercedes forbade it from selling vehicles for that purpose and it would be penalized by Mercedes, reducing the allocation of vehicles to the plaintiff. The cost to the plaintiff in prospective lost sales and the loss of opportunity to service vehicles was significant. It implemented a requirement for purchasers to execute a Non-Export Acknowledgement Agreement and a statutory declaration that purchasers would not export a vehicle but if they did, the purchaser would pay predetermined damages of $20,000. The defendant, Z.L., was an employee of the corporate defendants Ray Song Credit and the defendant J.S.L., who was its director and majority shareholder. Under Z.L.'s employment contract with Ray Song Credit, he was hired as "broker" to buy cars for it to export. The agreement demanded secrecy between the parties at the cost of $100,000 for any related breach. In January 2017, Z.L. and J.S.L. drove to Saskatoon from Winnipeg to purchase a Mercedes from the plaintiff. J.S.L. waited in the parking lot while Z.L. completed the purchase and provided him with a bank draft for the purchase price. The plaintiff's business manager deposed that with every sale, she reviewed the Non-Export Agreement with purchasers and although

she could not remember this sale, she averred that she would have followed the same practice. Z.L. deposed that he was hesitant to sign the document and called J.S.L., who told him that he would be reimbursed for any penalty and asked him to sign the agreement. Z.L. signed it and the statutory declaration, confirming in his affidavit that he was signing on behalf of Ray Song Credit.
HELD: The application for summary judgment was granted and the plaintiff was given judgment against the defendants jointly and severally in the amount of $20,000. The court found that it was an appropriate case for summary judgment because the evidence was consistent and uncontroverted, the amount claimed readily quantifiable, and there was no genuine issue for trial. It found that Z.L. understood the terms of the purchase agreement, the Non-Export Agreement and statutory declaration and chose to sign them. J.S.L. was aware of the terms of purchase and instructed Z.L. to proceed with the purchase on behalf of Ray Song Credit and himself.

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R v Bear, 2020 SKQB 109

Hildebrandt, April 16, 2020 (QB20102)

Criminal Law – Judicial Interim Release Pending Trial – COVID-19

The applicant accused sought a review pursuant to s. 520 of the Criminal Code of the decision of Provincial Court judge in October 2019 that denied him bail and remanded him in custody pending trial. The accused had been charged with various offences including assault and operating a vehicle while impaired. The accused brought his application on the grounds that: the judge erred in law in finding that the Crown had met its onus on the secondary ground under s. 515(10)(b) of the Criminal Code; and there was admissible new evidence that showed a material change in the circumstances of the case in that due to the pandemic, trials were not proceeding and as the applicant was 75 years old and suffering from diabetes, being imprisoned threatened his health. The applicant was denied bail by the Provincial Court judge under s. 515(1)(b) because he had a criminal record of over 60 convictions, 38 of which were driving-related. In this application, he deposed that if he were released, he would return to his home on his reserve where his sister and grand-niece resided with him. He offered them as sureties and suggested that they would prevent him from drinking and driving.
HELD: The application was dismissed. The court affirmed the Provincial Court judge's decision on the secondary ground. The applicant's sister and grand-niece had been available as potential sureties when he made his first request for bail and proposing them as such now was not a material change in circumstances. The risk of the applicant finding ways to access alcohol remained high

regardless of how well-intentioned his relatives might be. The pandemic constituted a material change in circumstances since the first application. However, its presence alone was not sufficient to justify judicial interim release. Here, the release plan was not adequate. Although the court accepted that the applicant had diabetes, the Crown's evidence showed that the correctional centre where he resided on remand had taken appropriate precautions to prevent spread of the virus. As well, the applicant's risk to his community remained an issue if he were to be released.

