The Law Society of Saskatchewan Library's online newsletter
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Subject Index

Pilot Butte (Town) v. Aaron Enterprises Inc., 2014 SKCA 119

Whitmore, November 18, 2014 (CA14119)

Civil Procedure – Appeal – Leave to Appeal
Statutes – Interpretation – Planning and Development Act

The prospective appellant, a town, applied for leave to appeal the decision of the Saskatchewan Municipal Board ("SMB"). The prospective respondent and prospective appellant were unable to agree on a service agreement for the payment of service fees for the prospective respondent's development in the town. The prospective respondent applied to the SMB pursuant to s. 176(4) of The Planning and Development Act, 2007 for a decision on the servicing agreement. The SMB determined that the servicing agreement could not include future capital costs and directed payment terms. The prospective appellant argued that s. 172(3) of the Act allows council to establish and include capital cost of certain services. They also argued that the Act allows time limits and other assurances.
HELD: Leave to appeal was granted because the prospective appellant satisfied the two branches of the Rothman's test for leave to appeal. The questions raised were questions of law. The prospective appellants argued that they could set the service fee rate as long as it was within guidelines set out in the legislation. The prospective respondent argued that the legislation is clear and the board could consider the fees to be charged and therefore the fee was without merit. The appeal court held that the appeal had merit and therefore met the first branch of the Rothman's test. Further, the Court of Appeal found that the question of who may set servicing fees raised

an issue of broader importance and had application to all subdivision applicants.

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Klette v. Leland, 2014 SKCA 122

Lane Klebuc Caldwell, November 20, 2014 (CA14122)

Family Law – Appeal – Child Support Order
Family Law – Child Support – Adult Child with Disabilities
Family Law – Child Support – Extraordinary Expenses
Family Law – Child Support – Income in Excess of $150,000
Family Law – Child Support – Section 7 Expenses

The appellant appealed the chamber's decision that ordered the respondent to pay child support for one child in an amount significantly less than Federal Child Support Guidelines for his income. The appellant also argued that the chambers judge erred by not ordering a specific amount for s. 7 extraordinary expenses. The parties married in 1986 and separated in 2007. Their youngest child was born with Down's syndrome. In 2009 the respondent was ordered to pay $2,500 per month and there was a shared custody and parenting arrangement. The respondent remarried in 2010, and in 2012 there was a sole custody order whereby the child resided full time with the appellant. The appellant requested child support in the amount $7,526 per month with s. 7 expenses of $2,946 per month for caregiver costs. The chambers judge found the child support requirements of the child to be $5,871 per month. The Guideline amount for the respondent's income was $8,189 per month, which the chambers judge found to be inappropriate considering the child's needs. The issues were: 1) did the chambers judge apply the standard of proof required to rebut the presumptive rule that the table amount applied to child support payable under s. 3(2)(b); 2) did the chambers judge err in holding that the table amount was inappropriate and a child support order of $5,450 per month was appropriate; and 3) did the chambers judge err by not ordering the respondent to pay a proportionate share of the child's s. 7 extraordinary expenses as a distinct amount.
HELD: The appeal was dismissed. The Court of Appeal concluded that the analytical approach in s. 4(b)(ii) of the Guidelines applied to children over the age of majority even though direct application is not indicated therein. The Court of Appeal determined the issues as follows: 1) there was no doubt that the chambers judge correctly identified, interpreted and summarized the applicable law. The chambers judge examined the child's condition, needs, means and other circumstances and concluded that some of the proposed

Torts – Negligence – Duty of Care

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101068682 Saskatchewan Ltd. v. Al-Can Distributors Inc.

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expenses were unreasonable or unsupported by evidence. The chambers judge provided four reasons that the table amount was inappropriate; 2) the appeal court did not find any material error, misapprehension of evidence or error in law that would allow an appeal or vary the support order. The Court of Appeal supported the chambers judge's decision to deduct the government funding the child received from her expenses because those funds were for the child's accommodations and personal needs; and 3) the chamber's judge did not err by including the child's extraordinary expenses in a global support order; s. 3(2)(b) does not contemplate a court determining s. 7 expenses as a separate and additional support obligation.

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R. v. Shepherd, 2014 SKCA 123

Klebuc Caldwell Herauf, November 21, 2014 (CA14123)

Criminal Law – Motor Vehicles Offences – Driving with Blood Alcohol Exceeding .08 – Appeal
Constitutional Law – Charter of Rights, Section 11(b), Section 24(1)
Constitutional Law – Charter of Rights – Delay – Stay of Proceedings – Appeal

The applicant requested leave to appeal the decision of the summary conviction appeal court (see: 2014 SKQB 83) that overturned the Provincial Court trial decision that stayed the charges of impaired driving and driving while over .08 against the applicant because of a violation of his s. 11(b) Charter rights. The trial judge held that a delay of 38 months of which 23 months were attributed to the Crown was too long (see: 2013 SKPC 12). The appeal judge found that the trial judge had erred by: 1) classifying the delay occasion by the illness of the original trial judge as "institutional delay" rather than inherent delay; 2) taking judicial notice of the court's internal statistics regarding the time it takes to get to trial; and 3) failing to balance the prejudice suffered by the applicant against society's interests in having the matter dealt with by a trial on its merits. The appeal judge set aside the judicial stay and remitted the matter to Provincial Court for a retrial.
HELD: The court granted leave to appeal and dismissed the appeal. The court agreed with the summary conviction appeal judge's interpretation of the Supreme Court's decision in R. v. MacDougall. The original trial judge's illness was an extraordinary and unforeseeable event and there was no delay on the Crown's part to have a new judge assigned. The new trial date was offered within six to seven months. Although the court was concerned that there was no record of appearance before the trial coordinator when the date for a

new trial was selected, which would have been informative by verifying what exactly transpired when the parties spoke to the date of the second trial, the appeal court correctly found that the six- to seven-month period should be classified as neutral and that the remaining period of delay was well within reason in the circumstances. The court also agreed that the trial judge's use of internal statistics was improper. The records are not so widely known so as to meet the requirement of judicial notice. And finally, the court agreed with the finding that the trial judge had not balanced the interests of the applicant against those of society. The prejudice suffered by the applicant was offset in the circumstances by societal interests.

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Mohageghdoust v. Shaw Cablesystems G.P., 2014 SKCA 125

Jackson Klebuc Ryan-Froslie, November 24, 2014 (CA14125)

Civil Procedure – Documents – Disclosure

The appellants commenced an action against the respondents to recover damages for personal injuries associated with a claim that the respondents failed to retrieve lost email messages and electronic property. They applied in chambers for an order for the recovery of all emails located on various servers, including that of the respondent Shaw and for an investigation of email account activity on one of the appellant's email accounts. The respondent ministry argued in that application that the appellants' requests were for the discovery of documents and information and as such, their application was premature. The chambers judge agreed and dismissed the application. The appellants appealed the decision.
HELD: The court dismissed the appeal. The appellants had not complied with the timelines established by the Queen's Bench Rules and it was within the discretion of the chambers judge to dismiss their application.

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R. v. M. (N.), 2014 SKCA 126

Lane Jackson Whitmore, November 20, 2014 (CA14126)

Criminal Law – Appeal – Sentence
Criminal Law – Child Pornography – Possession
Criminal Law – Child Pornography – Making

Criminal Law – Sentencing Appeal – Global Term
Criminal Law – Sexual Offences – Touching for Sexual Purpose

The appellant Crown appealed the fitness of the sentences given to the respondent from the Provincial Court. The respondent pled guilty to the following Criminal Code charges: 1) inviting, counseling or inciting, for a sexual purpose, a person under 16 to touch a part of his body contrary to s. 152; 2) being in a position of trust or authority, for a sexual purpose, touch with his body to the victim contrary to s. 153(1)(a); 3) possessing child pornography contrary to s. 163.1(4); and 4) making child pornography contrary to s. 163.1(2). The victim was the respondent's granddaughter. The accused received a total sentence of four years: 1) 30 months for s. 152 offence; 2) 30 months concurrent for the s. 153 offence; 3) six months consecutive for the s. 163.1(4) offence; and 4) one year consecutive for the s. 163.1(2) offence. The respondent admitted touching the victim 20 to 30 times when she was between three and five years old. The respondent took pictures of the victim, the first being taken when the victim was three years old. HELD: The Court of Appeal held that the Provincial Court sentencing judge demonstrated his understanding of the law but nonetheless committed errors: 1) the judge first decided that four years was the appropriate global sentence and then applied the individual sentences starting with the required minimums for ss. 163.1(2) and 163.1(4), which left no room to consider what would be proportionate for the sexual offences; 2) sufficient weight was not given to the gravity of the offences or the degree of responsibility of the offender. The victim was only three, there were numerous incidents, and she was family. The respondent was 67 years old without a record. The court applied the deferential standard and did not find a basis to intervene with the sentences for the two pornography charges. Intervention was found to be warranted on the sexual offences. The Court of Appeal sentenced the respondent to 42 months on both sexual offences, to be served concurrent to one another. The total global sentence was increased to five years.

