The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
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Caldwell, February 21, 2018 (CA17123)

Civil Law – Appeal – Leave to Appeal
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The applicant sought leave to appeal against an order in a fiat issued in December 2017 in which a Queen's Bench chambers judge varied an earlier order (see: 2010 SKQB 411). The original order granted the applicant "exclusive possession" of a ranch jointly owned by the applicant and the respondent. The fiat varied the order by awarding exclusive possession of the ranch to the respondent. The applicant's grounds for his prospective appeal were that the chambers judge had erred with respect to making provisions regarding the income from the ranch. The application for leave to appeal was not required by The Family Property Act (FPA) because s. 55 gives an unlimited right of appeal. However, there were questions associated with whether the original order was granted under the FPA.
HELD: The application was dismissed. The court advised the applicant he was free to file a notice of appeal from the December fiat. It found that regardless of whether the original order had been made pursuant to the FPA, the December fiat had been made pursuant to it and that was determinative of the question of whether leave to appeal was required.

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

The Crown sought leave to appeal and appealed the acquittal of the respondent in the Court of Queen's Bench sitting as a summary conviction appeal court, pursuant to s. 839 of the Criminal Code (see: 2017 SKQB 9). The respondent had appealed his conviction after his trial in Provincial Court (see: 2015 SKPC 112). He had been charged with driving while his blood alcohol level exceeded the legal limit. He argued that his s. 10(b) Charter right had been violated because after arresting him, the police officer advised him of his right to counsel and then asked him if he understood his right. The respondent answered affirmatively, but the officer had not gone on to ask him if he wanted to speak to a lawyer when he was in the police cruiser. The officer was the only witness to testify at the voir dire. He relied upon his notes and read that the respondent had declined to call a lawyer. The trial judge found that the patrol car video clearly showed that, at the roadside, the respondent had not been asked if he wanted to call a lawyer and had not declined to do so. The officer's notes indicated that he had again asked the respondent at the police station if he wanted to call a lawyer and the trial judge noted the inaccuracy. The judge concluded that the inaccuracies affected the reliability of the officer's evidence but determined that despite the omission to ask the respondent whether he wanted to contact a lawyer, the respondent was properly informed of his s. 10(b) Charter right as it was made clear to him that that legal advice was immediately available, including free Legal Aid. As there was no Charter breach, the Certificate of Analysis was admitted and the respondent convicted. On appeal, the appeal judge concluded that the failure of the police officer to ascertain whether the respondent wanted to contact counsel constituted a breach of s. 10(b). In conducting a Grant analysis, the appeal judge decided that the Certificate should not be admitted and thus there was no evidence to support the conviction. The Crown's grounds of appeal were: 1) had the appeal judge erred in concluding that an officer who had complied with the informational component of s. 10(b) of the Charter also had the duty to ask a detainee whether they want to consult with a lawyer; 2) if there was a duty, had the evidence before the appeal judge supported the conclusion that the officer had not complied with it; and 3) whether the appeal judge erred in law by

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excluding the Certificate pursuant to s. 24(2) of the Charter.
HELD: Leave to appeal was granted and the appeal allowed. The court restored the trial judge's conviction. It found with respect to the first issue that there had been no breach of the respondent's s. 10(b) Charter right. Police officers do not have a duty under s. 10(b) to ascertain whether a detainee wishes to invoke their right to counsel. As a result it was unnecessary for the court to address the second and third issues.

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R v Turcotte, 2018 SKCA 16

Herauf Ryan-Froslie Schwann, March 7, 2018 (CA17128)

Criminal Law – Assault – Sexual Assault – Victim under 16 – Conviction - Appeal

The appellant appealed his conviction for sexual assault on a minor contrary to s. 271 of the Criminal Code. Because the appellant had testified at his trial and denied all of the accusations made against him by the complainant, the central issue was credibility. The appellant pointed to comments made by the Provincial Court trial judge that showed he had erred in law by relying upon his rejected testimony as affirmative evidence of guilt.
HELD: The appeal was allowed, the conviction set aside and a new trial ordered. The trial judge erred when he used the appellant's evidence, which he had rejected, to confirm or support the testimony of the complainant without any finding of concoction or fabrication required to support its use for that purpose. Having rejected the appellant's evidence, the trial judge erred in using it as evidence against him to support a finding of guilt. The verdict would not necessarily have been the same if the judge had not made the error.

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Saskatchewan v Racette, 2018 SKCA 17

Caldwell, March 16, 2018 (CA17126)

Civil Procedure – Court of Appeal Rules, Rule 15
Civil Procedure – Appeal – Stay of Execution – Application to Lift
Statutes – Interpretation – The Proceedings Against the Crown Act, Section 19(5)

The respondent brought an action for damages for breach of contract against the appellants, Ladham and the Government of Saskatchewan. After trial, the jury awarded pecuniary damages of $5 million to the respondent. The appellants appealed the judgment and the as-yet unassessed costs award. The respondent applied to lift the automatic stay of execution imposed under rule 15(1) of The Court of Appeal Rules resulting from the appeal by the government and only in part: he requested $1.13 million of the damages award or alternatively the costs award at trial to assist him with the financial burden of responding to the appeals. The parties agreed that the costs award could range between $200,000 and $400,000. The respondent applicant did not supply evidence of his financial situation. The appellant government opposed the application and in the alternative, relied upon s. 19(5) of The Proceedings Against the Crown Act to suspend payment under the judgment. The issues included: 1) whether at law an automatic stay is imposed on the execution of this judgment under rule 15(1); and 2) whether the stay should be lifted.

