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Prekaski v. Prekaski, 2014 SKQB 429

Goebel, December 12, 2014 (QB14418)

Family Law – Custody and Access – Interim
Civil Procedure – Contempt

The parties had separated in 2011, and at that time the court ordered that the mother was to have primary care of the two children of the marriage and the father was granted specified access. Each of the parties had brought multiple applications since the original order. In this instance, the father applied in June 2014 to have the mother found in contempt of court and for variation of the original order to give him primary care of the children among other items. In September 2014, the court ordered that the father be given compensatory access and directed that the issues were to be heard in November 2014. In the interim, the mother brought her own application to vary the 2011 access order to suspend the father's access. The father argued that the mother had been in contempt because she had withheld access to the children in violation of a court order. The mother did not deny that she had notice of the order or that she had withheld access but that she had withheld it because of her legitimate concern for the children. She had brought an application in April 2014 that sought to suspend the father's access pending an RCMP investigation into her allegation that the father had threatened to show up at the children's school and take them away, which had caused their son to be anxious, and that their daughter told her the father had slapped her face. That application was dismissed but the mother continued to withhold the children, relying upon the same allegations in this hearing regarding

the father's June 2014 contempt application. The father argued that the court had the authority to change primary care as a sanction related to the contempt finding, or alternatively, upon a material change in circumstances since the original order was made. He argued that this remedy was supported by the numerous breaches by the mother, the history of the proceeding, the impact of the mother's behaviour on the children and the overall best interests of the children.
HELD: The court found the mother in contempt. It was not in the best interests of the children to change their primary caregiver when the trial was pending and the custody and access assessment had been started. The court granted compensatory access to the father until the trial. The father was given leave to re-apply for an order for interim primary care if the mother breached the terms of access.

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Jackson Klebuc Ottenbreit, February 9, 2015 (CA15011)

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Criminal Law – Appeal – Sentence
Criminal Law – Manslaughter

The accused appealed his conviction of manslaughter contrary to s. 236 of the Criminal Code. The Crown and accused sought leave to appeal the sentence of seven years imprisonment. The accused was caring for his girlfriend's 18-month-old son for approximately four hours one afternoon, at the end of which the child had stopped breathing and was unresponsive. The child had numerous bruises and was determined to be brain dead so was taken off life support. The cause of death was determined to be lack of oxygen to the brain with no pre-existing condition; the forensic pathologist concluded that someone smothered the child. The accused admitted to placing three fingers over the child's mouth for a short period of time but he indicated that he did not block his nostrils. In later testimony, the accused denied putting his fingers over the child's mouth. The trial judge concluded that the accused smothered the child until he was unconscious or incapacitated by blocking his airways. The unlawful act of smothering was likely to cause bodily harm or injury and that act was a significant cause of the child's death. The issues on the accused's appeal were: 1) did the trial judge err by not following the proper analysis to determine if there was an evidence-based reasonable doubt; 2) did the trial judge convict the accused on the basis of his own theory not supported by the evidence and not put before the defence; 3) did the trial judge examine the accused's testimony in light of the evidence as a whole; 4) did the trial judge

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United Food and Commercial Workers, Local 1400 v. Affinity Credit Union

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approach circumstantial evidence with the proper distinction between evidence-based inference and conjecture; 5) did the trial judge apply the standard of reasonable doubt to the credibility of witnesses and did he prefer and ignore certain testimonies over others without explaining the grounds for preferring one person's testimony over another's contradictory testimony; and 6) was the verdict unreasonable.

HELD: Leave to appeal was granted but all appeals were dismissed. The Court of Appeal dealt with the issues as follows: 1) the trial judge did not have to decide how the act was committed if he was satisfied beyond a reasonable doubt that the acts of the accused caused the death; 2) the trial judge never found that death was caused by an assault that incapacitated the child. The accused raised the issue of self-smothering in his statement and it was therefore a live issue at trial; 3) the trial judge did review the accused's evidence in light of the evidence as a whole and concluded that he did not believe the accused; 4) the accused argued that the trial judge made four findings based on conjecture. First, the trial judge's conclusion that the accused blocked the child's airways was reasonable. Second, the trial judge's conclusion that the accused knew he was doing something inherently dangerous was reasonable given the accused's reluctance to admit he had put his hand over the child's mouth. Third, the Court of Appeal held that the trial judge did not need a medical expert to find that the accused was angry or frustrated. The trial judge found that the accused caused the bruises and it was reasonable to conclude that he was therefore angry. Lastly, the trial judge did not say that the bruises and smothering were simultaneous; 5) the trial judge carefully and properly set out the reasons for his decision not to accept the accused's evidence. Further, the trial judge, as finder of fact, was entitled to accept one expert's evidence over the others; and 6) the Court of Appeal found that the findings of fact and credibility made by the trial judge were not in error such that the verdict was unreasonable. With respect to the accused's sentence appeal, the appeal court found that the trial judge made it clear that he was not concluding that the accused lacked remorse because he exercised his right not to plead guilty. Further, contrary to the accused's argument, the trial judge did take into account the accused's lack of criminal record. With respect to the Crown's sentence appeal, the appeal court found that the trial judge did not fail to take into account the gravity of the offence or the accused's moral culpability. The trial judge also correctly considered ss. 718.01 and 718.2(a)(ii.1) of the Criminal Code.

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McKay v. Erickson, 2015 SKCA 12

Klebuc, February 9, 2015 (CA15012)

Civil Procedure – Leave to Appeal
Small Claims – Appeal
Statutes – Interpretation – Small Claims Act, Section 47

The prospective appellant sought leave to appeal the decision of the Court of Queen's Bench acting as appeal court for the decision from the Provincial Court regarding the small claims action. The prospective appellant claimed the cost of repairing his motor vehicle for damages incurred when it was struck by the motor vehicle being negligently driven by the prospective respondent. The trial judge dismissed the prospective appellant's claim concluding that he failed to prove the damage was caused by a motor vehicle being negligently driven by the prospective respondent. The Court of Queen's Bench judge dismissed the prospective appellant's appeal.
HELD: The application for leave was denied. Section 45 of The Small Claims Act, 2007 limits appeals to questions of law and s. 47 limits the extent to which an appeal court can take into account procedural shortcomings. The Queen's Bench was found to be correct in holding that there was some evidence for the trial judge to conclude that the damage was not occasioned by the negligence of the prospective respondent. The trial judge did intervene to comprehensively examine a witness; however, given s. 47 of the Act the Court of Appeal held the Queen's Bench judge did not err in holding that the manner of questioning by the trial judge did not render the trial unfair.

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United Food and Commercial Workers, Local 1400 v. Affinity Credit Union, 2015 SKCA 14

Jackson Klebuc Ryan-Froslie, February 24, 2015 (CA15014)

Administrative Law – Judicial Review – Standard of Review – Reasonableness
Statutes – Interpretation – Trade Union Act, Section 6(1.1)

The appellant union appealed the decision of a Queen's Bench judge in chambers quashing a decision of the Saskatchewan Labour Relations Board (see: 2014 SKQB 241). The union had filed an application for certification with the board to represent certain employees. The board conducted a workplace investigation and determined after 53 minutes that the 45 percent threshold for certification had been met and a direction to vote was issued. A notice of vote was given to employees indicating that the voters list would be determined at the vote. The respondent employer objected, indicating that the vote was not properly performed and that there were 17 employees, not 15 as initially thought, in the bargaining unit.