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Clements v. Preece, 2014 SKCA 128

Klebuc Herauf Ryan-Froslie, November 28, 2014 (CA14128)

Civil Procedure – Appeal
Civil Procedure – Application to Strike Statement of Claim

There were two appeals from the same Court of Queen's Bench fiat: 1) an appeal from the dismissal of the application to strike the amended statement of defence. Leave to appeal on this ground was granted previously; and 2) an appeal from the order to strike to the third party

claim against the Government of Saskatchewan. The action was an application for an interlocutory and permanent injunction requiring the respondent to move an obstruction on a roadway preventing access to the appellant's lake property. An injunction and order preventing further obstruction was granted in 2007. The respondent amended his statement of defence in 2011. The third party claim was commenced in 2012, over 5 years after the original statement of claim was issued.
HELD: Both appeals were dismissed. Orders to strike pleadings are discretionary. The chambers judge set out the proper test and given the contradictory material the Court of Appeal could not find that he improperly exercised his discretion. The Court of Appeal also concluded that the chambers judge did not err in striking the third party claim on the basis that it did not disclose an action. The claim was premised on the right to quiet enjoyment of the leased property, which did not make the Government of Saskatchewan liable for the actions of third parties.

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R. v. Stricker, 2014 SKCA 129

Richards Jackson Whitmore, December 5, 2014 (CA14129)

Criminal Law – Appeal – Controlled Drugs and Substances Act – Trafficking
Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Criminal Code, Section 686(1)
Criminal Law – Mens Rea

The appellant appealed his conviction of possession of methamphetamine (meth) for the purpose of trafficking on the grounds that the trial judge erred by failing to make the necessary findings of fact as to the mental element required for the charge. The police searched a vehicle driven by the accused and found a bag of 25.3 grams of meth. The police located a digital scale, two pipes, syringes, 80 baggies, a cell phone, three SIM cards, notebooks with names and dollar amounts, etc, in the passenger's purse. The passenger testified for the Crown and indicated, reluctantly, that most of the meth was for personal use but that some may be sold. In cross-examination the passenger indicated that there was no agreement with the appellant that they would sell the meth. The appellant conceded that the Crown had proven possession but not possession for the purposes of trafficking.
HELD: The appeal was allowed and a new trial was ordered. At trial, the judge only found that the appellant knew that at least some of the drugs were very likely going to be sold. The mens rea requires an

intention to traffic, which was not found. Also, the trial judge made no finding that the appellant was a party to the offence of trafficking. The Court of Appeal held that the trial judge erred in law by convicting the appellant of trafficking without making the necessary findings of fact required for the mental element of the offence. Further, the Court of Appeal held that the error could not be cured by s. 686(1) of the Criminal Code because the error was not trivial and the appellant would not have been convicted in any event. The Court of Appeal ordered a new trial because the trial judge failed to consider the Crown's argument that the appellant was guilty because he aided or abetted the passenger.

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Collins v. Pelletier, 2014 SKCA 130

Klebuc Caldwell Herauf, December 5, 2014 (CA14130)

Civil Procedure – Appeal
Civil Procedure – Costs – Double Costs
Civil Procedure – Pleadings – Application to Strike Statement of Claim – Abuse of Process – No Reasonable Cause of Action
Torts – Trespass

The appellants and respondents were neighbours in a resort village. The appellants appealed the respondents' largely successful application to have the claims made against them struck as disclosing no reasonable cause of action and being an abuse of process. The appellants' claim alleged 12 causes of action against the respondents; all but two were struck in chambers for showing no cause of action and one of the two was struck as an abuse of process. The chambers judge also awarded double costs against the appellants. The respondents cross-appealed from the decision not to strike the remaining claim. The issues on appeal and cross-appeal were if the chambers judge erred by: 1) striking claims as disclosing no reasonable cause of action; 2) striking claims as being an abuse of process; 3) declining to strike the conversion claim against the appellant as disclosing no reasonable cause of action; and 4) in the exercise of her discretion to award double costs.
HELD: The issues were determined as follows: 1) the Court of Appeal agreed with the chambers judge that nine of the ten causes of action struck lacked a sufficient factual foundation to support a cause of action, did not plead the requisite elements, or pled a cause of action not known at law. The court set aside the decision to strike the trespass claim because the chambers judge erred in dismissing the claim for not pleading damages from the trespass; 2) the chambers judge erred when she set aside the claims against the respondents as

an abuse of process; 3) the Court of Appeal did not find any merit to the cross-appeal. The respondent admitted to the conversion in their affidavits but indicated that the claim should be struck because the damages, if any, would be nominal. The chambers judge's conclusion with respect to the cross-appeal was without error; and 4) the Court of Appeal could find no reason to waiver from the default of double costs like the chambers judge ordered. Three claims against the respondents survived: 1) conversion; 2) trespass; and 3) an action under The Privacy Act.

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McGregor v. Snell, 2014 SKCA 131

Ottenbreit Herauf Ryan-Froslie, December 9, 2014 (CA14131)

Civil Procedure – Appeal
Insurance – Designation of Beneficiary

The appellant appealed the chambers judge's decision which declared that the designation of beneficiary form signed by the deceased designating the respondents as his beneficiaries under the Saskatchewan Healthcare Employees' Pension Plan (SHEPP) was valid. The original designation was sent back to the deceased when he did not indicate his relationship to the respondents. The designation was never returned to SHEPP and it was found torn in half when he died. SHEPP indicated that the designation was not valid because it was not in accordance with its policies and procedures because it had too many names on the first page and no relationship description. The chambers judge found the designation valid because the policy was only to ensure that the deceased's wishes were clearly identified, which they were. The appellant argued that the deceased's wishes had changed because he never sent the designation back and it was found torn in half.
HELD: The appeal was dismissed. The appellant did not discharge her onus, the Court of Appeal was satisfied that the chambers judge was correct.

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Campbell v. Hine, 2014 SKCA 132

Jackson Klebuc Ryan-Froslie, November 24, 2014 (CA14132)

Family Law – Custody and Access

The appellant and the respondent are the parents of a daughter born in 2003 as a result of a brief liaison. The daughter lived with the appellant in Prince Albert and apparently had little contact with the respondent until 2008 when the respondent brought a petition pursuant to the Children's Law Act for access and was granted access every other weekend in 2009. In October 2010, a custody and access assessment report was ordered. When it was delivered in June 2011, it identified two options which were that the daughter's primary residence remain with the appellant or be changed to be with the respondent. It is not clear which option was recommended, although the respondent then amended his petition and requested the court to award joint custody of with her primary residence to be with him. A trial date was set for September 2012, but before trial the parties entered into an agreement that included joint custody, primary residence with the appellant and liberal access for the respondent. Because the respondent was concerned about the number of days the daughter had missed school, the agreement included a provision that her primary residence would be with him if her absence from school was not "authorized" by a doctor. The terms of the agreement were incorporated into a consent judgment issued in September 2012. After an unauthorized absence occurred, the daughter visited the respondent at Regina Beach as part of his access schedule, and the respondent refused to allow her to return to the appellant's home. The appellant then managed to take her daughter back to Prince Albert by another subterfuge. The respondent then applied in July 2014 pursuant to enforce the consent judgment. The chambers judge, relying upon the 2011 Custody/Access Report, ordered that the daughter's primary residence be with the respondent. The appellant appealed the decision and then the respondent successfully applied to lift the stay. The court ordered that the daughter should stay with the appellant until the appeal was held.

HELD: The court allowed the appeal and set aside the July 2014 order. It found that the chambers judge had erred in permitting the terms of the agreement to override the ability of the court to determine the best interests of the child at the time of any alleged breach. The chambers judge made that decision in the absence of proper evidence regarding the best interests of the child in that he relied upon an out-of-date report and on the basis of affidavits. Rather than return the matter to the chambers judge, the court substituted its own very detailed interim order for custody and access pending trial.

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R. v. Brown, 2014 SKPC 187

Morgan, November 28, 2014 (PC14195)

Criminal Law – Forfeiture
Criminal Law – Jurisdiction

The issue was the jurisdiction of a judge of the same court with respect to property that was already the subject of an Order of Forfeiture as a result of proceedings of a co-accused. Two accused were jointly charged with a number of charges, including numerous charges of possession of stolen property. The eighth count on one information was amended to include possession of property of various unknown people. The applicant's co-accused pled guilty to count 8, and she acknowledged she did not own the items and they were forfeited to the Crown. The applicant was found guilty, in separate proceedings, on counts 1 through 7 on the information but not guilty on count 8, not amended. The applicant applied pursuant to s. 490(9)(c) of the Criminal Code for return of seized property.
HELD: The judge determined that he did not have jurisdiction to hear the matter. Section 490 was found to cease to have any application in this case because once an accused is ordered to stand trial, anything detained pursuant to s. 490 is forwarded to the court to dispose of as the court sees fit. The applicant was ordered to stand trial and all items were forwarded to the court. An Order of Forfeiture was made in 2009, when the co-accused was dealt with. The items were no longer detained, they were disposed of. The judge concluded that he could not interfere with an order of another judge of the court; to do so would be in effect sitting on appeal of the decision made in the same court. The fact that the co-accused had consented to the forfeiture did not matter; it was still a valid order of the court that could not be interfered with. The court was not swayed by the applicant's argument that he was the owner of the forfeited property.

