The Law Society of Saskatchewan Library's online newsletter
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Richards Caldwell Kalmakoff, October 22, 2020 (CA20118)

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Civil Procedure - Queen's Bench Rules, Rule 15-48

The appellant appealed the decision of a Queen's Bench chambers judge that dismissed his application for an order setting a pre-trial date in a family law proceeding and ordering costs against him in the amount of $500. The judge dismissed the application because the matters in issue, retroactive and ongoing child support and s. 7 expenses, had already been determined in a final way by another Court of Queen's Bench judge in a decision rendered three months earlier. The appellant alleged that the chambers judge erred: 1) in determining that the child support decision gave rise to a final order. The appellant argued that the decision gave rise to an interim order because it had been brought by way of a regular notice of application as opposed to an application seeking summary judgment, and the resulting order was presumptively interim in nature absent any explicit

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wording designating it as a final order; and 2) in awarding costs.
HELD: The appeal was dismissed. The court found that the judge had not erred: 1) in finding the decision to be final. It had all the hallmarks of a final order, although it did not contain explicit language describing it so. The decision disposed of each of the issues that were raised in the application in a final and binding way. The appellant had not appealed the decision and his recourse now would be to apply to vary it. The court noted that decisions made in chambers applications in family law proceedings are not presumptively interim in nature and the form of application used to request an order does not dictate whether the resulting order is interim or final. Queen's Bench rule 15-48 dictates that that any party applying for corollary relief under the Divorce Act shall do so by notice of application and the same notice shall be used for any application claiming a substantive or interim remedy. It recommended, regarding the nature of orders, that counsel should be clear about what they are seeking when making applications and judges should be precise in their decisions; and 2) in awarding costs to the respondent as the successful party.

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Heffernan v Saskatchewan (Police Commission), 2020 SKCA 119

Whitmore Tholl Kalmakoff, October 23, 2020 (CA20119)

Statutes - Interpretation - Police Act, 1990, Section 2, Section 59, Section 69, Section 71
Administrative Law - Judicial Review - Standard of Review

The appellant appealed the decision of a Queen's Bench chambers judge that dismissed his application for judicial review of a decision of the Saskatchewan Police Commission (see: 2020 SKQB 65). The Commission had dismissed the appellant's appeal of his conviction for a disciplinary infraction after a hearing was held pursuant to The Police Act, 1990. He also applied to introduce fresh evidence. The appellant was working for the Prince Albert Police Service (PAPS) as a Special Constable when he was charged with three disciplinary offences pursuant to the Act. The disciplinary hearing took place before an appointed hearing officer in October 2018 who found the appellant not guilty of the first two charges and guilty of the third, for which he was given a reprimand. He applied for permission to appeal the penalty to the Commission pursuant to ss. 59 and 69 of the Act. In December 2018, the appellant was dismissed from his employment for unrelated operational reasons. In June 2019, the Commission dismissed the appellant's application on the bases that it lacked jurisdiction and that the issue was moot, since the appellant was no longer an employee. The appellant applied for judicial review and the court found that the Commission decision was reasonable. The appellant

Statutes - Interpretation - Personal Property Security Act, 1993, Section 7, Section 35

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appealed the judge's decision on the ground that he erred in applying the standard of review of reasonableness whereas it should have been correctness. At the hearing of the appeal, the appellant's counsel acknowledged that the judge had not erred in applying the reasonableness standard but maintained that the Commission's decision was not reasonable. The fresh evidence sought to be adduced consisted of a document that the appellant had found amongst his belongings after leaving his employment that would prove his innocence. HELD: The appeal was dismissed as was the application to adduce fresh evidence. The court found that the chambers judge had correctly applied the standard of reasonableness to the Commission decision. However, after reviewing the Act and examining the Commission's reasoning, it noted that it had erred in its conclusion that it did not have jurisdiction to entertain his appeal because he was no longer an employee of the PAPS when, in fact, the appeal of the disciplinary process was already in existence. If the standard of review were correctness, the Commission's decision might be reversible. However, under the reasonableness standard, its decision was not unreasonable. The appellant's fresh evidence had not met the Palmer requirements and, regardless, the appellant had filed an affidavit in his application to the Queen's Bench judge and thus the evidence was already part of the record.

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Herrnbock v Input Capital Corp., 2020 SKCA 120

Jackson Caldwell Whitmore, October 27, 2020 (CA20120)

Statutes - Interpretation - Saskatchewan Farm Security Act, Section 60, Section 66

The appellants appealed the order of a Queen's Bench chambers judge that dismissed their application for an exemption from seizure of farm equipment pursuant to s. 60 of The Saskatchewan Farm Security Act (SFSA). The appellants entered into financing agreements with the respondent to finance their farming operations and granted it a security interest in their equipment. They were unable to repay the respondent and defaulted on their agreements. The respondent gave notice of its intention to seize certain equipment and the appellants applied to the Court of Queen's Bench for an order exempting their equipment from seizure pursuant to Part V of the Act, because they required it to continue farming under s. 66 of the Act. The judge dismissed the claim for exemption because their assertions that they needed the equipment was only a "bald claim," which was regarded as insufficient in the decision in Kovlaske. The issues on appeal were: 1) whether the chambers judge misdirected himself as to the applicable legal test; and 2) if not, had he erred in applying the test to the facts before him?