The board determined that there were 17 employees with one possible addition and found that the threshold to vote, as required by s. 6(1.1) of The Trade Union Act, was therefore not met. The board nonetheless dismissed the respondent's objections and issued an order to tabulate the previous votes. The respondent obtained a stay of proceedings so the votes would not be tabulated prior to further determinations of the court. The chambers judge found that the standard of review where a tribunal is interpreting its own legislation is one of reasonableness. The judge allowed the application and quashed the order. He held that it was unreasonable for the board to determine whether the threshold of 45 percent had been met when there was only a 53-minute investigation and there was no voter's list. Therefore, the direction to vote was done without s. 6(1.1) being met. When the board determined that the requirements of s. 6(1.1) had not been met, the decision to order a vote should have been overruled.
HELD: The appeal was allowed, the chamber's judge set aside and the decision of the board reinstated. The court held that the board's interpretation of s. 6(1.1) of the Act fell within the range of possible acceptable outcomes and was entitled to deference by the chambers judge. The chambers judge's view of how that subsection should be interpreted would greatly impact both how the board operates with respect to certification applications and the speed with which representational votes could occur. The board's position that the decision to order a representational vote should not be retrospectively reconsidered was reasonable and in accordance with the tenor of the Act. The 45 percent threshold set out in s. 6(1.1) was meant to be determined at the time the application is made and on the basis of the evidence filed in support of the application, subject only to the board's investigation. It was not meant to be determined after a full hearing.

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Gray, January 9, 2015 (PC15013)

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

The accused was charged with operating a motor vehicle while his blood alcohol content exceeded .08. Defence counsel gave notice to exclude evidence on the basis of violations of ss. 8, 9 and 10(b) of the Charter and a voir dire was held. The accused's vehicle was rear-ended during a traffic jam. The accused and the other driver got out of their vehicles to review the damage. The other driver advised that

the accident would have to be reported. An officer arrived shortly thereafter, and the accused informed her that he was the other driver and provided his driver's licence. The defence argued that the accused's answers given at the accident were inadmissible because he was compelled by s. 253(3) and (4) of The Traffic Safety Act to respond to the officer's questions. The officer smelled alcohol on the breath of the accused. When asked, the accused denied that he had anything to drink. The accused admitted that he lied to the officer. The officer made an ASD demand because she did not believe the accused and because of the accident. The defence argued that the demand made pursuant to s. 254(2) of the Criminal Code was invalid and therefore there was a breach of s. 9 of the Charter. When the accused failed the ASD test, the officer made a breath demand pursuant to s. 254(3). Defence counsel submitted that the officer did not have reasonable grounds to believe that the accused was driving nor had reasonable grounds to believe that the driving occurred within the previous three hours. The evidence of the officer that the fail reading on the ASD was not an adequate ground for a s. 254(3) demand. After the breath demand was made, the accused was taken to the police station. Within 37 minutes, the breath tests were administered. The officer waited 20 minutes before the accused provided the sample in accordance with best practice. The defence argued that the samples were not taken as soon as practicable because there had been no adequate explanation for the time elapsed between the demand and the sample. At the time of the arrest, the officer had informed the accused of his right to counsel and he said that he wanted to contact a lawyer. He also said that he wanted to call his mother to arrange for child care and he made that call. At the station, he said that he didn't want to consult with a lawyer, and the officer gave him the Prosper warning and he confirmed that he understood and reiterated that he did not want to call a lawyer. Before the breath samples were taken, another officer asked the accused whether he had spoken to a lawyer and was put in the telephone room, was shown a phone book and advised of Legal Aid, but the accused again said that he did not want a lawyer. The accused testified that he had had asked the officer a number of times if he could call his mother to obtain the name of the family's lawyer but that the officer had not permitted him to make the call. He eventually gave up and that was the reason that he had not exercised his right to counsel at the station. The defence argued that the accused was not given a reasonable opportunity to contact his counsel of choice because he was not permitted to call his mother.

HELD: The court found the accused guilty. It held with respect to each of the issues raised by the defence that: 1) the statements made by the accused to the officer at the accident scene were admissible. The court did not believe the accused thought that he had to provide the information that he did; 2) the demand pursuant to s. 254(2) of the Code was valid. The officer's knowledge that the accused was the

driver of one of the vehicles, that he had been in a recent vehicle accident and that he smelled of alcohol was sufficient to support her suspicion that he had alcohol in his body; 3) the officer subjectively believed that the accused had operated his vehicle in the previous three hours and had committed the offence of driving while over .08. The subjective belief could be objectively verified taking into consideration the information that she possessed. The officer had simply made a mistake when she described the results of the test; 4) there was only six minutes unaccounted for between the time of the demand and the sample. There was no evidence that the officers acted unreasonably; and 5) the accused was properly advised of his rights to counsel and properly given the Prosper warning. The court did not accept his evidence that he had not exercised his right to counsel because the officer denied him the opportunity to call his mother. There had been no breach of s. 10(b) of the Charter and therefore the Certificate of Analysis was admissible.

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R. v. Neufeld, 2015 SKPC 4

Labach, January 13, 2015 (PC15001)

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

The accused was charged with impaired driving and driving with a blood alcohol content exceeding the legal limit. The defence filed a Charter notice alleging that the accused's s. 10(b) Charter right had been violated and that the evidence obtained should be excluded pursuant to s. 24(2). A voir dire was held. After an RCMP officer had witnessed the accused rolling through a stop sign at an intersection, he started following the accused's vehicle. On a couple of occasions he observed that the car jerked and that its speed on a highway fluctuated between 80 and 120 km/h and decided to stop the vehicle. The officer noted that the accused had glassy eyes but he could not smell alcohol coming from her breath. He asked her when she had had her last drink, she said about two hours earlier at 11:00 pm. Suspecting that the accused was impaired, he detained her for an impaired driving investigation. As she left her vehicle to take the ASD test, the officer then noted the smell of alcohol. After failing the ASD, the officer arrested the accused and read her right to counsel and asked her if she wanted to call a lawyer. She responded, "No, I'm guilty." He then read the police warning and the breath demand, and she advised that she understood. At the detachment, the officer put the accused in an interview room and spoke to her about calling a

lawyer. The exchange was recorded and the accused told the officer that she would contact her lawyer if she had her cell phone, which had been left behind in her vehicle. It transpired that the accused had her lawyer's number in her cell phone contacts. The accused then said that she had to call her father because he had the number of their lawyer, but she didn't know her father's cell phone number. The accused then decided against calling a lawyer and confirmed that decision with the officer two more times in their conversation. He then asked her if she wanted to waive her right to contact a lawyer and she said yes. After the accused provided breath samples, she said that she wanted to call a lawyer.
HELD: The court found the accused's s. 10(b) Charter right had not been breached. The officer had fulfilled his informational and implementation duties. The accused was not diligent in exercising her right to counsel. The Certificate of Analysis was admitted into evidence and the court found the accused guilty of s. 253(1)(b) of the Criminal Code but acquitted her of the s. 253(1)(a) charge.