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R. v. Charles, 2014 SKPC 189

Gray, October 30, 2014 (PC14208)

Constitutional Law – Validity of Legislation – Criminal Code, Section 92(2)(a)(i)
Criminal Law – Sentencing – Controlled Drugs and Substances Act – Possession of Cocaine
Criminal Law – Sentencing – Possession of Loaded Firearm
Criminal Law – Sentencing – Firearm in Motor Vehicle

The accused was convicted of: 1) being an occupant of a motor vehicle in which he knew there was a firearm contrary to s. 94 of the Criminal Code; 2) possession of a loaded, prohibited firearm contrary to s. 95 of the Criminal Code; and 3) possession of cocaine, a controlled substance, contrary to s. 4(1) of the Controlled Drugs and Substances

Act. The Crown proceeded by indictment on all counts. The accused applied to challenge the constitutional validity of the mandatory three-year minimum sentence required by s. 92(2)(a)(i) of the Criminal Code for indictable conviction of possessing a firearm. The accused's vehicle was searched and a loaded, 9 mm semi-automatic handgun was found beneath the front passenger floor mat and eight baggies of cocaine were located in the centre console. The accused was 22 at the time of arrest. At the time of sentencing the accused was 28 and had a five-year-old daughter. He was employed and did not have a criminal record.
HELD: The court noted many mitigating and aggravating factors. The accused's moral culpability was high given the serious convictions. He was in downtown Saskatoon during the middle of the day with a loaded handgun. Also, the accused presented a fabricated version of events at trial; the court therefore concluded that he lacked remorse and did not accept responsibility for his actions. The accused had, however, lived in a law-abiding manner since his arrest. The court found that the principles of public safety, general and specific deterrence, and denunciation were paramount in sentencing. The combination of cocaine and a loaded handgun coupled with a lack of remorse outweighed the mitigating circumstances and a global sentence of three or more years was found to be appropriate. The accused was sentenced to three years incarceration for possessing a loaded, prohibited firearm and 18 months concurrent incarceration for possession of cocaine. The accused was given credit for two months remand time. The court did not have to consider the application regarding constitutional validity.

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R. v. Shalansky, 2014 SKPC 198

Hinds, November 21, 2014 (PC14193)

Criminal Law – Evidence – Identification

The accused was charged with operating a motor vehicle while his ability to do so was impaired, driving with a blood alcohol content exceeding the legal limit and with evading a police officer, contrary to s. 249.1(1) of the Criminal Code. The Crown argued that the accused was the sole occupant and driver of a vehicle that was speeding through residential areas of Regina and evading the police. The defence argued that the accused was not the driver of but the passenger in the vehicle. It had been driven by a person named Cody, whom the accused met at a party that night. A police officer had seen the vehicle in question being driven at high speed and attempted to stop it. The officer followed the vehicle and even though he increased

his speed, he was unable to follow it. From the distance between the vehicles, the officer saw only the head of one person in it, the driver. He later found the vehicle abandoned and used his police dog to track the trail of the person who had left it. During the tracking, the accused approached the officer and told him that he had been in the vehicle. The officer detained the accused and while watching him, saw the accused throw something away. He later looked on the ground for the object that the accused had thrown and found the keys to the vehicle. At trial, the owner of the vehicle testified that she had been drinking at a party outside of Regina and decided that she should not drive her car back to the city. She said that she had been told by another person that the accused had not been drinking so she gave the car keys to him and asked him to drive the car to Regina for her. She stated that another person named Cody was with the accused at the party. The accused testified that he had given the keys to Cody because he had had too much to drink. They drove back to Regina together, and when they entered the city, the friend began to speed. After the police vehicle had started to chase them, the friend and the accused decided to ditch the vehicle and run from the scene. The accused stated that he had done so because he had had some previous negative experiences with the police. He realized that he left his cell phone in the vehicle and started to return to it when he encountered the officer. He threw away the keys, which his friend had given him, because he thought that the police would think that he was the driver. The officer testified that he had not seen the driver during the pursuit and admitted that there could have been another person in the vehicle.
HELD: The accused was found not guilty of any of the charges. Although the court did not believe all of the accused's evidence, it did believe some of it, specifically that a person named Cody was with the accused when he received the keys to the vehicle from its owner. The court did not believe that Cody drove the vehicle but was left with a reasonable doubt regarding the identity of the driver because the officer could not identify him.

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R. v. Beleznay, 2014 SKPC 200

Jackson, November 21, 2014 (PC14184)

Criminal Law – Child Pornography – Make Available
Criminal Law – Child Pornography – Possession
Criminal Law – Sentencing – Child Pornography – Possession – Make Available

The accused was convicted of possession of child pornography contrary to s. 163.1(4) of the Criminal Code and of making child

pornography available contrary to s. 163.1(3) of the Criminal Code. The Crown proceeded by indictment and therefore the accused had to be sentenced to mandatory periods of incarceration; six months for the possession conviction and one year for the other. The Crown argued for 24-month periods of incarceration on each conviction, to be served consecutively. The defence argued for a total period of incarceration of 24 months followed by three years' probation. The accused did not have a prior criminal record. There were approximately 60,000 files, pictures and videos, of victims ranging in age from infants to early teens. The accused shared 116 files with over 4,000 users.
HELD: The court distinguished the case from a recent Queen's Bench decision because the accused in the latter was not deliberately distributing the pornographic material, whereas the accused in this case shared files with over 4,000 users. The court noted the anguish and horror of the victims knowing the images had been shared to that extent. The court found that the accused was not motivated to participate in counselling or programming. He also lacked insight and remorse. The accused was sentenced to 24 months' incarceration for the possession conviction and 12 months, consecutive, for the making available conviction, for a total of 36 months. Ancillary orders were also made.

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Judy v. Olympic Motors Corp. (SK) 1, 2014 SKPC 201

Demong, November 24, 2014 (PC14183)

Civil Procedure – Noting for Default Judgment – Application to Set Aside
Small Claims – Default Judgment – Application to Set Aside
Statutes – Interpretation – Small Claims Act, 1997, Section 37

The plaintiffs commenced an action under The Small Claims Act, 1997, against the defendant for damages regarding the purchase of a vehicle from it. The defendant filed a dispute note, denying all allegations against it. A case management conference was set for May, and at the request of the plaintiffs, it was adjourned until August. The defendant and its solicitor were advised orally and by letter of the change. On the new date for the conference, the defendant failed to attend, and the Justice of the Peace entered a default judgment against it, pursuant to s. 7.1(9) of the Act. Within days of service of that judgment upon the defendant's solicitor, an application was brought by the defendant to set it aside pursuant to s. 37(1) of the Act. It filed an affidavit in support of the application. At the hearing, the defendant's solicitor took full responsibility for the failure of his client to attend. He believed that he entered the new date for the trial in his electronic

organizer at the time, but for reasons unknown to him, he was not alerted by his system. He retained a lawyer to represent him at the application and testified that he had recognized the problem and solved it so that it would not happen again. The plaintiffs argued that the fault of the solicitor should extend to his client.
HELD: The court granted the application pursuant to its remedial power under s. 37 of the Act. It found in the circumstances of this case that the defendant's excuse was reasonable and the application was brought quickly and in a proper fashion. There was no attempt to hide the misfeasance. There was no evidence that setting the judgment aside would result in a material hardship for the plaintiffs but for the out-of-pocket expenses incurred for attending the conference. The defendant was ordered to pay costs in the amount of $317 within one month of the date of this application, failing which the original judgment would be confirmed.

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R. v. Vavra, 2014 SKPC 204

Labach, November 25, 2014 (PC14185)

Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 24(2)
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08 – Breath Demand – Reasonable Grounds

The accused pled not guilty to charges of driving while his ability to do so was impaired and with driving with a blood alcohol concentration over .08. He argued that his s. 8 and 9 Charter rights were breached. The accused said that the officer did not have the necessary reasonable and probable grounds to arrest him for impaired driving and to make a breath demand. The accused and two friends were at a bar drinking. The accused's friends were quite intoxicated when they left, and the accused drove. The accused drove one friend home and was going to drive the other friend home. The accused and friend started arguing while driving in downtown Saskatoon, and an officer noticed the vehicle go through an intersection with a flashing red light without stopping. The officer had been following the vehicle for some time and this was the only problem with his driving. The officer stopped the accused's vehicle. The officer noticed that the accused had glossy, bloodshot eyes and there was an odour of alcohol. The accused indicated that he had consumed a couple of drinks. As the officer was walking back to the accused's vehicle after checking his documents, he decided to arrest him for impaired driving. The accused used a wheelchair and was therefore given his right to counsel, police warning and breath demand while seated in his

vehicle. The officer also indicated that the accused's movements were slow, but the video showed otherwise. The accused blew two samples of .13. The issues at trial were: 1) did the officer have reasonable grounds to make a breath demand; 2) if he did not have the requisite grounds, should the evidence be excluded; and 3) did the Crown prove beyond a reasonable doubt that the accused was driving his motor vehicle while his ability to do so was impaired.
HELD: The court determined the issues as follows: 1) at the roadside the officer only asked the accused if he had been drinking but he did not pursue the details. The court found this surprising, given there were no other indicia of impairment present. The court was not satisfied that a reasonable person standing in the shoes of the officer would believe on the evidence that the accused was impaired. The officer did not have the necessary grounds to make a breath demand and therefore his s. 8 and 9 Charter rights were breached; 2) the court found that the Charter breaches were serious in this case. The officer did minimal investigation to ensure that he had reasonable grounds to make a breath demand, yet there was no urgency. The impact of the Charter breach on the accused was found to be far-reaching and significant. A review of society's interests in the adjudication on the merits of the case was found to favour inclusion of the evidence. The court determined, after balancing the factors in the s. 24(2) analysis, that the evidence should be excluded. The Certificate of Qualified Technician and any signs of impairment noted after the accused was arrested were excluded from evidence; and 3) the evidence did not prove beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired. The accused was found not guilty of both charges.