HELD: The application was granted in part. The court lifted the stay to permit the applicant to receive a portion of the award of trial costs, to be limited to $100,000. The court found with respect to each issue that: 1) the automatic stay of execution under Court of Appeal rule 15(1) applied in the circumstances. Section 19(5) of the Act applied to money judgments against the provincial Crown. The Crown was entitled to seek a suspension of its statutory payment obligation (i.e. a stay of execution) pending an appeal of a judgment. Court of Appeal rule 15 laid out the framework through which the court exercised the discretion given to it under s. 19(5) of the Act; and 2) there was no basis upon which to lift the stay with respect to the whole or part of the pecuniary damages award. Although the court accepted the applicant’s claims of financial hardship, no supporting evidence was provided by the applicant to conclude the release of the amount requested would be necessary to justify it. In the interests of fairness and equity, the court lifted the stay to permit the applicant to receive a maximum of the first $100,000 of the costs to be awarded to him after assessment had been completed.

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R v Rogal, 2018 SKCA 18

Richards Ottenbreit Schwann, March 22, 2018 (CA17129)

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

– Appeal
Constitutional Law – Charter of Rights, Section 7 - Appeal

The appellant was convicted in Provincial Court of impaired driving and driving while his blood alcohol content was over .08. He appealed both convictions to the Court of Queen's Bench sitting as a summary conviction appeal court. The appeal judge allowed the appeal regarding impairment but dismissed the appeal of the .08 conviction. The appellant appealed that dismissal. Before the trial, a voir dire had been held because the appellant made a Charter application alleging that his s. 8, s. 9 and s. 10(b) Charter rights had been violated. The court heard testimony from the arresting officer and reviewed evidence provided by two video recordings taken while the appellant was in the interview room and in the cell block. The defence counsel requested an adjournment because he believed that the Crown could provide another video that would show that there had been delay in taking the breath samples. The trial judge refused the request because the videos in evidence were sufficient to establish what had transpired. The defence did not make an application under s. 7 of the Charter during the voir dire nor in the three months following it before the trial judge delivered his decision that there had been no breaches of the Charter under s. 8, s. 9 or s. 10(b). On appeal, the defence argued that the trial judge erred by failing to adjourn the trial and by convicting the appellant of impaired driving when there was insufficient evidence. The Crown conceded the second ground, resulting in the conviction being set aside. The appeal judge concluded that the adjournment had not been an abuse of process and did not call for a Charter remedy. He found as well that the appeal could be dismissed under s. 686(1)(b)(iii) of the Criminal Code because no miscarriage of justice had resulted. In the appeal from the appeal judge's decision, some of the grounds were that the appeal judge had erred by: 1) not accepting that there was a breach of the accused's s. 7 Charter rights because the Crown had not provided the other video and the trial court had failed to adjourn the matter so that it could be produced; and 2) failing to find a miscarriage of justice because the adjournment was denied.
HELD: The appeal was dismissed. The court found regarding each issue that the appeal judge had not erred: 1) because the s. 7 Charter issue was never properly before the trial or the appeal court; and 2) in finding that the trial judge's refusal to grant an adjournment resulted in a trial that would not be perceived as unfair by a reasonable person. There was no merit in the appellant's position that the further video sought at trial would have been of meaningful assistance regarding delay given the timing of the breath samples.

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R v Podolski, 2018 SKPC 13

Bazin, March 14, 2018 (PC17104)

Criminal Law – Judicial Disqualification

After the Provincial Court judge decided not to accept the accused's guilty plea, the Crown made an application for the judge to recuse himself from the trial of the matter. The Crown argued the proposition that a judge is automatically disqualified from conducting a trial on a matter when the accused's guilty plea had not been accepted. Its position was not based upon disqualification on the basis of bias.
HELD: The application was denied. The Crown was in effect alleging institutional bias and putting forth a new automatic or peremptory disqualification category without providing any authority to support the proposition.

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R v Weinbender, 2018 SKPC 15

Kovatch, March 8, 2018 (PC17103)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Roadside Screening Devices
Constitutional Law – Charter of Rights, Section 8, Section 9

The accused was charged with impaired driving and driving while his blood alcohol content exceeded .08. The defence brought a Charter application, alleging that the accused's s. 8 and s. 9 Charter rights had been violated. A voir dire was held. The only witness called was the RCMP officer who had stopped the accused's vehicle because he noticed that one headlight was out. The officer detected a slight smell of alcohol while he spoke to the accused and asked him if he had been drinking. The accused said that he had had one drink. The officer directed the accused to come with him to the police cruiser to take the ASD. At the cruiser the officer performed a quick pat-down search over the accused's clothes after which he seated the accused in the rear seat of the cruiser. The accused took the test and failed it. The defence submitted that the practice used by the officer in this case of performing a pat-down prior to the ASD and locking the accused in the back of the cruiser contravened his Charter rights.

The officer testified that these were standard procedures he followed for the purposes of safety. The issues were whether: 1) the officer's use of general procedure and placement of the accused in the back seat of the police cruiser resulted in an arbitrary detention of the accused, contrary to s. 9 of the Charter. A less restrictive detention could have been utilized, such as taking the machine to the accused's vehicle; and 2) the pat-down search of the accused prior to his placement in the police cruiser resulted in an unlawful search and seizure and infringed his rights under s. 8 of the Charter. The defence argued that as the accused posed no kind of threat or danger to the officer, the pat-down was unjustified.
HELD: The application was dismissed. The court found that there had been no breaches of the Charter. With respect to each issue it held that: 1) the detention was not arbitrary under s. 9 of the Charter. The words of s. 254(2) of the Code authorize the police to detain an individual for an ASD test and require the detainee to accompany a police officer to provide a breath sample; and 2) there was no unreasonable search and seizure under s. 8. The pat-down was done for officer safety and it was minimally intrusive.