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R. v. Kelln, 2015 SKPC 9

Tomkins, January 23, 2015 (PC15009)

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

The accused was charged with impaired driving and driving while his blood alcohol content exceeded the legal limit. The defence alleged that numerous Charter violations had occurred and a voir dire was held. The accused lived across the street from a police officer. The accused was driving his truck down the street. The officer's wife was in the front yard and saw the accused hit their car, after which he pulled into his driveway. The officer was working in the backyard and heard the collision. His wife informed him of the accident and he went to talk to the accused. The accused told the officer that he had had a coughing spasm while he was driving and that had caused him to hit the officer's car. The officer asked the accused if he had been drinking and the accused told him that he had gone to buy pizza and had had a couple of beers while he waited. The officer asked him if he thought he should have been driving, and the accused said that he probably shouldn't have driven. The officer testified that he could smell alcohol coming from the accused. He told the accused that they would have to report the accident to the police. When the investigating officer arrived, the officer advised him that the accused had admitted alcohol consumption and mentioned the coughing spasm. When asked about the accident, the accused told the

investigating officer that he had had a coughing fit and also admitted to having had a couple of beers. The officer testified that the accused had bloodshot glassy eyes. He asked the accused to accompany him to the police cruiser. Almost immediately, the officer arrested the accused for impaired driving, read the police warning, advised him of his right to counsel and made a Breathalyzer demand. The accused was taken to the police station within 15 minutes of the arrest. On this evidence, the defence raised the following issues with respect to the accused's involvement with the officer, who was his neigbhour: 1) the accused's statements were compelled under The Traffic Safety Act and he made them for that purpose only. These statements are therefore not admissible in these proceedings upon consideration of s. 7 of the Charter; 2) the accused was unlawfully detained, contrary to s. 9 of the Charter; 3) the neighbour officer had not advised the accused of the reason for his detention, contrary to s. 10(a) of the Charter; 4) the officer did not afford the accused of his right to counsel contrary to s. 10(b) of the Charter; and 5) the officer had not made a Breathalyzer demand and therefore the demand was not made as soon as practicable. As such, the taking of samples constituted an unreasonable search, contrary to s. 8 of the Charter. Regarding the transaction between the accused and the investigating officer, the defence argued that: 6) his statements were compelled under The Traffic Safety Act and he made them for that purpose only. These statements were therefore not admissible in these proceedings upon consideration of s. 7 of the Charter; 7) the accused was unlawfully detained, contrary to s. 9 of the Charter; 8) the accused was not told the reasons for his detention, contrary to s. 10(a) of the Charter; 9) the officer had not made a Breathalyzer demand as soon as practicable. The taking of the samples therefore constituted an unreasonable search, contrary to s. 8 of the Charter; and 10) the officer had not had grounds to make a s. 254(3) demand and thereby breached the accused's right against unlawful search and seizure under s. 8 of the Charter.

HELD: The court dismissed the defence arguments with respect to issues 1 to 5 because, although the accused knew that his neighbour was a police officer, the latter had made it clear to him that he was not acting as such because he advised that they had to report the accident to the police. Regarding the remaining issues, the court dealt with them variously but decided the voir dire on the basis of issues 7 and 10. It held that the accused's admissions regarding consumption of alcohol and driving would not be admitted as the statements were made under compulsion of The Traffic Safety Act. The court found that the reason that the investigating officer had asked the accused to go to the police cruiser was to conduct an investigation leading to an impaired driving charge. The court held that the Certificate of Analysis would be excluded because the officer had not had reasonable grounds to make a Breathalyzer demand pursuant to s. 254(3) of the Criminal Code and that the taking of breath samples

therefore constituted an unreasonable search breaching s. 8 of the Charter.

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R. v. Howells, 2015 SKPC 14

Labach, January 27, 2015 (PC15012)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Refusal to Provide Breath Sample
Constitutional Law – Charter of Rights, Section 9

The accused was charged with failing without lawful excuse to provide a breath sample into an ASD, contrary to s. 254(2)(b) of the Criminal Code. The defence alleged that the accused's s. 9 Charter right had been breached and therefore the evidence of his failure to provide a breath sample be excluded. A voir dire was held and the evidence applied to the trial. An RCMP officer had seen the accused leave a bar in the early hours of the morning. The officer followed the accused and when he saw the accused stop his vehicle in the middle of a dirt road and begin to back up, the officer stopped him to see his licence and registration and to check for sobriety. When asked, the accused admitted that he had had his last drink 20 minutes before. The officer asked him to take an ASD test. The defence argued that the officer had not followed the ASD manual procedure requiring the test to be administered 15 minutes after the last drink because he had not established whether the accused meant that he had started or finished his drink at the time cited. The officer administered the test seven times. The breath samples given were not long enough in duration to be assessed. The officer charged him with refusal to provide a sample. At the scene, the accused advised the officer that he had only half a lung because of injuries suffered in a serious vehicle accident. The accused testified that the accident had occurred in 2002 and since then his lung problems had worsened. After this incident, the accused was diagnosed with pneumonia and COPD, which developed because of a cold he had had at the time of the incident. The passengers in the accused's vehicle testified that the accused had been sick at the time of the arrest. The defence argued that the Crown had not proven that the accused intentionally failed to provide a breath sample and had never said to the officer that he refused to do so.
HELD: The court ruled on the voir dire that the officer had a lawful reason to stop the accused and that he operated the ASD device properly and that there had not been a breach of the accused's s. 9 Charter right. The accused was found guilty of refusal to provide a breath sample because the court found him to be an evasive witness.

There was evidence that the accused had been able to provide breath samples in 2009 and 2012 and there was no evidence that the accused was unable to do so on this occasion.

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R. v. Shmyr, 2015 SKPC 15

Cardinal, January 27, 2015 (PC15017)

Criminal Law – Evidence – Beyond a Reasonable Doubt
Criminal Law – Wilfully Cause Pain to Animal
Regulatory Offence – Animal Protection Act, Section 4

The accused was charged with two counts of willfully causing unnecessary pain to a dog contrary to s. 445.1(1)(a) of the Criminal Code and one count of causing or permitting the animals to be or continue to be in distress contrary to s. 4 of The Animal Protection Act (APA). The accused's ex-wife picked up dog B from the accused's acreage when her son said he had been hit by a car. She took him to the vet, where it was found that he had a maggot infestation and part of his tail was missing. B was euthanized. The veterinarian examining B testified that extreme matting of his coat caused open sores on his skin. The veterinarian also determined that B had not been hit by a car. The veterinarian who did the necropsy on B testified that only the tip of B's tail had been severed but that the bone was cut, which would be unusual to do during grooming as indicated by the accused. B had some food in his intestines but not in his stomach and he had a lot of internal fat. The ex-wife returned to the acreage and took dog S to the vet. S had a low body-condition score with tartar build up on her teeth. The veterinarian testified that S was like a 90-year-old in human years and that she did not have any lice or fleas but had more dander than normal. The veterinarian described S as an old but happy dog. The accused commented that he did not feel that the dogs were his. The issues were: 1) did the Crown prove the Criminal Code charges, beyond a reasonable doubt; and 2) did the Crown prove the actus reus of the APA offence beyond a reasonable doubt, and if so, did the accused discharge the onus concerning the due diligence offence.
HELD: The accused was found not guilty, as follows: 1) the Crown did not prove beyond a reasonable doubt that the accused was guilty of willfully causing unnecessary pain to B. The Crown failed to prove that the actions of the accused were willful. The court also found that there was no evidence of long-term neglect. Further, he was found not guilty of causing unnecessary pain to S by long-term neglect; and 2) the accused was found not guilty of the APA charge with respect to S because he did not cause or permit the animal to be or continue to be

in distress. The court found that the accused was responsible for B but the Crown did not prove the APA offence beyond a reasonable doubt.