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R. v. R. (D.), 2014 SKPC 205

Metivier, November 27, 2014 (PC14187)

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

The accused was charged with sexual assault of a related victim contrary to s. 271 of the Criminal Code. The complainant said she had no memory of the assault due to an alcohol-induced blackout. The accused acknowledges the sexual activity but argued that it was consensual or that he had an honest but mistaken belief in consent. The complainant had consumed between 14 and 16 ounces of whiskey. She later drank a two-litre bottle of beer while she drove around with her mother and the accused. The next thing the accused said she remembers was waking up with no clothes below the waist and her

uncle, the accused, lying on the floor beside her. After realizing what happened, the complainant said she fled the house and stayed inside her friends' residence for four days. The accused indicated that the complainant asked him if there was somewhere they could be together, so they went to his sister's spare bedroom. He further indicated that his daughter burst into the room, admonished them for having sex and demanded that the complainant leave. The accused's sister indicated that she had a conversation with the complainant before she went into the spare room. The issues were: 1) did the complainant consent to having sex with the accused; and 2) if the complainant did not consent, did the accused have an honest but mistaken belief in consent.
HELD: There was contradictory evidence regarding the central issue of consent and therefore the court had to assess credibility. The complainant's action of fleeing the situation was found to be consistent with both not consenting and with regret, humiliation and embarrassment. The evidence of the accused's witnesses was found to raise a reasonable doubt about the complainant's non-consent. The court concluded that the complainant was not as intoxicated as she said; for example, she had a conversation with the accused's sister. Therefore, the court was also not satisfied beyond a reasonable doubt that the complainant was incapable of consenting due to her level of intoxication. It was unnecessary for the court to consider whether the accused had an honest but mistaken belief in consent. The accused was found not guilty.

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R. v. Storozuk, 2014 SKPC 206

Harradence, November 27, 2014 (PC14188)

Criminal Law – Defences – Charter of Rights, Section 11 – Delay
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08

The police failed to provide the court with the sworn information for the first appearance. The accused was summoned to appear in court again 13 months after the date of the alleged offence. The accused pled not guilty and the trial was 19.75 months after the swearing of the information. The self-represented accused expressed concern with the delay, so a voir dire was held. The accused was stopped on December 20, 2012, and arrested and a breath sample was demanded. He was charged with driving while impaired and driving over .08 contrary to ss. 253(1)(a) and 253(1)(b) of the Criminal Code. On the first appearance, January 28, 2013, the accused's name was not called and he agreed with the Crown's suggestion that the charges had maybe gone away. On October 22, 2013, the error came to the police's

attention. A summons was served on the accused December 17, 2013, requiring his appearance on January 21, 2014. The trial was scheduled for April 8, 2014. The trial was later moved to June 3, 2014, because of a Crown witness unavailability and the adjournment was not opposed by the accused. On June 3, 2014, the trial was moved to September 4, 2014, because of insufficient court time. The trial proceeded on September 4, 2014, on only the impairment charge.
HELD: The guideline is for a Provincial Court trial to proceed within eight to ten months. The inherent time requirements for a case of this nature were found to be insignificant. The court found that all of the delay was caused by the Crown. The actions of the accused neither amounted to waiver of delay nor did they contribute to delay. The accused testified on voir dire and the court found him to be an unsophisticated but honest witness. The accused's lack of inquiries regarding the charge were not found to amount to lack of prejudice. The accused was found to have suffered actual prejudice because of the delay. The court also concluded that while the actual prejudice was slight, the inference of prejudice was significant. The delay was in excess of 12 months from the time necessary to try a similar case. The inferential prejudice was inextricably linked to the length of delay. The unreasonable delay was found to outweigh the public interest in having the charges decided on their merits. The accused's right to be tried within a reasonable time was breached. A stay of proceedings was entered pursuant to s. 24(1) with respect to both charges.

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R. v. Eufemia, 2014 SKPC 207

Lavoie, November 26, 2014 (PC14189)

Criminal Law – Defences – Charter of Rights, Section 10(b)
Criminal Law – Driving with a Blood Alcohol Level Exceeding .08 – Approved Screening Device Demand – Forthwith
Criminal Law – Driving with a Blood Alcohol Level Exceeding .08 – Approved Screening Device – Grounds for Demand
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08

The accused was charged with driving while impaired and with driving over .08 contrary to ss. 253(1)(a) and 253(1)(b) of the Criminal Code, respectively. Two officers in a marked police vehicle met the accused's vehicle travelling at an estimated speed of 80 to 90 km/h in a 50 km/ h zone. The emergency lights were activated and the accused pulled over. Officer S. attended at the accused's vehicle and noticed a strong cologne smell, the accused's eyes were glossy, and the accused was slurring. The accused indicated that he had not consumed alcohol. The accused was asked to exit the vehicle where he noted a slight odour of alcohol coming from the accused's breath. The accused's

vehicle was noticed around 2:20 am and the ASD demand was given at 2:25. The officers requested an ASD machine be brought to them. The ASD result was a fail, and the accused was taken to the police station. He indicated that he understood the formal police demand for a breath sample. The accused indicated he wanted to talk to a lawyer and gave the number; however, then he said that it was the number for his parents and he was sorry for fooling around. The accused at no time conveyed to the officers that he then wanted to speak to a lawyer. After eight attempts the accused provided a suitable breath sample. There were the following Charter issues: 1) did the officer have reasonable grounds to make an ASD demand pursuant to s. 254(2) of the Criminal Code; 2) did the officer make the s. 254(2) ASD demand "forthwith" as required; and 3) did the police comply with the implementation aspect of the accused's s. 10(b) rights to counsel. HELD: The court found as follows: 1) the officer had the required subjective belief based on the objective criteria to make the ASD demand pursuant to s. 254(2)(b) of the Criminal Code; 2) the officer made the ASD demand just over four minutes after the stop and the court found that this met the "forthwith" requirement. Any brief delays were fully explained; and 3) the court was satisfied that the officer met the informational component of the right to counsel. When the accused was wavering on whether he wanted to contact a lawyer the officer gave the accused a clear secondary warning. The accused responded that he did not want to contact a lawyer at that moment but he would later. The officer was found to be entitled to take normal meaning to this and conclude that the accused did not want to contact a lawyer at that time. The accused did not indicate that he wanted to contact a lawyer at any time during his eight attempts to provide a breath sample. The accused's right to counsel were found not to be breached. The accused was found guilty of driving over .08 contrary to s. 253(1)(b) of the Criminal Code. The accused was found not guilty of impaired driving contrary to s. 253(1)(a) of the Criminal Code.

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R. v. Pankiw, 2014 SKQB 381

Gabrielson, November 17, 2014 (QB14373)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding the Limit – Appeal
Constitutional Law – Charter of Rights, Section 11(b) – Appeal
Criminal Law – Defences – Self-defence – Defence of Property – Appeal

The appellant appealed his conviction for driving while his blood alcohol content exceeded the legal limit. The appellant had made a

Charter application regarding an alleged violation of his s. 11(b) right to trial within a reasonable time. This application was dismissed (see: 2013 SKPC 173). At the trial proper in Provincial Court, the trial judge found the appellant guilty of the above-noted charge (see: 2013 SKPC 205). The grounds of appeal were that the trial judge erred in law: 1) in failing to find that the delay of the trial was a violation of s. 11(b) of the Charter. The appellant argued that the trial judge had not properly applied the tests outlined by the Supreme Court in R. v. Morin, R. v. Godin and R. v. Askov to weigh the total delay against the guideline amounts. The Crown took the position that the any excessive delay was due to legitimate issues of disclosure that arose out of the 2008 amendment to the Criminal Code regarding an approved instrument and the interpretation of these amendments by the Supreme Court in R. v. St-Onge Lamoureux; and 2) in failing to acquit him on the basis of self-defence or defence of property. The appellant argued that the trial judge had made errors in his findings of fact and had shifted the burden of proof on the appellant's defences to him. The appellant and the respondent took no issue with the decision of the trial judge to apply retrospectively, amendments made to ss. 34 and 35 of the Criminal Code by passage of the Citizen's Arrest and Self-defence Act.

HELD: The court dismissed the appeal. It held with respect to the grounds of appeal that: 1) the trial judge had correctly applied the test set in Morin. He found that a delay of 27 months was excessive in a normal drinking and driving case, but this was not a standard case. Much of the delay (5.5 to 8 months) was attributable to issues raised by defence counsel related to disclosure and the remaining time had been waived by the defence. The trial judge found that the appellant had suffered some prejudice as result of the delay, but it was minimal and did not outweigh society's interest in the matter. As findings of fact, the trial judge's decision was entitled to deference. He committed no reviewable error; and 2) in finding that the Crown had established that the ss. 34 and 35 of the Code defences of person and property, respectively, had not been made out, the summary conviction appeal court was satisfied that this was a verdict that a properly instructed jury could have reasonably rendered. In his judgment, the trial judge specifically referred to the onus of proof and stated that it was upon the Crown. The trial judge's conclusions, that 1) the appellant's belief that a threat of force was being made against him was not substantiated and 2) that his purpose in pursuing a vehicle that might have been driven by an alleged intruder while he was intoxicated was not to defend his property, were not unreasonable and not unsupported by the evidence.

