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The appellant sued the respondents claiming recovery of over $1 million, alleging that the respondents had improperly received crop insurance indemnities based on misrepresentations of crop production and yield information. The statements of claim were issued in 1998. The actions against the separate respondents were consolidated in 2006. In 2015, the respondents applied pursuant to Rule 4-44 of The Queen's Bench Rules for an order dismissing the action for want of prosecution due to delay. The chambers judge granted the order finding that a delay of 19 years was inordinate, all but four years was inexcusable, and it was not in the interests of justice to continue. The appellant appealed that decision as well as two other fiats made in Queen's Bench prior to the delay application ("incidental decisions"). The issues on appeal were whether: 1) the chambers judge of an incidental application erred by deferring the appellant's contempt and spoliation application until after the delay application had been heard; 2) the affidavit material that was struck by a chambers judge pursuant to an incidental decision should have been considered by the chambers

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judge who heard the delay application; and 3) the chambers judge overlooked or misapprehended material evidence and disregarded material facts to a degree that resulted in an error of law, and whether he erred in law in his interpretation and application of the ICC test, the test in a delay application.

HELD: The appeal was dismissed. The issues were determined as follows: 1) the case management judge did not rule on whether the contempt application should be heard before the delay application; he did not make a binding order. Section 9(5) of The Court of Appeal Act 2000 permits appeals of an incidental decision, however, the court determined that the case management judge's comments did not meet the definition of decision and therefore could not be appealed. Even if they had jurisdiction, the appeal court indicated that they saw no substantive basis to overturn the fiat; 2) the chambers judge concluded that any material relating to the merit of either party's case was irrelevant in the delay application. The appeal court also held that the ICC factors did not require an examination of the merits of the statement of claim; and 3) the appeal court agreed with the appellant that the chambers judge erred in his calculation of the length of the delay by ignoring an earlier fiat that directed a period not be considered in the issue of delay. The error changed the delay from 19 years to 18 years, which was not an overriding error. The appeal court disagreed with the appellant that the chambers judge failed to properly note their evidence. The chambers judge also concluded that the matter was not particularly complex, and the appeal court did not find that to be a palpable or overriding error. The chambers judge did consider evidence of the respondents' conduct, contrary to the appellant's assertion. Another argument of the appellant was that the chambers judge failed to consider how the Rules placed joint responsibility on both the plaintiff and defence counsel to move the litigation along, especially after amendments in 2013. The appeal court again responded by indicating that the chambers judge had taken the respondents' conduct into consideration. Also, if effect was given to the appellant's argument it would have only had effect from mid-2013 onward, not a substantial portion of the delay. The appellant also took issue with how the chambers judge assessed each of the eight factors under the interests of justice stage of the ICC test. The appeal court found that the chambers judge erred on his assessment of the last factor but said it would not be inappropriate to give this more weight than the other seven factors, which the chambers judge found mostly supported dismissal. The appellant also sought to invoke Crown prerogative for the first time on the appeal. The appellant argued that two prerogatives applied: a statute does not bind the Crown unless expressly stated; and nullum tempus occurrit regi, which means that time does not run against the Crown. The prerogatives still exist but are not absolute. The appeal court did not agree with the respondents that the Proceedings Against the Crown Act governs actions against the Crown as well as those brought by the Crown. The appellant

clearly invoked The Queen's Bench Rules. The appeal court concluded the burdens of timelines must be tied to the benefit of bringing the claim. The appellant waived its immunity and could not then rely on it to bar adjudication of the respondents' delay application.

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R v Montague-Mitchell, 2018 SKCA 78

Richards Ottenbreit Schwann, October 3, 2018 (CA18077)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Methamphetamine – Conviction – Appeal

The accused was convicted after trial by a Provincial Court judge of trafficking in methamphetamine and cocaine and of being in possession of the proceeds of crime. The accused was acquitted of charges of possession for the purposes of trafficking (see: 2017 SKPC 32). He had been arrested as a result of police surveillance of another person they suspected of drug trafficking. The suspect was parked in a truck when the accused attended at it and remained there for two minutes. Believing that they had witnessed a drug transaction, the officers arrested the suspect and found cocaine and methamphetamine in the truck. They then arrested the accused, charged him with trafficking and searched him, whereupon they found two cell phones, $2,770 in cash rolled in small bundles and a set of keys. The keys were found to belong to another individual also being investigated by the police and after obtaining a search warrant, the police searched his apartment and found $26,600 in cash and a bag containing methamphetamine and cocaine, similar to those found in the truck. The accused testified at trial that he had the keys to the apartment because his friend who lived there was leaving for a period of time and wanted the accused to let people into it while he was gone. He denied ever having access to the apartment or know what was in it. The judge did not believe the accused when he said that he had stopped at the truck in the parking lot because someone in it had asked him for a cigarette and convicted him of the charges related to trafficking. Although the judge did not accept the accused's account of how he came to have the keys to the apartment and found that the only reasonable inference was that he was an associate of the occupant and knew he used it as a stash house, he was not satisfied beyond a reasonable doubt that the accused had control and knowledge of the drugs and cash and acquitted him of the charges related to the search of the apartment. The accused appealed his conviction, submitting that the trial judge reversed the burden of proof during the course of his analysis and improperly admitted opinion evidence. He also contended that the convictions were unreasonable. The Crown