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R. v. Foster, 2015 SKPC 17

Kovatch, February 2, 2015 (PC15014)

Criminal Law – Blood Alcohol Level Exceeding .08 – Approved Screening Device
Criminal Law – Defences – Charter of Rights, Section 8, Section 10(b)

The accused was charged with driving while his blood alcohol content was over .08. The accused argued that his ss. 8 and 10(b) Charter rights were breached. The accused's vehicle was stopped after meeting the police vehicle on a road at 3:15 am. The officer noted the accused's stiff appearance and lack of eye contact. The officer also noted the smell of alcohol coming from the accused, who was the only occupant of the vehicle, and he noted the accused had glassy eyes. The accused indicated that he had one beer to drink. The officer made an ASD demand and the accused failed the ASD. The accused was arrested and given his rights to counsel. The accused indicated that he wanted to contact counsel. The accused was taken to the detachment a few minutes later where he was again asked if he wished to call a lawyer. The officer indicated that the accused chose to call Legal Aid. The officer said he contacted duty counsel and handed the phone to the accused in the phone booth. The accused talked to duty counsel for seven minutes. The officer acknowledged that a false positive result can be obtained from an ASD test if a drink was consumed within 15 minutes prior to administration of the ASD. The accused testified that he was not informed that he could have a phone book to search for a lawyer. On cross-examination the accused acknowledged that the officer read from the card that indicates an accused can call any lawyer, including Legal Aid. He said he was also aware of the yellow pages, the Internet, and Google and acknowledged that he did not ask for any of these devices to search for a lawyer. The accused argued that evidence should not be admitted because: 1) the officer should have asked the accused when he had his last drink, and because he failed to do so, all of the evidence obtained from the ASD and after should be excluded; and 2) the accused was streamed to Legal Aid and thus denied his right to counsel contrary to s. 10(b) of the Charter. HELD: The accused's ss. 8 and 10(b) Charter rights were not violated: 1) the officer did not have a duty to ask the accused when he had his last drink and the accused had no obligation to answer such a question. The accused would have to show that the officer knowingly obtained a breath sample within 15 minutes of his last drink. There

was no evidence as to when the accused had his last drink and no evidence that the officer knew it was within 15 minutes before the ASD and; 2) the Supreme Court of Canada has noted that the s. 10(b) Charter right makes no mention of a right to counsel of choice, just a right to counsel. The accused did not advise the officer of any dissatisfaction with his discussion with duty counsel nor did he ask to speak to another lawyer. All of the evidence was applied to the trial proper.

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R. v. Meadow Lake OSB Ltd. Partnership, 2015 SKPC 23

Kalenith, February 23, 2015 (PC15021)

Regulatory Offence – Forest Resources Management Act – Strict Liability – Defence of Due Diligence
Regulatory Offence – Litter Control Act – Strict Liability – Defence of Due Diligence
Statutes – Interpretation – Summary Offences Procedure Act

The accused, shareholder to a Forest Management Agreement (PAFMA) regarding provincial and Crown forest, was charged with violations of The Forest Resources Management Act (FRMA) and The Litter Control Act (LCA) after enforcement officers found waste and either no garbage cans or garbage cans without lids at certain sites. The issues were: 1) whether the information was a nullity because the accused was a limited partnership and not an entity that could be charged. The accused argued that the offence provisions referred to "person", which was not defined in the Acts, and The Interpretation Act does not include a limited partnership in its definition; 2) whether the side agreement to the licence required the Ministry of Environment to follow the detailed enforcement process described in the side agreement prior to prosecution; 3) whether the prosecution amounted to an abuse of process; 4) whether the Crown proved the essential elements of the offences; and 5) whether the defence of due diligence applied because there was a mistaken belief or because all reasonable precautions were taken to avoid the offences.
HELD: The court found the accused guilty of counts 1 and 2 regarding Roberts Lake Block but not guilty of the remaining charges. The issues were discussed as follows: 1) the court found that the accused was a person properly charged under the LCA and the FRMA. The Interpretation Act does not exclude limited partnerships and the applicable part of the Criminal Code regarding summary offences includes partnership in the definition of person. Further, it makes sense that a partnership that has a licence pursuant to the FRMA can be charged for noncompliance; 2) nothing in the PAFMA or side

agreement indicated that the government was contracting out of laws of general application. The enforcement procedure outlined in the side agreement only pertained to enforcement of defaults created in the side agreement; 3) there was no clear language indicating an undertaking not to prosecute nor was there evidence to lead to that inference and therefore there was no abuse of process; 4) the LCA charges, counts 2 and 5, were strict liability and therefore mens rea was not required to be proven. The court found that items in count 2 and count 5 were abandoned. The FRMA charges, counts 1, 3 and 4, related to allegations that the operating plan was violated by a failure to have waste in a container with a lid at the respective sites; and 5) the accused indicated that they honestly but mistakenly believed they had 60 days to rectify any problems. The 60 days, however, came from the side agreement and not the charging legislation, so they did not have any application. The court did find that the accused took all reasonable and necessary steps to inform contractors of their obligation to provide the necessary containers and to pick up garbage. The contractors were responsible for the violations in counts 3, 4, and 5; the accused was not guilty of those offences. The court did not find the accused did all that was reasonably necessary with respect to the allegations in counts 1 and 2, and therefore they were found guilty of those charges.

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R. v. Badger, 2015 SKPC 26

Hinds, February 12, 2015 (PC15020)

Criminal Law – Care or Control – De Facto – Actual
Criminal Law – Care or Control – Presumption
Criminal Law – Evidence – Admissibility
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08

The accused was charged with operating a motor vehicle while her ability to do so was impaired and with driving with a blood alcohol level over .08 contrary to ss. 253(1)(a) and 253(1)(b) of the Criminal Code, respectively. The issue on voir dire was whether certain statements made by the accused to an officer were made voluntarily and should be admitted into evidence. The issues at trial were: 1) whether the Crown established that the accused had care or control of the vehicle; and 2) whether the Crown established that the accused was in de facto care or control of the motor vehicle. The accused and her common law partner became intoxicated at a party and began to fight. According to the accused, the partner physically assaulted her before they got in the vehicle. The partner was driving the vehicle and told her to switch seats with him when he saw the police lights. She

said that she switched seats because she was scared of what her partner might do to her if she didn't. While the officers were waiting for a tow truck, the partner sped off in the van with their three young children in the back.
HELD: The court found that the statements made by the accused to the officer were voluntary and without promise or threat. With respect to the issues at trial, the court held that: 1) neither officer testified that they actually saw the accused operating the van. The presumption was that she had care or control of the vehicle. The accused was found to be a credible witness and her evidence regarding the partner's physical beating and being forced to the driver's seat was accepted. The accused rebutted the presumption of care or control; 2) care or control can also be made out where there is a realistic risk of danger. The accused was simply occupying the driver's seat, there was no evidence her hands were on the wheel or that she was otherwise involved with the use of the vehicle or its equipment. Nor was there a risk that she would put the vehicle in motion so that it would become dangerous. The court was not satisfied beyond a reasonable doubt that the facts supported a finding of a risk of danger. The accused was acquitted of both charges.