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R. v. Kimery, 2014 SKQB 384

Megaw, November 25, 2014 (QB14363)

Criminal Law – Appeal – New Charter Argument
Criminal Law – Defences – Charter of Rights, Section 8, Section 10(b)
Criminal Law – Driving with Blood Alcohol Level Exceeding .08 – Reasonable and Probable Grounds – Breath Demand

The appellant was represented by his father, who was not a lawyer, at trial and was found guilty of operating a motor vehicle over .08. He then retained counsel and wished to advance two Charter arguments not advanced at trial: 1) the officer did not have reasonable grounds to suspect the presence of alcohol pursuant to s. 254(2)(b) of the Criminal Code, and therefore s. 8 of the Charter applied and the ASD result should have been excluded from evidence; and 2) the appellant was not provided his s. 10(b) Charter rights to counsel as he was not permitted to contact the lawyer of his choice, and therefore the Breathalyzer results should have been excluded. The appellant was stopped for speeding and the officer attending noted signs of impairment and the smell of alcohol. The ASD demand was given four minutes after the stop; the appellant failed the ASD. The appellant was arrested, given his rights to counsel, and a breath demand was made. The appellant talked to Legal Aid at the detachment after the officer dialed the number for him. The appellant's father prepared a Charter application for trial; the application was 13 pages long with a 12-page addendum. The Charter notice raised s. 254(2)(b) of the Criminal Code but reasonable grounds to suspect alcohol were not discussed. Further, the only argument regarding the appellant's right to counsel were with respect to a right to do so at roadside. The Crown argued that the arguments could not be made after trial and if they were allowed, the evidence should not have been excluded.
HELD: The appeal was dismissed. The appellant argued his case, as it then was, thoroughly at trial. The trial judge reviewed each position, provided an analysis, and dismissed each. Upon a review of the trial transcript, the court found that appellant conducted the trial he wanted at the provincial court level. Charter arguments were even advanced. To allow new argument, the appellant had to prove that the case was exceptional and that the interests of justice required the new arguments be permitted. The court did not find the facts of the case exceptional. Further, the appellant was not unrepresented; he made a deliberate decision to have his father represent him. Further, it was determined that just because a Charter right is said to have been infringed does not form sufficient basis for concluding an injustice will result if the argument is not advanced. The court also indicated that there was not a complete evidentiary record from the transcript for the new Charter arguments, especially in the right to counsel argument. The appellant indicated at trial that he was waiving any such

argument, and therefore the Crown indicated that they would not be calling evidence in that regard.

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F. (J.) v. T. (R.), 2014 SKQB 385

Wilson, November 25, 2014 (QB14376)

Family Law – Spousal Support – Quantum and Duration
Family Law – Child Support

The parties lived in a common law relationship from January 2000 to December 2009, and one child was born of the relationship in 2004. Prior to trial, they had agreed on the parenting arrangement and the division of family property. The issues between them were the amount of child and spousal support. These matters were to be dealt with pursuant to The Family Maintenance Act, 1997. Before the trial, there had existed a number of different arrangements between the parties. In January 2010, the petitioner began paying $4,000 per month to the respondent for support and paid monthly costs associated with the family home in the same amount. In September 2010 the court issued an interim order that the parties would have joint custody of their child with the primary residence being with the respondent. For the purposes of support, the court determined that the respondent could realistically earn $20,000 per year and petitioner's income was $352,000 and ordered him to pay $2,832 per month in child support and $4,500 per month in spousal support. After the parties had negotiated the division of family property and custody, the court granted a parenting order in January 2012 based on their agreement that they would have joint custody until September 2012, when a shared parenting regime would start. At that point, child support would be based upon that regime. At trial, the respondent took the position that she was entitled to retroactive child and spousal support from December 2009 to August 2010. She sought $8,580 as spousal support for a period of approximately seven years; at the conclusion of this period, support would be reviewed. Child support should be based on the petitioner's averaged income until September 2013, at which time it would be based on the set-off approach used in shared parenting under s. 9 of the Guidelines. The petitioner stated that he would not dispute whatever amount the court required in terms of child support but that spousal support should cease immediately or be set at a reasonable quantity for a fixed duration. He agreed that his income for 2011 was $373,490 but suggested that income in the amount of $40,000 be imputed to the respondent. He argued that she had made a lifestyle choice that lead to a minimal income. Regarding the respondent's claim for spousal support, the petitioner argued that

the increase in his income over the years was due to his hard work and not due to the help of the respondent. The respondent was in the same economic position at the time of separation as when the relationship began and thus was not disadvantaged by it. As the parties had not had an extravagant lifestyle, the respondent had not suffered a substantial decrease in her style of living since their separation.

The court reviewed the history of the parties' relationship in order to establish the amount and duration of spousal support. When the parties began living together, the petitioner was earning between $60,000 and $80,000 per year. The respondent was a self-employed hairstylist who worked 30 to 40 hours per week during times when her two children from an earlier relationship were at school. Her net income was minimal, as shown in her 2000 income tax return. When the parties' daughter was born, the respondent reduced her hours of work because she was breastfeeding. The respondent began working around the child's daycare attendance for two to three days per week. Since the separation, the respondent testified that she continued to work around the child's schedule and was earning a small income based on 15 to 20 hours per week. She testified that she was trying to build back her clientele in order to make more money, but she had not looked for another job or thought of training for any other type of employment because she liked her occupation and its flexibility. During their relationship, the petitioner began working much longer hours and his net income grew substantially. In 2011, his net income was $373,000. The petitioner acknowledged that the respondent had most of the responsibility for their child. Due to the fact that they lived simply, the parties saved a lot of money during the time they were together and their house appreciated significantly in value.

HELD: The court found with respect to determination of income and the issue of the amount of child support that: 1) the petitioner's income as being $316, 322 in 2010 and $373,490 in 2011. The respondent had not earned $20,000 per year in 2010 and 2011; the amount that the court believed at the time was a reasonable estimate. However, based upon the respondent's testimony that she was not looking for another position or retraining, that it would impute the amount of $20,000 in annual income to her commencing in 2010 and to further increase that amount to $30,000 in 2013 because shared parenting would allow her more time to work. The court adjusted the child support payments based on the petitioner's actual 2010 income to give him a refund for September 2010 to June 2011, and from July 2011 to June 2012. As his 2011 income was higher, his support payment should be increased from July 2012 to June 2013. His payments as of July 2013 should be based on his 2012 income and therefore increased, but because the shared parenting regime commenced in September 2013, the parties would use the set-off approach, using the sum of $25,000 as the respondent's income. Section 7 expenses should be paid by each party proportionate to their

incomes, considering spousal support paid.
The court found with respect to the duration and amount of spousal support that: 1) the respondent was entitled to spousal support. She was disadvantaged as a result of the relationship and was entitled to compensatory basis. The respondent also required compensatory support as result of the breakdown of the relationship, as she could not have met basic living expenses of the family home with her limited income. She should not be forced to sell the family home, received as part of her share of the family property, in order to support herself. The court found that the respondent could be financially independent and should not expect the petitioner to subsidize her choice to have flexibility in her current position. The court set the duration of spousal support to terminate finally, without review, in December 2015 because the respondent had no plans to retrain and should be able to build up her business by that time. The court declined the respondent's request for retroactive support from December 2009 until the 2010 interim order as the petitioner had made substantial payments. For various periods the court set spousal payments per month as follows: $4,500 from September 2010 to June 2012; $6,500 from July 2012 to June 2014; $3,700 from July 2014 to December 2015.

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Aalbers v. Aalbers, 2014 SKQB 387

Megaw, November 25, 2014 (QB14364)

Family Law – Child Support – Adult Child with Disabilities
Family Law – Child Support – Determination of Farming Income
Family Law – Child Support – Spousal Support
Family Law – Child Support – Variation
Family Law – Custody and Access – Variation
Family Law – Custody and Access – Wishes of the Child
Family Law – Spousal Support – Variation – Change in Circumstances
Family Law – Spousal Support – Variation –Termination

The respondent applied to vary the custody, child and spousal support orders made after trial in 2010. The order after trial awarded sole custody of the parties' three daughters to the petitioner with specified access to the respondent. The respondent's income was determine to be $115,000 and he was ordered to pay child support on that basis. He was also ordered to pay $1,500 per month in spousal support. The respondent had not paid child or spousal support since trial and the arrears at the variation were argued to be approximately $145,000. The respondent's appeal after trial was dismissed. The parties' oldest child, 20 years old, had Down's syndrome and resided with the respondent commencing May 2012. The middle daughter resided with the petitioner full-time and had little involvement with

the respondent. The youngest daughter resided with the respondent full-time since 2010 and had little to do with the petitioner. The respondent was a farmer, and he argued that his level of income was less than minimum wage with annual incomes between $5,173 and $13,663 for the years 2010 to 2014. The respondent indicated that there was severe flooding in 2011 resulting in only 3 percent of the crop being seeded and that in 2012 the canola crop was significantly less than expected due to disease and insect infestation. In 2013 the respondent indicated the crops were hit with hail on 16 quarters and a tornado. He indicated that all of the income from the farming operation was earned by his father, and his father's income tax return and CAIS application were provided.

