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Kwon v R, 2020 SKCA 56

Whitmore Leurer Tholl, May 7, 2020 (CA20056)

Criminal Law – Appeal – Conviction
Criminal Law – Assault – Sexual Assault – Consent
Criminal Law – Evidence – Credibility – Appeal

The appellant appealed his sexual assault conviction. He owned a bar that the complainant, A.D., and her husband frequented regularly. On the offence night, A.D. was at the bar without her husband. The appellant gave A.D. a ride home. He said that they had consensual intercourse initiated by A.D. A.D. testified that she did not remember having sexual intercourse with the appellant; she remembered little of the evening. The next morning, A.D. asked her husband if they had had intercourse the night before. When he said no, they went to the hospital for an examination. A DNA test revealed that the appellant and A.D. had sexual intercourse. The appellant testified that A.D. was not slurring her words, she did not need help walking, nor did she fall down at the bar. He also testified that A.D. requested that he not tell A.D.'s husband about the intercourse. The trial judge found that A.D. did not know she was having sex, so did not appreciate that she could decline sex. Because A.D. lacked the capacity to consent, the trial judge found that she did not consent. According to the trial judge, the appellant was required to take reasonable steps to satisfy himself that A.D. was consenting to have sex with him. He did not take any such steps. The deciding issue on the appeal was whether the trial judge erred in her assessment of the evidence and in her application of R v D.W. (D.W.).
HELD: The appeal was allowed. The trial judge had committed a

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reviewable error in her D.W. analysis. A new trial was warranted. The Crown must prove beyond a reasonable doubt that there is an absence of consent at the actus reus stage. Whether the accused was aware of, or was reckless or willfully blind to, the absence of consent is examined in the mens rea. Section 273.1(2)(b) of the Criminal Code, which was in force at the time of the trial decision, provided that no consent is obtained where "the complainant is incapable of consenting to the activity." The first step was to determine whether the Crown proved the absence of consent. If there is a reasonable doubt, then it is necessary to consider whether the ostensible consent was valid at law. The trial judge did not follow the two-step approach. She said there was no consent because A.D. did not have capacity to consent. The evidence raised concerns as to whether the trial judge properly concluded that A.D. was intoxicated to the point of incapacity. Because the appellant testified, the trial judge had to conduct an assessment of the evidence pursuant to D.W. The trial judge was found to have mischaracterized some evidence and to have arrived at several erroneous conclusions. The trial judge concluded that A.D.'s conduct the next day and her not remembering whether she had intercourse established that the appellant and A.D. did not have a conversation about having sexual intercourse the night before. The trial judge could not both conclude that A.D. did not remember having sexual intercourse and at the same time find her testimony credible and reliable in relation to whether these conversations did not take place. The appellant said that he believed A.D. was not sleeping at any point in the drive, but was simply resting her eyes. The trial judge said that the appellant acknowledged that A.D. was falling in and out of sleep, but that was not what the record said. The appeal court concluded that the trial judge finding A.D. reliable based on her rating of her intoxication or because she could not walk was inconsistent with the finding that A.D. was so incapacitated that it severely affected her memory of the evening. The transcript did not support the conclusion that the appellant attempted to downplay A.D.'s intoxication. The trial judge did not explain how she could rely on A.D.'s evidence that she needed help into the appellant's vehicle and that she also did not recall being in the vehicle except for brief moments and that A.D. was significantly intoxicated. A.D. could have forgotten about the conversations with the appellant regarding sexual intercourse. The appeal court found that there were significant issues with the reasons the trial judge gave as to why she did not believe the appellant's evidence. The trial judge was also still required to determine whether the whole of the evidence showed that A.D. either lacked capacity to consent or did not consent in order to complete her analysis pursuant to D.W. The trial judge did not reconcile why she accepted that A.D. did not remember most of the ride home and yet did accept her evidence about what occurred shortly before the drive. There was not much evidence to support the finding that A.D. was extremely intoxicated. If the conviction could not be upheld, then the conviction could only be maintained if it were clear that A.D. was unconscious or did not consent. The trial

judge did not find that A.D. was unconscious. Therefore, it was unclear whether A.D. consented, and the consent was vitiated by incapacity, or whether A.D. was unconscious and therefore did not consent. There was also no analysis of whether A.D.'s evidence was reliable. The trial judge failed to conduct a proper D.W. analysis. The high bar set by the definition of incapacity to consent was not met. The appeal was allowed, the conviction was quashed, and a new trial was ordered.

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Williams v R, 2020 SKCA 57

Barrington-Foote, April 8, 2020 (CA20057)

Criminal Law – Appeal – Application to Extend Time to File Notice to Appeal
Criminal Law – Controlled Drugs and Substances – Possession for the Purpose of Trafficking – Methamphetamine
Criminal Law – Sentencing – Appeal

The proposed appellant (appellant) pled guilty to possession of methamphetamine for the purpose of trafficking. He was sentenced to three years in prison. On February 21, 2020, the appellant applied for an order extending the time to file a notice of appeal of his sentence, which had expired December 18, 2019. The appellant said that he thought a corrections officer had faxed his notice of appeal on or about November 28, 2019, but did not learn until January 2, 2020 that it had not been faxed. The appellant was found with three pill bottles containing methamphetamine totaling 26.555 grams. In his statement to the police, the appellant said that he distributed the drugs, abused methamphetamine, and used one gram per day. He denied trafficking in the pre-sentence report, he indicated that all of the drugs were for personal use. The sentencing judge found that that the appellant admitted to having $2,700 worth of methamphetamine for distribution to others who would sell it to users. There was found to be a joint venture between three people who pooled their money to by the drugs. The ground of appeal was that the sentencing judge erred in finding that he was a mid-level dealer of methamphetamine for profit and basing his sentence on that conclusion.
HELD: The application was granted. It was in the interests of justice to extend the time for the appellant to appeal. The court was satisfied that the appellant formed a bona fide intention to seek to appeal within the allotted time. He satisfactorily explained the delay between sentencing and mid-January 2020, but not the additional four to five weeks before his application to extend time was finally filed. There was sufficient potential merit to the ground of appeal so that it weighed in favour of granting the application. There were also factors weighing against allowing the extension of time. The

concern with finality in the justice system is not sufficient to outweigh the interests of seeing that justice is done in the case.

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Lewis v Epp, 2020 SKCA 58

Caldwell Leurer Barrington-Foote, May 6, 2020 (CA20058)

Administrative Law – Judicial Review – Standard of Review – Reasonableness – Appeal
Small Claims – Practice and Procedure – Default Judgment – Appeal

The Queen's Bench chambers judge found that the Provincial Court judge had not committed a reviewable error in deciding not to open up a default judgment under The Small Claims Act, 2016. The default judgment had been entered against the respondent. The appellant did not attend at Provincial Court on the first date set for the trial of the respondent's claim against her. She did not attend on an adjourned date either. A default judgment was entered against the appellant. She applied under s. 42 of The Small Claims Act, 2016 to have the default judgment set aside. The Provincial Court judge concluded that the appellant did not have a valid defence to the claim and that her application to set aside the default judgment was frivolous and vexatious. The appellant appealed to the Court of Queen's Bench. The chambers judge determined that there was no right of appeal against a decision not to open up a default judgment under s. 42. The appellant did not appeal that decision; she brought an application for judicial review of the Provincial Court judge's decision.
HELD: The appeal was allowed. The chambers judge's decision was set aside, the order of the Provincial Court was quashed, and the application to set aside the default judgment was remitted to the Provincial Court for rehearing. The chambers judge dealing with the judicial review application correctly selected reasonableness as the standard of review and the standard was applied. A month after the decision, the Supreme Court of Canada released its decision in Vavilov. Vavilov clarified what the reasonableness standard entails and how it should be applied in the context of judicial review. The Supreme Court of Canada said that the reasonableness standard required determining whether judicial intervention is "truly necessary" so as to "safeguard the legality, rationality and fairness of the administrative process." The reviewing court must only consider the decision actually made, not the decision-maker's rationale. The chambers judge properly identified reasonableness as the standard of review, but did not correctly apply the standard of reasonableness as per Vavilov. The court was unable to conclude that the Provincial Court's brief reasons justified the outcome of dismissing the appellant's application to re-open the default judgment or that the outcome was justifiable having regard for the

record and the history of the proceedings. The Provincial Court's decision was based on two factors: finding that the appellant had no valid defence and that her application was an abuse of process. The appellant did raise circumstances that, if proven, would offer a valid defence to all or part of the claim against her. Therefore, the application to set aside the default judgment was not an abuse of process. The decision not to open up the default judgment was not reasonable. No order was made as to costs.

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Saskatoon (City) v Victory Majors Investments Corp., 2020 SKCA 59

Ottenbreit Schwann Kalmakoff, May 6, 2020 (CA20059)

Administrative Law – Municipal – Assessment Appeals – Deference
Municipal Law – Assessment Appeal

The city appealed a decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board (committee) concerning the 2017 municipal tax assessments of 11 commercial retail properties in the downtown core. Victory Majors Investment Corp. (VM) was the lead appellant to the Board of Revision (board) and the subsequent appeal to the committee. VM described all of the properties as being outside of the prime retail area. The assessor changed the assessment model in 2017. The same market rent was applied throughout the central business district (CBD), regardless of whether or not the property was within the prime retail area. Adjustments were made for the age of the properties and size of individual rental units, but not for style, configuration, or condition of the properties. The board deferred to the assessor's judgment and dismissed VM's appeal. The committee allowed the appeal and referred the matter back to the assessor for recalculation. The city was granted leave to appeal the committee's decision on four grounds.
HELD: The appeal was allowed. To determine the appeal, the court first considered the nature of VM's appeal to the board and the board's decision. VM argued that the assessor's rent model failed to account for market variations within the downtown core due to location, age, and condition of the properties. VM also took issue with the rental discount applied to second floor properties. The board was found to ponder whether the rental trends in VM's evidence would emerge if all relevant leases were analyzed. The board found that the assessor's decision to exclude properties that employed gross and semi-gross rents from the rent model as "questionable judgment", not error. The board therefore deferred to the notion of assessor discretion. The board found that it was unable to answer whether the same rentals would emerge if all leases were included rather than just the 45 leases submitted as evidence by VM.