appealed the acquittal on the ground that the trial judge erred in law by failing to consider whether the accused was willfully blind to the presence of drugs and cash in the apartment.
HELD: The accused's appeal was dismissed and the Crown's appeal allowed. The court ordered a new trial to be held on the charges related to the search of the apartment. Respecting the accused's grounds of appeal, the court found after reviewing the judgment that the judge had not reversed the burden of proof. However, he had wrongly admitted the evidence given by one of the investigating officers, not qualified as an expert, who offered an opinion that the length of time of the contact between the accused and the suspect in the truck was suggestive of a drug transaction at higher than street level. The court applied the curative provision under s. 686(1)(b)(iii) of the Criminal Code and decided that admission of the opinion evidence had no impact on the decision to convict the accused. The conviction was also found to be reasonable. In the Crown's appeal, the court found that the trial judge erred in law in failing to consider whether the accused had been willfully blind.

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Russell v Russell, 2018 SKCA 80

Caldwell Ryan-Froslie Schwann, September 5, 2018 (CA18079)

Family Law – Custody and Access – Interim – Appeal

The appellant appealed from an interim custody and access order that required the parties' children, aged five and eight, to reside in their home community. The parties lived on the family farm throughout their relationship and when the appellant left the family home, she moved with the children to a town approximately 60 km from their community where she was employed. The respondent did not consent to the move and it was made without court approval. He applied for shared custody on a week-on/week-off basis and for an order requiring the appellant to return the children to their home community. The appellant applied for interim sole custody and primary residence of the children. The chambers judge found that an interim joint custody was appropriate and ordered the appellant to promptly relocate the children's residence to their home community. If she did so, she would have primary care with the respondent having specified access. The appellant appealed only the portion of the judgment requiring the children to be returned to their home community, alleging that the judge erred by finding this was a mobility case and by failing to find that she had compelling reasons for the move.
HELD: The appeal was dismissed and the chamber judge's order was

therefore in effect, meaning that the children should be enrolled in school in their home community immediately. The court found that the chambers judge correctly recognized that the sole test was the best interests of the children. He may have incorrectly cited Gordon v Goertz in his decision, as it pertained to mobility when there was a prior order. While the judge identified that mobility was an issue, he treated it as only one factor in assessing whether the move was in the children's best interests.

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R v Heathen, 2018 SKPC 29

Agnew, April 6, 2018 (PC18022)

Criminal Law – Judicial Interim Release

The accused applied for judicial interim release. The Crown opposed his release and the defence raised the applicability of the Gladue decision. The court ordered the release of the accused and later provided its opinion regarding whether Gladue applies to judicial interim release.
HELD: The court held that the Gladue decision does not apply to bail hearings. The Gladue decision is confined to sentencing and the considerations found in s. 718.2(e) of the Criminal Code. Although culture-specific considerations which speak to the primary, secondary or tertiary grounds set out in s. 515 of the Code with respect to the specific accused before the bail court will always be potentially relevant, they are not related to the factors outlined in Gladue or Ipeelee and are equally applicable to all accused persons seeking judicial interim release.

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R v Fleury, 2018 SKQB 95

Layh, March 27, 2018 (QB18167)

Statues – Interpretation – Sex Offender Information Registration Act, Section 490.015

The applicant applied to the court under s. 490.015 of the Criminal Code, asking it to terminate his registration in the Sex Offender Registry. The registration occurred pursuant to s. 490.012 of the Code when the applicant was sentenced after trial in 2005 for offences under s. 271. The applicant was released from prison in 2008 and then

lived for four years in Saskatchewan and after 2012, in Brandon. He had reported personally to the local RCMP detachments in both provinces on an annual basis as required by the Sex Offender Information Registration Act (SOIRA). Since his release from prison he had been continuously employed and provided letters of reference from his employers in his application. He testified that he felt stress in complying with the reporting requirement and lived with the fear that people would learn of his conviction. He applied for the termination of his registration because he had had no further involvement with the criminal justice system and should not be obligated to continue reporting.
HELD: The application was dismissed. The court found that under s. 490.016 of the Code, the reporting requirement had not had any negative impact on the applicant's ability to obtain and retain employment. He had not shown any significant impacts to his liberty, privacy, mobility or employment because of his obligations under SOIRA.

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Input Capital Corp. v Gustafson, 2018 SKQB 154

Kalmakoff, May 17, 2018 (QB18154)

Statutes – Interpretation – Farm Debt Mediation Act, Section 2, Section 21
Contract Law – Unconscionability
Contract Law – Unjust Enrichment

The plaintiff brought two actions against the defendant, one commenced in Regina and the other in Estevan. The plaintiff, described as a canola streaming company, used a new business model for agricultural financing whereby it entered into multi-year contracts, "streaming purchase contracts", with farmers. The plaintiff's arrangement with farmers protected its interests in contracting with them by taking a security interest in both the crops the farmer was obligated to deliver as well as a collateral security interest in all of the farmer's present and after-acquired property and a collateral mortgage in any of the lands on which crops were grown. The plaintiff provided an up-front payment to the defendant farmer to be used by him for input costs, in exchange for the defendant agreeing to sell certain quantities of canola to the plaintiff. Prior to the signing of the contracts, the weather in 2012 had prevented the defendant from seeding a large portion of his land. In 2013, the defendant had enjoyed a good harvest but could not cash in on it for various reasons, including a shortage of delivery space because much of it had been spoken for by the plaintiff. By January of 2014, the defendant was