HELD: The court noted that the original order must be accepted as correct and findings of fact required for that order cannot be revisited. The court found that there was a material change in the circumstances of the oldest and youngest daughters and the child support orders were varied from the time each child commenced living with the respondent. The court declined to make an order pursuant to The Adult Guardianship and Co-decision-making Act for the oldest daughter because the respondent had not provided the requisite materials for such an application. The custody order was varied with respect to those daughters so that they would reside with the respondent and the parties would have joint custody with the respondent having final decision-making authority. An order was also made dispensing with the petitioner's consent to allow him to obtain a passport for the youngest daughter. The court had to analyze the respondent's income at January 1, 2011, and June 1, 2012, to make the necessary adjustments to child support. The court also decided to look at the respondent's income at the day immediately following the trial judgment and the date of the variation application. The respondent provided financial statements but there was no evidence as to their interpretation; counsel for each party just argued their interpretation and position. The court declined to make conclusions on the financial statements. The court found that there was no material change to the respondent's income on the first two dates; September 2, 2010, and January 1, 2011. The respondent indicated that the 2012 canola crop was significantly less than expected, but there was no evidence as to what was expected or even what the actual crop was. Further, the court was advised the crop insurance was not purchased but the court was not given an explanation as to why it was not purchased or if coverage could have been obtained if it had been purchased. The respondent did not indicate what the production was from the acres hit with hail and a tornado in 2013. At trial the judge made reference to the respondent's evidence regarding poor crop years and nevertheless found his income to be $115,000. The respondent did not provide any evidence of efforts made to obtain alternate sources of income. As a rebuttal, the respondent did indicate in an affidavit that he had some physical difficulties but no medical information was

provided. The affidavits indicated that the respondent has received approximately $1.5 million from his parents but there was no indication as to what basis those funds were received and why they couldn't be used to satisfy his support obligations. The respondent also did not provide information on how he has satisfied the shortfall in his income. The court was not satisfied that the respondent had shown a material change in the circumstances so as to warrant a change to his income for 2012 or the variation date. The respondent was ordered to pay child support to the petitioner for the middle daughter on the basis of his annual income of $115,000. The spousal support order made at trial was not connected to a level of income. The respondent argued that the material changes were that the petitioner was living common law and that the petitioner was either earning an income or capable of earing an income such that spousal support was no longer required. The petitioner denied that she was living in a common law relationship and she was unemployed. She indicated that she rents space in her home to a man and they have more than a platonic relationship. The court did not have any evidence that the petitioner had her financial situation improve since trial. The petitioner was found to continue to exhibit a need for spousal support and there was not a material change in the circumstances so as to warrant a change in spousal support.

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Van Der Merwe v. Dobson, 2014 SKQB 388

Barrington-Foote, November 26, 2014 (QB14365)

Civil Procedure – Examination for Discovery – Exclusion of Co-defendants

The plaintiff's hospital privileges were suspended as a result of concerns relating to his use of opiates. The individual defendants played a part in the plaintiff's suspension. The plaintiff made a claim against the three individual doctors and the health authority. The plaintiff also applied for an order that each of the three individual defendants be excluded from the questioning of their co-defendants so that evidence was not tailored. The individual defendants argued that, given the extensive documentation, the parties already knew each other's testimony and therefore there was no basis for the plaintiff's concern. The plaintiff asserted that at least one of the individual defendants and he did not get along and that all of the individual defendants were close professionally and personally.
HELD: The Queen's Bench Rules do not address the right of a party to attend to the questioning of a party who is not adverse in interest. They also do not address the court's authority to exclude parties from

the questioning. The possibility of tailoring evidence justified exclusion in some previous cases. Because of the nature of the plaintiff's claims, ie, harassment, credibility will be in issue. The court held that evidence of conspiracy was not required for the exclusion order to be made. Also, the nature of the evidence already documented did not go to the heart of the plaintiff's claims. The court also noted that while there was a possibility of evidence tailoring there was little possibility of prejudice to anyone if there was an exclusion order. The court ordered that each individual defendant be excluded from the questioning of the other individual defendants but that such order not continue in relation to questions arising from undertakings without another order.

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Behnami v. Mirakhori, 2014 SKQB 390

Tholl, November 26, 2014 (QB14367)

Family Law – Division of Family Property – Equitable Considerations
Family Law – Division of Family Property – Exemptions
Family Law – Division of Family Property – Unequal Division

The parties were married in Iran in 1988 and immigrated to Canada in 2010, separating in 2011. The issue remaining was division of property. The two items of property at dispute were a $75,000 at Scotiabank and a building in Saskatoon. Both items of property were in the petitioner's name and she argued that they should not be divided for reasons of equity and fairness and the presence of extraordinary circumstances. No documentation or value was given to prove the existence of premarital property or their values. The marriage dowry ("Mehr") entered into by the parties required the respondent to pay the petitioner $23,490 upon demand. Each party received an inheritance while still in Iran. The respondent's was used for family purposes and the respondent indicated that the petitioner's inheritance, which was received shortly before immigration to Canada, was less than $75,000. The parties immigrated to Canada under the Saskatchewan Immigrant Nominee Program, which required the petitioner to invest $200,000 in a business and provide a deposit of $75,000 (the Scotiabank money) to ensure compliance with the program. The petitioner had invested $175,000 in a business so far. The building was purchased for $189,000 with $54,000 cash and the remainder financed by mortgage. The amount remaining on the mortgage was $107,130.59 at trial. There was also a line of credit for $25,000 in the petitioner's name which was at its limit. The petitioner made all the payments on the mortgage and line of credit since separation. The building was two-thirds commercial and the

remainder residential. If the building had to be sold, the $75,000 would be forfeited for noncompliance with the nominee program. The store operating from the building was not successful, and the petitioner owed $35,793.82 for loans from various people. The petitioner was working two full-time minimum wage jobs, 96 hours per week, at the time of trial. The respondent was unemployed because he no longer had a work permit, and he expected to be deported to Iran soon. The petitioner argued that an equal distribution of property would be unfair and inequitable because: 1) her inheritance made up the bulk of the $75,000; 2) she made all the payments on the mortgage and line of credit since separation, which was shortly after the building was purchased; 3) she had additional debt payable to family and friends; 4) the respondent owed her a dowry; 5) she paid for one of their children's post-secondary education; and 6) her financial situation was dire.

HELD: The parties could not afford appraisals and the court determined the building's value at trial as $200,000 based on the parties' opinions of value. The net value of the building after deducting the mortgage and line of credit was $67,896, and the court attributed $22,623 to the home portion and $45,246 to the commercial portion. The net value of the Scotiabank deposit was $50,000 because $25,000 would be required to possibly access it. The court determined that neither party was entitled to any exemptions; there were no values given for any premarital property, nor was there any tracing. The court reviewed the petitioner's arguments against equal division as follows: 1) the court did not find any factors to deviate from the general rule that inheritances are shareable as family property; 2) the payment of debt against the building increased the equity and preserved the asset and was therefore found to weigh in favour of an unequal distribution. This factor was noted, however, not to be sufficient on its own to create extraordinary circumstance; 3) the court subtracted the $6,000 the petitioner said she owed the parties' son from the $35,000 in other debt because the petitioner was giving him money for his education. The court found it impossible to determine exactly what portion of these debts was for family purposes and what portion for the petitioner personally. The court said it was reasonable to use the amount of $15,623.82 (the pre-petition amount) as debt to take into account in property division; 4) the payment of a Mehr has been found to be both enforceable and unenforceable in other Canadian jurisdictions. All of the previous case law dealt with one party attempting to have the Mehr enforceable as a contract not as a way to deviate from equal property division. The court did not take the Mehr into account as a fairness and equity consideration because the petitioner had taken preliminary steps to have it enforced in Iran and there was uncertainty of its enforceability in Saskatchewan; 5) the shortfall required for the son's education was found to be $40,000 and the petitioner indicated that she would be responsible for the majority of it. The court found this comparable to the respondent failing to pay

child support. The court took the petitioner's payment to the child's education as a factor in determining whether equal distribution was fair and equitable; and 6) both parties were impecunious. The court did take into account that the only significant asset (the $75,000) would be forfeited if the petitioner had to pay equity. The court concluded that, pursuant to s. 21(2) of The Family Property Act, it would be unfair and inequitable to order an equal distribution of family property. Also, the totality of the circumstances was found to constitute extraordinary circumstances pursuant to ss. 21(1)(a) of the Act making equal division of the family home portion of the building unfair and inequitable. The court ordered that the building would remain in the petitioner's sole name, free from any distribution. Further, the court ordered that if the $75,000 is released to the parties, they will share the net proceeds, $50,000, and any accrued interest. Each party was responsible for debts in their name.