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AYE Services Ltd. v. Leduchowski, 2015 SKPC 30

Gordon, February 27, 2015 (PC15024)

Contract – Breach
Small Claims – Breach of Contract

The plaintiff sued the defendant in the amount of $8,000 for payment due and owing to him for work done on the defendant's home in 2012 and for interest at the rate of 2 percent from that date to the present. Initially, the defendant approached the plaintiff to replace her roof. The plaintiff advised her that it would cost $3,500. The defendant then asked the plaintiff to do additional renovation projects. The plaintiff testified that he said he would, but that he couldn't advise as to the cost because he wouldn't know the extent of the problems until he started the work. The plaintiff stated that the parties agreed that he would charge at his hourly rate. The defendant asserted that at no time had the parties discussed what the plaintiff's hourly rate was. Their agreement was not reduced to writing. A witness, who helped the plaintiff with the work, testified on behalf of the defendant. He said that the plaintiff told him that because of the extra work, he would charge $5,500. It appeared that the defendant was told this by the witness and agreed to the increased price.
HELD: The court gave judgment in the amount of $5,500 less the

amount already paid by the defendant. The court did not believe the plaintiff's evidence that the defendant agreed to pay him at his hourly rate or to pay 2 percent interest.

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Martyn v. Lubyk, 2015 SKPC 34

Baniak, February 23, 2015 (PC15022)

Statutes – Interpretation –Traffic Safety Act
Torts – Negligence – Contributory Negligence
Traffic Safety Act – Motor Vehicle Offences

The plaintiff claimed his insurance deductible from the defendant, claiming that the defendant's negligence was the sole cause of the accident. The plaintiff said that he travelled behind the slow-driving defendant for approximately 200 feet. As the defendant was passing the plaintiff, he said that the plaintiff turned left and struck his vehicle. The defendant said that the plaintiff did not signal. The plaintiff said that she did signal and that when she decided to turn, the plaintiff was still behind her.
HELD: The court found that the plaintiff did not follow the defendant for a sufficient length of time to determine why she was going slowly. The defendant made a hasty decision to pass and the location of his vehicle compared to the plaintiff's did not allow him to see her signal light. Also, the plaintiff did not signal in a timely manner because she signaled and then turned immediately. The court held that both parties were equally at fault for the accident.

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101090442 Saskatchewan Ltd. v. Harle, 2015 SKQB 20

Kraus, January 20, 2015 (QB15017)

Civil Procedure – Leave to Withdraw Concession
Contracts – Land – Damages
Contracts – Land – Specific Performance

The plaintiff conceded at trial that damages were too speculative to be assessed but if assessed they should be based on the increase in the value of land. The plaintiff applied for leave to withdraw the concession. The defendant appealed to the Court of Appeal and their appeal was allowed in part because the trial decision allowing specific performance was set aside and the matter was remitted back to the

trial judge for an assessment of damages.
HELD: The court held that the trial judge was wrong in accepting the plaintiff's concession, in awarding specific performance, and in failing to consider damages as a remedy available to the plaintiff. There was found to be a triable issue as to damages. The court exercised its discretion to grant leave to the plaintiff to withdraw its concession and lead evidence as to damages including evidence of its plan. The court accepted the plaintiff's submission that evidence of a plan and evidence of damages were inextricably tied together. There would be no injustice or prejudice to the defendant that could not be remedied through costs.

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R. v. Wilton, 2015 SKQB 30

Chicoine, January 27, 2015 (QB15029)

Criminal Law – Break and Enter Dwelling House with Intent to Commit Indictable Offence – Sexual Assault
Criminal Law – Dangerous Offender – Indeterminate Sentence
Criminal Law – Dangerous Offender – Long-term Offender
Criminal Law – Dangerous Offender – Supervision Order

The accused was convicted of breaking and entering a dwelling house and committing the indictable offence of sexual assault contrary to s. 348(1)(b) of the Criminal Code. The Crown argued that the accused should be declared a dangerous offender and be given a determinate sentence of incarceration followed by supervision in the community pursuant to a long-term supervision order. The accused did not call any evidence. The accused was 38 and he had no contact with his father. When he was six he was placed in the custody of his mother's sister. He was moved to a Native Boys Group Home at 13. He started incurring charges at the age of 13 with a break and enter to a dwelling house with intent to commit theft. The accused became a father at the age of 16 and he and his girlfriend would have a total of seven children together. The accused committed his first Criminal Code adult offence in 1995. Most of his life as an adult was spent serving lengthy periods of incarceration. By 2006 he already had 97 convictions for various offences. The predicate offence involved the accused cutting the screen to a kitchen window and entering a home occupied by the 13-year-old victim and her mother. He took off his pants and laid on top of the 13-year-old victim who was asleep on the couch. The accused left without further assaulting the victim or her mother. A manager of programs at the Regina Probation Office testified that there were limited programs offered in the community for offenders assessed at high risk like the accused. A youth worker testified that

the difference with the accused compared to other offenders with similar backgrounds was that the accused lacked empathy for his victims. The action manager of programs for the Regional Psychiatric Centre suggested that the accused be placed in a moderate intensity violence prevention program, followed up with a substance abuse program at the moderate level. The forensic psychiatrist who completed the assessment also testified and indicated that the accused did not have a major mental disorder or psychotic proportion. He found the accused to be capable of benefitting from treatment. The psychiatrist found the accused to be at the very early stages of being motivated to change. The accused's risk for future violence was found to be high. His motivation to change was also found to be high and the psychiatrist found him to be a good candidate for therapeutic interventions offered within federal institutions. The psychiatrist concluded that a lengthy period of supervision would be required for the accused to transfer what he learned within the institution to the community. The issues for the court were: 1) if the accused met the definition of dangerous offender pursuant to ss. 753(1)(a)(i) or (ii); 2) if the accused was a dangerous offender, what would the appropriate definite sentence and long-term supervision order be; and 3) if the accused was not a dangerous offender, did he meet the definition of a long-term offender pursuant to s. 753.1(1), and if so, what would the appropriate determinate sentence and long-term supervision order be. HELD: The court found that: 1) the predicate offence was clearly a serious personal injury offence because it was an indictable offence involving the use of violence against another person and having a sentence that could be more than 10 years imprisonment. The court was also satisfied that the Crown established patterns as defined in ss. 753(1)(a)(i) or (ii). The sexual offence was the first conviction for a sexual offence but it was found to form a pattern with previous offences, a pattern of repeated loss of self-control that resulted in the commission of repeated violent offences against people. The accused was found to be a dangerous offender; 2) aggravating factors included: the offence was in an occupied dwelling home; the victim was 13 years old; and the accused had an extensive criminal record. The accused was given remand credit of 1.25:1. The accused was sentenced to a total of eight years and six months. The court also concluded that an eight-year supervision period following incarceration was appropriate; and 3) the court indicated that the accused would also fit the criteria of long-term offender.