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Hood v Hrycyna, 2018 SKQB 63

Scherman, February 22, 2018 (QB17466)

Power of Attorney -- Capacity

The applicant sought a declaration that a power of attorney (POA) executed in 2010 regarding Vera Hrycyna remained valid and operative, and thereby finding that a subsequent POA in favour of the respondent, Peter Hrycyna, was invalid. The applicant also applied to be appointed as the personal and property guardian of Vera under The Adult Guardianship and Co-decision-making Act (AGCA) on the grounds that Vera was incapable of making appropriate personal or property decisions due to dementia. The respondent opposed both applications. Vera had begun living with the applicant in 2016 because the applicant believed that she was developing dementia. In 2017, the applicant's belief was confirmed after an assessment had been conducted of Vera by a geriatric psychiatrist and a practitioner of geriatric medicine. The doctors concluded in April 2017 that the Vera was incapable of making informed decisions about her personal life, health care or finances. They issued a letter advising that Vera should not sign any legal document or

make any changes to pre-existing versions of legal documents such as a POA or a will. A month after the assessment, the applicant agreed to the respondent's proposal that he take Vera for a short visit with him, but he failed to return her to the applicant's home. In June 2017, the respondent obtained a physician's letter stating that Vera was of sound mind and able to manage her own affairs. After Vera executed various legal documents, such as appointing the respondent her POA, a lawyer advised the applicant in September 2017 that he had been retained by Vera to deal with the applicant's abuse of the authority given by the POA and that it had been revoked and a new attorney appointed. Vera had executed an enduring POA appointing the respondent as her personal and property attorney before this lawyer and he had completed a certificate of legal advice stating he explained the nature and effect of an enduring POA to Vera and, in his opinion, Vera could understand the nature and extent of the grant at the time she signed it. The doctors who assessed Vera in April then swore affidavits in support of the applicant's application for appointment as Vera's personal and property guardian. The applicant served her two applications on the respondent and Vera. The lawyer who had met with Vera in September swore an affidavit in which he declared that he formed the opinion that she was fully aware of the matters being discussed and was competent to give instructions. The respondent argued that if the grantor understands the nature and effect of the document at the time of signing, it is valid and enforceable and the fact that the grantor lacks capacity at other times is of no legal consequence. Here, the evidence established that Vera had the capacity to execute the September 2017 POA which revoked the 2010 POA in favour of the applicant.
HELD: The applications were granted. The court accepted the opinions of the physicians who assessed and diagnosed Vera as having advanced dementia in April 2017 and found that Vera did not have the capacity to either grant a POA to the respondent or revoke the POA granted to the applicant. The 2010 POA remained valid. The court decided it was appropriate to appoint the applicant as guardian under the AGCA without a hearing pursuant to s. 10 on the basis of the physicians' affidavits regarding their assessment of Vera and in the absence of any credible evidence to the contrary.

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Bacik v Vitalaire Canada Inc., 2018 SKQB 71

Chow, February 28, 2018 (QB17455)

Civil Procedure – Queen's Bench Rules, Rule 7-1, Rule 7-3
Statutes – Interpretation – The Automobile Accident Insurance Act, Section 40.1, Section 103(1), Section 104

The plaintiffs, the administrators of the estate of their deceased parents, brought an action that sought damages, funeral expenses, their lost earnings as a result of the death of their parents in a motor vehicle accident in 2013, and damages for grief and loss suffered by them and their two siblings and for damages pursuant to the provisions of The Fatal Accidents Act (FAA). Their parents had not elected tort coverage pursuant to s. 40.2 of the Automobile Accidents Act (AAIA) and thus Part VIII of that Act applied to them and to the accident. The plaintiffs also sought damages for future loss of the income of their parents. The vehicle accident was caused by the defendant Reynolds who was operating the other vehicle. Reynolds was an employee of the defendant Vitalaire and the vehicle was leased by it. In 2015, Reynolds was convicted of two counts of dangerous driving causing death under s. 249(4) of the Criminal Code. The defendants applied pursuant to Queen's Bench rule 7-1 for a determination of two questions of law: 1) were the plaintiffs entitled to maintain an action for damages pursuant to s. 103 and/or s. 104 of the AAIA; and 2) were they entitled to maintain an action for damages pursuant to the provisions of the FAA?
HELD: The court found that the plaintiffs were precluded from pursuing their claims under s. 103 of the AAIA and the FAA and those claims were struck pursuant to Queen's Bench rule 7-3(a). The plaintiffs' claim regarding non-economic loss pursuant to s. 104 of the AAIA was allowed to proceed. The court found with respect to the questions of law that: 1) s. 103 of the AAIA limits recovery of economic loss only to the insured's surviving spouse or dependants, and thus the plaintiffs were not eligible. The issue for determination under s. 104 of the AAIA was the proper interpretation of the term "intentionally" as used in s. 104(2)(a)(ii)(A) and the plaintiffs would have to prove at trial that Reynolds intended to cause bodily injury or death; and 2) s. 40.1 of the AAIA precluded the plaintiffs from pursuing relief under the FAA.

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Van Ooyen v Carruthers, 2018 SKQB 73

Danyliuk, February 28, 2018 (QB17457)

Civil Procedure – Trial – Application for Mistrial

The self-represented petitioner applied for a mistrial during a child custody trial. Her grounds were related to relationship issues with the respondent, that he was having her followed and an alleged wrongful arrest by the police.
HELD: The application was dismissed. The petitioner was unable to point to anything in the trial process that would render the continuation of the trial unfair to her.