under significant financial pressure as he had not been able to sell his 2013 canola and would not be able to obtain financing from his bank and Farm Credit Canada (FCC) to purchase inputs to seed his 2014 crop. At the same time, the plaintiff's Vice Present of Marketing (VP) was trying to engage farmers in contracts for the delivery of canola because it had entered into a large number of canola delivery contracts with Viterra and needed to fill its obligations. The VP approached the defendant and promoted the streaming purchase contract with him. Although the terms of the agreements were lengthy and complex, the negotiations were conducted in general terms and the defendant did not obtain legal advice before signing. In April 2014, the parties entered into a canola purchase agreement and a streaming canola purchase agreement, followed by another streaming purchase contract in December 2014 which included a collateral security agreement and a mortgage amending agreement. Another amending agreement to the streaming canola purchase agreement was entered into in March 2015. The plaintiff made the advance payments set out in the contracts to the defendant but he did not deliver the commodity required by the contracts in 2014 and 2015. The plaintiff commenced the Regina action against him, alleging a breach of contract and seeking a number of remedies. In its second action, commenced in Estevan in June 2017, the plaintiff also alleged breach of contract and sought remedies such as damages, foreclosure of the mortgages and judicial sale of the defendant's land in June 2017. The parties provided the court with an agreement that both actions should be dealt with concurrently and a statement of 24 issues. Amongst the issues were: 1) whether the Farm Debt Mediation Act (FDMA) applied and, if so, what the consequences were of the plaintiff's failure to give the requisite notice before commencing the Regina action. The defendant argued that the FDMA applied because the plaintiff was a secured creditor and because it failed to give the notice under s. 21, the Regina action was a nullity; 2) whether the agreements were unconscionable in common law or equity. The defendant argued that contracts should not be enforced under the common law because he was under severe financial strain at the time he executed them. His problems were worsened by the plaintiff's purchase of significant capacity in the grain shipping infrastructure so that he had nowhere to sell his grain in 2014. The plaintiff was aware of his financial difficulty. Its ability to supply him with large sums in the negotiation stage of the contractual arrangements created an inequality of bargaining power which caused him to enter into them and they were so one-sided and unfair that they should be set aside and not enforced; and 3) to what remedy the plaintiff was entitled under the Estevan contract.

HELD: The plaintiff's Regina action was dismissed as a nullity. The court set aside the contractual agreements between the parties because they were unconscionable. The plaintiff was granted judgment in relation to the Estevan action in the amount of $4,399,400. With respect to each issue the court found: 1) the FDMA applied. The

Regina action was taken to enforce a remedy against the defendant's property. Under s. 2, the plaintiff met the definition of a secured creditor. Accordingly, it was required to give notice under s. 21 before commencing the Regina action and its failure to do so meant that the action was a nullity; 2) the defendant established that: i) there was inequality between himself and the plaintiff at the time the contracts were entered into as he was in financial distress, which continued through to 2015. The plaintiff was a stable and successful company; ii) the VP of the plaintiff used the inequality of bargaining power. The plaintiff's new streaming contracts were unknown to farmers and they were heavily one-sided in its favour if the farmer failed to meet his obligations under them. In this case, the VP knew that the defendant was desperate to sell his canola in 2014 and that he was under significant financial pressure due to his debts to the bank and FCC. The defendant was inadequately informed by the VP of the full effect of the collateral mortgage and security agreements nor did he receive the lengthy and complicated contracts ahead of time before he signed. By the end of 2014 the VP knew that the defendant had not delivered the canola and instead of terminating the contract, he negotiated a second streaming contract which made the defendant's delivery obligations much more onerous. Following the second contract, the VP learned that the defendant had lost his revolving line of credit and created the amending agreement that required him to deliver all his crops to the plaintiff in 2015 and 2016; and iii) the entire contractual relationship was unfair. As each contract was added on, the cumulative effect was more profitable and without risk for the plaintiff; and 3) the plaintiff's remedy was in equity. It was entitled to recover the moneys it paid to the defendant because he was unjustly enriched. He had received payments resulting in the deprivation to the plaintiff. It would be unjust to permit the defendant to retain the benefit. He used the money to continue to produce crops and provided nothing to the plaintiff despite the fact that he had canola he could have delivered to the plaintiff if he had chosen to. Finally, the court dismissed the plaintiff's claim for solicitor-client costs as it was not satisfied that this case warranted them. Due to the complexity of the case, it was awarded party and party costs calculated on Column III of the Tariff.

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Saskatchewan Power Corp. v Mainline Industrial Ltd. Partnership, 2018 SKQB 222

Barrington-Foote, August 14, 2018 (QB18226)

Builders' Liens – Priorities
Statutes – Interpretation – Builders' Lien Act, Section 15, Section 70

The applicant, Saskatchewan Power Corporation, paid $403,800 (the fund) into court under s. 57 of The Builders' Lien Act (BLA) in satisfaction of its obligations: 1) pursuant to its contract with Mainline Industrial; 2) under The Builders' Lien Act (BLA), to respondent subcontractors (Commercial Sand Blasting, Spartan Scaffolding, ATCO, Thermal Systems, G.T. & H. Holdings and Redriver Lumber); 3) under The Enforcement of Money Judgments Act, to the respondent EMCO; and 4) an assignment of accounts receivable by Mainline to Liquid Prairie Corp. pursuant to a Full Factoring Agreement (agreement). The same order also provided payment out of court on an application by any interested party. In November 2017, Commercial applied for an order that the fund be paid out and distributed pro rata to the subcontractors. The Minister of National Revenue claimed priority and entitlement to the fund pursuant to the deemed trust provisions of s. 227 of the Income Tax Act (ITA). The claim was comprised of employer contributions and amounts withheld from Mainline's employees' salaries pursuant to the ITA, the Canada Pension Plan and the Employment Insurance Act. Liquid, a commercial factor, claimed entitlement to the fund as an absolute assignee pursuant to the agreement.