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Shermet v. Miller, 2015 SKQB 34

Megaw, February 4, 2015 (QB15028)

Civil Procedure – Queen's Bench Rule 7-5, Summary Judgment

Mr. M. and his grandmother owned land jointly. They listed it for sale exclusively with one of the personal defendants, the real estate agent, for $74,500. Mr. M. and his grandmother accepted a $70,000 offer from the plaintiff, which was subject to financing. The plaintiff had trouble arranging financing, so two new offers were made, one for the residential property and one for the farm property, totaling $70,000. The two new offers were subject to financing. While the plaintiff was trying to get financing, the real estate agent prepared an offer to purchase the property for Mr. L. and Ms. M., advising them that the plaintiff was having difficulty getting financing. The offer of Mr. L. and Ms. M. was for $70,000 and was just for the residential portion. The real estate agent was also the plaintiff's agent. The real estate agent indicated that he was contacted by the plaintiff's wife for an extension to the financing condition. The plaintiff and his wife argued that they never asked for an extension but that they had advised the real estate agent that the financing condition had been met. Neither purchase was completed. The plaintiff and his wife lived in the property before and after the offer. Mr. M. commenced a separate action for a writ of possession to the land in order to remove the plaintiff and his wife from the land. The plaintiff claimed against the real estate agent, his employer, Mr. L. and Ms. M., and Mr. M. and his grandmother. All of the defendants applied for the matter to be determined by summary judgment. Mr. M. subsequently withdrew his applications for summary judgment and writ of possession. The remaining issues were as follows: 1) under what circumstances can the court apply the summary judgment provisions in The Queen's Bench Rules; 2) can the claim against the real estate agent and his employer be resolved by summary judgment; and 3) can the claim against Mr. L. and Ms. M. be resolved by summary judgment.
HELD: The court determined the issues as follows: 1) the court found that there was no genuine issue requiring trial in either application; 2) the real estate agent and his employer argue that they did not owe the plaintiff a duty of care because they represented Mr. M. and his grandmother and not the plaintiff. The contracts listed the real estate agent and his employer as the plaintiff's agent and he believed them to be. The court determined that Mr. M. and his grandmother refused to complete the transaction even after the plaintiff's wife advised them they had been approved for financing. There was nothing to suggest that the real estate agent or his employer did anything to prevent the transaction from proceeding or caused the plaintiff any damages. The claim against them was dismissed; and 3) there was no cause of action alleged against Mr. L. and Ms. M. and there could be no claim against them. The claim against them was dismissed.

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Magna Electric Corp. v. Tesco Electric Ltd. (c.o.b. Tesco Mechanical), 2015 SKQB 35

Megaw, February 6, 2015 (QB15032)

Civil Procedure – Queen's Bench Rule 7-5, Summary Judgment
Torts – Negligence – Duty of Care – Contributory Negligence

The plaintiff applied for summary judgment on the claim of $841,209.64. The plaintiff was an electrical consulting company contracted to construct steel framed buildings by a certain date to avoid penalty. The defendant was a subcontractor of the plaintiff to cut new holes in the floor of a building. The plaintiff and defendant discussed the need for a fire watch when the new holes were being cut in the metal floor. The defendant's employee decided to use an oxyacetylene torch to cut the holes and this caused a fire starting in the foam insulation on the underside of the building. There was no fire watch in place nor was there a fire extinguisher at the premises. The fire caused significant damage to the building and its electrical components. The issues were: 1) what is the test for determining whether a summary judgment application ought to proceed and; 2) should summary judgment be granted.
HELD: The court dealt with the issues as follows: 1) a consideration needs to include whether the application of the summary judgment rules will result in a fair process allowing for adjudication of the issue between the parties; 2) the defendant's employees engaged in an inherently dangerous activity through the use of the oxyacetylene torch without the approval or input from the plaintiff and without putting in place a fire watch as discussed between the parties. The defendant was negligent in causing the fire to occur, and the court found that the summary judgment provisions could be applied to make this determination. The court also found that the contributory negligence issue could be decided on the evidence before the court. The plaintiff was not negligent because the spray foam insulation had been applied to the underside of the building; the defendant was aware of the spray foam insulation. The court found that the defendant's claims amounted to steps the plaintiff should have taken to protect themselves from the defendant, not steps to be taken to avoid being contributorily negligent. The defendant was contracted to complete the work, so the plaintiff was not responsible for that work. The plaintiff was not contributorily negligent and there was not a genuine issue left for trial; and 3) the damage to the variable frequency drivers was not disputed and totaled $438,540.90. The court held that the significant amount in issue, coupled with the complexity of the damages claim, left a genuine issue for trial. The defendant should be given an opportunity to properly test the plaintiff's assessment of damages. The issue of damages was ordered to proceed to trial.

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R. v. Denny, 2015 SKQB 36

Wilkinson, February 5, 2015 (QB15033)

Criminal Law – Appeal – Conviction
Criminal Law – Dangerous Driving
Criminal Law – Defences – Charter of Rights, Section 10(a), Section 10(b)
Criminal Law – Impaired Driving

The appellant appealed his conviction of impaired driving on the grounds that the trial judge failed to address his alleged ss. 10(a) and (b) Charter breaches. During an afternoon in January, officers were following the appellant driving his truck when, after repeatedly weaving in and out of his lane, he missed his turn and drove right into the ditch. There was a strong odor of alcohol coming from the appellant and he had bloodshot eyes and slurred speech. He was unsteady on his feet. At the police vehicle the accused was placed under arrest for impaired driving and he advised officers that he did not want to speak to a lawyer at that time. Prior to providing breath samples the appellant was again asked if he wanted to contact counsel. He did not say that he did. The appellant was not notified that he was also being charged with dangerous driving until he was being released. At trial, the appellant was acquitted of the .08 charge due to doubt about the technician's certification and of the dangerous driving charge because there had been no real argument on it. The trial judge did not rule on the Charter issue in his reasons for decision even though the appellant provided the required notice.
HELD: The appellant was potentially in greater jeopardy than he was aware of when he declined his right to counsel. With respect to the impaired conviction, the material evidence was real evidence that did not require the participation of the appellant. The observation evidence was acquired by the police prior to his arrest, and prior to any alleged Charter violations. The appellant also made no attempt at trial to advance his Charter arguments and express how the Charter violations led to evidence collection. The evidence would not have changed even if the appellant had been notified of his dangerous driving charge or if he had contacted counsel. The appellant failed to address the nexus of a breach to conviction. If a trial judge concludes that there is insufficient foundation for a Charter challenge, the trial judge can determine it is not necessary to decide the issue and dismiss the motion. The appeal court held that the trial judge's reasons were sufficient.

