The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 20, No. 17 **September 1, 2018**

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R v Wiebe, 2018 SKPC 38

Hinds, June 22, 2018 (PC17130)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 8, Section 9, Section 10(b)

The accused was charged with impaired driving contrary to s. 255(1) and s. 253(1)(a) of the Criminal Code and driving while over .08 contrary to s. 255(1) and s. 253(1)(b) of the Code. The defence brought a Charter application alleging that the accused's s. 8, s. 9 and s. 10(b) rights had been violated and submitted that all observations made of the accused after he was detained by the police and the Certificate of Qualified Technician should not be admitted into evidence at the trial pursuant to s. 24(2) of the Charter. As the accused was overheld in police cells in violation of his s. 9 Charter rights, the defence argued that if the accused was found guilty, the court should reduce his sentence to below the minimum prescribed under s. 255(1)(a) of the Code pursuant to s. 24(1) of the Charter. A voir dire was held and by consent, all admissible evidence from it was applied to the trial. The police were dispatched to an impaired driver call at a car dealership. The dispatch call described the vehicle and the licence plate number. The police constables determined that the vehicle belonged to the accused. They met the accused when he parked in front of his home. The constable left her vehicle at 5:44 p.m. and spoke with the accused. He admitted that he drank a can of

beer just before and there was a case of beer on the back seat. The accused's speech was slow and his eyes were red and glassy. At 5:46 the officer decided to place the accused in her cruiser and observed that he stumbled and almost fell into it. During the next six minutes, the accused sat in the vehicle while the constable reviewed her grounds for arrests and breath demand with a colleague. At 5:54 the accused was arrested for impaired driving and read his right to counsel and the police warning. The breath demand was made at 5:56. The accused's request to call a lawyer from within his house was denied because of safety concerns. The accused was taken to the police station, arriving at 6:13 because the constables had stopped en route to give the keys to the accused's vehicle to another constable so that he could seize it. The accused was placed in the phone room. He was informed of his right to counsel again and placed calls to five different lawyers but reached only voice mail. He then spoke to duty counsel at Legal Aid and was then taken to the breath technician's room. The first breath sample showing 190 milligrams was taken at 7:10 and the second at 7:43 showed 200 milligrams. He was placed in the cells at 7:49 and released the next morning at 5:30 a.m. A constable testified that the accused was detained because of his level of impairment and normally it would be safe to release him after nine to ten hours. The issues were: 1) whether the constable had the necessary reasonable grounds to make the breath demand under s. 254(3) of the Code and if not, whether the accused's s. 8 and s. 9 Charter rights had been breached; 2) whether the breath demand and test had been performed as soon as practicable; 3) whether the accused's s. 10(b) right to counsel had been violated because he was not informed immediately upon arrest; 4) if any Charter breaches had occurred, what the appropriate remedy was; and 5) whether the accused's s. 9 Charter right was violated by being held in police custody after the breath tests were completed.
HELD: The accused was found guilty of the driving .08 charge and the charge of impaired driving was stayed conditionally until the appeal period expired. The court found with respect to each issue that: 1) the constable had reasonable grounds under s. 254(3) based upon the information about the accused's impaired condition from the dispatch call, her observations of his speech, appearance and ability to walk and his admission that he had consumed a beer in his vehicle. The constable's subjective belief was supported on an objective consideration of all the evidence. The accused's s. 8 and s. 9 Charter rights were not breached; 2) the delay of 74 minutes between the time of the demand and the test had been explained and the actions of the police were reasonable; 3) the accused's s. 10(b) Charter rights had not been breached when his request to phone a lawyer from his house was denied because he would have had to be kept under

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observation and would not have had privacy in which to make a call. His s. 10(b) right was violated when the the constable failed to inform of his right to counsel at 5:46 when she detained him in her cruiser as she conferred with her partner. She informed him eight minutes later; 4) the s. 10(b) breach was not serious, and the constable acted in good faith in consulting with a more experienced officer. The evidence of the constable's observations of the accused and the Certificate were admissible because they would not bring the administration of justice into disrepute; and 5) the accused's s. 9 Charter right had been breached when he was kept in custody. The only evidence that supported his detention was his high breath sample readings which reasonable under s. 497 and s. 498 of the Code, but the police should have checked on him later in the evening to determine if he could be released. As there was no connection between the breach and the charges, the court would not entertain a stay of proceedings. The appropriate remedy would be determined after sentencing submissions had been made.

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R v Kacuiba, 2018 SKPC 39

Harradence, June 20, 2018 (PC17129)

Criminal Law – Assault – Sexual Assault

The accused was charged with sexual assault. The complainant testified that she had been drinking and consequently was blacking out during the period of time in which she alleged that the accused had sex with her against her will. In cross-examination she admitted that she was intoxicated but not to the point of passing out or so as to be incapable of consent. The accused testified that he had had sex with the complainant but that it was consensual. The issues were consent and honest belief in consent.
HELD: The accused was found guilty. The court did not believe the accused's testimony that he asked the complainant to have sex or that she agreed. It found that he had not taken steps, let alone reasonable ones, to ascertain whether the complainant was consenting and was satisfied beyond a reasonable doubt that the complainant did not consent to sexual intercourse. The defence of honest belief was not applicable.