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Straker v Lavoie, 2018 SKQB 76

Wilson, March 2, 2018 (QB17459)

Family Law – Custody and Access – Interim
Family Law – Child Support – Interim
Civil Procedure – Queen's Bench Rules, Rule 15-19, Rule 15-49

The respondent brought an application to vary an interim parenting and child support order made in January 2017. When the order was made, the respondent was working in Lloydminster in the oil industry on a two-week, one-week-off basis and earning $100,000. The interim order granted the parties joint custody with the principal residence of their four-year-old daughter to be with the petitioner mother. The respondent's parenting time would occur during his week off when he was at home in Regina. Child support was set at $842 per month based upon the respondent's 2015 income. His share of s. 7 expenses was 57 percent. The respondent lost his employment in Lloydminster and the only work he could obtain in Regina was installing siding. His income had dropped and he predicted it would be only $33,600. Due to his changes in employment and income and the fact that he was residing only in Regina, the respondent sought to change the interim order to permit joint equal shared parenting on a rotation of two, two and three days and to reduce his child support payment.
HELD: The application was granted in part. The court noted that the respondent had mistakenly brought an application to vary in Form 15-49 under Queen's Bench rule 15-49. As it was an interim order, the respondent should have used a notice of application under rule 15-19(1). The court found that it would not be in the best interests of the child to change the interim order insofar as her principal residence was concerned, but that it would change and increase the amount of parenting time allotted to the respondent. The court agreed with the petitioner that income should be imputed to the respondent. The court decided that his income for the purposes of s. 3 child support should be $66,700

per annum, which was the same as the income earned by the petitioner. The respondent should pay $557 per month in child support in $236 in s. 7 expenses.

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R v Ermine, 2018 SKQB 77

Scherman, March 6, 2018 (QB17467)

Criminal Law – Robbery – Armed Robbery
Criminal Law – Evidence – Identity

The accused was charged with robbery contrary to s. 344(1)(b) of the Criminal Code. Three individuals committed an armed robbery of a hotel and four separate surveillance cameras recorded the crime. Two of the individuals pled guilty. They testified at the trial of the accused that they did not know who the third individual was. In the video, the third person was wearing sunglasses and a hat and his face was never clearly visible. At issue in the trial of the accused was whether he was the third individual. Two police officers testified that they could identify the accused as one of the individuals shown in the video because they had met him the day after the offence when they had been called to help a taxi driver with a passenger. The passenger was carrying a large bundle of cash. The officers identified the accused as the passenger. When they interviewed him, he had a distinctive tattoo on the back of one of his hands and on his face, a unique haircut and was wearing a gold chain. After reviewing the video, the officers concluded that the passenger was the same person shown in the video carrying a sawed-off shotgun. The defence argued that the video footage was the real evidence of what transpired and as it was the best evidence, the court must make its identification decision based upon it.
HELD: The accused was found guilty. The court was able to view the video using freeze frame images and could see that the robber was wearing a gold chain and had a tattoo on his hand as described by the officers. The court found the tattoo to be compelling evidence of identification and coupled with the other evidence it was satisfied beyond a reasonable doubt that the accused was the third individual shown in the video footage of the robbery.

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Sun Country Regional Health Authority v Mamchur, 2018 SKQB 79

Kalmakoff, March 6, 2018 (QB17461)

Civil Procedure – Queen's Bench Rules, Rule 7-1
Statutes – Interpretation – The Provincial Health Authority Act, Section 3-4

The plaintiff, Sun Country Regional Health Authority (SCRHA), applied for determination of an issue in advance of trial under rule 7-1 of The Queen's Bench Rules. It had brought its claim against the defendant in 2015 for breach of contract, alleging that after paying him $25,000 per year to fund his medical studies under their contract, he breached his obligation to practice medicine for SCRHA for the next four years. The defendant denied any breach of the bursary agreements and alleged that SCRHA fundamentally breached or frustrated the agreements by failing to exercise good faith in its negotiations and communications with him and how it executed the agreements. It also failed to ensure that he would be offered the practice placement that was held out to him and failed to provide him safe and reasonable working conditions. The defendant filed a counterclaim alleging that SCRHA had not taken the steps necessary to ensure that he could practice in a location acceptable to him and sought damages for lost wages, punitive or exemplary damages. He also amended his statement of defence, arguing that under the retroactive provision of s. 3-4 of The Provincial Health Authority Act that came into force in December 2017, all the bursary agreements were now between him and the provincial body, and as he had in fact practiced with the SCRHA since 2014 and into the future, he had complied with alleged contractual agreement. After this amendment was made, the SCRHA brought its application under rule 7-1 on the basis that the question of whether the retrospective application of the Act might operate as a complete defence to their claim against the defendant. He opposed the application, reasoning that it was unlikely to reduce costs or delay because even if the court ruled in his favour on the question, it would not dispose of his counterclaim and other applications before the court and further, making a determination regarding the retrospectivity question in the context of this action would require a determination of facts that were in dispute.
HELD: The application was dismissed. The court found that this was not a case in which deciding the issue in advance of trial under Queen's Bench rule 7-1 would serve a useful purpose, based upon the existence of significant factual dispute and because even if the decision favoured the defendant, it would leave his counterclaim outstanding.