R v T.K.

R v Thomson

R v Yashcheshen

Synergy Credit Union Ltd. v Bennington Financial Corp.

HELD: The appeal was allowed in part so that a number of pieces of farm equipment were exempted from seizure. The court had jurisdiction to hear the appeal under s. 7(3) of The Court of Appeal Act, 2000 and s. 106 of the SFSA, which restricts appeals to the Court of Appeal on questions of law only to which the standard of correctness applies. It found with respect to each issue that: 1) the chambers judge had not erred in identifying the analysis required by s. 66 of the Act in stating that the appellants had made, insufficiently, only a bald claim regarding how they intended to farm with the equipment in question and that it was necessary for the proper and efficient conduct of their agricultural operations; and 2) the chambers judge had erred in law in his assessment of the evidence when he dismissed the application for exemption regarding all of the farm equipment, because the respondent had conceded that the appellants had a 300-acre farm and that some of the equipment was necessary for its operation. The court then exempted certain pieces of equipment from seizure.

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Dabao v Investigation Committee of the Saskatchewan Registered Nurses' Association, 2020 SKQB 242

McMurtry, September 25, 2020 (QB20225)

Professions and Occupations - Registered Nurses - Discipline - Appeal
Administrative Law - Judicial Review - Duty of Fairness - Legitimate Expectation

The applicant, a registered nurse, applied for judicial review of a decision of the respondent, the Saskatchewan Registered Nurses' Association, to refer a decision made by its Investigation Committee (IC) on January 9, 2020 to a discipline hearing and abandon a Consensual Complaint Resolution Agreement (CCRA). On the first hearing date of the application, the applicant had sought and received an interim injunction under Queen's Bench rule 3-60 prohibiting the IC from proceeding to a disciplinary hearing until the judicial review decision had been rendered. This matter had arisen after the IC had investigated some complaints against the applicant in 2018 and 2019. It recommended to the Discipline Committee (DC) that she enter into a CCRA. The draft CCRA was sent to the applicant on November 1, 2019. One of its provisions stated that if the CCRA were signed by November 6, the IC would direct that the DC take no further action concerning the matter as long as the applicant complied with the CCRA conditions. The applicant's counsel obtained an extension to November 29 to review it. Before the deadline, the applicant's counsel requested that several clauses be amended. The IC declined but agreed to extend the deadline to January 2, 2020, which would be the final extension. The SRNA office would be re-opened that day after the Christmas holidays. On December 31, the applicant's counsel

emailed the investigator to say that she would still like the SRNA to consider amending the CCRA, but the applicant would sign it if the IC refused. The applicant did not provide the signed copy as required by the deadline. No response was received from the email of December 31 until January 17 when the IC informed the applicant by letter that it had met on January 9 and decided to refer the matter to a discipline hearing. Her counsel advised the investigator that the decision was unfair and unreasonable in the absence of a reply to her December 31 email. If the IC refused to make changes, the applicant should be allowed to sign the CCRA per her expressed intention. The investigator informed the applicant that the IC had considered the email at their meeting but decided to send the complaints to a hearing. It realized the significance of its decision and its impact on the applicant but was committed to its process and maintaining a consistent approach. The issue was whether the IC acted unfairly by denying the applicant an opportunity to sign the CCRA, thwarting her legitimate expectation that she could comply with the January 2 deadline by agreeing to sign it by that date. The SRNA asserted that the duty of fairness at an investigatory stage is limited to a duty to provide information about the complaint being investigated and an opportunity to respond. The decision to refer the matter was made because of the applicant's continued requests to amend the CCRA and her failure to sign it by the deadline. The parties agreed that a duty of procedural fairness applied to the processes used by the IC. HELD: The application was dismissed. The court noted that no assessment of the standard of review is required in cases where procedural fairness is at issue. It reviewed the applicant's circumstances in relation to the five factors set out in Baker. In its consideration of the fourth factor, the legitimate expectations of the person challenging the decision, it found that the IC had not established a legitimate expectation on which failed to follow through. The applicant could not have had a reasonable expectation that January 2 deadline would be extended again and it was not reasonable for her to expect to sign the CCRA before the deadline given the contents of the December 31 email.