HELD: The application made by Commercial was granted. It and the other respondent contractors were entitled to the requested relief. The court found with respect to the Crown's claim that the deemed trust in favour of it did not apply to any part of the holdback receivable or any part of the fund. The terms of the agreement permitted the assignment of the receivables subject to the liens and trust imposed by the BLA at the time they were factored, and there was no evidence that the ordinary course of factoring for construction contracts generally excludes receivables relating to holdbacks. The Crown was not entitled to any portion of the fund as against Liquid or as against the subcontractors. Regarding Liquid's claim, the court found that the meaning of "assignment" in s. 70(2) of the BLA includes absolute assignment to ensure that the interests of lien claimants could not be defeated by way of assignment. In addition, s. 15 of the BLA directs that lien claimants have priority over all general or special assignments, including absolute assignments. The holdback receivable, being an amount owing to Mainline, was subject to the trust constituted by s. 7 of the BLA for the benefit of the subcontractors. Therefore the subcontractors had priority over Liquid as an assignee of the holdback receivable pursuant to s. 15 of the BLA.

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Van Ginkel v Aon Reed Stenhouse Inc., 2018 SKQB 223

Leurer, August 20, 2018 (QB18227)

Employment Law – Contract – Interpretation
Employment Law – Breach of Contract – Restrictive Covenant
Civil Procedure – Queen's Bench Rules, Rule 7-5

The plaintiff brought an action against his former employer, the defendant AON Reed Stenhouse, for unpaid commission owed to him under the terms of an employment contract. AON counterclaimed, alleging the plaintiff breached the non-competition clause in the contract. The plaintiff applied for summary judgment: a) in the amount of his claim; and b) dismissing AON's counterclaim. AON had approached the plaintiff about becoming an employee in a new position created so that he would work with other AON employees to create strategies to secure new business and to mentor other employees to assist them in expanding their individual sales portfolios. The evidence tendered by the plaintiff to support his claim for commission was contained in an email from a senior executive of AON that stated that it would pay him 25 percent of new revenue. The written agreement prepared by AON provided that the plaintiff was eligible to participate in an incentive compensation plan, details of which would be provided when the plaintiff commenced employment. The terms of the compensation plan differed from the 25 percent commission arrangement described in the emails and the details of the plan were not given to the plaintiff when he went to work for AON.
HELD: The plaintiff's application for summary judgment was granted. He was given judgment in the amount of $75,750, representing his 25 percent commission. The court found that the plaintiff's evidence was unchallenged, that he and their executive had reached an agreement in their emails regarding his commission and that he had not been informed regarding AON's incentive plan. Similarly, there was uncontradicted evidence that supported the role played by the plaintiff in obtaining the sale for which he claimed his commission in damages. The court dismissed the plaintiff's application to dismiss AON's counterclaim because there was a contentious issue, turning on issues of credibility, as to whether the plaintiff breached clauses in his contract. The court found that there was a triable issue with respect to the counterclaim, but that did not prevent it from granting summary judgment on the main claim as there was no evidence that AON would suffer any prejudice, whereas if judgment were stayed, the plaintiff would be prejudiced if enforcement were deferred.

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Case v Rotelick and Associates, 2018 SKQB 242

Elson, September 7, 2018 (QB18236)

Civil Procedure – Parties – Application to Add Parties
Courts and Judges – Discretion – Nunc Pro Tunc
Statutes – Interpretation – Contributory Negligence Act, Section 7
Statutes – Interpretation – Limitations Act, Section 14, Section 20

The defendants applied for an order granting leave to issue a third-party claim against the proposed third-party defendants claiming contribution and indemnity. The defendants and proposed third-party defendants are chartered professional accountants. The plaintiffs claimed against the defendants and the defendants argued that the proposed third-party defendants also provided advice and assistance to the plaintiffs. The third-party defendants argued that the application was contrary to the Contributory Negligence Act and relevant provisions of the Limitations Act. The plaintiffs claimed that the defendants were responsible for unanticipated tax costs resulting from a Canada Revenue Agency reassessment. They claimed a breach of contract and negligence misstatements. In their statement of defence, the defendants assert that they recommended the sale of shares should have been directly to the other two holding companies and that they generally recommended against the use of butterfly reorganization, which was used. They also indicated that the plaintiffs sought a second opinion from the proposed third-party defendants, who recommended the butterfly reorganization. The defendants then agreed to deal directly with the third-party defendants in planning the butterfly reorganization. The defendants argued that if the plaintiffs suffered loss, it was the result of the third-party defendants breaching contract and/or negligent misrepresentations. There was a tolling agreement between the defendants and the proposed third-party defendants that stipulated during the agreement, the defendants shall not commence a third-party claim against them. During the "tolling period", any time-based defences would be tolled. The tolling period ran from March 30, 2015 to April 20, 2017. The defendants indicated that their prior counsel miscalculated the tolling period. The issues were whether: 1) the defendants missed the limitation under s. 14 of The Limitations Act; and 2) a claim could be made against the proposed third party for contribution or indemnity based on breach of contract without privity.
HELD: Leave was granted, with some modification. The court determined the issues as follows: 1) the starting point is the date the statement of claim was served on the defendants, April 9, 2013. The limitation period would have expired April 10, 2015, but for the tolling agreement. The limitation expired after May 1, 2017. The defendants first application was served on April 24, 2017 and filed on April 26, 2017, before the expiration of the limitation period. The court also examined s. 20 of the Limitations Act in case the calculation of the limitation period was incorrect. The court was more than satisfied that the application met the criteria in s. 20. The case relied on by the proposed third-party defendants was distinguished by the court; and 2) leave was granted; however, the claim against the proposed third-