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Thompson v Kletzel, 2018 SKQB 80

Elson, March 7, 2018 (QB17462)

Civil Procedure – Queen's Bench Rules, Rule 3-31, Rule 3-71
Torts – Negligence
Civil Procedure – Parties – Application to Add Third Party Defendant
Statutes – Interpretation – Contributory Negligence Act, Section 7, Section 10
Courts and Judges – Stare Decisis

The plaintiff sued the defendants for damages suffered by him as a result of a police investigation and criminal prosecution. He had been arrested and charged with sexual assault and other offences but was acquitted. His statement of claim pled two causes of action: malicious prosecution and negligence. The four defendants were comprised of three RCMP officers and the Crown Prosecutor. The statement of defence filed by the officers denied any negligence or malice in their conduct. The claim against the prosecutor was in malicious prosecution. In the prosecutor's statement of defence, she denied any wrongdoing in the conduct of the prosecution and asserted that it was undertaken with reasonable and probable cause and that she met the requisite prosecutorial standard. She then applied for leave as required by Queen's Bench rule 3-72(1)(c)(ii) to amend her statement of defence and to issue a third party claim under s. 7 of The Contributory Negligence Act against the lawyer who represented the plaintiff both in the criminal proceeding and in the civil action. The defendant applicant asserted that the lawyer was negligent in his representation of the plaintiff at a show cause hearing under the judicial interim release provisions of the Criminal Code. The plaintiff's claim for damages related in part to his continued detention after his bail application was denied. The defendant applicant proposed a third party claim under Queen's Bench rule 3-31 to add the lawyer as a third party. Her proposed amendment to her pleadings contained similar allegations of the lawyer's negligence as responsible for the plaintiff's continued detention. The court defined the issues as whether: 1) it was permissible for an alleged tortfeasor to pursue an action for contribution and indemnity against a negligent tortfeasor under s. 10 of The Contributory Negligence Act; and 2) the proposed third party claim and amendment to the statement of defence constituted an abuse of process that would result in leave being denied.

HELD: The application for leave was dismissed regarding the proposed third party proceedings and the proposed amendment. The court found with respect to each issue that: 1) it remained bound by the decision of the Court of Appeal in Chernesky that held that s. 10 of the Act would not permit a defendant, defending an allegation of an intentional tort, to pursue a claim for contribution and indemnity against an alleged tortfeasor accused of negligence; and 2) to grant the defendant's applications would require the court to re-litigate the show cause hearing and would constitute a collateral attack on the Provincial Court decision that would be an abuse of process.

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Saskatchewan (Government Insurance) v Young, 2018 SKQB 81

Chow, March 8, 2018 (QB17468)

Insurance – Automobile – Insurable Interest – Appeal
Statutes – Interpretation – Traffic Safety Act, Section 2(x)
Statutes – Interpretation – Automobile Accident Insurance Act, Section 78, Section 39
Statutes – Interpretation – Small Claims Act, 1997, Section 40

The appellant, Saskatchewan Government Insurance, appealed as of right pursuant to s. 39 of The Small Claims Act, 1997 (rep.) from the decision of the Small Claims Court granting judgment in favour of the respondent (see: 2015 SKPC 56). The owner of a vehicle had allowed the registration to lapse when his driver's licence was suspended in 2011. He executed a transfer of the vehicle in favour of the respondent, his roommate, who paid the nominal sum of $5.00, whereupon the insurance agent issued a certificate of registration and insurance. The original owner worked out of town and the respondent used the vehicle for his own purposes. After an accident, the respondent filed a proof of loss and the appellant determined the vehicle a total loss. The appellant then obtained statements from the respondent and the holder of the previous registration wherein they disclosed the facts leading to the respondent's operation and registration of the vehicle and the appellant concluded that the respondent had no financial interest and therefore no insurable interest in the vehicle. SGI advised the respondent that the vehicle had been improperly registered and the insurance coverage was retroactively cancelled and his claim denied. The respondent brought an action in Small Claims Court and the judge awarded damages in the amount of $8,500. The issues were whether the trial judge erred: 1) in concluding that the appellant's application

of the common law principle of insurable interest in this case was a discretionary exercise of policy or that the principle was not a valid basis upon which to deny coverage pursuant to The Automobile Accident Insurance Act (AAIA); 2) in law by not properly considering material evidence of the respondent's lack of ownership and beneficial interest in the vehicle and by finding the respondent properly insured same; 3) in law by failing to consider the provisions of s. 78 of the AAIA; and 4) in awarding damages.
HELD: The appeal was allowed and the matter remitted to the Small Claims Court for a new trial. Applying the appropriate standard of review, the court found with respect to each issue that the judge: 1) had not erred in concluding the respondent had an insurable interest in the vehicle. He correctly identified and applied the relevant law to the facts as he found them and based upon the uncontroverted evidence, the findings of fact were reasonable; 2) had not erred. He identified and applied the relevant law to the facts and found that the respondent was the owner based upon the findings of fact and was entitled to register the vehicle. It was not necessary for him to find that the respondent was the only owner; 3) had erred in failing to consider s. 78 of the AAIA. Although the matter was raised in oral argument, the judge did not refer to s. 78 in arriving at the conclusion he did; and 4) had erred in law in awarding damages. Under s. 39 of the AAIA, there is a procedure setting out how the value of a vehicle is to be determined, and judge exceeded his jurisdiction by accepting the respondent's appraisal of the value as the basis of his award.