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Hetherington v Saskatchewan Liquor and Gaming Authority, 2020 SKCA 110

Mitchell, April 17, 2020 (QB20103)

Civil Procedure – Summary Judgment
Employment Law – Dismissal Without Cause – Damages
Employment Law – Dismissal Without Cause – Mitigation of Loss
Employment Law – Dismissal Without Cause – Reasonable Notice
Employment Law – Dismissal Without Cause – Working Notice

The plaintiff employee claimed against the respondent employer, a Saskatchewan Crown corporation, for dismissal without cause. She was terminated as Director of Organizational Development in June 2017. She had been in that position since 2007. The employee's dismissal occurred when her position became redundant. The employer acknowledged that the dismissal was without cause. The employee argued that the severance pay should have been based on all her years of Saskatchewan public service, which was more than 28 years. In 2005, the employee's service with Saskatchewan was interrupted when she worked in Lethbridge for 29 months before returning to work for the employer. The employee's service with Saskatchewan started in 1982 when she was a summer student. When the employee started in the position that was terminated, it was determined that her start date of employment for vacation and long service purposes was 1989. She reduced her hours to 60 percent in July 2014 and returned to 100 percent in January 2016. The matter proceeded by way of summary judgment. There were three issues: 1) what qualified as reasonable notice to the employee; 2) whether the employee made adequate attempts to mitigate any loss she suffered; and 3) whether the employee was entitled to damages in addition to the severance package received.
HELD: The issues were determined as follows: 1) the employee argued that the appropriate range of notice was between 16 and 22 months. The employer argued that the voluntary break in service disentitled her from relying on prior government service. The employer also noted that the employee was employed by a Crown corporation, not part of the public service, prior to going to

Lethbridge. There were three sub-issues regarding reasonable notice: a) whether the employer and the Government of Saskatchewan were the same employer for severance purposes; b) if so, what was the effect of the employee's 29-month voluntary break in service on a reasonable notice period; and c) what was a reasonable notice period in the circumstances of the employee's case? The sub-issues were determined as follows: a) the employer was an emanation of the Government of Saskatchewan and there was no reason why, for employment law purposes, it should be treated separately from the Government of Saskatchewan; b) the employee's 29-month break in service should not disqualify her years of prior government service from being included in her severance calculation. The evidence was found to disclose that the employer recognized the employee's previous service to the Government of Saskatchewan in all matters except for the purposes of severance; and c) the court applied the Bardal factors to the circumstances of the case: the employee's length of service was 28 years; she was 65 years old when her position was abolished, so would have difficulty finding similar employment; the employee had a senior management position, but not an executive position; the employee had exceptional credentials; and she did not have private sector experience. The court found that the employee's prospects for finding alternate comparable employment were minimal, if not non-existent. The court found that the range of notice required would be between 15 and 18 months. Based on the common law, the notice period was fixed at 17 months. Working notice was found to be applicable. The court found that the working notice commenced on January 29, 2017 when the employee knew the date of her job abolition. Therefore, 12 months were compensable in damages; b) the court found that the employee did not fail to mitigate her losses. The employee started a consultancy business after her employment ended but she only earned $1,850. The employee also said that she applied for at least two other jobs with the federal public service similar to her position with the employer. The notice period was not reduced for failure to mitigate; and 3) the employer was required to compensate the employee for 12 months of notice. The employee argued that the notice calculation should be based on what she would have earned in 2017-2018 if her job had not been terminated. She would have earned $114,000 or $9,500 per month. The court found that performance pay was an integral part of the employee's compensation package. There was nothing in the employer's policies that specifically removed the employee's common law entitlement to performance pay. The employer argued that the employee would not have been entitled to performance pay in 2017 because she was not employed on July 2, 2017 when that was determined. But for the employee's wrongful dismissal, she would have received performance pay on July 2, 2017. The court found her annual salary to be $114,000. The court left it to counsel to determine the benefits that the employee was entitled to. The court did not award the employee the $5,000 career assistance grant because it could not be in the category of remuneration the

employee would have been entitled to if she had remained employed with the employer. The employee was entitled to pre-judgment interest and taxable costs.