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R v Groshok, 2018 SKPC 42

Scott, July 5, 2018 (PC17131)

Criminal Law – Motor Vehicles Offences – Impaired Driving – Refusal to Provide a Breath Sample
Constitutional Law – Charter of Rights, Section 7, Section 8, Section 9

The accused was charged with failing to comply with an ASD breath demand contrary to s. 254(5) of the Criminal Code. The accused admitted that she had refused but argued that the officer did not have the requisite reasonable suspicion and therefore the demand was not proper and her s. 7, s. 8 and s. 9 Charter rights were violated. She sought the exclusion of the evidence under s. 24(2) of the Charter. A police officer responded to a dispatch that loud music and yelling was coming from a parked car. When the officer approached it, the vehicle left the scene at an accelerated rate of speed. When it stopped, the driver ran from it and the officer pursued her. He detained and handcuffed her. Another officer arrived in his vehicle and the first officer walked the accused to it and placed her in the rear seat. During the five minutes he was with the accused, he testified that he had not smelled alcohol coming from the accused. During his questioning of the accused while he was in the front seat and the accused remained in the back, the second officer could not smell alcohol. He left the vehicle and when he returned, he opened the rear door and then detected the smell of alcohol. The first officer then returned to the cruiser and formally arrested the accused for evading police and testified that he did not smell alcohol while speaking to her. Shortly after the arrest, the second officer made the ASD demand. The issue was whether the demand was lawful: did the officer have a reasonable suspicion that the accused had alcohol in her body at the time of the demand? HELD: The accused was found guilty of refusing to comply with a proper ASD demand. The court found that in the circumstances, it accepted the second officer's testimony and that he had a suspicion that the accused had alcohol in her body and that it was reasonable and the demand was proper and therefore her Charter rights were not violated.

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Cowessess First Nation No. 73 v Phillips Legal Professional Corporation, 2018 SKQB 156

Barrington-Foote, May 22, 2018 (QB17544)

Statutes – Interpretation – Legal Professions Act, 1990, Section 67, Section 71
Professions and Occupations – Lawyers – Fees – Assessment

The applicant, Cowessess First Nation, applied for an order pursuant to ss. 67 and 71 of The Legal Profession Act, 1990 (LPA), referring certain bills issued by the respondent to the registrar for assessment. The bills totaled $982,560 and were issued in relation to many different files dating from September 2013 to May 2016. Of the bills, 16 were issued in May 2016 and had been previously referred for assessment. The other 67 were received and paid for more than 30 days before the application was filed and therefore could not be referred for assessment, unless the court was satisfied that it was in the interests of justice to do so. The respondent had provided legal services to the band council during a time when it was divided into two political factions. One faction was composed of four councilors who deposed that they were infrequently invited and thus intentionally excluded from most council meetings. There was no formal written retainer agreement with the respondent until June 2015 when the Chief, and the four councilors who supported him, signed one. The retainer stated that the applicant understood that it had the right to have accounts assessed under the LPA but that payment of amounts billed would be consistent with the agreement and that the amounts were reasonable. Three weeks before the band election was held, the Chief and his four councilors signed a Band Council Resolution (BCR) that requested the respondent continue acting as counsel and approved a further retainer agreement. This agreement also contained the right to assess accounts. The BCR and 2016 retainer also dealt with invoices issued prior thereto and stated that the signatories had reviewed invoices attached in schedules A, B and C, that they were fair and reasonable, and they were pleased with the legal services rendered by the respondent. These invoices contained thousands of entries and covered work done from 2013 to February 2016. The schedule A invoices were paid more than 30 days before the application was filed. The schedule B invoices were paid on April 6, 2016 and the schedule C invoices were paid after the application was filed. The election was held on April 27, 2016 and on the following day, the new Chief and councilors terminated the retainer. The applicant argued that it was entitled to apply under s. 67 and to relief based on a stand-alone right to assessment created by s. 71 of the LPA. The issues raised by the parties included whether: 1) an Indian band is a "person" within the meaning of s. 67 of the LPA and therefore entitled to apply for assessment pursuant to s. 67(1)(a); 2) s. 71 of the LPA creates a right to apply for assessment as long as the application is made within 30 days after the date the bill is paid; 3) ss. 67 and 71 of the LPA are

inapplicable to the applicant by virtue of the doctrine of interjurisdictional immunity due to their impact on Canada's jurisdiction regarding Indians and Lands Reserved for Indians pursuant to s. 91(24) of the Constitution Act, 1867? The respondent argued that the ability of the applicant to discharge its obligations pursuant to the Indian Act would be fundamentally impaired if it were not permitted to retain legal counsel to assist it in the conduct of band council meetings, essential to its capacity to self-govern. In addition, the respondent argued that the sections were inoperable in relation to the applicant pursuant to the doctrine of paramountcy as a result of inconsistency with the applicant's financial bylaw passed by a BCR, a federal regulation. The bylaw confirmed that schedules A, B and C invoices were final and would be not adjusted; and 4) some or all of the disputed accounts should be referred for assessment pursuant to ss. 67 or 71 of the LPA. HELD: The application was granted. The court found with respect to each issue that: 1) an Indian band is a person within the meaning of s. 67(1)(a) of the LPA. The legislation protects all consumers of legal services and would include a band. Further, a band is a juridical person for certain purposes and has the necessary status to be a "person charged with the bill" within the meaning of s. 67(1)(a)(i) and (iii) of the LPA; 2) s. 71 of the LPA does not create a stand-alone right to apply for an assessment. Payment of a bill does not preclude taxation of it, provided that the application for assessment is made within the time specified in s. 71; 3) ss. 67 and 71 of the LPA are not inapplicable to the applicant as a result of the doctrine of interjurisdictional immunity. The provisions do not define or limit the authority of a council to conduct its business. The argument regarding paramountcy could not succeed either, because regardless of whether a BCR could be considered a regulation, it could not preclude an application for assessment. There was no operational conflict between the BCR and ss. 67 and 71 of the LPA. In accordance with constitutional practice of preferring harmonious interpretations of federal and provincial legislation over an interpretation resulting in incompatibility, the harmonious interpretation of the BCR contemplated applications for assessment of any account, including those appended as schedule A, B and C to it; and 4) it was in the interests of justice that all of the bills under the various schedules should be referred for assessment. The court raised concerns that the respondent may have provided legal services on many files in a manner that increased complexity and delays, resulting in unreasonable costs to the applicant. It considered the retainers, the reasons for the lack of complaints by the former council, the manner in which and when legal services were billed and the close relationship between many of the files handled by the

respondent as general counsel. The court held that the applicant was entitled to $20,000 in solicitor-client costs. The respondent's attempt to prevent an assessment increased the complexity and cost of the proceedings.