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Keck v Balgonie Early Learning Centre Inc., 2018 SKQB 82

Zarzeczny, March 9, 2018 (QB17463)

Contract – Breach – Damages
Statutes – Interpretation – The Non-Profit Corporation Act, 1996, Section 225
Civil Procedure – Queen's Bench Rules, Rule 7-5

The plaintiffs first commenced a claim in Provincial Court in November 2015 and then commenced a proceeding in Queen's Bench by an Originating Application in August 2016 against the defendant non-profit corporation and its directors. The defendants applied for and were granted a stay of the Queen's Bench action until the first action was determined. The Provincial Court judge's decision after trial was that the defendants had not

wrongfully and improperly terminated the plaintiffs' contract for the provision of early learning and child care services to their son. The judge found that he did not have jurisdiction to deal with the plaintiffs' claim under s. 225 of The Non-Profit Corporations Act, 1995 (see: 2017 SKPC 39). Counsel for the defendants then reinitiated the application challenging the plaintiffs' claim in Queen's Bench. The defendants applied for a dismissal of the Originating Application by way of summary judgment under Queen's Bench rule 7-5 or, alternatively, to have it struck pursuant to rule 7-9.
HELD: The application for summary judgment was granted and the plaintiffs' action was dismissed pursuant to Queen's Bench rule 7-5. The court found that it was an appropriate case for disposition by summary judgment. The court agreed with the findings and conclusion of the Provincial Court judge that it was open to the defendant to terminate the contract in consequence of the plaintiff father's breaches of the defendant's Code of Conduct. As a consequence of the services contract being legally and properly cancelled pursuant to the provisions of the defendant's bylaw, the plaintiffs were no longer eligible for membership in the corporation and membership was terminated. Consequently, there was nothing in the circumstances constituting oppression within the meaning of s. 225 of the Act.

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R v Whitstone, 2018 SKQB 83

Zuk, March 9, 2018 (QB17464)

Criminal Law – Sentencing – Aboriginal Offender - Appeal

The appellant was on an 18-month conditional sentence order when she committed new offences and was charged under s. 403(1) and s. 364(1) of the Criminal Code of impersonating someone with intent to obtain groceries from a store and fraudulently obtaining food from it. She was sentenced to six months' incarceration on each charge to be served concurrently. The Crown applied pursuant to s. 742.6 of the Code to convert the unexpired portion of the appellant's conditional sentence order to be served in jail. Counsel for the appellant consented to the Crown application and the sentencing judge ordered her to spend the remaining 12 months of the conditional sentence order in a Provincial Correctional Centre. During the hearing, neither the Crown or defence counsel nor the sentencing judge raised the question of whether the appellant was Aboriginal, nor was it acknowledged in the sentencing. The appellant, representing

herself, appealed her conviction and sentence but later abandoned her conviction appeal. During her oral submissions, the appellant raised the fact that she was an Aboriginal person and that the sentencing judge failed to address the Gladue considerations. The court defined the issues as: 1) whether s. 718.2(e) of the Code imposed an obligation on a sentencing judge to determine if the offender being sentenced was Aboriginal; 2) what was the effect of a sentencing judge's failure to consider the circumstances of the offender being Aboriginal in sentencing the offender; and 3) whether a joint sentencing submission eliminated the obligation imposed on a sentencing judge under s. 718.2(e) to consider Gladue factors.
HELD: The appeal was allowed. The court set aside the sentence and the termination of the conditional sentence order. The matter was referred back to Provincial Court for sentencing. The court found with respect to the first two issues that under s. 718.2(e) of the Code, the sentencing judge was under a mandatory duty to determine whether an offender is Aboriginal. In this case, the Information charging the appellant listed her residence as being on the Thunderchild First Nation Reserve. This information ought to have drawn the sentencing judge's attention to the need to ask the appellant if she was of Aboriginal ancestry. Even if the sentencing judge took the Gladue factors into account implicitly because he knew that she was Aboriginal from her prior involvement before him, he failed to refer to such knowledge at any point in the sentencing process and the correctness of the resulting sentencing decision could not be properly assessed on appeal. Regarding the third issue, the court held that where, as here, there was a joint submission made respecting an Aboriginal offender and it failed to provide evidence of Gladue factors that enabled the sentencing judge to consider the appropriateness of the sentence in light of the offender's Aboriginal circumstances, such a submission might render the sentence open to appellate review if the judge failed in their statutory duty to conduct the inquiry and analysis required by s. 718.2(e).

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Naber v Calidon Equipment Leasing (Calidon Financial Services Inc.), 2018 SKQB 84

Zuk, March 9, 2018 (QB17465)

Statutes- Interpretation – The Saskatchewan Farm Security Act, Section 53, Section 61

The applicants entered into a series of lease agreements in which

the respondent leased farm equipment and grain bins to them over a term of 60 months with an option to purchase the equipment at a residual value. The applicants fell into arrears in the amount of $458,000. In July 2017, the respondent began enforcement proceedings to take possession of the equipment under The Saskatchewan Farm Security Act. The applicants proposed making an immediate payment of $35,000, followed by another of $50,000 by May 1st, to secure an adjournment of the enforcement proceedings to May 1, 2018. They requested a further adjournment from May to September as they intend to catch up on all of the arrears once they had completed the 2018 harvest. The respondent had no interest in extending the time for payment and argued that any delay would jeopardize its ability to market the equipment in advance of the 2018 spring seeding operations. The applicants had been experiencing difficulties since 2013 due to crop losses due to weather or the impact of the lack of railway cars available to ship grain. Their ability to pay the arrears was based only on the presumption that the 2018 crop would produce sufficient income to cover debts.
HELD: The application was dismissed. The court had the discretion under s. 53 of the Act to grant temporary relief arising from a farmer's temporary inability to pay. In this case, the court found that the applicants' financial hardship was not temporary in nature nor was their request for relief from forfeiture for a period of eight months temporary in nature. As the application was not frivolous, the respondent was not entitled to costs under s. 61 of the Act.