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Sentes v Atamipek Land Corp., 2020 SKCA 110

McMurtry, April 21, 2020 (QB20105)

Civil Procedure – Summary Judgment
Real Property – Easement – Non-Mutual Easement – Interpretation

The applicants own a piece of land, SW19, that is adjoining land, NW18, owned by the respondent A Corp. Another respondent, RBDB, a joint venture, formerly owned NW18. In December 2015, the applicants granted RBDB an easement on SW19 to build an access road across it to link NW18 and a service road project north of SW19. The easement was registered on NW19. The applicants argued that the easement was to be temporary until the service road project was complete. They sought an order pursuant to ss. 107 and 109 of The Land Titles Act, 2000 discharging the non-mutual easement registered against SW19. The respondents argued that the terms of the easement indicated that the agreement allowed it to continue until the owner of NW18 notified the owner of SW19 that it no longer required the easement. The respondents also objected to portions of two affidavits sworn by one of the applicants, D.S. The applicants applied for summary judgment.
HELD: The court struck all but one of the objected-to portions of D.S.'s affidavits for various reasons. In paragraph 3 of the easement, the purpose was described as "…permitting the Grantee to construct… an access road and to operate, maintain, alter, or repair such access road…". The purpose was found to be less clear in paragraph 4, which stated that "…for the purposes of them using sufficient material from SW19… to construct the access road for the purposes of hauling the Borrow Material from NW18 and the Grantors shall allow the Grantee the use of the said access road for the purposes of hauling the Borrow Material from the borrow site to the service road being constructed north of the said Access Lands." The court determined that given the unambiguous language in paragraphs 2 and 3, it was more likely than not the reference to the service road in paragraph 4 was intended to situate the easement, not to describe its purpose. The purpose of the easement was found to give the respondents the right of access to and use of the access road until they no longer required them. There was no genuine issue for trial. The easement remained valid until the grantee no longer required the easement and the access road on the land. The application was dismissed with costs to the respondents.

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R v P.C.M., 2020 SKQB 118

Zerr, April 28, 2020 (QB20116)

Criminal Law – Offences Against Children – Sentencing – Appeal
Criminal Law – Aboriginal Offender – Gladue Factors – Appeal

The respondent pleaded guilty to assaulting her 11-year-old son. The Crown appealed the sentence of a 12-month conditional discharge imposed by the Provincial Court judge (see: 2019 SKPC 11). The Crown alleged numerous grounds on which the sentencing judge had erred in law that included: 1) his weighing of the correct sentencing principles, because he focused on rehabilitation of the respondent due to the presence of Gladue factors in her background and by doing so, elevated it to an equal or higher priority than denunciation of physical violence against children under s. 718.01 of the Criminal Code; 2) in his approach to aggravating factors. He mischaracterized the probative value of a previous assault charge against the respondent that had been referred to alternative measures as of little value. Further, the judge failed to adequately consider other aggravating factors such as the victim's age, the respondent's abuse of her position of trust and the impact on the victim; and 3) in finding the assault was a result of immaturity and thus a second category offence in accordance with R v Marks. HELD: The appeal was allowed and the court determined that a fit sentence for the respondent was a 12-month suspended sentence, resulting in a criminal record, and confirmed the same conditions imposed by the sentencing judge. It found that this was a fit sentence because of the gravity of the offence, the unprovoked nature of the assault, the respondent's position of trust and that she was intoxicated. It held with respect to each issue that the sentencing judge had: 1) erred by elevating rehabilitation and Gladue considerations to an equal or higher priority than denunciation and deterrence as required by s. 718.01 of the Code; 2) not erred with respect to his finding that that a previous assault that was not serious enough to warrant prosecution to conviction carried little weight. With respect to his consideration of the other aggravating factors, he erred because he had not given the proper weight to the age of the victim under s. 718.2(a)(ii.1) of the Code, the respondent's position under s. 718.2(a)(iii) of the Code, and the impact on the victim under s. 718.2(a)(iii.1); and 3) had not committed a reviewable error in this regard. It was within his discretion to choose the category.

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Olson, Re (Bankrupt), 2020 SKQB 120

Thompson, April 30, 2020 (QB20117)