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R v G.G., 2018 SKQB 169

Gabrielson, June 1, 2018 (QB17562)

Criminal Law – Sexual Offences – Sexual Interference – Person under 16 – Sentencing

The accused pled guilty to five counts of sexual touching of victims under the age of 16, contrary to s. 151 of the Criminal Code. The offences were committed while the accused was working as an educational assistance in a primary school located on his reserve. The victims were all eight or nine-year-old girls who attended the school. They told the police that the accused had touched their private parts and/or their buttocks while they were at school or on school trips. Victim impact statements written for them by their parents or other relatives stated that the victims had become withdrawn after the offences occurred. Some no longer wanted to go to school. The psychiatric assessment of the accused, a 25-year-old Aboriginal man, indicated that he suffered from some intellectual disabilities but that he appreciated the nature and quality of his acts and that they were legally or morally wrong. He was diagnosed as having paedophilic sexual problems and his risk of reoffending was high. A psychologist and the author of the Pre-Sentence Report (PSR) both assessed his risk of reoffending as low but if he did not receive treatment for his sexual interests and cognitive distortions, his risk would increase. He did not possess any hostility to women or children. He had no prior criminal record and did not abuse substances. In addressing the Gladue factors, the PSR stated that although the accused had not attended residential school, his grandparents had. He said that he had not suffered from racism. The accused expressed remorse. The Crown proceeded by way of indictment and therefore the accused was liable to imprisonment for a term of not more than 14 years but for a minimum of one year. The Crown argued that an appropriate sentence was a three-year prison term. Since there were five victims, the accused could be sentenced under s. 718(4)(a) of the Code to five years but by application of the totality principle, the sentence would be reduced to three years. The defence submitted that the mandatory minimum sentence

provided in s. 151 was unconstitutional as it violates s. 12 of the Charter. If it was found to be unconstitutional, an appropriate sentence was three to eight months in jail. If the Charter argument was not accepted, the accused should receive a sentence of one year to 18 months.
HELD: The accused was sentenced to two years' imprisonment followed by a period of supervised probation of three years. The court found that an appropriate sentence for the accused was in excess of one year because of the number of offences committed against five victims and therefore he could be sentenced to a total sentence of five years. It was unnecessary to consider the constitutionality of the mandatory minimum sentence because it was not grossly disproportionate to the circumstances of this case. The mandatory minimum in this instance did not offend s. 12 of the Charter because it had no impact on the accused and the issue was moot.

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Anderson v Anderson, 2018 SKQB 182

McIntyre, June 14, 2018 (QB17568)

Statutes – Interpretation – Enforcement of Maintenance Orders Act, 1997, Section 28

The respondent applied to set aside a notice of continuing seizure pursuant to The Enforcement of Maintenance Orders Act, 1997 and the petitioner applied for summary determination that the respondent's employer was liable under the notice served April 2018. The respondent was ordered in July 2017 to pay the petitioner monthly child and spousal support and to continue to pay the mortgage and property taxes for the family home as well as the home equity loan. The respondent submitted that as a result of surgery he had been unable to work and was receiving Workers' Compensation benefits. Due to his reduced income, he had been able to make only partial payments toward the mortgage. He argued that they were not part of child or spousal support and could not form the basis of the continuing seizure.
HELD: Both applications were dismissed. The court held that the 2017 order requiring the respondent to make the mortgage and home equity loan payments related to the family home were for the benefit of the petitioner and the parties' child and were payments on account of the respondent's obligation to support his spouse and their child. The respondent had also failed to meet the criteria set out in s. 28 of the Act to set aside a notice of

seizure. The petitioner's application was served on short notice without an order abridging the time for service and she had not provided evidence of service on the application.

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R v T.A.S., 2018 SKQB 183

Barrington-Foote, June 15, 2018 (QB17569)

Criminal Law – Sexual Offences - Sexual Touching – Victim under 16 – Sentencing
Criminal Law – Mandatory Minimum Sentence – Constitutional Challenge
Constitutional Law – Charter of Rights, Section 7

The accused was convicted of sexual touching pursuant to s. 151 of the Criminal and sexual assault pursuant to s. 271 of the Code (see: 2017 SKQB 339) with the latter charge conditionally stayed pending the expiration of the appeal period. The sentencing hearing pursuant to s. 151 of the Code was accompanied by the accused's challenge to the constitutionality of the mandatory minimum sentence imposed by s. 151 of the Code and of s. 490.012(1) of the Code pursuant to s. 7 of the Charter, because the Code provision requires a sentencing judge to make an order requiring an offender to comply with the Sex Offender Information Registration Act (SOIRA) for a 20-year period specified in s. 490.013 of the Code. The conviction resulted from four sexual encounters that occurred between September 2014 and January 2015 when the accused was 22 and the victim 14 years of age. The accused was the victim's school bus driver prior to and at the time the sexual touching occurred. The victim initiated the communication and although the accused resisted, he eventually agreed to meet her, and the sexual encounters ensued because the victim threatened suicide. The victim's mother was very ill at the time and she was vulnerable. The accused had no prior criminal record, nor had he had any prior sexual experience. His psychiatric assessment found him capable of appreciating the nature and quality of his acts but showed that he had little insight into his behaviour, was emotionally immature and had difficulty responding to some social situations. The victim gave a victim impact statement and said that she had suffered from guilt and that she had retreated from a social life for two years because of what had happened.
HELD: The accused was sentenced to 15 months' imprisonment with 12 months' probation. He would be registered for 20 years under SOIRA. The court determined the proportionate sentence

having regard to the objectives and principles of sentencing set out in the Code without regard to the mandatory minimum. The sentence was proportionate to the gravity of the offence and the accused's degree of responsibility. Accordingly, the constitutionality of the mandatory minimum specified by s. 151 would have no effect on the accused's sentence and the constitutional issue was therefore moot. The court declined to exercise its discretion not to adjudicate the constitutional question. Here the victim's age and the accused's position of trust were considered as aggravating circumstances under s. 718(a)(ii.1) and (iii.1) and s. 718.2 of the Code respectively. The offence was a major sexual assault because four incidents of sexual contact occurred over a four-month period when the complainant was particularly vulnerable and they had had significant impact upon her. The following were considered as mitigating factors: the accused's young age; his guilty plea that saved the complainant from again testifying at trial; his acceptance of responsibility; his low risk to reoffend; that he had no criminal record; and he had complied with his release conditions for over three years. The court determined that s. 490.12(1) did not violate the accused's s. 7 Charter rights. Although the 20-year registration requirement would interfere with the accused's liberty rights, his rights to security of the person were not infringed by it. The provision was not overbroad and its impact on the accused was not disproportionate.