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Dukart v. Quantrill (Jones), 2014 SKQB 391

Pritchard, November 27, 2014 (QB14378)

Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Joint Custody
Family Law – Custody and Access – Primary Residence
Family Law – Custody and Access – Shared Parenting

The unmarried parties separated when their daughter was one year old. By agreement in 2011 the parties agreed to parenting scheduled around the dad's work. The agreement was altered in 2013 to reduce the dad's weekday access to only one night from two. The dad agreed that the child could be enrolled in kindergarten in the town the mom lived in. The dad lived in a town 30 miles away. The issue at trial was the parenting regime while the child was in kindergarten and then full-time school. The dad requested equal, shared parenting with alternating weeks with each parent. He changed his work schedule to day shifts only, so that this parenting regime could work. The dad was 35 and lived with his fiancé and their 11-month-old son. His father was prepared to assist with the child as required. The dad's fiancé was also available to assist with the child. Before being on maternity leave, she worked Monday to Friday 7:00 am to 4:00 pm, but indicated she would return to work part-time after maternity leave. The mom expressed concern about the child being bounced back and forth. She was also concerned about the length of drive for the child to go to school when she would be with her dad. The mom was 26 and was married. Their home was two doors down from the child's maternal grandparents and three blocks from her school. The

mom worked full-time with generous holiday time. Her husband also worked Monday to Friday.
HELD: The parties did not communicate well. The mom had the child baptized without adequately involving the dad, and the dad had a tendency to control. For example, as soon as the child arrived at his home, he insisted that every article of her clothing be removed and that she wear only clothing that he provided. The parties also each had separate medical professionals for the child and the child even had different pairs of glasses from two different optometrists. The court was also concerned with the distance between the communities and which community the child would look to for extra-curricular involvement. The child was entitled to have a significant number of her activities in the same community that she attended school. The court concluded that shared parenting was not an option in the best interests of the child because of the dad's hours and days of work and the distance to the school from his residence. The dad was ordered to continue to parent on alternating weekends when he was not working. The weekends that the dad works he was given parenting time from Thursday after school until Saturday at noon unless the child had school on Friday. If the child had school on Friday, the parenting time would not start until Friday after school. The dad was also given the option of spending time with the child after school during the days he had off. The dad would also parent one-half of each school holiday. The mom would be the parent primarily responsible for the child's medical appointments, including eyes. The dad would be responsible for the child's dental requirements. Each party was ordered not to unnecessarily withhold consent to the child's travel with the other parent. The parents would continue to have joint custody with primary residence with the mom. The parties had settled child support and the court ordered s. 7 expenses on a pro-rata basis.

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TCRT Investments Inc. v. Registrar of Titles, 2014 SKQB 415

Rothery, December 19, 2014 (QB14407)

Statutes – Interpretation – Land Surveys Act, 2000, Section 21

TRCT Investments brought an application for an order declaring it to be the lawful owner of a quarter section of land, including a portion of Yorath Island in the South Saskatchewan River. It acquired title to the land in 2006. Its title originated from a grant from the Crown to Frank Whitehead in 1910. The east boundary of the quarter section was defined as the left bank of the river, based upon a 1902 plan of survey. Over time, the left bank eroded and an island developed in the river. The federal government owned and utilized the island until 1961

when it transferred title to the Province of Saskatchewan. In 1963, the province transferred the title to the City of Saskatoon. In 2008, the Information Services Corporation of Saskatchewan concluded upon review of the City of Saskatoon's Certificate of Title that there were duplicate ownerships of portions of Yorath Island, including the original Whitehead Grant and proposed that the city's title be amended to except out the portion included in the applicant's title. The city objected, and eventually the matter was brought to court by the applicant for resolution. The applicant relied upon Grasett v Carter, which held that when a legal instrument describing real property references a plan of survey, that plan is incorporated into and forms part of the instrument. It also relied upon s. 16 of The Land Titles Act in entitling it to be the registered owner of the title because it had gained title via the Whitehead Grant, issued long before the city received its grant of the Island from the federal Crown. The city took the position that Grasett did not apply when the plan of survey was based upon a natural monument that had changed over time, as per s. 21 of The Land Surveys Act, 2000 and The Land Survey Regulations. The court heard evidence by affidavit from the registrar of titles and the controller of surveys regarding the history of the land in question. There was no evidence that the applicant or any previous owner had ever objected to the federal and then the provincial Crown dealing with the Island. In 1981, the owner previous to the applicant dealt with the subdivision of a portion of the mainland title and the boundary of the left bank of the river was resurveyed. The definition of the left bank of the river in that survey located the river boundary some distance to the west of the 1902 survey.
HELD: The court dismissed the application and issued a declaration that the City of Saskatoon is the lawful owner of Yorath Island. It found on the evidence that the left bank of the river's boundary was as it now exists, not as it was in 1902. Consequently, all of Yorath Island was properly registered in the City of Saskatoon's name.

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P. (C.) v. Saskatchewan (Minister of Social Services), 2014 SKQB 416

Keene, December 22, 2014 (QB14403)

Class Action – Certification

The plaintiffs brought a claim under The Class Actions Act (CAA) and sough certification. The class was defined as all persons who lived in Saskatchewan who were in the custody of the defendant Minister of Social Services in 1959 and after who suffered personal injury while a minor and for whom the defendant did not make a claim under The

Criminal Injuries Compensation Act or The Victims of Crime Act. The application dealt only with the failure to prosecute civil remedies on behalf of the wards. The plaintiffs relied on the Alberta decisions in T.L. v. Alberta (see: 2006 ABQB 104, 2008 ABQB 114). In order to certify the action, the plaintiffs had to demonstrate that the claim met the requirements of certification set out in s. 6(1) of the CAA.
HELD: The court dismissed the application for certification. It found with respect to each of the criteria set out in s. 6(1) of the CAA that: 1) the pleadings did not disclose a genuine cause of action. The Alberta cases could be distinguished in that the wards reported abuse to the defendant government agencies and they did nothing, and the limitation period expired. In Saskatchewan, there is no limitation period for the alleged tortious acts. Further, the plaintiffs pled that the inaction of the defendants had led to a denial of compensation but had not provided any facts in the pleadings that support any denial of compensation; 2) the definition of the class was too broad and the plaintiffs had not supplied an evidentiary basis that supports that there was a class of more than one person who share the common claim. The affidavits of the two proposed representatives were not satisfactory in this regard; 3) the claims of the class members raised two common issues: a) whether the defendants owed a duty to class members since 1959 to protect their legal rights by taking steps to obtain compensation on their behalf, and if so, what was the nature of the duty and what policies and practices did the defendants have in place since 1959 for the prosecution of civil claims of children in care, and b) were the policies sufficient to discharge the duty that the defendants owed the plaintiffs; 4) the two common issues appeared to be appropriate to class action proceedings rather than being tried as a test case, as argued by the defendants; 5) the representative plaintiffs were disqualified as suitable on the basis that the first plaintiff lacked the ability to be a proper representative as she did not grasp the purpose of a class action and believed that it concerned her personal issue with Social Services for abuse, and the second plaintiff had no understanding what the claim was about or the purpose of the application for certification; and 6) the litigation plan and notification for other class members could have been developed if the case had been certified.

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101068682 Saskatchewan Ltd. v. Al-Can Distributors Inc., 2014 SKQB 426

Sandomirsky, December 30, 2014 (QB14416)

Contracts – Set-off
Landlord and Tenant – Commercial Lease – Arrears of Rent

Landlord and Tenant – Lease – Repair
Landlord and Tenant – Writ of Possession

The landlord applied for a writ of possession of commercial property for non-payment of rent pursuant to s. 50 of The Landlord and Tenant Act regarding commercial property. The tenant opposed the application arguing that there was no rent due if the amount was set-off against the money the landlord owed the tenant. The tenant also argued that the landlord breached its obligations under the lease regarding the condition and suitability of the premises. The chambers judge ordered a vive voce hearing. In addition to the landlord and tenant, there was also a family trust and another numbered company (Saskcorp) involved. The trustees of the trust were the shareholders and principals of the landlord, and the shareholder and principal of Saskcorp was also the shareholder and principal officer of the tenant. Saskcorp had sold its shares in the landlord to the trust. The landlord said that the payment for the shares was made by setting off rent due from the tenant to the landlord even though there were no assignments between the parties. The shareholder of the tenant did initial the set-off statements the landlord prepared each month. The current lease between the landlord and tenant was dated effective June 1, 2014, for 12 months commencing August 1, 2014. The lease indicated that the tenant was responsible for maintaining and repairing the leased premises in a state of repair and the landlord was responsible for maintaining the structural integrity of the building. The tenant had two previous leases with the landlord for the same premises. The landlord indicated that the tenant had not paid any rent under the monthly lease and also claimed $1,252 for payments made on behalf of the tenant for leasehold improvements and repairs. HELD: The tenant argued that there should be a trial of the matter rather than the court adopting the summary process to resolve matters between the parties. The court concluded that the summary process was the better one given there were only seven months left in the tenancy and the trial would not have even taken place by the end of the tenancy. The court rejected the argument that anyone was coerced into acknowledging the reconciliation statements prepared by the landlord. The tenant's shareholder argued that it should not have had to pay rent for the space that was not used because a dealership that was going to go in there never happened. The court held that the tenant could not after paying rent for three months (by way of set-off as described earlier) then say that it should not have. The tenant was planning on occupying the space with a dealership, and renovations were started in the space. The tenant's set-off for the share purchase was exhausted and no rent was paid in the new lease. The court held that the landlord was not in breach of its obligation to maintain the structural integrity of the building, just because of the failure to completely solve the leaking roof problem. The roof was a longstanding issue well known to the tenant shareholder's husband. The tenant failed to provide evidence that the landlord's alleged

breaches of the lease caused any financial loss or damage to the business undertaking, the tenant's improvements or its inventory. Most of the tenant's complaints were in response to the landlord's application rather than problems that had been brought up to the landlord prior. The tenant defaulted under the lease and the landlord made out the right to re-entry pursuant to s. 9(1) of the Act. A writ of possession was ordered.