Bankruptcy and Insolvency – Discharge

The bankrupt's application for discharge was opposed by one of his creditors, Raymore Credit Union. Its proven unsecured claim for $1,418,200 made up 91 percent of the proven unsecured claims in the bankruptcy. The bankrupt, the sole officer and shareholder of ABO Transport (ABO), entered into a general security agreement to provide financing to ABO in 2012 and he granted Raymore security interests in all of ABO's present and after acquired property along with his own personal guarantees. He admitted that he purchased equipment and funded ABO's operations with Raymore funds. The increased value in ABO increased the value of its shares, all held by the bankrupt. After the bankruptcy in 2018, the shares were attributed a total value of $1. Although the trustee in this case recommended the bankrupt's absolute discharge, Raymore submitted that two factors existed in connection with the bankruptcy contrary to s. 173 of the Bankruptcy and Insolvency Act (BIA): i) the bankrupt's assets were not of a value equal to 50 cents on the dollar on the amount of his unsecured liabilities contrary to s. 173(1)(a) and there was no evidence that the bankrupt could not be held responsible; and ii) he had failed to satisfactorily account for any loss of assets to meet his liabilities in that he liquidated significant equipment holdings of ABO. The proceeds of the equipment ought to have been available to the creditors. Raymore submitted that the fact that the bankrupt failed to identify the whereabouts of pledged assets or proceeds from their disposition raised the suspicion that he might be sheltering assets to the detriment of his creditors. The bankrupt admitted that some of the pledged property was not owned by ABO when he pledged it as security for ABO financing and that he was unable to account for some of the pledged equipment. Raymore sought this hearing so that it could cross-examine the bankrupt to obtain an explanation as to how the company used $1,418,200. The bankrupt was 61 and had insufficient income to trigger the requirement to make surplus income payments.

HELD: The court ordered that the bankrupt would be discharged if he were able to meet one of three alternative conditions: to pay $26,000 to the trustee, based on the value of equipment for which he had not accounted, and serve a suspension of one year; or if the trustee was satisfied that the bankruptcy did not have the ability to pay that amount, then he would be eligible for discharge two years from the date of this disposition; or if proceeds from property seized by Raymore were sufficient to cover ABO's debts such that no personal liability existed, the discharge would be suspended for one year from the date of this decision. The court found that because the trustee's report stated that no s. 173 facts existed, the onus to establish that the bankrupt was at fault for the asset to liability ratio rested with Raymore. Based on the evidence, the bankrupt had pledged assets that were not owned by ABO and was unable to account for other pledged property. He had not justified the fact of his assets not being worth less than 50 cents on the dollar of

unsecured liabilities and had failed to account satisfactorily for the loss of the value of the shares he held in ABO.

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R v Ross, 2020 SKPC 16

Cardinal, April 3, 2020 (PC20014)

Criminal Law – Assault – Sexual Assault – Sentencing
Criminal Code – Sentencing – Dangerous Offender
Criminal Law – Aboriginal Offender – Sentencing – Gladue Report

The accused was convicted after trial of sexual assault contrary to s. 271 of the Criminal Code. The Crown made a dangerous offender (DO) application and a psychiatric assessment of the accused was prepared. The sexual assault constituted the predicate offence in the application. The accused had attempted to have sexual intercourse with a cognitively-challenged Aboriginal woman. During the assault, he restrained and hit the victim while she actively resisted him, and eventually she was able to escape. She had become very fearful as a result of the accused's assault and resorted to drug use to ease her pain. The accused, a member of the La Ronge Indian Band, aged 49 at the time of the offence, had spent his childhood either in foster homes or with his alcoholic mother as well as spending three years in a residential school. He said that he had suffered from physical and sexual abuse while in foster care and at the residential school. He became a heavy drinker. From the age of 16, the accused had been involved with the criminal justice system. His criminal record included 62 convictions over a 32-year period and of these, 14 were violent offences comprised of three convictions for sexual assault, two for assault causing bodily harm, and six for assault. Many of his convictions were for being unlawfully at large and failing to comply with court orders, including four for failing to comply with an order under the Sex Offender Information Registration Act. The accused had served sentences in correctional centres, in the penitentiary and in the community and at various times during his periods of incarceration had participated in programs dealing with substance abuse, violence and anger management. He had successfully completed the Aboriginal Sex Offender Program in 1998. Correctional officers testified that although the accused participated in programming, he was not able to carry what he had learned back to his life in the community and he reverted repeatedly to substance abuse and not abiding by his conditions for release. The psychiatrist who assessed the accused testified that the accused acknowledged responsibility for his past violence, but demonstrated little insight into his behaviour, and blamed drinking or the victims. In the case of the predicate offence, he denied that it had occurred. He was dismissive of the value of programs. The accused did not suffer from cognitive deficits but met