MacLachlan v MacLachlan

Olive v Administrator of the Rural Municipality of Keys No. 33

Pierson v Estevan Board of Police Commissioners

R v Bird

R v Hamilton

R v Mehari

R v Moberly

Regina Professional Firefighters Association, IAFF Local No. 181 v Regina (City)

Rubidge v Holtzhausen

Ryan v Benderski

Ryan v Klause

S.M. v L.W.

Saskatoon (City) v Victory Majors Investment Corp.

Suffern Lake Regional Park Authority v Wildman

TD Waterhouse Canada Inc. v Weimer

Williams v R

The omission of evidence of all the leases was found to be less than an error on the assessor's part. The board was found to properly defer to the assessor's judgment and discretion. The court next considered the appeal to the committee and the committee's decision. VM's notice of appeal to the committee asserted that the board had erred in how it dealt with the principle of assessor discretion. VM did not, however, appeal the board's finding of a lack of evidence or its finding that the evidentiary gap was simply a lack of diligence on the part of the city and not error. Therefore, for the committee to find a material error on the part of the board, the committee had to overlook certain items. The committee concluded that excluding rental data for properties that charge semi-gross or gross rents from the analysis has the potential to affect the achievement of equity. The committee found that the assessor had erred by failing to take into account the factors that bear on comparability. The committee concluded that the board made a mistake when it (a) upheld the assessor's decision to exclude gross and semi-gross rents from the analysis in developing its rent model, and (b) accepted the assessor's flat rate adjustment for second floor rentals in the face of varying floor rates and without including data from properties charging gross and semi-gross rent. The court found that the real issue was whether the committee had erred by invoking its remedial powers without first addressing whether the board had erred in how it assessed VM's evidence and whether the board had found material error at all. The committee's function was to determine whether the board had erred, not to rehear the case and determine whether the assessor erred. The committee never dealt with what the board had actually decided. The board had determined that an insufficient evidentiary foundation made it unable to determine assessor error on its own. Where an error is absent, deference is required. The committee's approach was an error in law. The court had further concerns about the committee's approach. The committee's decision was set aside, and the board's decision was reinstated. The city was given costs.

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Jans Estate v Jans, 2020 SKCA 61

Caldwell Ryan-Froslie Tholl, May 13, 2020 (CA20061)

Contract Law – Formation – Oral Agreement – Appeal
Contract Law – Unjust Enrichment – Appeal
Statutes – Interpretation – Statute of Frauds Amendment Act, 1828, Section 5

The appellants appealed from the trial decision of a Queen's Bench judge that allowed the respondent's claim for breach of contract and unjust enrichment and awarded him damages of over $3 million dollars (see: 2016 SKQB 275). The respondent's action was based

upon an oral agreement made between him, his father and brother in 1984 that the brothers would inherit equal shares in the family ranch in exchange for their labour. At that time, the respondent and his brother were 17 and 12 respectively. When issues arose amongst the family, the father sought to exclude the respondent from the ranch in 2010. The respondent commenced his claim, seeking remedies in contract and unjust enrichment, against the appellants: his father; his brother; and the corporation owned by his brother and his brother's wife. Before the trial, the father sold certain ranching property and gifted the remainder to the respondent's brother. The father died in 2015 in the midst of the trial before he could testify. The action continued against the estate as represented by the brother in his capacity of executor. The trial judge found that an oral contract existed between the parties in that the terms were sufficiently certain to be identified and enforced and that there were sufficient acts of part performance, based on the evidence, to make the contract enforceable. He awarded damages to the respondent based upon half of the value of the assets. The appellants' multiple grounds of appeal included that the trial judge had erred: 1) in finding the essential terms of the contract and inventing its terms. They argued that benefits received by the respondent while he lived and/or worked on the ranch refuted the existence of the contract, and that constituted a palpable and overriding error; 2) in his use of subsequent conduct. They argued that he took such conduct into account in order to find a contract existed, but that it should only have been considered if the contract was ambiguous and could only be considered alone after the judge considered the factual matrix; 3) by failing to apply a higher standard of proof to the contract because of the family relationship. Because the appellant father had died, there was a higher standard of proof required as well; 4) by failing to consider the appellant brother's minority status and applying s. 5 of the Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act). He did not have capacity to contract; 5) by failing to apply the value survived approach properly because had had not properly defined the trust property and then failed to take into account all of the parties' contribution in his consideration of the claim of unjust enrichment. The final ground raised was that because the judge had been a partner in a law firm that had represented the respondent, there was a reasonable apprehension of bias.

HELD: The appeal was dismissed. The court found with respect to each issue that the trial judge had not erred: 1) in concluding there was a contract based on his findings of fact in relation to the parties, price and property. He had not created the essential terms. He examined the benefits conferred on the respondent and found they were minor and did not affect the contract; 2) because he had determined that a contract existed before he turned to the subsequent conduct evidence in order to interpret it and imply necessary terms. As the contract was oral, the judge was entitled to give weight to the subsequent conduct evidence to assist in determining the intention of the parties; 3) because he dealt with the issue of whether there was a contract formed between family

members as depending upon the facts. There was no higher standard of proof required where a defendant has died, and in this case, the appellant father's evidence provided in prior proceedings confirmed the existence of the agreement; 4) in not addressing this issue, because none of the appellants had pleaded Lord Tenterden's Act in their statement of defence, nor did anyone argue it at trial. The court declined to allow the appellants to amend their defences. In obiter, however, it stated that in this case, the contract fell into the category of contract that must be repudiated by the minor or it remains enforceable. The appellant brother's filing of a statement of defence that disavowed the contract was not a valid repudiation because he had to repudiate it within a reasonable time after he ceased being a minor; 5) had not erred in his application of the value survived approach. There were no grounds upon which to interfere with his findings. There was ample evidence upon which the judge could find that the respondent's contribution to the ranch consisted of at least a 50 percent share. Respecting the ground of reasonable apprehension of bias, the court found that there was none. It noted that the judge had no knowledge of the case and had left the firm three years before the trial. None of the appellants had objected to have the trial proceed before the judge, who had offered to recuse himself when they were informed by the respondent of his former association.

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Kyrylchuk v Kyrylchuk Estate, 2020 SKCA 62

Richards Jackson Kalmakoff, May 20, 2020 (CA20062)

Contract Law – Unjust Enrichment – Appeal
Civil Procedure – Summary Judgment – Appeal

The appellant appealed from the decision of a Queen's Bench chambers judge that granted summary judgment to the respondents and struck the appellant's claim (see: 2019 SKQB 214). The appellant and the respondents were first cousins and the appellant's action was against them in their capacities as executors of the will of their deceased uncle. The deceased bequeathed all of his farmland and machinery to two nephews but did not name the appellant as a beneficiary. He and the deceased had farmed together for many years and during that time, the appellant had helped his uncle, often at his own expense, in the belief that he would be left some of the uncle's farmland and machinery upon his death. After the appellant's application to have the will proved in solemn form was dismissed (see: 2017 SKQB 353), the respondents brought an application to strike the appellant's claim based on abuse of process. The chambers judge allowed the application in part by striking portions of the claim but leaving intact the causes of action based in constructive trust and contract (see: 2018 SKQB 132). The

respondents then successfully applied for summary judgment. The appellant argued on his appeal from that decision that the chambers judge had erred: 1) in determining that summary judgment was appropriate because, as there were conflicts in the affidavit evidence pertinent to his claim for unjust enrichment, a trial was necessary; and 2) in concluding that the appellant's actions did not unjustly enrich the deceased because he had misapprehended or failed to consider material evidence such as the amount of money that the appellant had spent performing work on behalf of the deceased. HELD: The appeal was dismissed. The court found with respect to each ground that the chambers judge had not erred: 1) in finding that that this was an appropriate case in which to grant summary judgment despite some conflict in the affidavit evidence. The conflicts were not sufficient to undermine the judge's decision and, in any case, the appellant's own admissions made during questioning established that he received tangible benefits from the resources he put into the farming operation and that he never expected payment for his efforts; and 2) by misapprehending the evidence. Although he may not have detailed every benefit or calculated the corresponding amount of deprivation, it was not necessary for him to do so. Regardless, the judge's finding that the appellant had acted with donative intent was supported by the evidence and was sufficient to defeat the claim for unjust enrichment. The respondents' request for solicitor-client costs was not granted as the appellant's conduct did not meet the level of being scandalous, outrageous or reprehensible.

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R v Moberly, 2020 SKCA 63

Caldwell Leurer Kalmakoff, May 11, 2020 (CA20063)

Criminal Law – Firearms Offences – Sentencing – Appeal

The appellant appealed his conviction for firearms and ammunition offences under ss. 85(2) and 117.01(1) of the Criminal Code on the grounds that the evidence did not support the verdicts and that the trial judge erred in reaching unreasonable verdicts on these offences by reasoning backwards from findings of guilt on the other charges for which he had been convicted: aggravated assault contrary to s. 268(1) of the Code and unlawful confinement contrary to s. 279(2) of the Code. The appellant also appealed his sentence on the basis that it was demonstrably unfit. He had received a nine-year global sentence comprised of concurrent eight-year terms of imprisonment for the latter two offences, one year concurrent for the s. 85(2) offence and one year consecutive for the s. 117.01(1) offence. The Crown appealed against the concurrent sentence for the s. 85(2) offence, arguing it was an illegal sentence because s. 85(4) of the Code mandates a consecutive sentence for it.