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C & D Septic Ltd. v Prince Albert (City), 2018 SKQB 185

Meschishnick, June 21, 2018 (QB17571)

Administrative Law – Judicial Review – Procedural Fairness

The applicant applied for an order quashing a decision of the respondent, the City of Prince Albert, on the grounds that: it did not engage in a fair process in making the decision; the decision was unreasonable; and it acted in bad faith. The applicant operated a septic tank cleaning, haulage and disposal service to residential, commercial, institutional and farming customers in Prince Albert and environs. The respondent permitted the applicant to deposit liquid and solid waste into its wastewater treatment facilities and landfill. In July 2017 it provided notice to the applicant that it would no longer permit it to have access to the respondent's facilities because, after an investigation, it suspected that the applicant was illegally discharging septage

into the respondent's sanitary sewer system. The respondent referred the investigation report to the bylaw enforcement unit of the police and the applicant was charged with five violations. It pled not guilty and the matter was still outstanding. The respondent also sent a letter to its residents who were not connected to the sewer system stating that they would no longer be entitled to reimbursement of five percent of the cost of having their septic tanks emptied, pursuant to its municipal rebate program, if they hired the applicant to perform the service. A meeting held between the parties subsequent to the letter being sent to the applicant did not result in a resolution of the matter. The bylaws regarding sewers and landfills passed by the respondent pursuant to The Cities Act did not provide for an appeal from the decision of the Director of Public Works nor was there an appeal provision from a decision concerning eligibility in the respondent's resolution that created the rebate program. The respondent argued that its decision was not subject to judicial review.

HELD: The application was granted and the respondent's decisions were quashed. The court ordered that in making any decisions regarding the conduct of the applicant that the respondent should provide: notice to it; the decisions being considered and the authority under which they were made; the evidence it relied upon; and the procedures by which the matter would be heard. The court found that the respondent's decisions were subject to judicial review. They were made by public officials under a statutorily delegated authority. The officials had the discretion to decide if the applicant should be barred from accessing its waste facilities. That decision was grounded in a finding that the applicant had violated the bylaw. Such a decision was quasi-judicial in nature. The decision was also the basis of the respondent's decision that city residents should be restricted in their choice of using the applicant's services in order to qualify for a rebate. These decisions would affect the applicant financially and were made without notice to it. As the bylaw and the program did not contain any procedural provisions or right of appeal, the court found that these factors called for fair process.

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R v Graham, 2018 SKQB 188

Scherman, June 25, 2018 (QB17574)

Criminal Law – Controlled Drugs and Substances Act – Unlawful Production of Marijuana

Criminal Law – Controlled Drug and Substances Act – Possession for the Purpose of Trafficking – Marijuana

The two accused were charged with: unlawfully producing marijuana contrary to s. 7(1) of the Controlled Drugs and Substances Act CDSA); unlawful possession of marijuana for the purposes of trafficking contrary to s. 5(2) of the CDSA; and unlawfully having Canadian currency of a value exceeding $5,000 knowing that property was obtained by the commission of an indictable offence contrary to s. 354(1)(a) of the Criminal Code. The charges were laid as a result of an investigation by the RCMP acting on a tip that marijuana was being grown in greenhouses located on a certain property. Based upon their belief that it was, the RCMP entered the property pursuant to a general warrant. Before they entered, the police saw two men go into the greenhouse whereupon they followed them into it and arrested them. One of the men was the accused, C.G., and the other was an individual named O.G. The second accused, M.B., arrived at the greenhouse shortly thereafter and was kept under observation. The police found 750 marijuana plants growing in the greenhouses and a search of a nearby trailer yielded five bags of dried marijuana and two "personal use production licences" for marijuana in the name of O.G. The licences were issued for production site addresses in Ontario for a maximum of 449 plants and had expired in March 2014. The police found $6,200 in cash in the home of the accused, located about one quarter mile to the east of the greenhouses. The two accused explained that they had built the greenhouses to enable them to grow vegetables in a business they started with M.B.'s brother who had conducted similar enterprises in Ontario. Their business plan was to eventually grow marijuana. The accused C.G. suffered a serious injury that prevented him from being able to operate the greenhouses and after consulting with M.B.'s brother, they decided to lease the greenhouse to his acquaintance, O.G., who had a licence to produce medical marijuana. Gutierrez produced copies of his licences and explained that the expiry dates were "grandfathered" as a result of a court decision but that he would contact Health Canada and get the production location addresses changed. The accused M.B. testified that she called Health Canada to attempt to confirm what O.G. had told them, but they advised that they could not share information about the licences but confirmed that the expiry dates could be grandfathered. O.G. then provided them with a copy of a letter from Health Canada showing the new address for the production property. The two accused then executed a lease with O.G. and others that the rental payment of $12,000 would be paid after the marijuana was harvested. The tenants brought the trailer and each of them lived on the site at different times during the summer in question and were

responsible for the care of the plants and the operation of the greenhouses. Each of the accused testified that they were told there were only 400 plants. The Crown's evidence consisted of a number of text messages between the various parties from which it could be inferred that each of the accused was growing the marijuana. There was no evidence that M.B. had called Health Canada.
HELD: The accused were each acquitted of all charges. The court believed the evidence provided by the two accused and found that it was possible that the lease represented the actual arrangement between them and O.G. and that they believed that there only 400 plants in the greenhouses and they were part of a legal grow operation. The letter provided by O.G. purporting to change the address of his licences was found to have been forged by him. Regarding the possession for the purpose of trafficking, the court found that it was not satisfied on the evidence that either of the accused ever had personal possession or control of the marijuana plants nor that they had joint or constructive possession by virtue of some arrangement with O.G. The accused had explained that the cash seized by the police from their house had been received by them after they sold a trailer.