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Lundstrom v. Canada (Minister of Health Canada), 2015 SKQB 41

Popescul, February 9, 2015 (QB15038)

Civil Procedure – Class Action
Civil Procedure – Queen's Bench Rule 13-28
Civil Procedure – Service
Statutes – Interpretation – Crown Liability Act, Section 23(2)

The plaintiff applied for an order appointing a designated judge to hear a class action certification application. The only document tendered to satisfy the requirement of proof of service on each of the three named defendants was one acknowledgment of service signed by the Deputy Attorney General of Canada. The plaintiff also named the Minister of Health Canada and the Department of Health Canada as defendants.
HELD: The application was denied. The court interpreted s. 23(2) of the Crown Liability Act to mean that service of a claim against the Crown may only be made upon the Deputy Attorney General of Canada when the Crown is named in the claim as the Attorney General Canada. The proof of service did not contain sufficient information because it did not indicate whether the signor was acknowledging service on behalf of each defendant or for only the Attorney General Canada. The court granted leave for the application to be renewed once proof of service of the claim on the two remaining defendants was filed.

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101090442 Saskatchewan Ltd. v. Harle, 2015 SKQB 42

Kraus, February 10, 2015 (QB15039)

Civil Procedure – Addition of Defendants
Civil Procedure – Parties – Adding Defendants
Civil Procedure – Pleadings – Amendment – Parties
Limitation of Actions – Extension of Time
Statutes – Interpretation – Limitations of Actions, Section 20

The plaintiffs were purchasers pursuant to a deal with the defendants scheduled to close on September 7, 2007. The deal did not close. The proposed defendants brought an application to be added as defendants. The proposed defendants were a realty company in the failed transaction. They claimed the unpaid commission and argued that the limitation period had not passed because it did not start until 2014, when the Supreme Court of Canada rejected leave to appeal.

Alternatively, they argue that the court should use its discretion pursuant to s. 20 of The Limitations Act and allow the addition of the defendants.
HELD: The court agreed with the defendants that the addition of the proposed defendants would be to allow a separate and distinct cause of action. The proposed defendant's action did not arise out of the same cause of action as the existing action. The court also indicated that there would be prejudice to the defendants to allow the application. If the action was not statute-barred, as argued by the proposed defendants, then they could commence a new and separate action.

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Propak Systems Ltd. v. Grey Owl Engineering Ltd., 2015 SKQB 43

Allbright, February 11, 2015 (QB15040)

Builders' Lien – Payment into Court
Statutes – Interpretation – Builders' Lien Act, Improvement

The applicant retained a metal company to build three storage tanks. The metal company retained the respondent to provide the engineering services for the tanks. The respondent provided all the services but the metal company did not build the tanks. The respondent therefore registered a lien against the land that the tanks were to go on. The applicant was successful in an application to the court pursuant to s. 56(1) of The Builders' Lien Act for an order vacating the lien upon payment into court of the full amount claimed plus 25 percent. The applicant now applied for an order paying out the funds held in court and an order for solicitor-client costs. The issue was whether the storage tanks constituted an improvement on the land, and were thus capable of maintaining a builders' lien pursuant to s. 22(1) of the Act. The court had to determine whether the statutory definition of "improvement" was expansive in its meaning or exhaustive and restrictive.
HELD: The court found that the Saskatchewan legislation was not like British Columbia's because it did not include a specific exception to the definition. The Saskatchewan Act does not contain an express exception for things that are "not affixed to the land or intended to become part of the land". The definition is not broad and inclusive as argued by the respondent; it is exhaustive and restrictive. The court reviewed the intention of the parties with respect to whether they intended that the tanks be affixed to the land. The tanks were bolted onto large concrete pads on the land. The court indicated that the test was whether the tanks could be moved. Further, the threshold of

movement was low so that if it is capable of being moved the intention was that it was not affixed to the land. The court concluded that the tanks were not intended to be permanently affixed to the land and become an improvement of it. The applicant was entitled to the funds held in court. The court declined to order solicitor-client costs because this was a matter that did not have a Saskatchewan decision.

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Weinmeyer, Re (Bankrupt), 2015 SKQB 44

Thompson, February 11, 2015 (QB15041)

Bankruptcy – Discharge

The bankrupt applied to be discharged from bankruptcy. The unsecured claims in the bankruptcy totaled $391,811.53. Because the personal income tax debt exceeded $200,000 and made up over 75 percent of the unsecured proven claims the bankrupt was not entitled to automatic discharge. The court had to determine whether the circumstances supported an order for discharge and what terms would be appropriate if a discharge was supported.
HELD: The bankrupt was a first-time bankrupt and a self-employed disc jockey at the time the tax debt was incurred. The majority of the tax debt was the result of a tax reassessment issued by Canada Revenue Agency where the bankrupt's earnings were reassessed to be higher than filed. There was no information about his original filing or the reassessment process. The bankrupt also had GST debt for failing to collect GST in relation to disc jockey services for 2005 and 2006. The bankrupt made no effort to pay his income tax liability but the court did not find that he acted in bad faith. He initially appealed the reassessment and abandoned it after his bankruptcy assignment. Also, the bankrupt did not have the ability to pay in the month between the reassessment and when the CRA began garnishing his wages. The bankrupt did pay his cell phone and cable bill the months after he was reassessed. He was 40 and employed full-time. The court held that an order of payment was required to preserve the integrity of the bankruptcy system. The court ordered that the discharge be suspended for 24 months and that the bankrupt: 1) pay $24,000 at the rate of not less than $100 per month for the general benefit of the creditors; 2) file monthly income and expense statements; 3) comply with his post-bankruptcy tax obligations; and 4) file all personal income tax and GST returns by their due date during his suspension.

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Canadian Trade International, Inc. v. Klein, 2015 SKQB 45

Zuk, February 11, 2015 (QB15042)

Builders' Lien – Application to Dismiss, Section 60
Builders' Lien – Claim or Deficiencies – Payment into Court, Section 57(2), Section 56(2)
Builders' Lien – Holdback
Builders' Lien – Order to Vacate – Builders' Lien Act, Section 60

The applicants applied for orders: to vacate a lien registered by the respondent on land; to vacate a written notice of lien; and to withdraw a certificate of pending litigation. Alternatively, the applicants sought an order to post security for the lien to be vacated. The applicants contracted with the respondent for the construction of a luxury home to cost a maximum of $1.6 million. The applicants indicated that the contract was formally terminated in March 2014. They had paid almost $200,000 to the respondent and direct payments to subcontractors of almost $60,000. The respondent said that another $255,000 was still owing. The applicants indicated that there were not invoices totaling that amount and also that some of the work done was deficient. According to the applicants, the project was no more than 15 to 20 percent complete and the most they could owe the respondents was $4,800. The respondent argued that the contract was terminated because the applicants did not maintain payments as they became due. The respondent said that the applicants' home was 30 percent complete. The issues were as follows: 1) were the applicants entitled to an order pursuant to s. 60 of the Act vacating the lien on the basis that is was grossly exaggerated, fraudulent, or consisted of charges not properly lienable; 2) were the applicants entitled to an order pursuant to s. 57(2) of the Act that the respondent's claim of lien be vacated upon payment into court of security in the amount of $20,000 or such other amount as the court considers appropriate; and 3) were the applicants entitled to an order pursuant to s. 56(2) of the Act and what amount, if any, should be paid into court to vacate the respondent's lien.
HELD: The court analyzed the issues as follows: 1) the respondent provided invoices totaling $358,000 and the contract allowed for an additional 15 percent administration fee. The court found that the respondent established that the lien was not on its face grossly exaggerated, inaccurate, obviously spurious, or otherwise is capable of being supported in law. The application pursuant to s. 60 was dismissed; 2) the amount claimed by the respondent greatly exceeded the holdback calculated in accordance with s. 34 of the Act and therefore an order to pay the holdback amount pursuant to s. 57(2) of the Act was not made; and 3) the court considered s. 56(2) of the Act to be the appropriate procedure. It was not plain and obvious to the court that the respondent's claim was without merit. The lien was considered valid for the purposes of s. 56(2) of the Act. The court

ordered that the lien be discharged off the applicants' title upon payment into court of the sum of $255,413.40 (the total amount of the lien claimed) plus $50,000 as security for costs, or posting of security in a like amount.