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R v B.T.H., 2018 SKQB 85

Danyliuk, March 14, 2018 (QB17472)

Statutes – Interpretation – Criminal Code, Section 276(2)
Criminal Law – Assault – Sexual Assault - Consent
Criminal Law – Evidence – Conduct of the Complainant – Application to Cross-Examine

The accused was charged with sexual assault. He applied pursuant to s. 276(2) of the Criminal Code to testify about his prior sexual history with the complainant and her sexual proclivities as well as to cross-examine the complainant on these matters. He argued that to make full answer and defence to the charges and in particular to advance his claim of honest but mistaken belief in the complainant's consent to the sexual acts, he must be allowed to adduce the evidence. The court found that

the applicant met the threshold of the first stage of the application that the evidence was capable of admission pursuant to s. 276(2) of the Code. The matter proceeded to an in camera hearing at which the accused testified and was cross-examined. The accused's defence of honest but mistaken belief rested on the fact that the complainant and he had been friends for a considerable time up until June 2016, when they had an intense four-day sexual relationship. They then returned to a platonic friendship but on the day of the alleged offence, the accused had visited the complainant's house and gotten into bed with her without a sexual purpose, but based upon her actions, he believed that she was trying to initiate sex with him. However, in cross-examination, the accused clearly stated that his actions on the day of the incident were not based upon what had happened between him and the complainant the year prior.
HELD: The application was dismissed. The accused had not provided any evidence that linked what happened at the time of the offence to sexual activity between him and the complainant a year earlier. The prejudicial effect of the proposed evidence would outweigh its probative value.

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Perdikaris v Purdue Pharma Inc., 2018 SKQB 86

Barrington-Foote, March 15, 2018 (QB17469)

Civil Procedure – Class Action – Settlement Approval

The plaintiff applied pursuant to s. 38 of The Class Actions Act for orders approving a National Settlement Agreement and the fees and disbursements requested by the four law firms that coordinated a national settlement of class action litigation relating to the use of OxyContin and OxyNEO. An earlier application made by the plaintiff was declined because of the judge's concerns relating to the provisions of the agreement which dealt with the subrogated claims of Provincial Health Insurers (PHIs) for cost of health services provided or to be provided to class members (see: 2017 SKQB 287). In this renewal of the application the parties provided the requested supplementary material in response to those concerns raised in the previous application, such as that class counsel would provide direct evidence from all provincial and territorial PHIs that they had approved the settlement in accordance with their subrogation legislation.
HELD: The application was dismissed. The court refused to approve the agreement because the evidence provided regarding

the approval by all PHIs in accordance with their subrogation legislation was insufficient. Further, the court was not satisfied that the agreement was fair, reasonable and in the best interests of the class because it was not convinced that the assumptions identified by class counsel as to the range of damages, average recovery, total recovery and the number of potential claimants were sound.

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Birnie v Birnie, 2018 SKQB 87

Brown, March 15, 2018 (QB17470)

Family Law – Child Support – Interim - Determination of Income

Pursuant to an interspousal agreement between the parties, the amounts of child and spousal support payable by the petitioner were set until June 2014, whereupon the parties were to exchange income tax returns as required by the Guidelines to properly assess their respective incomes and the petitioner's obligations regarding child support. After making numerous applications to obtain the information from the petitioner, the respondent sought the determination of his income or alternately, an understanding of the resources that he had access to and with which he could provide support for their two children and for her. The petitioner had incorporated his farming and cattle operation in 2015 after carrying on business before then as a sole proprietorship. In 2015, the corporation had a total value of $3,600,000 (net $1,665,000) and in 2016, it was $3,468,900 (net $1,856,200). In its 2016 financial statement, the corporation's earnings before income tax were $87,900, showing allocations for various expenses. The petitioner stated that his income from the corporation was $38,600 and that it was struggling for various reasons, such as that it needed new machinery. The respondent argued that the petitioner should have the entire pre-tax income from the corporation attributed to him, as he was either earning or capable of earning substantially more income than he claimed. The issues were: 1) whether a final support order should be made based on the material before the court; and 2) if not, what the interim order should be.
HELD: The court granted an interim order for child support. It found that it was not appropriate to make a final order as the real revenue and expense picture for the corporation had to be ascertained and that could be accomplished with greater precision when full reports, additional evidence and cross-examination were available at pre-trial or trial. The matter of

spousal support was left for pre-trial and trial because of the terms of the agreement. The court found that for the purposes of making an interim order for child support, the petitioner's line 150 income was not sufficient and not reflective of the money available to him for support, and income should be imputed to him under s. 18 of the Guidelines. The petitioner had not discharged the onus on him to establish that the corporation's retained earnings should not be utilized to ascertain the money available for support. The evidence showed that the corporation was fiscally healthy and did not require the entirety of the pre-tax corporate earnings. The court made a number of upward adjustments to the pre-tax corporate earnings and concluded that the petitioner had $129,400 available to him for child support and should pay $1,778 per month.

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Brown v Ughetto, 2018 SKQB 88

Brown, March 15, 2018 (QB17471)

Family Law – Custody and Access – Variation

The parties agreed to a consent order in 2016 regarding the terms of custody and access of their son who was then six years of age. The respondent applied to vary the consent order to obtain additional access. The respondent argued that there had been a material change in circumstances pursuant to s. 17(5) of the Divorce Act because as the child was older, more mature and in school full time, the judgment no longer suited him given his level of development as he could now appreciate travelling with the respondent. As well, the respondent's income had increased, which gave the child more opportunities.
HELD: The application was dismissed. The court found that the respondent had not established a material change in circumstances. The passage of time did not warrant changing the terms of the consent judgment, particularly in light of the fact that it had dealt with access with specific reference to the child's school schedule and holidays. The increase in the respondent's income was not a sufficient basis on which to find a material change in circumstances.