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Fortier v Fortier, 2020 SKQB 243

Brown, September 25, 2020 (QB20226)

Family Law - Custody and Access - Schooling - COVID-19

Both of the parties applied to the court to resolve whether their three children, aged 13, 10 and nine, should attend their elementary school in September 2020. The school had been closed in March 2020 due to the COVID pandemic but had re-opened for the fall term. The parties had separated in August 2018. In March

2019, the court ordered that the children's primary residence be with the plaintiff father and that the respondent have specified access. The parties began a voluntary week on/week off shared parenting arrangement in December 2019. When the children's school re-opened, the respondent determined that the risk of the children contracting the virus was too high, and she decided she would home school them. It would also allow her to teach them more about their Aboriginal heritage and culture. The plaintiff opposed this decision because the best interests of the children would be served by returning to school where they could be with their friends and continue to benefit from the education and tutoring that the school offered. He also argued that to permit the children to be home schooled by the respondent meant that the terms of the custody order would be altered so that she would, in effect, have primary residence of the children.
HELD: The court held, in this interim application, that it was in the best interests of the children for them to return to the elementary school that they had always attended. It was satisfied that since neither they nor their parents had compromised immune systems, they were not at higher risk should they contract COVID. The return to school allowed the children to receive the benefits of being with their friends and teachers. The decision acknowledged the status quo that existed before the shutdown in March. In response to the plaintiff's concern that allowing the children to be home schooled would violate the maximum contact principle, the court considered the question of whether it would be in the children's best interests and found that it would not be the lack of contact with the plaintiff, but rather the lack of contact with friends and teachers, that would pose the problem.

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C. T. Farms Ltd. v Fix Building Products 2000 Ltd., 2020 SKQB 252

Keene, October 2, 2020 (QB20236)

Contract - Breach - Damages

The plaintiff, a farm corporation, applied for summary judgment under Queen's Bench rules 7-2 and 7-5. It and the corporate defendant, Fix Building Products 2000 Ltd. (FBP), entered into a contract to construct a building. Construction commenced with the installation of piles and a grade beam, as well as some wood framing. The plaintiff paid $198,000 and $3,940 for expenses to FBP by way of progress payments. The partially-built building collapsed, and FBP abandoned the job. It refused to refund the monies paid. The plaintiff sued FBP for breach of contract and negligence, claiming $201,900 by way of damages. FBP acknowledged that the collapse constituted a breach of the agreement. The plaintiff also sued the director and

officer of FBP, Fayad, and its sales manager, Finnell, for misrepresentation, claiming that they represented during the contract negotiations and construction that FBP carried adequate insurance to cover any potential problems. The plaintiff claimed that its officer, Chase, relied on such false representations and the two defendants knew of such reliance. Chase deposed in his affidavit that he inquired numerous times whether FBP carried insurance. The reply was always in the affirmative. Had the officer known that there was no insurance, the plaintiff would have obtained its own or declined to enter into the agreement. The plaintiff submitted an affidavit sworn by a professional engineer that the value of the work completed and materials was $27,300 and that the building collapsed due to inadequate bracing, sheathing and other defects. In their affidavits, the personal defendants denied having any discussions or making any representations to Chase before the building's collapse concerning the existence or nature of FBP's insurance or whether the building would be insured during construction. The issues were whether there was a genuine issue requiring a trial to resolve: 1) whether the personal defendants misrepresented any material fact; 2) whether FBP breached the agreement; 3) the damages payable by FBP; and 4) whether FBP was negligent.
HELD: The application for summary judgment against FBP was allowed. FBP was ordered to pay damages in the amount of $174,640. The application against the personal defendants was adjourned. The court found concerning each issue that: 1) as it could not resolve the conflict in the affidavit evidence, it ordered that oral testimony and cross-examination of the parties should take place pursuant to Queen's Bench rule 7-5(3); 2) there was no genuine issue requiring trial because of FBP's concession; 3) there was no genuine issue requiring trial as a fundamental breach of the contract had occurred and on the evidence, it was satisfied that FBP had repudiated the agreement which had been accepted by the plaintiff. The plaintiff was entitled to be compensated in the amount of $201,940, less the value of the work done of $27,300; and 4) it was unnecessary to consider the question of negligence because of the finding regarding the breach of contract.

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Friesen v Braun, 2020 SKQB 253

Goebel, October 5, 2020 (QB20237)

Family Law - Child Support - Adult Child
Statutes - Interpretation - Family Maintenance Act, 1997, Section 4

The claimant and the respondent had had a spousal relationship in Germany that ended months after the birth of their daughter in 2001. They reached an agreement at that time that the claimant mother would have

primary care with the respondent father having parenting time on alternate weekends and holidays. The agreement included that the respondent would pay 400 German euros ($590 CAD) per month until their daughter reached 18 years of age. In 2010, the claimant and the daughter moved to Saskatchewan and the claimant began living with her current spouse. The respondent stayed in contact with their daughter through telephone calls and an annual visit. In order to maintain contact, the respondent, his wife and her son moved to a town close to the claimantâ€™s home. Unfortunately, the daughter resisted visiting with the respondent after he moved to Saskatchewan and advised him when she was 17 that she had no interest in continuing their relationship. At the time of her eighteenth birthday in 2019, the respondent made his last support payment pursuant to the terms of the agreement. The claimant asked the respondent to continue to pay the same monthly support while their daughter attended a two-year program in agricultural management at Olds College, but he did not agree, and she brought this application pursuant to The Inter-Jurisdictional Support Orders Act (IJSOA). During the hearing of the application, the claimant estimated the cost of the daughterâ€™s tuition fees, books and travel expenses at approximately $8,000 per year. The daughter had obtained student loan funding of $15,000 for each year of her program as well as having earned income of $11,000 from employment in 2019. The claimant and her husbandâ€™s 2019 income tax returns reported that they earned $37,300 and $80,000 respectively. The respondent was able to work in Canada under a temporary work visa but only obtained employment in August 2019. He reported income for that year at $24,950 and estimated his income for 2020 at $50,000. His wife did not work outside the home.
HELD: The claimantâ€™s application pursuant to the IJSOA was dismissed. The court reviewed the factors set out in s. 4 of The Family Maintenance Act, 1997 to determine whether the claimant had met the evidentiary burden of establishing that the daughter was entitled to support. It found that she had not demonstrated entitlement to support after taking into account the resources available to her and each of her parents, along with her unilateral termination of the relationship with the respondent.