HELD: The court dismissed the appellant's conviction appeal and allowed his sentence appeal. The Crown's appeal as to the nature of the s. 85(2) offence was allowed, and the accused was ordered to serve one year of imprisonment consecutive to the other sentences. The court found that the judge had not erred in principle in sentencing. She noted the Gladue factors and accordingly reduced the appellant's sentence for aggravated assault and unlawful confinement from nine years to eight. However, varying the s. 85(2) sentence brought the appellant's global sentence to 10 years, which appeared excessive in the circumstances. The court exercised its discretion under s. 718.2(c) of the Code to reduce the overall sentence to nine years' imprisonment by reducing the concurrent sentences under ss. 268(1) and 279(2) from eight to seven years each.

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The Creeks in Regina Land Development R Ltd. v Ozem, 2020 SKCA 64

Richards Jackson Kalmakoff, May 22, 2020 (CA20064)

Statutes – Interpretation – Land Titles Act, 2000, Section 107
Real Property – Interest in Land – Caveat – Appeal

The appellant, a residential land development company, appealed the decision of a Queen's Bench chambers judge that dismissed its application as the registered owner of a parcel of land for an order under s. 109 of The Land Titles Act, 2000 directing the Registrar of Titles to discharge a caveat registered against the title (see: 2019 SKQB 180). In the 1960s, the lands had been owned by a company in which the respondent was a shareholder. The respondent established through engineering studies that there were significant gravel deposits. As a result, he entered into a royalty agreement with the company whereby it agreed to pay him royalties for all gravel "gotten and sold" from the land in exchange for giving up his shares. The royalty agreement provided that the respondent would have the same rights as if he had been granted a legal mortgage covering the lands and would be entitled to file and maintain a caveat against them. The respondent then filed the caveat in question. The lands changed ownership a number of times and, in 1997, a notice to lapse the caveat was refused by the court and it ordered the registration to continue until further order or removal by consent. In 2007, the city annexed the lands and rezoned them so that gravel extraction was not permitted. The appellant purchased the lands in 2013 and began developing a subdivision. It took no steps to contact the respondent for the purpose of having the caveat removed until 2018. At the hearing of the application, the chambers judge found that the caveat was based upon an interest in land as evidenced by the parties' intention as reflected in the royalty agreement and was validly registered. He further found that the

appellant's contention that because the gravel could not be extracted, the purpose of the caveat was gone, was not a basis upon which to remove the caveat. On appeal, the court described the issue before it as being whether a court has the authority under ss. 107 and 109 of the Act to discharge a caveat in the circumstances of this case.
HELD: The appeal was dismissed. The chambers judge had correctly found that the caveat was valid and would remain on the registry unless it was dealt with by the parties or there was some authority for the registrar or a court to order its discharge.

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TD Waterhouse Canada Inc. v Weimer, 2020 SKQB 111

Tochor, April 21, 2020 (QB20104)

Contracts – Enforceability of Agreement – Queen's Bench Act, 1998, Section 29(1)
Contract Law – Formation
Wills and Estates – Executors – Authority

The respondent, M.W., applied for a declaration that the parties had entered into a binding agreement and she sought an order requiring the applicant to pay her the proceeds of a Registered Retirement Savings Plan (RRSP) as per the agreement. The respondent, executor of the estate of the deceased (executor), opposed the application. He argued that only three of the four beneficiaries consented to the terms of the settlement and that there was no agreement on all essential terms. M.W. and the deceased began a common-law relationship in 1989. In 1998, the deceased designated M.W. as beneficiary of his RRSP. The parties separated in 2000, but M.W. remained the sole beneficiary of the RRSP. The deceased died in 2016. His will, dated April 2015, named M.W. as one of the beneficiaries. She was to receive 11 percent of the residue of the estate. M.W. argued that she was also entitled to the proceeds of the RRSP. She pointed to s. 10 of the separation agreement between her and the deceased that indicated that either party could receive any other benefit that the other party may choose to give the other by will, codicil, insurance policy or other document. M.W. and the executor negotiated, and M.W. asserted that they had an agreement to settle the matters. M.W. argued that they agreed that she would receive the proceeds of the RRSP and pay for the tax liability associated with it. She would forego her claim to the 11 percent residue of the estate. The issues were: 1) whether there had been a meeting of the minds; 2) whether there was consensus on all essential terms; and 3) whether the agreement was conditional on anything.
HELD: The application was allowed. A declaration was made that there was a binding agreement between the parties for the

settlement of the within matter, and the court ordered payment of proceeds be made to M.W. The court had jurisdiction to determine the enforceability of the agreement pursuant to s. 29(1) of The Queen's Bench Act, 1998. The issues were determined as follows: 1) the email correspondence between the parties' lawyers was clear, concise, and straightforward. In August 2019, M.W.'s counsel communicated her acceptance of the executor's counter-proposal. There was a meeting of the minds that was binding on the parties due to at least three factors: a) the terms of the agreement were clear; b) the executor had clear and unmistakable authority to enter into an agreement on behalf of the estate as per the terms of the will; and c) the communications were conducted by legal counsel, who had the authority to bind their clients. 2) There was consensus on all essential terms. The executor argued that not all essential terms were agreed to, but failed to specify what term was missing. The issues brought up by the executor were issues as to performance of the agreement, not essential terms that were left unaddressed; and 3) the agreement was not subject to any conditions that had to be completed before it could bind the parties. The executor asserted that there were two conditions: a) the agreement was conditional on him receiving approval of all beneficiaries, and some beneficiaries did not agree with the counter-proposal he made. The executor was not required to obtain the consent of any beneficiary before settling a claim against the estate. Further, the counter-proposal did not suggest that the agreement was subject to the approval of any of the beneficiaries or anyone else. He had an obligation to clearly communicate that; and b) the executor asserted that there could not be a binding agreement without a formal written agreement. Queen's Bench and Court of Appeal case authorities do not agree. The court found that all three elements of the test set out in Fontaine were met. A binding agreement existed. The court also concluded that the matter was one where the costs award required some measure of compensation to M.W. She was awarded costs of $7,500.

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Lansdowne Equity Ventures Ltd. v Cove Communities Inc., 2020 SKQB 113

Elson, April 21, 2020 (QB20111)

Statutes – Interpretation – Residential Tenancies Act, 2006, Section 72

The appellant, Lansdowne Equity Ventures, appealed from the decision of a hearing officer of the Office of Residential Tenancies that found it and the respondent, Cove Communities, jointly and severally liable to pay $6,266 in damages to the respondent, M.B., a former tenant. M.B. had rented a trailer from the appellant in 2016, and Cove acquired the property and assumed the role of landlord in

2017. M.B. left the property in July 2018 and then brought a claim asserting that the appellant and Cove had failed in their duty to repair and maintain the rental unit so that it was fit for habitation as required by s. 49(1) of The Residential Tenancies Act, 2006. While the hearing officer found that M.B.'s evidence did not support all of his claims, she found that two items justified an award of damages that took the form of rent abatement against both landlords. The appellant's ground of appeal was that the hearing officer erred in law because she addressed the evidence in such a way that she misapplied the burden of proof. It argued that she was persuaded by evidence that was qualitatively insufficient to meet M.B.'s burden, and therefore effectively shifted the onus to the appellant.
HELD: The appeal was dismissed. The court found that the appeal engaged a question of mixed fact and law and was beyond the scope of s. 72(1) of the Act. Where a tenant pursues a claim for damages based on a breach of s. 49(1), he or she bears the burden of proof, which is a principle of law. If a hearing officer expressly disregards the burden, it is a reviewable error on a question of law. The question of whether findings of fact satisfy that applicable principle of law is a question of mixed fact and law. Under s. 72(1) of the Act, the question was unreviewable.

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MacLachlan v MacLachlan, 2020 SKQB 117

Brown, April 27, 2020 (QB20115)

Family Law – Child Support – Determination of Income – Interim

The parties separated in 2018 and petitioner wife made an application for joint custody of the three children of the marriage with their primary residence with her, child support, and spousal support. The only matter that had not been resolved by the parties by the time of the hearing was the respondent's income for the purposes of establishing interim child support and whether spousal support should be awarded. The respondent operated a sheep ranch until 2017 when he began grain farming. During that year, he created a farming corporation of which he became the sole officer and shareholder. For each year from 2016 and 2018, the respondent's income for line 150 tax purposes was $146,500, $98,800 and $17,800 respectively. The average of the three years' line 150 income was $87,700. Between 2017 and 2019, the farm corporation showed retained earnings of $241,350, $259,990 and $247,000 respectively. The petitioner argued that the respondent had additional money available for support.
HELD: The court ordered on an interim basis that the parties should have joint custody and the two youngest children should have their primary residence with the petitioner. The oldest child at the age of 18 could make his own decision as to residence. The respondent

should pay $1,949 monthly in s. 3 child support beginning in October 2019. Spousal support was not payable at this time and the matter should proceed to pre-trial. Regarding the income available to the respondent for the purposes of determining his child support obligations, the court found that the respondent's line 150 income was not sufficient and did not reflect all of the money available to him. He had not met the onus of demonstrating why the entirety of the 2019 pre-tax income of the corporation should not be attributed to him. The court adjusted the pre-tax income upwards by removing some of the claimed expenses and added the amount of $52,996 to his income available to him, as well as adding $9,600 for personal contract work and $44,852 for the 2019 pre-tax corporate income, bringing his income for support purposes to $107,449. The petitioner's 2019 income was found to be $52,000. With the three children in her care, the s. 3 child support payable by the respondent was $1,949. Because of the short history of the farm corporation, the matter must move to pre-trial and possibly trial so that the revenue and expense picture for the corporation and the respondent could be ascertained with the benefit of full reports, additional evidence and cross-examination.