party defendants had to be limited to one based on negligence and/or negligent misrepresentation. The defendants were granted leave, nunc pro tunc, to issue the third-party claim, provided an amendment was made to limit the liability of the third party to be based on negligence and/or negligent misrepresentation.

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Spencer Health Network Inc. v Co-operators Life Insurance Co., 2018 SKQB 244

Barrington-Foote, September 10, 2018 (QB18237)

Contracts – Interpretation
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Contracts – Interpretation – Rectification
Limitations of Actions

The plaintiff developed vision care benefits and the defendant was a life and disability insurer that provided extended health insurance (EHC). The parties entered into a service agreement in November 2000 that provided the plaintiff would make vision care benefits (plaintiff benefits) available to members of EHC plans issued by the defendant. The defendant would pay access fees to the plaintiff. The arrangement was terminated by the defendant in October 2008. The plaintiff claimed that the defendant underpaid access fees for the entire term of the service agreement, the total being $539,787.38. The defendant argued that the plaintiff was incorrectly interpreting the service agreement and they counterclaimed. The parties agreed that the defendant would pay an access fee of seven cents per month for each EHC group plan member. The plaintiff would pay a usage fee to the defendant. The plaintiff testified that he agreed to the lower than usual access fee because he understood that it would be paid for every EHC group plan member in the defendant's "book of business". There were four drafts of the service agreement. The final version indicated that dependents would be excluded for the purpose of calculating access fees, but that group EHC plan members without vision care benefits would be included. Payments were made quarterly to the plaintiff. The defendant only paid the access fee for those members that had the plaintiff benefits, not all plan members. The parties disagreed on who should be subject to the access fee. The plaintiff first questioned the defendant's calculation of payments when the defendant claimed that they had miscalculated access fees by including fees for members of a stop-loss insurance plan.
HELD: The plaintiff was entitled to recover a portion of the amount claimed. The defendant's counterclaim was dismissed. Because the plaintiff knew that not all members had the plaintiff benefit, it did not

mean that he also knew that the defendant was not calculating the fee based on the total number of people covered under a group contract of EHC issued by the defendant. The court determined the payment to be for the number of persons (excluding dependents) covered under a group contract of EHC issued by defendant, regardless of whether they were eligible to receive vision care benefits under the group contract. The defendant argued that the plaintiff knew or ought to have known that the defendant could not impose the plaintiff benefits on third-party administrators (TPAs). The court found, however, just because the plaintiff knew that the plaintiff benefits were not extended to some TPAs did not mean that he knew the plaintiff was not being paid for all members of group EHC plans. Further, the court did not find that the plaintiff knew the defendant could not unilaterally extend plaintiff benefits to TPAs, he could have just thought they had not been extended to all TPAs yet. Evidence of previous correspondence regarding the plaintiff's knowledge and understanding of extending benefits to the TPAs was not admitted because the language at issue in the service agreement, considered in light of the surrounding circumstances, was not ambiguous. The defendant argued that the court's interpretation would mean they were paying something for nothing. The court disagreed. The court went on to consider the meaning of "group contract of extended health insurance issued by" the defendant. The defendant argued that it was not responsible to pay for arrangements where it provided no insurance services, such as stop-loss arrangements. They argued that stop-loss arrangements were not group contracts of extended health insurance because they were not liable to individual members of the group, but to the plan sponsor or TPA. Further, the defendant argued that there was no underlying EHC insurance, because the stop-loss provided insurance protection to the plan sponsor, which self-insures in relation to EHC benefits for its members. There were three stop-loss agreements. The court considered each individually. The first one was found to be a group contract of EHC insurance within the meaning of the service agreement because the defendant expressly agreed to insure and pay extended health care benefits to the individuals who fell within the definition of "member". The court was not satisfied that the second and third agreements were contracts of extended health insurance issued by the defendant. The defendant argued that if the court concluded that the express terms of the service agreement were unclear, a term should be implied limiting membership in the calculation group. The court concluded that even if an implied term was found the interpretation of the payment clause would be interpreted in the same manner as before, the payment would not change. The defendant also argued that the doctrine of rectification should be used to read in the manner of the implied term proposed. Again, the court found that even if the rectification was accepted, the composition of the calculation group would not change. The drafts of the agreement were reviewed and none of them limited the group