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Kumar v Korpan, 2020 SKQB 256

Klatt, October 5, 2020 (QB20239)

Civil Procedure - Queenâ€™s Bench Rules, Rule 7-9
Barristers and Solicitors - Negligence - Duty to Non-Client

The defendants, a lawyer and his law firm, applied pursuant to Queen's Bench rule 7-9 to have the plaintiff's statement of claim dismissed on the basis that it disclosed no reasonable cause of action, was an abuse of process and/or was frivolous, vexatious or scandalous. The plaintiff's wife (the client) had retained the defendant lawyer to represent her in her divorce proceedings against him. The client did not want the lawyer to serve the plaintiff at his office and advised him that the plaintiff had used the McKercher law firm in the past. The lawyer deposed that when he had information that a party may have legal representation, it was his practice to contact that lawyer. In this case, knowing that McKercher was the registered office of the plaintiff's medical practice and acting upon his client's instructions, the lawyer contacted a lawyer at McKercher whom he knew practiced family law, with a view to determining whether she would discuss with the plaintiff whether he wanted her firm to represent him in the divorce. After calling the lawyer, he forwarded the petition, property and financial statements and associated documents to her. She later advised him that she would not be representing the plaintiff. The plaintiff was served personally approximately six weeks later. He asserted in his statement of claim that the defendants failed to apply due diligence in determining whether any lawyer at McKercher represented him and by sending the petition to the lawyer there without his consent, thereby exposing the plaintiff's sensitive and confidential personal information to an unknown number of people in the law firm. The plaintiff claimed that this conduct constituted an intentional or reckless intrusion upon his privacy contrary to s. 2 of The Privacy Act. He further claimed that the defendants had committed the tort of intentional infliction of mental suffering because their conduct was intentional, flagrant and outrageous and caused him embarrassment and depression. Finally he claimed that the defendants owed him a duty of care to serve documents in accordance with The Queen's Bench Rules.
HELD: The plaintiff's action was dismissed in its entirety as disclosing no reasonable cause of action. It was unnecessary to deal with the other grounds. The court struck the claim of alleged breach of privacy under the Act because it was not a violation of the plaintiff's privacy to serve the divorce petition on a lawyer who was a member of a firm with whom he had a solicitor-client relationship. Furthermore, the plaintiff had not pleaded any facts that supported his assertion that the disclosure of the petition was done willfully, as required by s. 2 of the Act. The claim for intentional infliction of mental suffering was struck because the plaintiff had not pleaded any facts regarding conduct that was flagrant or outrageous. Finally, the claim for negligence was struck because there is no duty of care between a lawyer and an opposing party.

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Synergy Credit Union Ltd. v Bennington Financial Corp., 2020 SKQB 257

Meschishnick, October 7, 2020 (QB20240)

Statutes - Interpretation - Personal Property Security Act, 1993, Section 7, Section 35

Synergy Credit Union (SCU) and Bennington Financial Corporation (BFC) each applied for declarations that their security interest in a truck had priority. SCU financed the truck's acquisition for one of its clients and then took and perfected a security interest in it by registration in the Personal Property Registry (PPR) in August 2016. Its customer subsequently sold the truck to a purchaser in Alberta, where it was licensed in July 2018. SCU's customer defaulted on payment of the loan. In 2019, BFC received an application to finance the acquisition of the truck from the Alberta purchaser, and it searched the PPR in Alberta but not in Saskatchewan. When it found no prior registrations in Alberta, BFC financed its customer's purchase, taking a security interest that it perfected by registration in Saskatchewan. The parties agreed that the truck was the type of collateral falling within the definition in s. 7(2)(a)(ii) of The Personal Property Security Act, 1993: equipment of the type that is normally used in more than one jurisdiction. SCU submitted that through the combined effect of ss. 7(2) and 35(1) of the Act, if no other priority rule applies, priority is determined by the first to register, and thus it had priority in the truck. It said that BFC should have searched the PPR in Saskatchewan before advancing funds to its customer. If it had, it would have found the registration of SCU's security interest. BFC argued that s. 7(3) applied and that SCU's security interest was unperfected in Saskatchewan. Thus, s. 35 of the Act was inapplicable. Since the truck was located in Alberta when it took its security interest, it was unnecessary to search the Saskatchewan PPR to protect itself.
HELD: The court found that BFC's security interest had priority. In the case of collateral normally used in more than one jurisdiction, a search of the registry where the truck was located was the only search necessary unless the truck has been in that jurisdiction for less than 60 days.