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R v Fiddler, 2018 SKQB 197

Dovell, July 10, 2018 (QB17592)

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

The accused was convicted after trial of manslaughter and had pled guilty to possession of a firearm while prohibited from doing so. Before sentencing, a Gladue report was prepared. The accused, a 65-year-old Aboriginal man, shot and killed his first cousin for no apparent reason. He used a rifle that he was prohibited from possessing. He had been living with his cousin because his own house had burned down. The accused was intoxicated at the time he committed the offence. He had never expressed remorse. Both of his parents attended residential school and he was sent to one at the age of seven, where he remained until he was 12. He suffered physical and sexual abuse during this period. When he returned to his reserve, he began using drugs and alcohol and his criminal activities commenced. His criminal record included 55 convictions, 17 of which were for violent offences. The Crown argued for a global sentence of 15 years with a one-year sentence for the prohibited possession

of a firearm to run concurrently. When given credit at the rate of 1:1.5 for remand time, the accused's sentence would be 11 years and 5 months. The Crown also requested that the court make an order pursuant to s. 743.6(1) of the Criminal Code that would require the accused to serve one-half of his sentence before being eligible for parole. In this case, it would be a further three years and 11 months before eligibility would arise if the court imposed a 15-year sentence. The defence argued that a global sentence of eight years was appropriate in the circumstances. A longer sentence was not warranted in this case to take it out of the range of four to seven years suggested in R v Hathaway. It was not appropriate to impose a s. 743.6 order in this case and it would be counter-productive. The Gladue factors were numerous and they should be taken into account and addressed by restorative programs, that the accused might not have access to, if the court made such an order.
HELD: The court sentenced the accused to a global sentence of 10 years for the manslaughter conviction. A one-year concurrent sentence was imposed for the conviction of prohibited possession of a firearm. The court gave him credit at the rate of 1:1.5 for his time on remand, resulting in a net global sentence of six years, five months to be served in a federal penitentiary. The Gladue report was considered and the background of the accused was assessed as an enormous mitigating factor. The court found that this was not an appropriate case to make an order pursuant to s. 743.6 of the Code both because of the multiple Gladue factors and because it had addressed the principles of denunciation and deterrence in the global sentence.

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Canadian Hot Rods Inc. v Sacher, 2018 SKQB 199

Gabrielson, July 10, 2018 (QB17593)

Statutes – Interpretation – Small Claims Act, 2016, Section 45

The appellant defendant appealed the decision of a Provincial Court judge that dismissed its application to dismiss the respondent's claim on jurisdictional grounds. The respondent plaintiff had filed a statement of claim in Provincial Court in September 2017, in which it alleged that he had contracted with the defendant for it to design, build and deliver a custom built automobile frame but the frame it built was unsuitable. The claim alleged that the appellant, a company incorporated in British Columbia, carried on business in that province as well as in Saskatchewan. After being served with the summons, the

appellant requested and obtained an adjournment. The appellant then sent a letter to the court asking it to reconsider the issuance of a small claims summons on the basis that the court lacked jurisdiction. In addition to deciding that it could not hear the application because there was no provision in the Small Claims Act for it, the court ordered the appellant to file a reply in which it raised the issue of jurisdiction, which could then be decided at trial on the basis of a full evidentiary record.
HELD: The appeal was dismissed. The court found that as the claim was issued but not completed before the coming into force of The Small Claims Act, 2016 on January 1, 2018, the proceeding was continued pursuant to its provisions. Under s. 45 of the Act, a party can only appeal a judgment of the Small Claims Court to the Court of Queen's Bench. In this case, the decision of the Provincial Court judge was interlocutory and therefore the appeal was premature.

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Richardson v Hooker Estate, 2018 SKQB 201

Barrington-Foote, July 16, 2018 (QB17586)

Will and Estates – Capacity

The applicant challenged the validity of her late mother's will, executed in October 2008. She applied for an order pursuant to Queen's Bench rule 16-47 revoking the grant of letters probate and that the will be proved in solemn form under rule 16-46. The will named the respondent as executor. He, one of the applicant's brothers, obtained the grant and distributed the assets amongst the named beneficiaries after they had provided releases. The applicant refused to provide a release and when told by the respondent that he was holding her funds and that she should contact him to receive payment, she filed this application. In her affidavit the applicant deposed that her mother had suffered from dementia after 2005 and therefore, she lacked testamentary capacity to make the October 2008 will. She stated that her mother had been diagnosed with dementia in 2007 and 2008 by her doctor and it was evident in such things as her mother's inability to prepare a meal after 2006. The applicant submitted her mother's medical records from a period of hospitalization from December 2008 to April 2009 that confirmed the doctor's diagnosis. Based on this evidence, the applicant argued that her mother lacked testamentary capacity when she executed the will. The respondent denied that the testatrix was incompetent when she executed the 2008 will. The lawyer who

had drafted the will deposed that she met the testatrix a number of times during 2007 and 2008 and found her coherent and believed that she had the capacity to sign the document.
HELD: The application was denied. The court found that it was clear that the testatrix was suffering from dementia when she gave instruction for the preparation of the 2008 will, but evidence of dementia and cognitive decline is not enough. The question was the extent to which the evidence tends to prove the impact of the testator's cognitive issues on the abilities that make up testatmentary capacity at the relevant time. The evidence submitted by the applicant did not describe the testatrix's behaviour close in time to when she gave instructions for and then signed the will. The respondent's evidence and in particular, the affidavit of the testatrix's lawyer, was uncontradicted that the testatrix had testamentary capacity when she made her will.