counted in the fee calculation to those that the plaintiff benefits were actually extended. The claim for rectification was denied. The last issue was whether the plaintiff's claim was statute barred. The plaintiff testified that he did not know he was being paid the appropriate fee until he received an October 10, 2008 letter from the defendant. The cause of action arose on that day and therefore, the two-year limitation period from The Limitations Act applied. The plaintiff's claim was not statute barred. The court also did not find that the plaintiff was estopped from asserting his claim because he cashed the quarterly cheques. The plaintiff argued that the plaintiff was disentitled from recovery because the plaintiff acted in bad faith by incorrectly calculating the usage fee payable to them. The court found that even if the plaintiff incorrectly paid the usage fee to the defendant, his calculation was fully disclosed to the defendant throughout. If there was a breach it was not a breach of the general duty of honesty in contractual performance. A breach as alleged by the defendant also would not have disentitled the plaintiff from recovery. The court outlined the groups to include in the access fee calculation and gave the parties 30 days to agree on the amount payable.

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Poon v Parker, 2018 SKQB 247

Smith, September 17, 2018 (QB18241)

Real Property – Certificate of Pending Litigation
Real Property – Homestead Affidavit
Real Property – Joint Owners with Right of Survivorship
Trusts – Resulting Trusts

The applicant was the daughter of the deceased. The deceased and the applicant were joint owners with right of survivorship of a condominium. The respondent registered a homestead interest against the condo on April 17, 2013, after the deceased had a stroke. The deceased died in December 2015. The respondent registered a certificate of pending litigation against the title in October 2016. The applicant argued that any entitlement the respondent had to the condo was through the deceased, so it vanished as a result of her death. The respondent argued that the condo was his family home with the deceased since they had been living together as spouses since 2001. He asserted that there was a resulting trust in his favour because the transfer to joint names was without consideration. The applicant argued that the respondent and deceased were not spouses. The respondent applied to consolidate The Family Property Act actions with the condo dispute commenced by the applicant. The applicant

requested orders under ss. 107 and 109 of The Land Titles Act, 2000 and The Homesteads Act, 1989, directing the registrar of titles to discharge the homestead interest as well as an order under s. 47 of The Queen's Bench Act, 1998, vacating the certificate of pending litigation. The condo was purchased in 1993 and transferred to joint tenants in 2007. The deceased told her lawyer that the transfer was for estate planning purposes.
HELD: Unregistered interests, such as claims of resulting trusts, are enforceable between the immediate parties or those claiming through the same. The applicant must claim through the deceased. The respondent argued that the deceased held a resulting trust in his favour. The court concluded that it would be inappropriate to allow the applicant the opportunity to deal with the condo prior to the respondent having his claim adjudicated. The court did not discharge the homestead certificate or the certificate of pending litigation. The court ordered that the applicant's matter was to be heard at the same time as the respondent's petition and the evidence called under each matter shall apply to the other. The applicant was given the opportunity to apply to the court if she wished to sell the condo in the meantime.

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Giesbrecht v Giesbrecht, 2018 SKQB 249

Brown, September 18, 2018 (QB18238)

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Wills and Estates – Testamentary Document
Wills and Estates – Wills – Interpretation

The applicant applied for an order pursuant to s. 37 of The Wills Act (Act) that a "fill-in-the-blank" will completed by the deceased was valid and capable of being probated. The blanks appeared to have been completed by the deceased and she and another person signed the end of the document. The deceased gave her husband, the applicant, a parcel of land and indicated that if the applicant predeceased her all of her real and personal property would go to her two sons. The document did not indicate a gift with respect to the rest and residue of the estate if the applicant did not predecease her. The document did not adhere to the requirements of the Act because only one person other than the deceased signed it. Further, the document did not satisfy the requirements of a holograph will because it was not entirely in the deceased's handwriting. The respondent was the surviving son of the applicant and deceased; their other son predeceased his mother. The respondent did not oppose to the document representing the deceased's intentions.

HELD: The court concluded that s. 37 applied to the document and declared it to be fully effective as if it had been executed according to the Act. The court accepted the notion of substantial compliance for s. 37 to apply. The section was also found to grant broad discretion to the judge. There must however, be clear testamentary intentions in the document for the judge to exercise discretion and invoke s. 37. The court was satisfied that: there was no fraud with respect to the document; and the document was testamentary in nature. Even though there was an intestacy left regarding the rest and residue since the applicant survived the deceased, it did not lead to the conclusion that the document was not an expression of the deceased's testamentary intent regarding the land. The gap will be filled by The Intestate Succession Act, 1996. The court ordered that letters probate were to issue.

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R v Scholpp, 2018 SKQB 252

Barrington-Foote, September 21, 2018 (QB18239)

Criminal Law – Sentencing – Breach of Probation
Criminal Law – Sentencing – Consecutive Sentence – Concurrent Sentence
Criminal Law – Sentencing – Failing to Remain at the Scene of an Accident
Criminal Law – Sentencing – Negligence Causing Bodily Harm
Criminal Law – Sentencing – Sentencing Principles