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R v Yashcheshen, 2020 SKQB 259

Danyliuk, October 8, 2020 (QB20242)

Criminal Law - Application to Strike Appeal - Want of Prosecution

The Crown applied to strike the appellant's appeal for want of prosecution. The appellant had been found guilty of a charge under s. 241.1(2) of The Traffic Safety Act and fined $175. She appealed the decision a month later in December 2018 and had done nothing to perfect the appeal since. The appellant had been granted an adjournment in October 2019, when the Crown had first applied to strike the appeal, based upon her

advice that she had brought an application on another matter dealing with her inability to pay for transcripts. As that application had been dismissed in January 2020, the Crown now asked for this appeal to be dismissed. The appellant protested that she was a "pauper" and did not have the money to pay for the transcript in this matter. She also argued that as she had been declared a vexatious litigant in other proceedings, pursuant to Queen's Bench rule 11-28 (see: 2020 SKQB 160), she could no longer bring any matters before the court after that decision was made in June 2020.
HELD: The application was adjourned to allow the appellant further time to file proof with the Local Registrar that she had ordered the transcript within a month of the decision, failing which the appeal would be dismissed. The court noted that the order made under Queen's Bench rule 11-28 was not an absolute bar and that the appellant had not applied to obtain the court's approval to bring proceedings. The appellant had had many months to take steps to perfect her appeal before the June 2020 decision that declared her a vexatious litigant, but she did nothing.

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R v T.K., 2020 SKQB 262

Mitchell, October 14, 2020 (QB20243)

Criminal Law - Young Offender - Judicial Interim Release - Gladue Factors

The accused applied for judicial interim release pursuant to s. 28 of the Youth Criminal Justice Act (YCJA). Upon release, he proposed to live with his mother pending trial. He was 16 years of age and had been charged with first-degree murder. On the night of the offence, the accused was one of six individuals, four of whom were young persons and the other two, adults, who attended a party. The victim was attacked and died from his injuries, some of which appeared to have been inflicted by a machete. There was evidence that the accused had brought one with him. All of the six people faced first-degree murder charges. The Crown opposed the application under the second and third grounds identified in s. 29 of the YCJA and s. 515(10) of the Criminal Code. Regarding the second ground, the Crown argued that there was a risk that if the accused were released, he might commit a serious offence. The Crown pointed to the accused's lengthy youth record, which showed failures to comply with court-ordered conditions and undertakings, citing as an example that he had been on release and living with his mother as a condition of that release when he allegedly committed this offence. On the third ground, the Crown conceded that its case against the accused was not strong, but there was a likelihood that it could obtain a conviction against him as a party to lesser and included offences. Defence

counsel argued that the accused's prior convictions had been for relatively minor offences and that there was no physical evidence linking him to the killing itself. She proposed an extensive list of conditions governing the accused if he were released to live with his mother. Further, she submitted that the Gladue factors should be considered on this bail application, relying upon R v Pinacie-Littlechief. The accused, a member of the White Bear First Nation, had been in the care of Social Services from age 11 to 15 but was no longer under its supervision.
HELD: The application was granted. The accused was released under multiple conditions. The court found that the Crown had not demonstrated on a balance of probabilities that the accused should be detained pending trial as required by ss. 29(2)(b) and 29(3) of the YCJA. The Gladue principles were relevant to his application, particularly as they pertained to the secondary and tertiary grounds.

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Elite Property Management Ltd. v Cain, 2020 SKQB 265

Danyliuk, October 15, 2020 (QB20244)

Civil Procedure - Injunction - Interim

The plaintiff, a property management business, brought an action against the individual defendants and the corporate defendant, alleging that the personal defendants breached the non-disclosure agreement (NDA) they signed while employed by the plaintiff. It claimed that the defendants had used confidential information garnered from it to promote their own property management company, the corporate defendant, which they had established after they were terminated in the spring of 2020. The plaintiff brought this application for a one-year injunction as against all defendants. The personal defendants began working as property managers for the plaintiff in 2012 when they had each signed a letter of agreement comprising the entire agreement between the parties. In December 2019, each of the defendants was asked to sign an NDA that did not have a non-competition clause. The plaintiff asserted in an affidavit deposed by its president that the NDAs were simply an extension of existing human resources policies and that the defendants had an opportunity to obtain legal advice. The personal defendants attested that the NDA had not been part of the terms of their employment and that the plaintiff had indicated that if they did not sign it, they would be fired. They were terminated, allegedly for cause, some months later. The plaintiff's president stated that after the corporate defendant was established, the plaintiff lost an estimated $385,900 due to the defendants' acts. They denied initiating contact with the plaintiff's clientele. They said the business they acquired from same was brought

about due to the plaintiff's customers contacting them to seek their services. They denied using any confidential information. The issues were: 1) the proper test for an interlocutory injunction; 2) whether the plaintiff had met the requirements of that test to allow injunctive relief to be granted.
HELD: The application was dismissed. The court found concerning each issue that: 1) the application was one to enforce a negative covenant. The test was whether there was a serious issue to be tried, but it would also consider the matter from the perspective of a "prima facie case;" and 2) the evidence submitted by the plaintiff did not demonstrate either a serious issue to be tried or a prima facie case. The strength of the plaintiff's case was based on the validity and enforceability of its NDA and the alleged use of confidential information, and the evidence regarding it was not strong. It also failed to show what the risks were that it would suffer irreparable harm if the injunction were not granted. The balance of convenience favoured the defendants. Finally, the court found that the plaintiff's undertaking was fatally flawed because its solicitor, and not an officer of the plaintiff, had signed it.