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Jablonowski v. Hall, 2015 SKPC 5

Demong, January 8, 2015 (PC15002)

Torts – Negligence – Duty of Care
Torts – Negligence – Duty of Care – Contributory Negligence

The plaintiff sought $700 in damages for negligence in a motor vehicle accident. The quantum of damages was not in dispute. The plaintiff was travelling eastbound on the No. 1 Highway in the southern most lane at about 115 km/h. The defendant was operating a tractor and large cutter in the ditch between the two divided highways. The tractor and cutter were partially on the shoulder of the highway and partially in the ditch. Just as the plaintiff was passing the tractor/cutter, he heard noises against his vehicle and, when he stopped, noted scratches, dents and abrasions along the length of the car. A door handle had been knocked off and there was a hole in the driver's-side door. The plaintiff argued that the cutting blade of the cutter whipped rocks and gravel at his vehicle. There were no other vehicles close by. The plaintiff tendered pictures of the tractor/cutter that showed rocks accumulated under it and with the side facing the highway elevated slightly between 4 and 8 inches. There was no guard to prevent the cutter from shooting rocks and debris. The driver of the tractor did not attend trial and there were no defence witnesses. The defendant's only final argument was that the plaintiff was travelling too fast because there was an orange lamp on the tractor.
HELD: The court concluded that the damage to the plaintiff's vehicle was caused as described by the plaintiff; the cutter swept rocks and gravel from the ground into the plaintiff's vehicle. There was no evidence that the orange lamp located on the tractor was on at the time of the incident. The defendant did not expand on his argument to indicate what driving protocols the plaintiff should have undertaken if it was an orange zone, nor was there any evidence of whether there were signs posted, flag men present, etc. The damages were found to be solely caused by the tractor/cutter. The driver of the tractor/cutter was found to owe a duty of care to the users of the public highway. Also, the damages were held to be a reasonably foreseeable

consequence of using a powerful cutter on the side of a road that may have rock and gravel on it. The court found that expert evidence was not required to conclude that operating a cutter on a highway exposes users of the that highway to certain risks and that therefore an operator of that equipment should take certain precautions to prevent against or minimize those risks. The defendant should have, at a minimum, equipped the cutter with a guard or some protective device to reduce the likelihood and velocity of projectiles thrown from it. The defendant was found to have failed to exercise the standard of care of a reasonably prudent and careful operator of the machinery in the immediate vicinity of other users of the highway. The operator of the machinery breached the standard of care required of him in the circumstance and was negligent, the negligence being the sole and proximate cause of the damage to the vehicle. The court awarded damages, prejudgment interest, and costs to the plaintiff.

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Brickner v. Hawryliw, 2015 SKQB 5

Smith, January 6, 2015 (QB15002)

Landlord and Tenant – Residential Tenancies – Appeal
Landlord and Tenant – Residential Tenancies – Remedies

the applicants applied by originating application for an order quashing several decisions by hearing officers of the Office of Residential Tenancies. The applicants had signed a lease with respondent and left the rental property before the period of the lease expired. The respondent served them with a notice of hearing with respect to his claim arising from the termination of the lease and other expenses. The applicants asserted that they had not been served with the notice and for that reason were not present at the hearing. The hearing officer found that the respondent had proved his claim against the applicant and gave judgment against them. When the applicants learned of the decision, they appealed pursuant to s. 72 of The Residential Tenancies Act and the court found that the appeal period had expired. As the respondent was making another application regarding a claim for further damages, the court ordered that at the second hearing the hearing officer could revisit the issue of service. At that hearing, the hearing officer confirmed the original order because she believed the evidence of the respondent and refused to allow one of the applicants to present evidence to confirm his version. The applicants appealed that decision and the court decided that it did not find that any errors of law or unreasonable findings of fact had been made. Instead of appealing to the Court of Appeal under s. 72(2), the applicants applied for judicial review.

HELD: The court dismissed the application. Although the remedy of judicial review was available in the context of residential tenancies proceedings, the Act provided for an adequate appeal procedure and the court would not interfere. In any case, there was nothing in the facts that was sufficient to trigger the extraordinary remedy of judicial review.

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EECOL Electric Corp. v. 101194203 Saskatchewan Ltd. (c.o.b. A1 Plumbing, Heating & Electric), 2015 SKQB 12

Laing, January 12, 2015 Corrigendum February 4, 2015 (QB15010)

Debtor and Creditor – Liability of Corporate Entity – Personal Liability
Debtor and Creditor – Personal Guarantee

The plaintiff brought an action for payment of $142,402 for goods sold and delivered to the defendant A1 Plumbing. The defendants Bob and Sonja Behari were sole officers, directors and shareholders of A1. The plaintiffs had filed a builders' lien against property owned by the defendant Baydo Development Corporation as A1 had been a contractor on one of Baydo's projects. Baydo paid into court the money to discharge the lien, and a further sum of $28,300 at the hearing, directly to the plaintiff in satisfaction of its remaining requirements under The Builders' Lien Act, thereby reducing the plaintiff's total claim to $102,360. The plaintiff brought an application for summary judgment with respect to its remaining claims. The issues were whether Mr. Behari was personally liable to the plaintiff based on the terms of a credit application made by him to it on behalf of A1 and his personal liability based on a guarantee he signed at the time of his credit application. On the credit form, A1 was identified as the customer. Behari had entered $60,000 in the line that asked "Credit required". At the end of the credit form, it stated that in consideration for establishing a monthly account, the undersigned principals agreed to be responsible for the payment of the account in respect of any goods supplied to the customer. Behari signed the application twice, once on the customer's signature line and once on the principal's signature line. The plaintiff sent a letter to A1 approving an initial credit limit of $15,000 and noting that the credit limit might vary as determined by the credit department and to contact it if he had any concerns or requests with respect to the amount of credit to be granted. Over time, the credit limit was increased twice, to $40,000 and then to $200,000. A1 was operated by general managers and the Beharis had no contact with the day-to-day operation of the company. When A1 requested that the credit limit be increased, the plaintiff attempted to contact Mr. Behari but he did not return the calls.

However, the plaintiff acknowledged that its representatives dealt with the A1's management personnel throughout and not directly with Mr. Behari. The plaintiff submitted that the credit application bound Mr. Behari as principal to pay the full amount of A1's outstanding account. Mr. Behari argued that his personal obligation to pay was limited to the $60,000 that he indicated on the application and on the personal guarantee that he signed. At no time had Mr. Behari communicated to the plaintiff that he wished credit to be restricted to $60,000.

HELD: The court found that Mr. Behari was personally liable to pay $102,300 to the plaintiff based on the words of the contract. The court stated that Mr. Behari's evidence consisted solely of his subjective intentions or beliefs, which were not communicated to the plaintiff. As such, the evidence was inadmissible and, further, would not modify the unambiguous words of indemnification in the application signed by him. Similarly, Mr. Behari signed an unqualified guarantee and was liable to the plaintiff for the full amount owing to it by A1 on the basis of his personal guarantee.

CORRIGENDUM dated February 4, 2015: [1] The judgment amount of $102,368.33 is a result of an arithmetic error made in paragraphs 4 and 5 of the judgment.

[2] To correct the error, the judgment is revised to reflect a judgment of $114,058.78.

[3] Judgment accordingly.

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Beecher Estate, Re, 2015 SKQB 19

Barrington-Foote, January 19, 2015 (QB15016)

Estate Administration
Wills and Estates – Executor – Fees and Disbursements

The executor applied pursuant to rule 16-57 of The Queen's Bench Rules and s. 52 of The Trustee Act, 2009 to determine his executor's fees and disbursements. The remaining assets were 880 acres of farmland and $29,914. The testator died in 1978 and he left a life estate to his wife with the residue to be divided equally between his children that were surviving on his wife's death. The applicant and the wife were co-executors until her death. Two land sales were completed prior to the wife's death and the remainder of the land was leased. The wife appeared to have the most involvement with negotiating the leases and sales. In 1986 there was an application made by the wife and her three children to remove the applicant as executor. The action was discontinued but the applicant paid $3,500 in legal fees plus $504.30 for court transcript services. The applicant had little to do

with the estate after 1986. In 2007 he incurred additional fees totaling $6,852.17. The executor argued that he should be paid $30,000, approximately 3 percent of the value of the remaining assets, plus some legal fees and disbursements. The residual beneficiaries argued that the executor should be paid 1 percent of the value of the estate at death of the testator.

HELD: The court determined that only "necessary and proper" legal fees and disbursements could be charged against the estate. The applicant was entitled to legal fees and time and effort spent to defend his right to be executor. The court found he was not entitled to the $6,852.17 because they were not necessary and proper charges for the purposes of estate administration. The fees were to investigate whether the wife could obtain title to the lands. The applicant resisted the wife's desire to sell additional land and the court found that as a benefit to the residual beneficiaries. The court also determined that a fee based on the receipts and disbursements of the estate was not appropriate. A key factor was that the applicant spent little time and effort on the estate for a great deal of the 35 years. The applicant was found to be entitled to $12,500 plus: 1) legal fees for the 1986 application in the amount of $3,000; 2) $504.30 for court transcript services; 3) $500 for estate litigation expenses; and 4) $1,500 in costs.

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