The accused was convicted of the following Criminal Code offences: two counts of negligence causing bodily harm, contrary to s. 221; one count of failing to remain at the scene of an accident, contrary to s. 252; and one count of breach of probation, contrary to s. 733.1(1). The accused was driving a "lifted" Ford F150 and followed a Chevy S10 that he believed his girlfriend was in. The accused's girlfriend was not in the vehicle, there were only two occupants; the victims of the negligence causing bodily harm convictions. The accused hit the victims' vehicle from behind twice and locked bumpers, pushing it at speeds over 100 km/hr. The victims' vehicle was pushed off the highway and into the ditch where it rolled. One victim was knocked unconscious and left dangling from his seatbelt. He had a soft tissue injury to his back and had to change jobs. He continued to suffer from significant back pain, he feared driving at night, and was quick to lose his temper since the event. The other victim suffered cuts to his hands and back and a soft tissue injury to his back that caused him to quit his job as a farm labourer. He continued to have pain from the back injury and pre-existing migraines were exacerbated. The accused did not stop to check on his victims, but instead called a friend and told

him to check on them. The accused was 30 years old at sentencing and had one ten-year-old son but was not in an intimate relationship. The accused's employer said he was willing, hard-working, and reliable. He had a history of emotional and behaviourial issues as well as alcohol abuse. The accused stopped drinking in April 2017. He had a significant record of provincial driving offences and a significant criminal record. The accused's criminal record included breaches of probation orders and undertakings, obstruction, and resist arrest. The accused abided by his conditions since the offence, attended sessions with a mental health professional, and completed an anger management course. According to the PSR, the accused was assessed as a medium risk to reoffend. The author of the report indicated that the accused minimized his actions and deflected responsibility. The Crown argued that the accused should be sentenced to two years in prison for criminal negligence causing bodily harm, one year consecutive for leaving the scene of an accident, and six months' concurrent for the breach of probation. The Crown argued that the sentence for leaving the scene should be consecutive because it was a separate choice and a separate action. The maximum sentence for the negligence causing bodily harm is 10 years and five years for leaving the scene. The Crown argued there were numerous aggravating factors, with a few mitigating circumstances. The offender argued that the appropriate sentence would be one year, with three months' concurrent for leaving the scene.

HELD: The court found that denunciation and general deterrence were the primary sentencing objectives. Specific deterrence and rehabilitation were also taken into account by the court. The court was satisfied that the offender wanted to make the changes required to avoid committing further offences, and he had made some progress already. The aggravating circumstances were those argued by the Crown, with two exceptions: the fact that the offender left the scene was not an aggravating factor in the negligence convictions because he was being separately sentenced for that conviction; and the court was not satisfied beyond a reasonable doubt that the circumstances that resulted in a peace bond being issued in a separate matter were aggravating. The use of a half-ton truck was significant with respect to the gravity of the offence and the degree of responsibility of the offender. The court also agreed with the mitigating circumstances suggested by the Crown: the offender was a productive worker; the offender had family support; and the offender had a difficult early childhood. There was concern that that offender did not accept responsibility for the offences. The court sentenced the offender to two years on each of the criminal negligence causing bodily harm charges, to be served concurrently. He was sentenced to four months' incarceration for the leaving the scene charge. The sentence was consecutive to the other sentences. The sentences were consecutive because they protected different social interests. The court found the offence slightly mitigated because the offender did call his friend to

assist the victims. The offender was sentenced to six months' concurrent time for the breach of probation. The court considered the 28-month prison sentence to be consistent with the totality principle. The court did not find the step principle to assist the offender. He was given credit for six days served because he was in custody for four days. The offender was prohibited from driving for two years upon his release from prison. The court also ordered a DNA sample be taken because it was in the best interests of the administration of justice. A firearm prohibition for 10 years after the offender's release from custody was also made. Restitution of $700 to the victim who owned the vehicle, to pay him back for his insurance deductible, and a surcharge in the amount of $800 was also ordered.

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Wells v General Motors of Canada Co., 2018 SKQB 253

Currie, September 24, 2018 (QB18240)

Civil Procedure – Cross-Examination of Affiant
Civil Procedure – Queen's Bench Rule 7-2
Civil Procedure – Queen's Bench Rule 7-3(2)
Civil Procedure – Summary Judgment

The plaintiff sued the defendant, an automobile manufacturer, in connection with a fire that occurred in a vehicle he was driving. The defendant applied for summary judgment to dismiss the claim pursuant to Rule 7-2 of The Queen's Bench Rules. The defendant sought the ability to cross-examine the defendant's representative on his affidavit if the claim was not dismissed outright.
HELD: To defend the summary judgment application, the plaintiff had to file evidence showing that there was a genuine issue requiring a trial. Rule 7-3(2) contemplates the cross-examination on an affidavit by the respondent of an application for summary judgment. The application to cross-examination did weigh in favour of allowing it. The right to cross-examine is not automatic. The cross- examination of the defendant's representative would not cause an injustice. The claim alleges that the defendant did not manufacture the vehicle in such a way as to prevent it from starting to burn without an external cause, but there was no indication how the defendant failed in its manufacture or how the failure led to the fire. The plaintiff indicated that he wanted to retain the services of an expert to determine the cause of the fire, but first wanted to get an indication from the defendant as to possible causes of the fire. The court did not find that there was any contradictory evidence, the fire started in the engine compartment of the vehicle. There was no information from the defendant's representative that required clarification; the plaintiff

wanted to obtain new information from him based on unreliable information from internet research. The information was hearsay information. The plaintiff also had the opinion that the defendant's representative had knowledge and documents relating to the spontaneous fire, but the plaintiff was not qualified to give opinion evidence. His opinion was not based on personal knowledge or information and belief, it was based on internet articles. The plaintiff's request to cross-examine was to undertake a fishing expedition. Courts do not usually allow cross-examination for fishing expeditions. A party cannot allege a wrongdoing without specifics and then hope to find evidence of the wrongdoing through questioning and examining documents. The cross-examination, if allowed, would not assist in resolving issues, there were no contradictions that required resolving. The application to permit cross-examination of the defendant's affidavit was dismissed. The court also declined to defer the summary judgment application to allow the plaintiff to have a fishing expedition through the discovery process of the action. There was no evidence before the court that the defendant had done anything wrong. The application for summary judgment was granted. The plaintiff's claim was dismissed with costs.