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R v Lerat, 2020 SKPC 30

Rybchuk, October 14, 2020 (PC20034)

Criminal Law - Assault - Aggravated Assault - Sentencing
Criminal Law - Aboriginal Offender - Sentencing
Criminal Law - Sentencing - Pre-Sentence Release - Credit

The accused pled guilty to aggravated assault contrary to s. 268(1) of the Criminal Code and unlawful confinement contrary to s. 279(2) of the Code. The accused committed the offences with three other men against the victim, the accused's uncle, in 2016 on the Muscowpetung First Nation reserve. The accused and the others first punched and kicked the victim and later drove him to a remote location where the accused struck him multiple times on the head and body with a large metal bar. Then he and two other accused departed, leaving the victim in the back of the van. The victim survived but suffered serious injuries. He did not provide a victim impact statement but expressed his desire that the accused not go to jail. The accused had been released in 2016 on strict conditions and ordered to wear an electronic monitoring device. He had complied with the order. The Crown sought a carceral sentence of between eight and nine years without credit for time on release. The defence submitted that an appropriate sentence was four to five years. If the court exercised its discretion to give the accused credit at 1.5 for time spent on release under strict conditions, the

total time would be almost six years, which would result in a sentence of time served but with the addition of probation. The accused, a 36-year-old Aboriginal man, was married with nine children. He was a member of the Muscowpetung band and spent portions of his childhood on the reserve and in Fort Qu'Appelle, where he suffered discrimination. His parents abused alcohol until the accused was six when they stopped. Other Gladue factors consisted of the accused's and his relatives' involvement with the residential school system. The accused began using alcohol and drugs in his teens but had been sober since the offence. He was active in his community, organizing sports teams and tournaments, and he continued to do so during his release. He had adopted the use of Aboriginal cultural practices and being a member of the church and had the support of the community and his family. The accused's previous six convictions dated back to 2008, but he did not have any violent offences on his record and had not been imprisoned.
HELD: The accused was sentenced to four years' imprisonment: four years for the aggravated assault and four years concurrent for the unlawful confinement count. The court found it was a fit sentence after balancing the relevant sentencing principles and factors that favoured a custodial disposition in the low end of the range. The accused was given credit for remand time of 21 days. The court acknowledged that the Gladue factors, those specific to the accused and the general ones of alcoholism, poverty and racism in his community, provided a link between his background and his moral culpability. Nonetheless, his moral culpability remained high, and the gravity of the offences serious. It also examined the accused's post-offence conduct during his pre-sentence release and how restrictive the conditions imposed upon him were and held that they were not so restrictive as to be akin to custody. Although the time spent on release would have a mitigating impact, it would not rise to the level that would move an otherwise appropriate sentence outside the range. The factors recognized as mitigating, in this case, were that the accused: had a limited criminal record; had shown remorse; had many pro-social supports; had not breached any of his release conditions over three years; had been employed steadily while on release; had obtained his Grade 12 and completed all programming required of him while on release; and had not used drugs or alcohol since the offence. The aggravating factors were that the victim suffered significant injuries with a lasting impact. He was assaulted by multiple attackers over several hours, carried away, forcibly confined and left with severe injuries in a remote location. The accused had driven the vehicle and used a weapon during the assault.

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R v Thomson, 2020 SKPC 39

Beaton, October 15, 2020 (PC20035)

Criminal Law - Firearms Offences
Constitutional Law - Charter of Rights, Section 8, Section 24(2)