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Czerwonka v Montmartre (Rural Municipality No. 126), 2018 SKQB 202

Barrington-Foote, July 17, 2018 (QB17587)

Civil Procedure – Queen's Bench Rule 4-44

The defendant, the Rural Municipality of Montmartre, applied for an order pursuant to Queen's Bench rule 4-44 to dismiss the plaintiff's action. The action was commenced in August 2012 and claimed damages of $500,000 resulting from flooding of the plaintiff's land caused by the construction of a trench by the defendant in a manner that breached a verbal contract between the parties. Mandatory mediation occurred in April 2013 and no further steps were taken until March 2018 when the defendant served its affidavit of documents followed by this application in May. The plaintiff served his affidavit of documents two weeks after receipt of the defendant's. Between 2013 and 2017, the defendant's counsel emailed the plaintiff's counsel seven times about moving the action forward. The plaintiff's lawyer responded twice by email and once by telephone call. He failed to respond on four occasions. The plaintiff conceded that the delay was inordinate but that there were a number of reasons that caused the delay, including the death of his spouse in September 2014. He explained that he is the sole operator of a large ranching operation and had had to spend a lot of time and resources on other legal matters. He had sent his documents to his lawyer in 2015 and early 2016 but it was not until January

2017 that he learned that his lawyer had misplaced some of the documents. His lawyer stated that he had not pressed his client for his documents because of his spouse's death. Later, when he discovered that documents had been misplaced, he decided to wait for them to show up and did not ask the plaintiff to get new copies.
HELD: The application was denied. The court found that the delay was inordinate and inexcusable. The death of the plaintiff's spouse would excuse less than a year of delay. His responsibility in running his ranch and his choice to prioritize other claims did not assist him in explaining the remaining 50-month delay. Regarding the question of whether it was in the interests of justice for the claim to proceed to trial, the court reviewed the factors set out in International Capital Corp. v Robinson Twigg & Ketilson and concluded that the health issue and the role of counsel were of some assistance to the plaintiff. Inferred prejudice and the length of the inexcusable delay weighed in favour of dismissal. On balance though, the action should be determined on its merits.

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Schemenauer v Little Black Bear First Nation, 2018 SKQB 203

Elson, July 17, 2018 (QB17594)

Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 7-5

The plaintiff, carrying on business as a chartered accountancy, applied for an order for summary judgment in its claim for $76,600 against the defendant, the Little Black Bear First Nation, for the unpaid balance from certain invoices and finance charges issued to the defendant for accounting services rendered between 2011 and 2014. The defendant admitted that the plaintiff provided some services and was paid for them. It asserted that the services were deficient in certain respects but made no counterclaim or set-off. The plaintiff was initially engaged by the defendant in 2010 by the then Chief of the defendant to assist it while it was under third party management. Although the plaintiff drafted an agreement outlining the tasks it was to perform, it was never signed. During the next two years, the plaintiff continued to provide services and it brought its unpaid invoices to a new Chief who authorized certain payments towards the indebtedness. The Chief deposed that although the defendant's funds were tight, it was expected that the plaintiff would eventually be paid in full. After another band election in 2013, the new Chief deposed in his affidavit that the defendant

had some problems with the plaintiff's services. The plaintiff commenced this action and it pled the agreement and the total outstanding on 10 invoices. It did not identify the precise amount of the service invoices that had gone unpaid. There was a discrepancy in the amount owing given in the pleadings and the amount provided in the plaintiff's affidavit.
HELD: The application for summary judgment against the defendant for the unpaid balance of the service invoices was granted. The court was satisfied that there was no genuine issue requiring a trial regarding the defendant's liability for the plaintiff's service invoices based upon the affidavit evidence. However, the amount of the unpaid balance under the plaintiff's invoices required determination. The evidence regarding the amount was not clearly presented and prevented the court from determining the amount owing. The plaintiff's claim for interest on the unpaid balance was based upon a term in the agreement that it would be calculated at one-and-one-half percent per month. As the agreement did not stipulate an annual equivalent, it was contrary to s. 4 of the Interest Act and could not be enforced. Interest would be limited to five percent per annum.

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R v S.A.B., 2018 SKQB 204

MacMillan-Brown, July 17, 2018 (QB17595)

Criminal Law – Evidence – Admissibility

The accused was charged with aggravated assault against her husband, contrary to s. 268 of the Criminal Code. During the trial, a voir dire was held with respect to the admissibility of statements made by the accused's two pre-teen daughters, S.B. and F.B. The statements consisted of: 1) a spontaneous utterance made by one daughter to an RCMP officer on the morning of the alleged offence. Initially both girls told the officer that they didn't know anything about what had happened but a few minutes later, they ran after him and S.B. told him that she had seen what had happened between her parents. The officer testified that S.B. was very nervous and did not want him to tell her mother that she had given him the information; and 2) two video-taped statements given by F.B. and S.B. respectively to the RCMP. These statements were taken during an interview of each daughter by a different RCMP officer conducted later in the same day. The interview with F.B. was conducted with her grandmother (her mother's mother) present. During the times when the officer left the interview room the recording showed

that the grandmother was coaching F.B. When S.B. was interviewed, her grandmother was not present. Her version of what had happened evolved throughout the interview. When confronted with the differences between her first statement and her current description, she said that she had forgotten the right story. She indicated that her mother had told her not to talk to the police.
HELD: The court ruled with respect to the statements that: 1) the one given by S.B. to the officer was admissible under the res gestae exception to the hearsay rule and was therefore evidence to be considered in the trial; and 2) the video-taped statements were not admissible. Although the Crown had shown that the statements were necessary, they were not sufficiently reliable.