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R v Mehari, 2020 SKQB 123

Popescul, April 30, 2020 (QB20123)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine – Sentencing
Constitutional Law – Charter of Rights, Section 8, Section 9

The accused was charged with possession of a firearm without a licence contrary to s. 91(1) of the Criminal Code, possession of a loaded firearm without a licence contrary to s. 95(1)(a) of the Code and possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. The defence brought a Charter application to exclude evidence under s. 24(2) alleging the accused's ss. 8 and 9 Charter rights had been breached. A voir dire was held with the agreement that the evidence called would be applied to the trial proper. The charges against the accused were laid as a result of a police surveillance operation after they received tips from three informants, whom they believed were reliable sources, that the accused was trafficking drugs, using a red car to do so, and was living at a specific address. During the surveillance at the residence, where a red Lexus was parked, the police saw a man, later identified as the cousin of the accused, leave the house carrying a bag. The police followed him when he drove away and noted that he made several stops of short duration that were consistent with drug trafficking. They arrested him and found cocaine, currency, several cell phones, marijuana and drug

packaging material. The police then obtained a search warrant for the accused's residence and found drugs and money in one bedroom, establishing drug trafficking. The parties agreed that the contents of the bedroom were in the possession and control of the accused's cousin except for a backpack containing a scoresheet that belonged to the accused. After the police located and then followed the accused driving the Lexus, they noted that he appeared to use evasive tactics to determine if he was being followed. Based upon these observations and the other information, the police arrested the accused for trafficking. The search of his person revealed nothing. The Lexus was impounded and searched two hours later at the police station. In it, the police found 13 grams of cocaine in a closed compartment, a pistol under the driver's seat and body armour, a baton and the wallet and identification of the accused's cousin. The issues were: 1) whether the arrest was an arbitrary detention contrary to s. 9 of the Charter; 2) whether the search of the vehicle was an unreasonable search and seizure contrary to s. 8 of the Charter; and 3) whether the evidence established that the accused possessed the cocaine and the pistol found in the vehicle.
HELD: The Charter application was dismissed and the evidence obtained by the police was admitted. The accused was acquitted. The court found with respect to each issue that: 1) there had been no breach of s. 9. The warrantless arrest of the accused was made on reasonable grounds that included the confidential tips, the contents of which were confirmed during surveillance, the arrest of the accused's cousin and the manner in which the accused drove his vehicle and these grounds were objectively justifiable; 2) there was no breach of s. 8 of the Charter. The search of the vehicle was incidental to arrest and the fact that it occurred two hours after it was not significant; and 3) the Crown had failed to prove beyond a reasonable doubt that the accused was knowingly in possession of either the cocaine or the pistol in the vehicle.

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Rubidge v Holtzhausen, 2020 SKQB 125

Currie, May 1, 2020 (QB20124)

Civil Procedure – Queen's Bench Rules, Rule 4-44

The defendant, Dr. Sheridan, applied pursuant to Queen's Bench rule 4-44 to dismiss the plaintiff's claim on the basis of delay. The plaintiff was transferred to the Royal University Hospital in 2004 for delivery of her child because she was experiencing low platelet counts and was at risk of bleeding during delivery. After the baby was born, the plaintiff suffered a stroke. She brought an action in 2006 against the defendant, who was involved in her treatment for her blood problems, claiming that his negligence regarding her treatment caused her strokes. Questioning of the parties occurred in

the spring of 2007. The plaintiff's counsel advised a year later that the plaintiff's family litigation had kept her from attending to the matter. In September 2009, the defendant's counsel advised the plaintiff's counsel that it proposed the plaintiff should discontinue, failing which, it would make an application for dismissal for want of prosecution. The plaintiff's counsel response indicated that she would make a settlement proposal soon, but it was not until February 2011 that counsel sent the proposal. In November 2012, mediation occurred, following which the defendant took the position that the claim was defensible, and he would proceed to trial. In 2016, the plaintiff's counsel wrote that his client was in a position to proceed to trial, and the defendant requested certain records. Correspondence between the parties was desultory until the spring of 2019 when the defendant's counsel asked that the plaintiff provide the documents, indicating that an application for dismissal would be made in the absence of a response. The plaintiff's counsel replied, saying that his client intended to prosecute her claim. In his application, the defendant argued that the requirements for dismissing a claim under Queen's Bench rule 4-44 as set out in International Capital Corporation (ICC) had been met. He was most concerned that to proceed to trial would cause him prejudice because he did not recall attending the plaintiff and other witnesses' memories would be similarly challenged. The physician who had had the primary responsibility for the plaintiff's care had died in 2017. The plaintiff argued against dismissal. She noted that some delay was caused by her lawyer and some by the defendant, and only the delay from 2016 to 2019 was inexcusable. The early delays had been due to her pursuing her family law litigation and were not inordinate nor inexcusable. Further, the factors set out in ICC only applied to cases arising after that case was decided in 2010. The delay from 2006 to 2010 should be assessed under the previous, less stringent test established in Carey v Twohig.

HELD: The court granted the application and dismissed the plaintiff's claim. The court reviewed the factors set out in ICC and found that the delay was: 1) inordinate. A medical malpractice suit should not take 15 years to get to trial. The delay attributable to the plaintiff or her counsel would account for nine years, and that was inordinate. Its assessment remained unchanged even if it applied the Carey test to the two years before the decision in ICC; 2) the delay was inexcusable. The plaintiff had provided an explanation but not an excuse, and 3) it was not in the interests of justice for the case to proceed to trial. The only factor supporting dismissing the application was the stage of litigation that had been reached; the remaining considerations supported granting it.

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Bakken v Bakken, 2020 SKQB 127

Hildebrandt, May 7, 2020 (QB20125)

Contract Law – Breach

The plaintiff brought an action against the defendants, his mother and brother, in which he sought either specific performance or damages for their breach of minutes of settlement executed in August 2010, following negotiation and mediation regarding the transfer of a quarter section of land to him from his mother. The plaintiff's initial statement of claim, issued against his mother in May 2010, claimed specific performance of an agreement he had reached with her in 2007 through their counsel for her to sell the quarter section to him. The correspondence between the lawyers was admitted as evidence and confirmed that a sale had been contemplated. The plaintiff also commenced another action in 2010 against his brother for partition and sale of another piece of land. After mediation, the parties negotiated minutes of settlement in August 2010 that dealt with both actions. In the settlement, the mother agreed to sell the quarter section to the plaintiff for $16,000 and the brother would purchase the plaintiff's interest in the other lands for $75,000. If the plaintiff paid the $16,000, it would be used to reduce his payment from $75,000 to $59,000. Because of the mother's ill health, her lawyer attended the mediation and signed the agreement as her solicitor and agent. The mother testified that, although she had instructed her lawyer to attend the mediation, she did not remember seeing either the 2007 agreement or the minutes of settlement. The brother testified that he only skimmed the minutes of settlement and signed them under the impression that it dealt only with the action against him. He thought that the $16,000 represented rent owing from the plaintiff to his mother. Although the minutes indicated the sale of the quarter section to the plaintiff, the mother had previously sold the quarter to the plaintiff's brother for $40,000 and he became the registered owner. The plaintiff maintained that neither he nor his counsel was aware of this transfer until after the mediation and only learned of it in June 2010 when the RCMP informed him that his brother owned the land he was currently seeding and wanted him off it. The plaintiff then amended his first statement of claim in September 2010, adding his brother as a defendant and seeking judgment in accordance with the minutes and the 2007 agreement. In their statement of defence, the defendants claimed frustration of contract and/or mistake with respect to the sale agreement reflected in the minutes. The issues were: 1) was there an agreement regarding the sale from the mother to the plaintiff; 2) was the contract frustrated; 3) whether the defendants were entitled to rely on contractual mistake to render the contract unenforceable; and 4) if there was no frustration or mistake, to what remedy was the plaintiff entitled?
HELD: The plaintiff was granted judgment and awarded damages. The defendants were liable for breach of contract. The court found with respect to each issue that: 1) the minutes of settlement reflected an agreement for sale of the quarter section. The plaintiff's evidence was accepted and neither of the defendants were credible. 2) The

agreement was not frustrated as the supposedly frustrating event, the transfer of the quarter section to the brother, occurred prior to the mediation and not after the formation of the contract. 3) The defendants could not rely on the doctrine of mistake. The court did not believe that the brother had not read the minutes or was unaware that they embodied an agreement for sale of the quarter section to the plaintiff. The plaintiff had proven that he did not know of the sale of the land to his brother at the time of the mediation and subsequent minutes of settlement and was thus unaware of his brother's alleged mistake; and 4) the appropriate remedy was damages, as specific performance could not be awarded for a number of reasons. Based upon limited evidence, the current value of the land was set at $71,000. After deducting the purchase price of $16,000, the defendants owed, joint and severally, damages of $55,400.