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B.R., Re, 2018 SKQB 261

McIntyre, September 28, 2018 (QB18252)

Family Law – Child in Need of Protection – Temporary Order

The Ministry of Social Services applied for an order that would place four children, B.R., aged 13 years, B.G., aged 12 years, C.W.(1), aged 6 years and C.W.(2), aged 4 years, in the custody of D.E. as a person of sufficient interest (PSI) on an indefinite basis. D.E., the children's paternal grandmother, was designated as a PSI in 2017. The children had been living with their mother, M.M., until 2013 when Social Services apprehended them and placed them in the care of D.E. In 2014, M.M. indicated that she wanted to parent these children and began addressing her problems with addictions by taking and completing treatment. Social Services planned reunification on a staged basis. It found that all of the children were attached to M.M. and their relationships with her were healthy and loving. However, M.M. had relapsed on a number of occasions and had been found intoxicated. At the time of trial, she had been homeless for four months after being evicted and had not provided a plan as to how she would find accommodation or financial support if the children were returned to her and how she would address her alcohol addiction. HELD: The court granted the Ministry's application. It ordered that

the children remain in the care of their grandmother as a PSI for a period of up to one year pursuant to s. 37(1)(b) of The Child and Family Services Act. If M.M. was able to find appropriate housing and support and obtain treatment for her addiction, the children could be returned to her before the expiry of that period.

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Gudmundson v Fisher, 2018 SKQB 264

Goebel, October 2, 2018 (QB18255)

Family Law – Custody and Access – Interim

The parties separated in 2017 after having two children during their three-year relationship. The children were now three and one year old respectively. The petitioner mother was the children's primary caregiver during the relationship and took the children with her when she left the family home. The parties arranged that the respondent should have parenting time, but because the youngest child was only seven months old, the petitioner would not permit her to be away from her care for long periods. The respondent claimed that the arrangement was thrust upon him but there was no evidence that he had expressed any concerns about his access. In 2018, the respondent refused to return the oldest child to the petitioner for four months. He contended that the child had developed behavioural problems because of the petitioner and her new boyfriend. The petitioner then refused to allow the respondent to see the youngest child unless she was present. In August 2018, they agreed to implement a shared parenting schedule but in the months that followed, both parties, in particular the respondent, developed concerns that the children were receiving substandard care, although these beliefs were not confirmed. The respondent retained the children while they were visiting him and the petitioner applied for an order that she have primary care of the children with the respondent's parenting time to be specified.
HELD: The court granted the petitioner's application. It granted an interim order that the parties would have joint custody of the children with the petitioner having their primary care. The respondent would have access for two overnights each week. The court ordered both parties to attend the high conflict parenting after separation course offered by Family Justice Service and to file proof of their attendance. The court found that the petitioner had demonstrated the greater willingness to facilitate contact with the other parent and the respondent's behaviour had shown that he had not considered the children's best interests.

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Johnson v S.G.I., 2018 SKQB 265

Scherman, October 2, 2018 (QB18256)

Statutes – Interpretation – Automobile Accident Insurance Act, Section 144, Section 145

In August 2014, the father of the plaintiffs was killed in an automobile accident. He was unemployed and had no surviving spouse at the time of his death. His children were then all under the age of 21 and thus dependants within the meaning of The Automobile Accident Insurance Act. In October 2015, SGI provided decision letters to the plaintiffs that prorated a spousal death benefit among them. They each brought an action against SGI claiming that they each were entitled to receive the full share of what a surviving spouse would have received under s. 144(4): $66,696. Weekly death benefits had been paid to each of the plaintiffs as dependants pursuant to s. 144(6), (7) and (10) of the Act until October 2015 when they elected to receive the balance of their weekly benefits as a capitalized lump sum. They then sought a declaration that they were individually entitled to the spousal benefit provided by s. 144(4) in addition to their weekly benefits as dependants. They argued that based upon a literal reading of s. 145(2) of the Act, where a sole parent of a dependant has died as a result of an automobile accident, the dependant is entitled to the death benefit mentioned in s. 144(4). They argued that this interpretation was confirmed by the fact that other provisions, such as s. 145(6) in the Act and s. 26(4) of The Personal Injury Benefits Regulations, did not prescribe a manner of calculating and dividing the benefit other than that directed in s. 145(2), resulting in each of them receiving $66,696. SGI argued that by virtue of the directions in s. 145 of the Act and s. 26 of The Personal Injury Benefits Regulations, each plaintiff was entitled to only a prorated share of a surviving spouse's entitlement. HELD: The plaintiffs' appeal from the decision letters was dismissed as was their request for the declaration. The court held that the proper interpretation to be given s. 144(4) and s. 145(2) of the Act is that where an insured dies in an automobile accident without a surviving spouse, the insured's dependants share equally the spousal death benefit provided for in s. 144(4).

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