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K.A.W. v S.R.W., 2018 SKQB 205

Brown, January 18, 2018 (QB17588)

Family Law – Spousal Support – Interim

The petitioner wife issued a petition in October 2017 and brought an application for an order respecting custody, access and child and spousal support in May 2018. The court made an interim order that the parties' three children should have their primary residence with the petitioner and that the respondent should pay $2,400 per month in child support, based upon the petitioner's income of $41,000 and the respondent's of $133,400. In this application, the petitioner sought interim spousal support. When they separated in 2015, the respondent had just graduated from RCMP training. The petitioner and their three children moved to Saskatchewan to live with him at that point but when they arrived, the respondent ended the marriage. The petitioner rented a house in Regina at a cost of $1,400 per month and had lived there with the children since. She was able to find employment. Her family expenses totaled $62,900 and when the child support payments and child tax credit were taken into account, the petitioner had a $12,400 surplus annually. The respondent relocated to Gravelbourg for a posting and was in a new relationship. His financial statement showed $111,900 in expenditures and his surplus income was $21,400. The respondent argued that as the family had a history of low income prior to him becoming an RCMP officer, this was a relevant factor in denying the petitioner's claim for spousal support.
HELD: The application was granted. The respondent was

ordered to pay interim spousal support in the amount of $850 per month. The court found that the petitioner was entitled to spousal support because of the disadvantage she had suffered due to the breakdown in the marriage. The parties had had a long-term marriage and there was a current large disparity in their incomes. The respondent had been able to become an RCMP officer because the petitioner remained in Ontario and took care of the children. In order to relieve economic hardship arising from the breakdown and to allow the petitioner to maintain a reasonable standard of living and considering the needs and means of the parties, the court assessed support in the mid-range of table support set out in the spousal support advisory guidelines.

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Council of Rural Municipality of McKillop No. 220 v Schmidt, 2018 SKQB 206

Leurer, July 18, 2018 (QB17589)

Municipal Law – Referendum – Application for Direction

The applicant, the Rural Municipality of McKillop, applied to the court pursuant to s. 138 of the Municipalities Act for directions regarding the wording it should use in drafting two separate petitions presented to it by different groups of electors: the first, the Schmidt petition, and the second, the Johnston petition. The Schmidt petition asked the elected council of the applicant to hold a referendum directing council to request that the government of Saskatchewan alter the applicant's divisional boundaries. The redrawn electoral boundaries were intended to more evenly distribute the RM's population among its six electoral districts. The Johnston petition requested the applicant's council to hold a referendum to explore options to give the resort communities the ability to have self-government and control over their administration, taxation, zoning and bylaws, if they so chose, while leaving the division boundaries unchanged. As the applicant's administrators found the petitions to be "sufficient" within the meaning of s. 135(1) of the Act, it was mandatory under s. 136(1) for the applicant to submit the matter as a bylaw or resolution to the voters in accordance with the request of the petitioners. The applicant raised three issues: 1) was the wording of each of the petitions clear; 2) was there a conflict between the petitions; and 3) what direction should the court provide regarding the referenda required by each petition. HELD: The court found with respect to each issue that: 1) the

wording of each petition was clear and unambiguous; 2) there was no conflict between the petitions. It was possible for the applicant's council to carry out or implement the resolution that would be required by an affirmative vote on each referendum question; and 3) the questions put to voters must accord with the petitions and be sufficiently clear so that the applicant's council knows what it is required to do if there was a majority of yes votes to either or both questions. The court provided instructions related to whom the applicant should refer when making a request to change the boundaries and to the map in the Schmidt petition. It suggested that the term "hamlet" be substituted in the Johnston petition, as the phrase "resort communities" is not used in the Act. In addition, the wording of the petition could take into account the limited nature of the powers given to a hamlet under the Act or alternatively, the applicant might explore changes to the existing legislation.

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Munday v Deshwar, 2018 SKQB 208

Leurer, July 23, 2018 (QB17590)

Real Property – Agreement for Sale – Validity
Real Property – Agreement for Sale – Cancellation
Contract Law – Interpretation
Civil Procedure – Queen's Bench Rules, Rule 1-4

The plaintiff became a tenant of the defendants in 2004. There was no written lease but the parties agreed that the plaintiff was to pay rent of $500 per month and was responsible for the cost of utilities. Shortly after the plaintiff took possession, the parties began discussing the sale of the property. They then negotiated an agreement for sale (AFS) that included that the plaintiff would continue making the monthly payment, which would be credited to property taxes and insurance that the defendants would continue to pay, then towards interest, and finally in reduction of the principal. The plaintiff would become responsible for the upkeep of the property. The plaintiff claimed that the purchase price was $38,000. The defendants maintained that no agreement was ever reached and that the plaintiff continued as a tenant. As such, he made a number of unauthorized renovations to the house and breached numerous city bylaws. As a result, the defendants eventually refused to take any more payments from him after June 2012. They were unsuccessful in having him removed from possession. The self-represented plaintiff brought an action against the defendants in

2013 whereby he alleged the existence of a rent-to-own arrangement between them at the purchase price of $38,000. He claimed that he made improvements to the property in reliance on the existence of the agreement and made sufficient payments to extinguish his payment obligations to the defendants under the agreement. He asked for judgment transferring title of the property to him. In their statement of defence, the defendants, also self-represented, denied that an agreement had been reached. They insisted that if there was an AFS, the purchase price was $43,000. They commenced their own action in 2016 in which they stated that the plaintiff breached his tenancy agreement with them and requested an order of possession. Alternatively, if there was an AFS, the plaintiff had failed to pay sums owing under it since 2012 and asked for an order pursuant to The Agreements of Sale Cancellation Act (ASCA) and The Land Contracts (Actions) Act cancelling the agreement. The court struck the claim for cancellation of the alleged AFS because the defendants failed to meet the requirements for leave to commence the claim. The two claims were consolidated and the defendants' claim was continued as a counterclaim. Until the trial, the defendants continued to represent themselves and although they then applied for and were granted leave to commence a proceeding for an order cancelling the alleged AFS, they failed to do so. At trial, the court decided that the defendants could make the claim regardless. As the plaintiff was given notice that they intended to seek cancellation of the AFS and had the opportunity to respond, the court found that the test for the grant of a remedy not claimed as set out in Queen's Bench rule 1-4 had been met. The court ordered that the defendants' counterclaim be amended to include a request for judgment for an order cancelling the AFS pursuant to the ASCA. The issues were: 1) whether an AFS existed; 2) if so, what payments were made and should be credited against the purchase price; and 3) what was the appropriate remedy.