The accused was charged with leaving multiple firearms unlocked and improperly stored contrary to s. 86.2 of the Criminal Code. The RCMP dispatch received a 911 call from a neighbour of the accused on the Carry the Kettle First Nation reserve, advising that she had heard shooting outside his residence and was concerned because there were children around. She later called back to say that she learned that the person had fired only one shot in the air and was not threatening anyone and was back in the house without a firearm, and she just wanted the police to check out the situation. Although initially not concerned, the officer who had taken the call from dispatch began to think it might be more serious than first reported. He and two officers went to the accused's residence armed with carbines and wearing hard body armour. After police hailed the house with a loudspeaker, a relative of the accused emerged who was then restrained and put in the police vehicle. The officers were met at the door by three young children who appeared fine and were not upset and answered that the person who had fired the shot had left and there were firearms in the house. The children reported that the man had fired the shot in the air outside where they were playing because they were not cleaning as they had been instructed to do. A search proceeded, and a Winchester rifle was found in plain view in the accused's son's bedroom as well as three firearms in soft cases lying on a table. A gun cabinet was opened after the officer determined it was unlocked. The officers then seized 31 firearms without a warrant and secured them in a police vehicle. The officer testified that the firearms were seized because of their improper storage and because the accused was known to be difficult and was about to return to his residence. The accused arrived, refused to interact with the police and locked the door. The defence brought a Charter application on the basis that the accused's s. 8 Charter rights had been breached. A blended voir dire and trial was held. The issues were: 1) whether the Crown had proven that the seized guns met the Criminal Code definition of "firearm"; 2) whether the officers had breached the accused's s. 8 Charter rights when they entered and then searched his house; 3) whether the officers had breached the accused's s. 8 Charter rights when they seized the firearms; and 4) if there had been a Charter breach, should any evidence be excluded pursuant to s. 24(2) of the Charter? HELD: The Charter application was granted. The accused was acquitted after the evidence was excluded pursuant to s. 24(2) of the Charter. The court found with respect to each issue that: 1) the Crown had proven that seized guns were "firearms" within the meaning of s. 2 of the Criminal Code. Although only one gun had been tested, it inferred from the circumstances that the others seized met the definition. The firearms were owned by the accused, and he was responsible for their proper care and storage; 2) the accused's s. 8 Charter rights had been breached by the officers when they entered his house and searched it. Based on its assessment of the evidence, the court was satisfied that the officers had formed a plan to search the house before speaking to the children. The circumstances of their entry did not establish a necessity, reasonably and objectively considered, to address an imminent threat to the safety of the public or themselves. Once the officers

ascertained that no one was in the house with weapons, and no one needed assistance, there was no further immediate threat to safety. There was no reasonable basis for opening the gun cases and safe. They had the means to secure the house and could have sought a warrant authorizing a further search; 3) if the officers had been lawfully in the residence and their searches lawful, s. 489(2) of the Code permitted them to seize the firearms as they were evidence of the commission of an offence pursuant to s. 86(2); and 4) after conducting a Grant analysis, the evidence should be excluded. The breach of the accused's s. 8 Charter rights by the officers' entry and search of his residence was serious despite being well-intentioned. They did not give due consideration to the objective circumstances that anyone was in danger. The breach had an extremely serious impact on the accused's privacy rights. In consideration of all the circumstances of the case, the evidence ought to be excluded.

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R v Awasis, 2020 SKPC 41

Segu, October 22, 2020 (PC20036)

Constitutional Law - Charter of Rights, Section 11(b)

The accused was charged with sexual assault alleged to have occurred in February 2018. The information was sworn the next day, but the accused could not be located. The police sought a warrant for arrest on that date but it was not executed until 328 days later. 31 months and 12 days had elapsed from the date the information was sworn until the trial date of October 1, 2020. The defence brought a Charter application on the grounds that the accused's s. 11(b) rights had been violated because the delay violated the presumptive 18-month ceiling set out in Jordan, and requested a judicial stay of proceedings. The Crown argued that there were significant periods of time that could be attributed either to the accused's actions or the global pandemic and when such periods were deducted, the remaining delay was within the prescribed timelines. The defence conceded that the pandemic constituted an exceptional circumstance. However, it asserted that the clock began ticking when the information was sworn.
HELD: The Charter application was dismissed and the matter would proceed to trial. The court found that the total period of delay was 16 months and was within the prescribed time period. For the purposes of calculating the delay, the starting point was the date of the accused's arrest: January 13, 2019, following the decision in R v McCullough. The total delay was 627 days and the only time deducted from it as attributable to defence delay was 35 days. As the total of 592 days still exceeded the presumptive ceiling, the Crown was required to,

and had, successfully established that the pandemic constituted exceptional circumstances. When 99 days were deducted because of the closure of the courts due to COVID-19, then the total delay amounted to 16 months.

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R v Donald, 2020 SKPC 44

Schiefner, October 22, 2020 (PC20037)

Criminal Law - Sentencing - Conditional Sentence Order - Breach
Statutes - Interpretation - Criminal Code, Section 746.2

The accused was placed on a Conditional Sentence Order (CSO) on July 29, 2020, after pleading guilty to certain Criminal Code offences. It included the condition that the accused was required to report to a supervisor within two days. The accused spoke to a probation officer at Prince Albert Corrections on the day she received the CSO and advised her that she had been placed on a new order by the court following the five months of her previous release order. The officer told her that she was no longer required to comply with the rules of her release order and that she should phone the next day to speak to someone about her new CSO. The accused failed to do so. She testified that she didn't understand what would happen next on her CSO or her reporting obligations but did understand that she was to call the next day. She could not explain why she didn't make the call but offered that she telephoned the office on August 5 and left a message with her name and phone number. The supervisor at the Community Corrections office testified that all contacts made with it were recorded in the Criminal Justice Information Management System. A phone call from the accused was received on that date, but no message had been recorded. The defence submitted that the Crown was required to prove subjective mens rea. The Crown argued that a breach of a CSO differed from other criminal proceedings.
HELD: The accused had breached her CSO. The court found that the Crown was required to prove subjective fault in breach proceedings based upon its review of s. 742.6 of the Criminal Code. Regardless of the ambiguity in the section, the presumption should remain that subjective fault is an element of any proceedings where the consequences of state action can significantly affect an accused's liberty. The Crown had to meet the burden of proof of breach of a CSO on a balance of probabilities: that the accused was required to report at a specific place and time pursuant to the terms of the CSO and that she knowingly or willfully failed to do so. In this case, the court did not believe that the accused was confused. She understood her obligations to report by telephone on July 30 and had knowingly or willfully failed to report. Although she called the appropriate

number, the evidence supported that she had not left a message. That conduct was consistent with the accused being knowingly or wilfully blind to her obligations. Once the Crown proved a breach, then under s. 742.6 of the Code, the accused could argue that she had a reasonable excuse, but the court did not find that she had one.