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Input Capital v 101181565 Saskatchewan Ltd., 2020 SKQB 130

Danyliuk, May 6, 2020 (QB20127)

Foreclosure – Farmland
Mortgages – Foreclosure – Order Nisi for Sale – Redemption Period – Extension
Real Property – Foreclosure – Order Nisi for Sale – Redemption Period – Extension

The defendant mortgagor applied for an extension to the redemption period set out in an order nisi for sale by real estate listing. In 2016, the plaintiff and defendant entered into an agreement called a Streaming Canola Purchase Contract whereby the plaintiff provided financial assistance to the defendant. The security was a mortgage covering numerous parcels of farmland. In 2016, payments were made through deliveries of canola. There were no further deliveries made in 2017 or 2018 nor any other payments. The plaintiff made a demand for payment in February 2018. In November 2018, the defendant owed $262,194.14. The plaintiff filed its statement of claim as of March 18, 2019. The defendant was noted for default in June 2019. A consent order nisi for sale by real estate listing was granted in September 2019. The right to redeem the property by paying the amount owing was provided to October 31, 2019. No payments were made by the expiration of the redemption period. Payments of $50,000 and $25,000 were made in November. The defendant applied for the extension of time to May 30, 2020 and indicated that it would be able to sell grain in February 2020 to make a further payment of $50,000, and further stated that it would consign equipment valued at $200,000 with proceeds going to the plaintiff. The defendant also wanted to limit the list of lands for sale

to five parcels down from ten. The plaintiff agreed to adjourn the matter sine die on five days' notice. The defendant did not do any of the things it had indicated it would. The plaintiff applied to have the matter in chambers on March 17, 2020. The defendant indicated by letter that it would have $100,000 to pay to the plaintiff by March 24 or 25. No payment was made. The defendant made another proposal, which included: paying $25,000 by May 6, 2020; paying $25,000 by May 12, 2020; giving the plaintiff security in the equipment that was supposed to have been consigned before; and giving security by assigning a canola contract with a grain company that was to be delivered in September 2020. The plaintiff agreed to some modification of the order nisi such as selling the land in stages. The plaintiff was not willing to agree to extend the redemption period to the fall. The issues were: 1) the general principle applicable to an application to extend the period of redemption in a judicial sale order; and 2) the order that should be made.
HELD: The significant extension requested was not granted. The court commented on the defendant's most recent proposal as follows: the plaintiff already had security on implements and the canola sale was for canola not yet produced, so there was no assurance there would be canola to sell. If there was value in the canola contract with the grain company, the defendant could get a loan from someone else and then pay the plaintiff. The court was not prepared to rewrite the deal between the parties, which was what the plaintiff's offer contemplated. The issues were determined as follows: 1) even after factors are considered as to whether an extension should be granted, the court maintains residual discretion to ensure that equity and fairness prevail; 2) the court applied the factors from the Woodbine case: a) there was ample security, which may support a staged sale of the land; b) the court did not accept that the defendant was doing its utmost to raise and make payments; c) the court was not convinced that there was a reasonable probability that the defendant would raise funds to pay the debt; d) there were some substantial payments made, which militated in favour of an extension, but only slightly; e) the defendant was not blameless; f) the extent of the overall default was significant. After consideration of all the factors, the court concluded that they did not support an extension of the redemption period to the degree sought by the defendant. The court's residual discretion also militated against a large adjustment to the period of redemption. The defendant consented to the order nisi in the first place. However, there was plenty of land as security so there was no compelling reason for all the land to be sold forthwith. The court ordered that the land shall be sold in two stages, with five listed parcels to be sold first; if required, the remaining lands would be sold in stage two; the stage one lands for sale shall be sold on or after May 13, 2020, unless the defendant paid $50,000 by May 12, 2020. If the defendant paid the $50,000 and the land was not redeemed, the plaintiff may only list the stage one lands for sale after May 26, 2020; and the land may be redeemed on or before May 25, 2020 by making full payment including party-and-party costs.

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Ryan v Klause, 2020 SKQB 131

Allbright, May 7, 2020 (QB20128)

Civil Procedure – Queen's Bench Rules, Rule 7-9(2)
Statutes – Interpretation – Provincial Court Act, 1998, Section 63

The defendant, a Provincial Court judge, applied pursuant to s. 42(1.2) of The Queen's Bench Act, 1998 and Queen's Bench rule 7-9(1)(a) and rule 7-9(2)(a), (b), and (e) to exempt the parties from attending mandatory mediation prior to the application and to strike the plaintiff's pleadings on the basis that they disclosed no reasonable cause of action or that they were scandalous, frivolous, vexatious or an abuse of the court's process. The self-represented plaintiff alleged in his statement of claim that the applicant had: 1) remanded him in custody for the purpose of coercing psychiatric treatment in bad faith; 2) uttered the defamatory comment that the plaintiff had significant issues in the presence of others in the courtroom; and 3) conspired with the City of Saskatoon and the Saskatoon Police Service to prevent the plaintiff from putting up posters. The plaintiff agreed to the granting of the exemption to mandatory mediation.
HELD: The applications to exempt the parties from mandatory mediation and to strike the plaintiff's pleadings were granted. The plaintiff's claim was struck in its entirety. The court noted that a self-represented litigant's pleadings are not held to the same standard as those drafted by a lawyer, but the pleadings must disclose a cause of action or demonstrate a new or novel cause of action that should be recognized. After reviewing the transcripts of the hearings in Provincial Court, the court found that there was no basis for the first two of the plaintiff's allegations and they were struck under Queen's Bench rule 7-9(2)(a). The applicant was also protected by s. 63 of The Provincial Court Act, 1998, whereby an action cannot be commenced against a Provincial Court judge unless an "act or omission was done maliciously", and such malice was not present here. With respect to the third allegation, the court found it should be struck pursuant to rule 7-9(2)(b) and (e).

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Ryan v Benderski, 2020 SKQB 132

Allbright, May 7, 2020 (QB20129)

Civil Procedure – Queen's Bench Rules, Rule 7-9(2), Rule 11-28
Statutes – Interpretation – Fee Waiver Act, Section 6

The defendants, the Deputy Sheriff and Court Services, applied pursuant to Queen's Bench rule 7-9(1)(a) and rule 7-9(2)(a)(b) and (e) for an order striking the plaintiff's claim against them. They also requested an order pursuant to Queen's Bench rule 11-28 declaring the plaintiff to be a vexatious litigant and an order pursuant to s. 6 of The Fee Waiver Act cancelling any fee waiver certificate issued to the plaintiff. The plaintiff, a self-represented litigant, alleged in his statement of claim that the defendant Sheriff conducted a negligent investigation and made a negligent misrepresentation related to a witness statement that he had provided regarding a criminal proceeding taken against the plaintiff. The claim did not state the remedy sought. The plaintiff's trial was scheduled to be conducted in September 2020. The defendants sought to have the plaintiff declared a vexatious litigant because he had commenced over two dozen actions in the Court of Queen's Bench since January 2019 and of them, nine were initiated since March 2020, naming 31 separate defendants.
HELD: The applications were granted. The court struck the plaintiff's claim pursuant to Queen's Bench rules 7-9(2)(a), (b) and (e). It ordered that the plaintiff be declared a vexatious litigant and cancelled his fee waiver certificates. Although it was not clear from his statement of claim what cause of action the plaintiff was relying upon, the court found that if it was based upon the torts of negligent or fraudulent misrepresentation, then he had failed to plead the requisite elements of those torts and thus the claim should be struck under rule 7-9(2)(a). The claim was also struck under Queen's Bench rule 7-9(2)(b) and (e) because the plaintiff had not sought a remedy and his intent was to harass or intimidate the applicant by impugning his credibility and motives as a witness in advance of the criminal trial at which he would give evidence. The court found that it was appropriate to declare the plaintiff a vexatious litigant considering his conduct in issuing a multiplicity of actions and it was appropriate to cancel any fee waiver certificates to him under s. 12(2)(a) of The Fee Waiver Regulations and s. 6 of The Fee Waiver Act.

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Regina Professional Firefighters Association, IAFF Local No. 181 v Regina (City), 2020 SKQB 134

McCreary, May 12, 2020 (QB20126)

Labour Law – Arbitration Board – Judicial Review – Standard of Review
Labour Law – Collective Agreement – Interpretation – Ambiguity
Labour Law – Collective Agreement – Interpretation – Extrinsic Evidence

The applicants applied to quash or set aside the December 2018 (decision) of a labour arbitration board (board). The decision determined that the respondent city was not required to provide a dental plan for adult orthodontic expenses in the collective bargaining agreement between the city and the applicants. The collective agreement first included dental coverage for applicants in 1986. The wording in the agreement for dental coverage did not change through 2017. The applicant argued that that the dental plan in 1986 was meant to provide coverage for adult orthodontic expenses. The dental plan did not, however, provide coverage for adult orthodontics from the date of implementation. The applicant indicated that it did not realize that the dental plan only covered children's orthodontic expenses until a member was denied adult coverage in 2016. The denied member filed a grievance in January 2017 (grievance). The board concluded that the collective bargaining agreement did not require the city to provide a dental plan with coverage for adult orthodontic expenses. The issues were: 1) the standard of review and 2) whether the board's decision was unreasonable, specifically: a) whether the board departed from accepted arbitral norms when it used extrinsic evidence to interpret the collective agreement and b) whether the board's findings and applications of fact were unreasonable on the evidence.
HELD: The board's decision was reasonable. The court determined the issues as follows: 1) the standard of review was reasonableness. A reasonableness review focuses on the decision maker's conclusion and its reasoning process. The reviewing court considers whether the decision, including its rationale and outcome, is reasonable. The court explained that two fundamental flaws tend to render a decision unreasonable: first, when reasoning is not rational and logical, and second, when a decision is indefensible in the context of the relevant factual and legal limitations that bear on it. 2)a) The Article in the collective agreement referring to orthodontic expenses did not specifically indicate that it only applied to children, so the applicant argued that it must include adults. The applicant argued that the board applied extrinsic evidence without first finding that the language of the Article was ambiguous. The court disagreed and found that the board understood the modern principles of interpretation to be applied to determine the meaning of a collective agreement. The board did find that the language of the Article was ambiguous, requiring an examination of the factual circumstances. Arbitration boards are permitted to consider extrinsic evidence to establish whether some degree of ambiguity exists in the language. The court determined that when conducting a reasonableness review, deference should be given to an arbitrator's assessment of ambiguity, the weight attached to extrinsic evidence, and its interpretation of the collective agreement. Since the board found an ambiguity, it was reasonable to apply extrinsic evidence to interpret the ambiguity; and b) the board's findings and applications of fact were reasonable. A 1986 memo referred to the applicant wanting a dental plan on the same basis as the police. The police did not have adult orthodontics in their plan. The court concluded that in 1986,

the applicant agreed to a dental plan on the same basis as the police. The court found that the board's inference was logical and reasonable on the indirect evidence available. The board concluded that the evidence of not knowing adults were excluded until 2016 was implausible given the time that had passed and because 59 adult orthodontic claims had been denied. The court found that the conditions required to admit past practice as an interpretation aid were met. Costs were awarded to the city.