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Britto v University of Saskatchewan, 2018 SKQB 92

Danyliuk, March 22, 2018 (QB17476)

Statutes – Interpretation – The Local Authority Freedom of Information and Privacy Act

The appellant appealed to the Court of Queen's Bench under s. 46(1) of The Local Authority Freedom of Information and Privacy Act (LAFOIPA) after a review had been conducted under s. 38 of LAFOIPA by the Information and Privacy Commissioner for Saskatchewan. The review had been undertaken after the appellant applied to the respondent University to disclose certain records pursuant to LAFOIPA. The respondent provided some of the requested records but withheld others, amounting to 306 pages, based on exemptions from disclosure under s. 8, s, 14(1)(d), s. 16(1)(a) and (b), s. 21, s. 28(1) and s. 30(2) of LAFOIPA. The Commissioner determined variously that the respondent's exemption claim under s. 14(1)(d) was not valid and under s. 16(1)(a) and (b), s. 28(1) and s. 30(2) was partially valid. He listed the records not properly exempted and recommended that the respondent release them to the appellant. As the recommendations were not binding upon the respondent, it refused to release the documents and the appellant appealed. The court ruled that the respondent should submit the documents under seal and provided further directions to the parties (see: 2017 SKQB 259). After reviewing the documents, the commissioner's report and hearing argument, the court described the issues, based on the exemptions claimed by the respondent, as: 1) whether s. 28(1) of LAFOIPA had any application to the relevant records. The respondent argued that under s. 23(1)(k), one document, an email, identified another person whose name was redacted; 2) whether s. 14(1)(d) of LAFOIPA had any application to the relevant records. The respondent argued that disclosure of them would be injurious to its position in legal proceedings with the appellant; 3) whether s. 16(1)(a) of LAFOIPA had any application to the relevant records. The respondent argued that all of them fell within the exemption it provided because the communications related to advice sought and received regarding the appellant's employment relationship with it; 4) whether s. 16(1)(b) of LAFOIPA applied to the relevant documents. The respondent submitted that this section related to internal discussions concerning employees and exempted disclosure of records reflecting those discussions; and 5) whether s. 30(2) of LAFOIPA applied to any of the relevant records. The respondent argued that evaluations of an employee's suitability for the employment could occur throughout the employee's tenure.
HELD: The appeal was allowed in part. The court ordered the respondent to provide documents that it enumerated to the appellant. It found with respect to each issue that: 1) the

document should be disclosed. The respondent had taken too restrictive a view of the term "personal information" as used in s. 28 and s. 23(1)(k) of LAFOIPA; 2) certain records were exempt under s. 14(1)(d). Although a number of legal proceedings between the parties had been resolved, it was reasonable for the respondent to anticipate further proceedings. It was entitled to rely upon litigation privilege as the documents covered the relevant period starting from the appellant's initial complaint of discrimination/harassment against the Dean of Libraries; 3) s. 16(1)(a) applied to numerous records and they were exempted from production; 4) s. 16(1)(b) applied to a number of the documents and exempted them from production. Employer consultations in the past regarding an employee cannot be precluded from a legitimate consideration of what it will do in the future respecting that employee; and 5) s. 30(2) applied to exempt a small number of documents.

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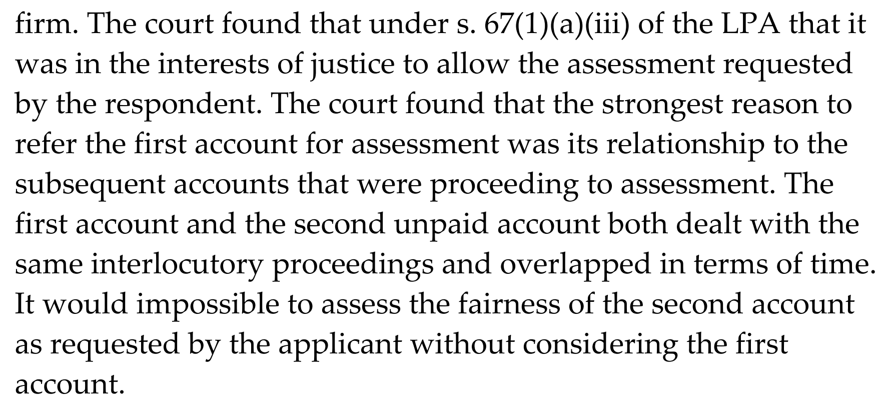
Merchant Law Group LLP v Arseneau, 2018 SKQB 94

Leurer, March 22, 2018 (QB17478)

Professions and Occupations – Lawyers – Fees – Assessment
Barristers and Solicitors – Compensation – Taxation – Limitation Period

The applicant law firm sought an order pursuant to s. 67 of The Legal Profession Act, 1990 (LPA) directing an assessment with respect to an unpaid account in order to permit it to pursue enforcement procedures. The respondent then applied for an order directing an assessment of the account that she had paid. The applicant had represented the respondent in matrimonial litigation. There was no retainer agreement or letter respecting the arrangements, but the respondent maintained the applicant had told her that the cost of legal services would be capped at $10,000, an allegation that the applicant denied. Over the course of its representation of the respondent, it rendered three accounts, the first for $9,945, the second for $6,700 and the last for $2,170. The first account was paid in full in October 2016 but the two last remained unpaid. As the respondent's application was beyond the limitation of 30 days provided by s. 67(1)(a)(i) of the LPA, the issue was whether it was in the interests of justice to allow the assessment.
HELD: The applications by the law firm and the respondent were granted. The court ordered that the Local Registrar of the Court of Queen's Bench assess the three bills issued by the law



firm. The court found that under s. 67(1)(a)(iii) of the LPA that it was in the interests of justice to allow the assessment requested by the respondent. The court found that the strongest reason to refer the first account for assessment was its relationship to the subsequent accounts that were proceeding to assessment. The first account and the second unpaid account both dealt with the same interlocutory proceedings and overlapped in terms of time. It would impossible to assess the fairness of the second account as requested by the applicant without considering the first account.

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