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R v Daniels, 2020 SKPC 37

Schiefner, October 30, 2020 (PC20039)

Criminal Law - Possession of Stolen Property

The accused was charged with being in possession of stolen property. She testified that she had been awakened by a man she knew only slightly who asked her to drive him to a nearby location. As this person appeared high on something, and she did not want him to cause a disturbance in the apartment where she was living with her aunt, she agreed. She said that she knew that the person did not own a car. The vehicle appeared undamaged and did not occur to her that something might be wrong until later when the man began sweating and acting paranoid. She pulled into an alley behind the building where he wanted to go and parked. She intended to walk home, but before she could give the keys to the man, the police arrived, and he walked away in the other direction. At that point, she realized that the vehicle was probably stolen. In his testimony, the police officer stated he followed the vehicle because he observed that the driver appeared to be taking evasive action when he got close to it. When he arrived where it was parked, the accused was standing beside it. He detained her and found the key fob in her pocket. The Crown argued that the accused either knew the vehicle was stolen or was willfully blind to the possibility because her evidence showed that she knew the accused did not have a car and was behaving suspiciously. She also took evasive action when she noticed the police vehicle, which was consistent with guilty knowledge. The fact that she still had the keys when she was stopped demonstrated a continuing intention to possess the vehicle. The issue was whether the Crown had proven the mens rea of the offence: that the accused knew the vehicle was stolen together with a continuing intent to possess it.
HELD: The accused was acquitted. The court found that the Crown had proven the three elements of possession but had not established that they co-existed simultaneously. It accepted the accused's testimony as plausible, cogent and sufficient to raise a reasonable doubt that she knew the vehicle was stolen when she agreed to drive the man. It was not satisfied that the evidence established that the accused's realization that it was stolen occurred at any point prior to when the police arrived and the man walked away. She had no intention of possessing it after she knew it was stolen.

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R v B.V., 2020 SKPC 45

Kovatch, October 28, 2020 (PC20041)

Criminal Law - Sentencing - Young Offender
Criminal Law - Assault - Sexual Assault - Young Offender - Sentencing

The accused pled guilty to sexual assault contrary to s. 271 of the Criminal Code. The offence was committed when the accused was 16 years old, and the complainant was 13. The accused had known her before the offence and was aware of her age. The complainant visited the accused when he was alone at his parentsâ€™ home. He offered her vodka to drink because she had asked for beer, and there was none. The accused indicated that he wanted to have sex, but the complainant said she was very drunk, and it wouldn't be right. At some time, however, they did have sexual intercourse. The complainant told her mother of the incident the next day, and the matter was reported to the police. She said that she had little recollection of the events and was confused. The Crown suggested that because the accused supplied the complainant with alcohol and knew that she had not consented, this was a very serious and violent sexual assault. Thus, under s. 39 of The Youth Criminal Justice Act (YCJA), a custodial sentence was available. It asked for a sentence of 120 days of open custody, 80 days of closed custody, followed by 40 days of community supervision and 16 months' probation. It did not request a sentencing hearing. The defence argued that the complainant was a willing participant and that the accused would never have participated in sexual intercourse if the complainant had not consented. He had only entered a guilty plea because s. 150.1(1) of the Criminal Code provides that the complainant's consent to sex gave him no defence. It submitted that nothing could be gained from a custodial sentence. According to the authors of an adolescent sexual offence risk assessment and a Pre-Sentence Report, the accused was at the lowest risk to re-offend sexually. He was a good student and participated in sports at his high school while maintaining part-time employment. His family was described as strong and supportive. The accused indicated that he would participate in any treatment or counselling the court might order.
HELD: The accused was sentenced to 18 months' probation with multiple conditions. The court found that as the Crown had not requested a sentencing hearing to prove beyond a reasonable doubt the aggravating factor of forced intercourse, it decided to pass sentence on the basis of the complainant being a willing participant. Under s. 42(5) of the YCJA, a sentence of deferred custody was not available as this offence caused the complainant serious psychological harm. Although a custodial sentence was possible under s. 39 of

the YCJA, it was not a sentence that had to be imposed automatically. The court had to consider the other sentencing principles under the YCJA: that rehabilitation of the accused and reintegration is the paramount factor in sentencing youth. In light of the reports submitted concerning the accused's risk to re-offend, the absence of a criminal record, his willingness to participate in programming, and his supportive family, the court concluded that a probation order would be an appropriate sentence.

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