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MacKinnon v R, 2020 SKQB 138

McCreary, May 13, 2020 (QB20131)

Regulatory Offence – Traffic Safety Act – Speeding – Sentencing – Appeal

The appellant pleaded guilty to speeding in a school zone and was fined $318. He appealed the amount of the fine, arguing that the justice of the peace (JP) failed to consider and apply appropriate sentencing principles in that he emphasized general deterrence instead of specific deterrence. The appellant contended that the JP should have imposed a lower fine than the standard one because he had an impeccable driving record and had not realized that he was in a school zone.
HELD: The appeal was dismissed. The standard of review for sentencing appeals would not permit interference unless the sentence was demonstrably unfit or clearly unreasonable. The JP had not erred in emphasizing the principle of general deterrence as speeding is a strict liability offence and consideration of the specific deterrence of the offender is not a mandatory component of sentencing for traffic safety offences. In imposing the standard fine, the JP placed significant weight on the importance of general deterrence in cases of speeding in a school zone.

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S.M. v L.W., 2020 SKQB 139

Tochor, May 13, 2020 (QB20132)

Family Law – Child Support – Determination of Income
Family Law – Child Support – Extraordinary Expenses
Family Law – Child Support – Imputing Income
Family Law – Child Support – Retroactive
Family Law – Trial – Costs
Family Law – Child Custody and Access – Best Interests of the Child
Family Law – Child Custody and Access – Shared Parenting

Family Law – Custody and Access – Status Quo
Family Law – Division of Family Property – Unequal Division
Family Law – Division of Family Property – Valuation
Family Law – Spousal Support – Compensatory
Family Law – Spousal Support – Non-compensatory

The parties had a five-and-one-half-year spousal relationship. They had one child, a daughter. The parties separated in June 2016. An interspousal contract (agreement) was executed in November 2016. The respondent sought sole custody, primary residence with specified parenting for the petitioner, retroactive and ongoing child and spousal support, and a further opportunity to arrange financing of the family home to become sole owner. The petitioner sought joint custody with equal parenting time for each parent and he disputed claims for retroactive and ongoing child and spousal support. The petitioner also wanted an opportunity to obtain financing to become sole owner of the family home. The issues were: 1) custody; 2) child support; 3) retroactive child support; 4) s. 7 expenses; 5) spousal support; 6) division of family property: a) personal property; and b) family home; and 7) costs.
HELD: The issues were determined as follows: 1) the shared parenting arrangement that had been in place for a significant time should be continued for the following reasons: a) the status quo of shared parenting on an equal basis had been in place for years and it was the arrangement agreed to in August; b) the maximum contact principle goal was being met with the existing shared parenting arrangement; and c) the court concluded that an analysis of the whole of the evidence compelled the conclusion that shared parenting on an equal basis was in the child's best interests. 2) The respondent argued that the petitioner was voluntarily unemployed because he had declined offers that would have provided a higher income. The court concluded that the petitioner's wish to remain close to home for the child's sake was genuine and reasonable. The court calculated that the petitioner's income would be $96,000 for 2019. The respondent indicated at trial that she had recently opened a small business and provided a list of expenses. She also testified about various health issues that she said impacted her efforts to maintain employment. There was a lack of evidence to confirm the health issues. Because the respondent was able to open a small business, the court concluded that she was capable of some level of employment. The court imputed a 2019 annual income to the respondent of $22,000, equivalent to minimum wage. Child support was ordered based on the 2019 incomes of the parties; 3) the court did not accept the respondent's calculation of the petitioner's arrears in child support of $22,212 based on the petitioner having an annual income of $138,833 because: the petitioner was not voluntarily underemployed; the income suggested by the respondent was not grounded on any objective evidence; and the calculations were inconsistent with the amounts the petitioner indicated that he paid, and which the respondent eventually agreed were correct. The court calculated that the petitioner had overpaid child support by $4,892.

The respondent's claim for retroactive child support was dismissed. The court did not make any order in the petitioner's favour because he had not requested it, nor was it in his pleadings; 4) the petitioner was responsible for 81.4% of appropriate s. 7 expenses. The $1,645 of expenses tendered by the respondent were found to be necessary and reasonable as required by the Guidelines; 5) the agreement required the petitioner to pay spousal support of $1,400 per month for 24 months after the respondent assumed responsibility for the mortgage, property taxes, and insurance for the family home. The respondent said that she took over those responsibilities in March 2018 so was owed $33,600 in spousal support. The court gave little weight to compensatory entitlement because the respondent had two young children from a previous relationship that impacted her working career prior to the parties' cohabitation. The circumstances did establish a basis for entitlement based on non-compensatory grounds. The Spousal Support Advisory Guidelines provided a duration of 2 to 13 years and, based on the parties' 2019 income, a range of $1,390 to $2,022. The court found that an award for retroactive spousal support was warranted. The petitioner had already paid numerous expenses, such as mortgage, taxes, and utilities on the family home and other expenses post-separation totaling $29,249.23. The court found that this equated to approximately $1,529 per month from June 2016 to December 2017. The parties had settled on spousal support of $1,400 per month for 24 months in their agreement; however, it also provided that the respondent receive all of the equity in the family home. The respondent may not have agreed to the spousal support term if the family home equity were dealt with differently. The court concluded that the appropriate duration of spousal support was 3.5 years. The court subtracted the period from June 2016 to December 2017, given expenses were paid during that time that were considered spousal support. The quantum of spousal support was determined to be $1,600 per month. The court determined that the parties would be best served by a lump sum payment of spousal support. The total lump sum payment ordered was $38,400; 6)a) the court concluded that the parties were satisfied with the de facto division of personal property that had occurred since their separation. The de facto division also appeared to be relatively equal; b) it was found to be in the respondent's and child's best interests to be given a further opportunity to try to arrange re-financing and remain in the family home. If she were not successful, the home would be listed for sale. The court did not find any extraordinary circumstances as required by s. 22 of The Family Property Act to justify an unequal division of the family home; and 7) the respondent was ordered to pay costs to the petitioner because most of the time spent at trial was regarding whether or not shared parenting should continue. The respondent was ordered to pay the petitioner the sum of $2,000, inclusive of taxes and disbursements. The court noted that a larger cost award was justified. However, the respondent's means to pay were limited and she bore the risk of any increase or decrease to the value of the family home while she attempted to get financing. After considering

all of the determinations made, the net amount owed by the respondent to the petitioner was $72, which was not ordered given the small amount.

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Distinct Homes Inc. v Thomas Izekor Medical P.C. Inc., 2020 SKQB 141

Mitchell, May 13, 2020 (QB20133)

Civil Procedure – Costs – Security for Costs
Civil Procedure – Queen's Bench Rules, Rule 4-22, Rule 4-24, Rule 4-25

The plaintiff sued the defendant for $1,955,147.13 for an alleged breach of contract in the purchase of a custom-built home. The defendant applied pursuant to Rule 4-22 of The Queen's Bench Rules for an order directing the plaintiff to post security for costs in the amount of $30,000 within 30 days of the service of such an order. The plaintiff constructed a home for the defendant. During the construction, the defendant complained to the plaintiff about deficiencies in the construction, but such deficiencies were not rectified according to the defendant. The defendant did not take possession of the home and refused to pay anything beyond the initial deposit to the plaintiff. The plaintiff sued for the purchase price minus deposit and the defendant counterclaimed for $83,000, which was the return of the $50,000 deposit and $33,000 spent on custom blinds for the home. The plaintiff sold the home to another purchaser for $1,375,000, which was considerably below the price the defendant agreed to pay.
HELD: The defendant's application was granted. The plaintiff was ordered to post security for costs in the amount of $20,000, payable in four instalments of $5,000. Rule 4-24 does provide a non-exhaustive list of criteria to take into account. The applicant bears the onus. The court took the criteria into account as follows: (i) whether it was likely the applicant would be able to enforce a judgment against assets in Saskatchewan – the only real property held by the plaintiff had been recently sold; (ii) the ability to pay the costs award – the plaintiff argued that it did not have the ability to pay a costs award. It had several Canada Revenue Agency judgments registered against it, it had frozen bank accounts, and $125,754.48 had been seized. The plaintiff owed suppliers and subcontractors more than $200,000 and had a judgment of over $20,000 registered against it. Pursuant to Rule 4-24, the court was able to pierce the corporate veil of the plaintiff to prevent the sheltering of assets. It was not certain that the principals of the corporation could satisfy security for costs if ordered. (iii) The merits of the action on which the application was filed – on its face, the plaintiff appeared to have a meritorious claim, maybe even a

strong one. The court did not find that it was clear that the claim or the defence and counter-claim would ultimately prevail. This criterion was neutral. (iv) Would a costs order unduly prejudice the plaintiff's ability to continue to prosecute its action? The plaintiff argued that a security for costs order would prevent it from being able to continue with the action. The court did find that the plaintiff was in a difficult financial state but there was no evidence that it would become insolvent in the near future. The court concluded that a security for costs order would not effectively terminate the action and ordered $20,000 in security of costs be paid by the plaintiff as follows: a) $5,000 within 60 days of service of the order; b) $5,000 within 30 days from the conclusion of all questionings; c) $5,000 within 30 days of the conclusion of the pre-trial conference; and d) within 30 days after a trial date is assigned, if necessary. The defendant was awarded $1,000 in costs for the successful application.