HELD: The defendants were given judgment against the plaintiff. The court found with respect to each issue that: 1) there was a valid AFS between the parties effective January 1, 2005. The parties agreed that the property would be sold for $43,000 pursuant to the rent-to-own arrangement; 2) relying upon the defendants' accounts, there was reliable evidence of payments made by the plaintiff, up to June 2012, of $30,940 towards the principal amount of $43,000. The court calculated that in accordance with the agreement the plaintiff owed to the defendants: the outstanding balance as at June 2012 subject to interest at the rate provided in the agreement, the property taxes and insurance paid by the defendants up to December 31, 2017, all of which totaled $26,219; and 3) the appropriate remedy in the circumstances was the cancellation of the AFS but that the

plaintiff should be given the opportunity to redeem the property. He was entitled to redeem his equity in the property by paying out the amount owed by him ($26,219) plus any additional property taxes and insurance paid for by the defendants for 2018, plus interest from January 2018 to the date of redemption. Upon payment, the defendants were to transfer title to the property to the plaintiff. If the plaintiff did not pay the total amount into court by November 1, 2018, the agreement would be cancelled and the defendants would have a right of possession to the property and all monies paid by the plaintiff to them pursuant to the AFS would be forfeited to them.

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Ziola v Petrie, 2018 SKQB 209

Layh, July 24, 2018 (QB17591)

Contract Law – Sale of Land – Formation
Real Property – Sale of Land – Oral Contract

The plaintiff brought an action against the defendant for specific performance and damages. The plaintiff claimed that the defendant agreed to sell him three quarters of land. The defendant's position was that there was no agreement and if there was, it was not in writing as required by The Statute of Frauds. The plaintiff made this application for a resolution of the initial question of liability as to whether an agreement was created and if it was, then proof of damages would follow. The plaintiff argued that a contract was created and that it complied with the statute because he made his offer in writing, via an internet-based land auction program, and the acceptance was orally communicated by a telephone conversation. Therefore, all the requisite elements of a valid land sale were present. The defendant had used a website to list 17 quarters of land for sale, including six quarters of relevance to the action. The website was intended to connect sellers of farmland with interested buyers in a type of "non-binding auction" to permit sellers to gauge interest in their land, find the best possible price and avoid realtor's commissions if a sale were completed. The listing showed three groups of the farmland for sale, described as 1) three adjoining quarters (the subject quarters); 2) two quarters (the adjacent quarters) and 3) one quarter (unsold quarter). In his online comments to the defendant during the auction, the plaintiff said that he wanted all five quarters (the subject and adjacent quarters). The plaintiff bid on each of the above parcels and had the highest bid on the subject quarters, but that in itself

did not guarantee the purchase under the terms of the online auction program. He stopped bidding on the adjacent quarters because he thought they were becoming overpriced. After the auction, the plaintiff consulted with family members regarding whether to pursue negotiations with any of the bidders. They discussed the problems that would occur if the subject quarters were separated from the adjacent quarters because the two blocks were owned by different individuals. The defendant then telephoned the plaintiff and gave him two package options for the sale, both of which resolved the identified problem by including the purchase of the adjacent quarters. The package options were to purchase the subject and the adjacent quarters for $1,050,000 (which was 5 percent more than the $625,000 the plaintiff offered for the subject quarters and his last bid of $375,000 on the adjacent quarters) or the subject quarters and one of the adjacent quarters for $840,000. At the end of the conversation, the plaintiff testified that he wanted to be sure that regardless of his response to the package option offers, he would be able to buy the subject quarters for $625,000. The plaintiff did not have concerns about the purchase because he said that the defendant told him that "we had them". He believed that this indicated the defendant's willingness to accept his bid on the subject quarters and that if he accepted either of the two options, then either of the newly accepted offers would replace the agreement respecting the subject quarters. The defendant's interpretation of the conversation was that he declined to accept the offer on the subject quarters until he heard back from the plaintiff respecting the package options and then he would decide whether or not he would sell the subject quarters. He either misheard or misunderstood the plaintiff's question about the subject quarters and denied that he gave any assurance that he would sell them to him regardless of his response to the package offers. The plaintiff called the defendant shortly after the first conversation and advised that he would not accept either of the package option offers but would immediately bring the deposit for the purchase of the subject quarters. The defendant told him to "hold off". The plaintiff interpreted that to mean that there was no urgency regarding the deposit rather than that no agreement existed respecting the subject quarters. The defendant testified that he said he was not prepared to accept the deposit at this time, which meant that he was not prepared to accept the plaintiff's bid on the subject quarters. Three days later, the defendant emailed the plaintiff and said that he would not be accepting the bid. The issues were: 1) whether a contract was formed; 2) if so, did the Statute of Frauds apply.

HELD: The plaintiff's action was dismissed. He had not established on a balance of probabilities that he and the

defendant were parties to a valid and enforceable agreement of sale regarding the subject quarters. The court found with respect to each issue that: 1) there was no contract. In interpreting the words of the first telephone conversation and the context of the bidding process, using the standard of the reasonable bystander, there was no consensus ad idem between the parties. The second telephone conversation had done nothing to alter that finding. Both the plaintiff and the defendant reasonably believed different things; and 2) the Statute did not apply as there was no contract.

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