the criteria for the diagnoses of Antisocial Personality Disorder and Substance Abuse Disorder, both of which had developed in reaction to adverse childhood experiences. Although sexually aggressive, he was not a sexual deviant. In the psychiatrist's opinion, the accused was at high risk to re-offend, violently or sexually, if he did not make a significant change. The accused's risk to others could be mitigated by sobriety, ageing and identity and treatment programs. Close monitoring and supervision for the rest of the accused's life would be required. The Crown made its application on the basis that the accused's violent offending behaviour coupled with his sexual offending behaviour fell under ss. 753(1)(a)(i) and (ii) and s. 753(1)(b) of the Code.
HELD: The application was granted. The accused was designated a DO and given an indeterminate prison sentence. The court was satisfied that Crown had proven that in the circumstances of the predicate offence, the accused met the definition in ss. 752(a)(i), 752(a)(ii) and 752(b) and then proven under ss. 753(1)(a)(i) and (ii) and s. 753(1)(b) of the Code that he could be designated. Under s. 753(1)(a)(i) of the Code, the court found that the accused had exhibited a pattern of repetitive and persistent aggressive behaviour and the predicate offence was part of a broader pattern of violence. The pattern of behaviour showed the accused was indifferent to the reasonably foreseeable harm to victims caused by his behaviour as required by s. 753(1)(a)(ii). The accused's pattern of violent conduct was found to be intractable. The psychiatrist believed it was overly optimistic to suggest that with treatment, he might be able to reduce his risk where he could be managed in the community. The accused's age had not affected his propensity to violent offending. The Crown also proved that the accused should be designated a DO under s. 753(1)(b) of the Code. Including the predicate offence, he had been convicted of four sexual assaults against women he knew. He was related to three of them. He remained at high risk to reoffend. In considering the appropriate penalty under s. 753(4) of the Code, the court found that the accused had had many opportunities to make the necessary changes to his life to be successful upon release into the community and showed repeated non-compliance with conditions of parole and court orders. His moral blameworthiness was high and although Gladue factors were present, it found they carried little weight. It concluded that in light of all the evidence, only detention in a penitentiary for an indeterminate period would adequately protect the public.

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R v Bear, 2020 SKPC 20

Green, April 29, 2020 (PC20016)

Criminal Law – Firearms Offences – Possession of a Firearm

The accused was charged with 16 offences. The charges were laid after a police officer observed a vehicle matching the description of one that had recently been reported stolen. The licence plate on the vehicle was also one that had been reported stolen. The officer began following the vehicle and with the assistance of another officer in another cruiser, attempted to box in the vehicle. The driver of the stolen vehicle escaped by driving around one of the police cruisers, and a high-speed chase ensued. Once the vehicle was stopped, its driver, the accused, and his passenger were both pulled from the vehicle and arrested. During this process, the officers saw a firearm lying on the ground a few feet from the passenger door. It was a sawed-off .303 rifle. In their search of the vehicle, the police found a magazine of .303 ammunition and a can of bear spray in plain sight on the driver's side. In the backseat, they located four tires that had been reported stolen and the vehicle's licence plate.
HELD: The accused was found guilty of the majority of the offences. With respect to the constellation of charges relating to the firearm: carrying a firearm in a careless manner contrary to s. 86(1) of the Criminal Code; being an occupant in a vehicle in which a firearm was located contrary to s. 94(1)(a)(i) of the Code; possessing an unloaded firearm together with readily accessible ammunition contrary to s. 95(1)(a) of the Code; and possessing a firearm when prohibited from doing so contrary to s. 117.01(1) of the Code, the court was satisfied beyond a reasonable doubt that accused was guilty of these offences. It found that the accused knew that the firearm was present in the vehicle and that he either had control of it himself or had consented to the passenger's possession of it. Regarding the charges relating to the vehicle, the court found that it could infer that the accused knew it was stolen and he admitted that he knew that there were stolen tires in the backseat. He was aware that he did not have the owner's consent to operate the vehicle. The accused was guilty of taking a vehicle without the consent of the owner contrary to s. 225 of the Code and possessing property of a value not exceeding $5,000 (the tires) obtained by crime contrary to s. 354 of the Code.

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