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Pierson v Estevan Board of Police Commissioners, 2020 SKQB 144

Elson, May 13, 2020 (QB20134)

Administrative Law – Judicial Review – Workers' Compensation Board
Administrative Law – Standard of Review – Reasonableness
Employment Law – Workers' Compensation
Statutes – Interpretation – Workers' Compensation Act, 2013, Section 28.1

The Workers' Compensation Board Appeal Tribunal (tribunal) reversed an earlier decision of the Workers' Compensation Board Appeals Officer (appeals officer) and denied the applicant's claim for benefits under the provisions of The Workers' Compensation Act, 2013 (Act). The issue in both decisions was whether the applicant sustained a psychological injury out of or in the course of employment. The applicant was a long-term police officer who had been diagnosed with post-traumatic stress disorder (PTSD). An independent psychologist and the applicant's caregivers both said that the PTSD arose from circumstances related to his employment with the police service. The Act has a presumption that where a worker who "works and is exposed to a traumatic event" is diagnosed with a psychological injury, the injury is presumed to be one that arose out of or in the course of the workers' employment. The tribunal did not expressly consider the presumption. The applicant did not seek medical care for his issues until he had a negative interaction with his superior in February 2017. The applicant was diagnosed with generalized anxiety disorder and PTSD by a psychiatrist as early as May 4, 2017. A psychologist

confirmed the PTSD diagnosis as early as the spring of 2017. Another psychologist performed a Mental Health Assessment (MHA) on the applicant in 2017. In her report in July 2017, the psychologist concluded that the applicant was suffering from PTSD. Contributing factors to the PTSD were the exposure to events that the applicant had during his work as a police officer as well as when his infant son stopped breathing. The applicant's claim for benefits was first considered by the WCB Claims Entitlement Specialist III (CES III). She concluded that the circumstances of the applicant's case did not fall withing either s. 28.1 or POL 02/2017. The CES III found that the predominant cause of the applicant's problems was the possible disciplinary discussions with the employer, such discussion being considered a normal part of employment and not a traumatic event. The applicant appealed the decision to the appeals officer. The appeals officer allowed the appeal. The Chief of Police was not satisfied with the appeals officer's decision and requested an appeal to the tribunal. The tribunal reversed the applicant's entitlement to benefits without mention of s. 28.1 or the presumption within it. The tribunal found that the applicant's injury directly correlated to the disciplinary interaction of the applicant and his superior. The issues were: 1) the appropriate standard of review to be applied to the tribunal's decision; and 2) whether the tribunal made any reviewable errors in arriving at its decision. HELD: The tribunal's decision was found to be unreasonable and was quashed. There are three layers to the workers' compensation scheme: the Act, the Regulations, and policy directives created by the WCB. The issues were determined as follows: 1) in Vavilov, the Supreme Court of Canada identified reasonableness as the presumptive standard. The standard of review was reasonableness; and 2) in Vavilov, the Supreme Court of Canada shifted the focus on a reasonableness review from the justifiability of the decision maker's conclusion to whether it was actually justified by a rational and coherent chain of analysis. Vavilov identified a non-exhaustive list of seven factors for a reviewing court to consider. The court found four of the factors engaged. The tribunal had to consider s. 28 in coming to its decision. The police service argued that they were successful in convincing the tribunal that the applicant's diagnosis was wrong, and therefore, s. 28.1 of the Act did not even apply. Alternatively, it was argued that because the tribunal's decision fell within a range of reasonable outcomes, a misapplication of s. 28.1 would not affect the reviewability of the decision. The court disagreed. Reasonable outcomes will not survive bad reasoning. The court had to review the reasons for the tribunal's decision, especially as it related to its treatment and interpretation of the Act. The tribunal had to interpret the eligibility provisions, including s. 28.1, according to the modern principle of statutory interpretation. The court found that the only reasonable interpretation of s. 28.1 of the Act was one that presumed a conclusion that the worker's diagnosed psychological injury arose out of and in the course of employment once a diagnosis was made. The tribunal was found to have ignored the diagnosis that obliged it to apply the rebuttable

presumption. The court found that the tribunal went out of its way to challenge and question the diagnosis, which would have met the s. 28.1 requirements. It was not reasonable for the tribunal to conclude that the diagnosis may have been skewed. The evidence established a diagnosis of PTSD, so the presumption should have been made. The presumption was rebuttable if the contrary were proven, which it was not. The tribunal failed to distinguish between events that cause a psychological condition and those that trigger it. The cause of the condition was the "accumulation of traumatic exposure" throughout the applicant's career, whereas the trigger was the disciplinary discussion. The police service appeal was remitted back to the tribunal for a rehearing. The applicant was awarded costs against the police service.

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Desbiens v Warken, 2020 SKQB 145

Tochor, May 15, 2020 (QB20135)

Civil Procedure – Application to Set Aside Default Judgment
Civil Procedure – Jurisdiction of the Court – Inherent Jurisdiction
Civil Procedure – Queen's Bench Rules, Rule 10-13

The applicant applied pursuant to Rule 10-13 of The Queen's Bench Rules to set aside the default judgment entered against her in December 2016 and to allow her to file a statement of defence. The plaintiff was the passenger of a vehicle driven by the defendant in February 2013. The vehicle entered the ditch, whereby the plaintiff suffered significant injuries and economic loss. The plaintiff filed a statement of claim in January 2015. An order for substituted service was made in July 2015 allowing service by registered mail on the defendant's father and uncle. They were both served by registered mail in July 2015. The defendant was noted for default in August 2015. The father and uncle were served with an application to assess damages in August 2016. The defendant did not appear on the application and damages were assessed at $713,195 plus taxable costs and disbursements. Judgment in the amount of $730,923.28 was issued in favour of the plaintiff in December 2016. The defendant filed an application to set aside the judgment in January 2019. The issues were: 1) whether, and from where, the court had jurisdiction to set aside a judgment in these circumstances; 2) whether the application was made expeditiously; 3) whether there was a satisfactory explanation for the delay in making the application; 4) whether the proposed defence raised arguable issues; and 5) whether there was serious prejudice to the plaintiff.
HELD: The issues were determined as follows: 1) Rule 10-13 only applies to judgments entered in default of defence and not to judgments that were granted on their merits and upon notice. The principles of Rule 10-13 must be examined in either case. The court

must use its inherent jurisdiction sparingly and only in exceptional circumstances. Whether exceptional circumstances exist is informed by the overarching principles of equity and fairness; 2) the defendant submitted that she did not have notice of the plaintiff's claim or the application to assess damages. She said that she had not spoken to her uncle in 10 years and that she seldom spoke to her father. She was made aware of the proceedings when she spoke to her mother in June 2017. The defendant's mother provided an affidavit wherein she said that she accepted the registered mail regarding the application to assess damages. She thought that the matter was completed and did not tell the defendant's father or the defendant. The defendant acknowledged receiving a letter from Saskatchewan Government Insurance in January 2016 with the statement of claim attached but she said that she did not read the claim or understand its importance. The court accepted the defendant's evidence that she did not receive notice of the plaintiff's claim or application to assess damages. A lack of notice is an exceptional circumstance that warrants the court's use of its inherent jurisdiction to set aside a judgment. The court found that the defendant did not understand the importance of the documents, nor did she deliberately decide to let the matter go to default judgment. 3) The application was not filed for over one year after the defendant contacted counsel. The court found that the fault did not lie with the defendant. The defendant's lawyer accepted responsibility for this delay. 4) The defendant's proposed statement of defence pled that the vehicle unexpectedly hit black ice that caused it to hit the ditch. The defendant said that she was therefore not negligent in the operation of the vehicle. The defence was defence of inevitable accident. The court concluded that the defendant raised an arguable issue and she therefore met the requirement. 5) The plaintiff argued that he would suffer prejudice if the application were granted because of delay in receiving compensation for his injuries and because he had commenced other actions as a result of receiving judgment in the matter. Also, the RCMP file on the matter had been purged so would no longer be available. The court found that the prejudice suffered by the plaintiff did not rise to a level that would justify dismissal of the application. The plaintiff did not indicate any specific evidence that was now unavailable to him. The court concluded that irreparable harm or serious prejudice would not result if the judgment were set aside. The court concluded that the overarching principles of fairness and equity required that the application be granted to set aside the judgment and permit the defendant to file a statement of defence. There were exceptional circumstances justifying reliance by the court on its inherent jurisdiction to set aside the judgment. The plaintiff was given 14 days to file a written statement on the issue of costs thrown away. The defendant could file a reply within 14 days of receiving the plaintiff's submission.

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Olive v Administrator of the Rural Municipality of Keys No. 33, 2020 SKQB 146

MacMillan-Brown, May 14, 2020 (QB20136)

Civil Procedure – Originating Application – Mandamus
Civil Procedure – Queen's Bench Rules, Rule 3-56
Municipal Law – Referendum – Requirements
Statutes – Interpretation – Municipalities Act
Statutes – Interpretation – Planning and Development Act

The applicant sought an order of mandamus to compel the rural municipality (RM) to report on the sufficiency of a petition in relation to a proposed development and, if that order were granted, another order of mandamus requiring the RM Council (council) to act upon the petition and put it to a referendum. The petition was in relation to the development of a Hutterite colony and intensive livestock operation (ILO) within the RM. To allow the Hutterite application, the RM's zoning bylaw would have to be amended to allow for communal dwellings and for a discretionary use permit to allow the ILO. The bylaw would be changed by amending the definition of "farmstead" to allow for collective dwellings. The amendment bylaw was read for a third time and passed on May 10, 2018. The Ministry signed and approved it in June 2018. The ILO Application was approved by council in June 2018. The applicant's appeal of the approval of the collective dwellings to the Development Appeals Board was rejected. That decision was appealed to the Planning Appeals Committee of the Saskatchewan Municipal Board. That decision had not been rendered by the time the court considered the originating application. A petition (December petition) was sent to the RM asking that a professional community planner be engaged to consult with all voters. The RM administrator deemed the December petition insufficient. The applicant argued that the administrator was required to report to council on whether or not the December petition was sufficient, i.e. the required signatures were affixed, and because he failed to do so, mandamus should be ordered. The applicant also argued that mandamus flowed from council's failure to undertake the referendum. The RM argued that the December petition related to zoning, which is a matter dealt with in The Planning and Development Act, 2007 (PDA), not The Municipalities Act (MA), so council did not have a statutory obligation to put the resolution to the voters by way of referendum. The RM conceded that the December petition was signed by enough voters to satisfy s. 132(2) of the MA.
HELD: The application was dismissed. A referendum can be on any matter within the jurisdiction of council pursuant to the MA. Section 134(1) says that the administrator is responsible for determining whether a petition is sufficient. "Sufficient" is not defined. Subsections 134(2) to 134(5) offer assistance to the administrator on

how to vet the petition. A petition is sufficient if it meets the formalities set out in s. 133 and the required number of people sign it in the correct way. The term "sufficiency" in the MA does not deal with jurisdiction. The administrator does not have to review the petition to determine if the subject matter falls within the jurisdiction of council. Section 4 of the PDA states that any conflict between the PDA and the MA is resolved by the PDA governing. An adequate number of signatures on a petition is not enough to compel a referendum. The MA has a procedural and jurisdictional threshold, both of which are required to compel a referendum. The procedural requirement deals with the sufficiency of the petition. A petition is sufficient with the minimum number of signatures. The procedural threshold was met by the December petition. The jurisdictional threshold requires that the subject matter of the petition fall within the jurisdiction of a municipal council under the provisions of the MA. The December petition did not fall within the jurisdiction of council under the provisions of the MA. The court also expressed concern that the applicant sought remedy through two different processes at the same time. He sought a remedy under the MA before the appeal specific to the zoning matter as found in the PDA was determined. If the court allowed the referendum pursuant to the provisions of the MA before the appeal process was concluded as per the PDA, voters would be allowed to circumvent the appeal process midstream. Further, for mandamus to be ordered, the applicant had to show that the administrator and council had a statutory obligation that they were required to fulfill and that they refused to fulfill. The administrator only reported to council that the December petition did not fall within the jurisdiction of council because it was outside the jurisdiction. The court concluded that it was of little importance that the administrator did not report to council on the sufficiency of the December petition as far as the number of signatures went. The application was dismissed, and the RM was awarded costs fixed at $2,500.

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Suffern Lake Regional Park Authority v Wildman, 2020 SKQB 147

Goebel, May 14, 2020 (QB20137)

Statutes – Interpretation – Land Titles Act, 2000, Section 10(2), Section 50

The applicant, the Suffern Lake Regional Park Authority, brought an originating application that sought vacant possession of the respondent's leased lot pursuant to the summary procedure prescribed by s. 50 of The Landlord and Tenant Act (LTA). The self-represented respondent occupied a cabin on the lot leased from the

applicant. The lease agreement required the respondent to pay annual property taxes and a rental fee. She and other lessees had been involved in a dispute with the applicant's board. As a consequence, the respondent decided not to pay her 2017 taxes but did pay her rental fee. On April 7, 2018, the applicant advised the respondent by email that it was terminating the lease agreement for non-payment of taxes. A number of weeks later, when it demanded that she vacate the lot, the respondent refused because the cabin located on the lot had become her permanent residence that she shared with her partner, the other defendant. The applicant then advised her that it would charge her a daily fee for her use of the lot. Although the defendant proposed that the matter be mediated, the board did not feel that anything could be achieved because of the respondent's longstanding dispute with it. After the respondent did not pay her 2018 taxes, the applicant brought this application. It argued that the LTA and not The Residential Tenancies Act, 2006 were applicable.
HELD: The application was dismissed. The court found that the lease agreement was governed by the LTA because the lease agreement pertained to the right to use the lot and not the buildings. As there was no factual dispute regarding the issues, it was an appropriate case to be determined by the summary procedure provided in ss. 50 to 52 of the LTA. The respondent met the definition of "overholding tenant" in s. 50 and she had breached the terms of the lease by failing to pay the taxes. As taxes could not be characterized as rent, the applicant had failed to provide the proper notice to the respondent as required by s. 10(2) as a condition precedent to it seeking a writ of possession pursuant to s. 50.

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R v Bird, 2020 SKQB 148

Hildebrandt, May 15, 2020 (QB20138)

Criminal Law – Offences Against the Person and Reputation – Flight – Sentencing
Criminal Law – Motor Vehicle Offences – Dangerous Driving – Sentencing

The accused pled guilty to: evading a peace officer while he and the officer were operating motor vehicles contrary to s. 249.1(1) of the Criminal Code; operating a motor vehicle in a manner dangerous to the public contrary to s. 249(1) of the Code; and obstructing a peace officer who was attempting to arrest him by fleeing the scene contrary to s. 129(a) of the Code. The police had been conducting surveillance on the accused as there were outstanding warrants for his arrest. An officer followed the accused while he was driving and turned on his emergency lights and siren in an attempt to stop the vehicle, but the accused accelerated and drove at speeds exceeding

120 km per hour. When an officer attempted to stop the vehicle by driving towards it, the accused did not stop and the two vehicles collided. The accused and one of his passengers fled on foot. During his arrest, the accused struggled and it took three officers to handcuff him. The accused, a 26-year-old member of the Little Pine First Nation, had a lengthy criminal record but had no previous convictions for flight or driving offences. He had been raised by his mother on the reserve. He grew up in poverty and experienced some abuse and neglect.
HELD: The court imposed a sentence of 27 months' imprisonment, a two-year driving prohibition and a one-year probation period. When it gave credit for time on remand, the accused had served his sentence. The sentence was comprised of 15 months for the first offence and, in accordance with s. 718.3(4) of the Code, it was to run consecutively to the concurrent sentences of 12 months each for the other two offences. The mitigating factors included that the accused was young, had no prior driving-related offences, had family support and had pleaded guilty early. The conditions of probation were extensive and included that the accused should obtain counselling and have no contact with any members of any gang.

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R v Hamilton, 2020 SKPC 19

Stang, April 23, 2020 (PC20015)

Criminal Law – Aboriginal Offender – Sentencing – Gladue Report
Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine – Sentencing
Criminal Law – Sentencing – Pre-Sentence Custody Credit
Criminal Law – Sentencing – Pre-Sentence Report
Criminal Law – Sentencing – Principles
Criminal Law – Sentencing – Possession of Proceeds of Crime

When the accused was arrested for assault, police located $5,260 in cash on his person. A search of his apartment resulted in finding 30 bags of methamphetamine with approximately one ounce in each bag. The total weight of the methamphetamine was 846 grams. The accused pled guilty to proceeds of crime contrary to s. 354(1)(a) for the cash located on him and to possession for the purpose of trafficking methamphetamine contrary to s. 5(2) of the Controlled Drugs and Substances Act (CDSA). The accused was on statutory release at the time of his arrest. Because of the arrest, his statutory release was revoked. The accused was arrested on June 4, 2019. He continued to be remanded to the Saskatchewan Penitentiary even after his two-year sentence expired on September 24, 2019. The accused agreed with the essential circumstances as presented by the prosecutor and he agreed to the content of the Expert Report as well as to a copy of the criminal record. One of the three phones located

at the search revealed that the accused had at least two other people working for him to sell methamphetamine. The accused confirmed that he had purchased a kilogram of methamphetamine to sell. All of the drug money located on the accused was from drug sales. The accused did not have any prior trafficking convictions but did have a prior criminal record. His motive for selling drugs was profit, not to feed an addiction. The accused was 42 years old at sentencing. He was Metis and grew up with his mother until he was 15 when he moved to live with his father. After living with his father for two months, his father left and he had to fend for himself, which he did. The accused was abused by his stepfather and he observed his stepfather abusing his mother. He witnessed drug use in the home and by the age of 15 was smoking marijuana and using a variety of hard drugs. The accused finished high school and had a solid employment record.

HELD: The accused was very forthright in his submissions and gave considerable information to the court about his involvement in these offences. The court found the accused's candor to be a clear indicator that he was fully accepting responsibility for the offences. The court accepted that the accused had only sold drugs for the couple of months before his arrest and that he got into trafficking because acquaintances from his time in custody presented him with the opportunity. The court found that there were Gladue factors present that resulted in some mitigation being factored into the decision. The appropriate sentence was found to be one in excess of two years. The court discussed how reduced moral culpability could still be factored into a penitentiary sentence. The accused's moral culpability was somewhat reduced. The aggravating factors were: the large quantity of methamphetamine; the impact that illegal drugs have on the community; that the accused was a "mid-level" trafficker; the accused's prior criminal record; that the accused had a prohibited weapon, bear spray; that the accused was still serving a sentence when arrested; and the accused's high level of moral culpability for the offences, though tempered by relevant factors in s. 718.2(e). The mitigating factors were: guilty pleas and acceptance of responsibility; the accused's background and personal circumstances; and the applicable Gladue factors. The court discussed the need to ensure the sentence is proportional to the gravity of the offence and the degree of responsibility of the offender. When discussing parity, the court agreed with the Crown that there was no established standard range of sentence for trafficking, or possession for the purpose of trafficking, of methamphetamine. Cases demonstrated that lengthy terms of imprisonment are common for CDSA offences involving methamphetamine. Also, the cases confirmed that the accused was in possession of a very large amount. Denunciation and deterrence are the predominant factors for the trafficking in methamphetamine offence. The court also considered rehabilitation as a subordinate factor. The appropriate sentence was found to be imprisonment for 56 months for the trafficking offence. The appropriate sentence for the possession of proceeds of crime was 12 months' imprisonment,

concurrent. The accused was given credit of 1.5 times for the period of time he was in custody after September 24, 2019. If the accused had not been charged with these offences, he would have been released on August 17, 2019. He argued that he should also be given credit at 1.5 times for the period from August 17 to September 24. He was given credit of one and a half months for that period. The total pre-sentence custody was 12 months. The remaining time to be served was 44 months. Forfeiture orders and ancillary orders were also made.

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