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Donahue v. Belitski, 2015 SKQB 47

Chicoine, February 12, 2015 (QB15044)

Damages – Damages in Tort – Non-pecuniary Damages
Torts – Negligence – Animal Attack
Torts – Negligence – Duty of Care – Contributory Negligence
Torts – Strict Liability – Scientor

The plaintiff commenced an action against the defendant for injuries suffered in a dog attack on the defendant's property. On November 15, 2008, the plaintiff went to the defendant's auto wrecking business. He was attacked by the defendant's dogs when he was returning to his vehicle after looking at some parts. The plaintiff was in the hospital for 16 days and was off work for a total of 10 months. He continued to have limited feeling in his right foot and it was wider and higher than his left foot so he required special work boots. The plaintiff testified that he still struggled emotionally five years after the attack. There were "beware of dogs" signs posted at the defendant's yard but no gate. The defendant's dogs had killed a neighbour's dog at the neighbour's yard in 2008. The defendant testified that he told the plaintiff to wait for him before he went looking for parts and that he also told him not to get out of his vehicle if he went looking. The defendant reluctantly acknowledged that three people had been bitten by his dogs the few months prior to the attack on the plaintiff. A Public Health Inspector testified that he had attended the defendant's yard in 2008, prior to the attack on the plaintiff, because they had information that the defendant's dogs had bitten someone. The issues were: 1) was the defendant strictly liable under the doctrine of scientor; 2) was the defendant liable in negligence for the plaintiff's injuries; 3) was the plaintiff contributorily negligent; and 4) if there was liability, what is the appropriate quantum of damages. The quantum of the following damages were not in issue: pre-trial loss of work; lost income from medical appointments; out-of-pocket expenses; lost holiday pay; and loss of employer's share purchase plan.
HELD: The court assessed credibility and determined that the plaintiff's evidence was much more credible than the defendant's. The court found that the defendant did not tell the plaintiff to wait for him nor did he tell him to remain in his vehicle. The defendant's credibility was compromised when he would not even admit the involvement of

and visit from the inspector. The issues were determined as follows: 1) the plaintiff proved all that was necessary for the defendant to be liable pursuant to strict liability: the defendant was the owner of the dogs; the dogs manifested a propensity to cause the type of harm occasioned; and the defendant knew of the propensity. Further, the defences of consent, trespass, and illegality had no application; 2) the defendant owed the plaintiff a duty of care and he ought to have taken reasonable care for the plaintiff's protection because there was a foreseeable risk of harm from the pack of dogs. The foreseeable risk of harm had been brought to the defendant's attention previously. The defendant also breached the duty of care that he owed the plaintiff by not acting reasonably in relation to maintaining control of the dogs. The breach of the duty of care was found to be the proximate cause of the injuries suffered by the plaintiff. The defendant was also liable in negligence; 3) the plaintiff was not found to be contributorily negligent; and 4) the court awarded $1,920 to the plaintiff for future cost of care for physiotherapy. The court agreed with the parties that the damages for non-pecuniary loss, compensation for pain and suffering, be $150,000. The total damages payable was ordered to be $324,347.11. Pre-judgment interest was awarded on the non-pecuniary damages and the pre-trial loss of earnings.

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R. v. Guraluick, 2015 SKQB 50

Zarzeczny, February 17, 2015 (QB15046)

Criminal Law – Appeal – Conviction
Criminal Law – Impaired Driving
Criminal Law – Evidence – Credibility

The appellant was charged with driving over .08 and with impaired driving contrary to ss. 253(1)(b) and 253(1)(a) of the Criminal Code, respectively. The .08 charge was dismissed after trial because the Certificate of Analysis was excluded pursuant to s. 24 of the Charter after a s. 10 breach was found. The trial judge convicted the appellant of impaired driving and he was given the minimum sentence. The appellant appealed his conviction. The issue was whether the trial judge committed a reviewable or reversible error in finding the appellant guilty. The appellant's vehicle was stopped after a third-party called the police about the appellant's erratic driving.
HELD: The appeal was dismissed. The trial judge reviewed the evidence that she accepted. She also referred to the appellant's testimony. The appeal court held that the trial judge did not err in her judgment nor did she fail to give any or adequate consideration to the appellant's evidence. The verdict was not unreasonable or

unsupported by evidence. The trial judge did not misdirect herself on the elements of reasonable doubt and their application to the facts and circumstances of the case. There was no palpable or overriding error made by the trial judge. Further, her findings of credibility were supported.

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Senger v. Harding Holdings Ltd., 2015 SKQB 55

Currie, February 19, 2015 (QB15050)

Landlord and Tenant – Residential Tenancies Act – Hearing – Appeal Statutes – Interpretation – Residential Tenancies Act, 2006, Section 7(b)

The appellant appealed the decision of a hearing officer of the Office of Residential Tenancies. The officer denied the appellant's claim for damages against the respondent landlord for its breach of her right to quiet enjoyment of her rental unit. At the hearing, the appellant testified that another tenant in the building had entered her unit without her permission several times over a period of six months. The other tenant submitted a written statement denying that she had entered the unit except at the time that the appellant was vacating it. The hearing officer found that as the other tenant was not acting in any way as an agent of the of the respondent, it was not responsible for the actions of the other tenant regardless of whether or not the entries had occurred. The appellant argued on appeal that the hearing officer erred in law because even if the other tenant was not acting as the landlord's agent, it remained liable for the breach of the appellant's right to quiet enjoyment.
HELD: The court allowed the appeal, set aside the hearing officer's decision and remitted to him the issue of whether the evidence established that the other tenant entered the appellant's unit without permission, thereby disturbing her right to quite enjoyment. The court found that the hearing officer had erred in determining the issue solely on the basis that the other tenant was not acting as an agent or employee of the landlord. If that person was in fact interfering with the appellant's quiet enjoyment of her rental unit, then by virtue of the fact that she was another tenant in the building, the landlord's duty to provide the appellant with quiet enjoyment of her rental unit obliged them to take steps to stop the interference, pursuant to s. 7(b) of The Residential Tenancies Act. If the landlord failed to take reasonable steps, the landlord breached its duty to provide the appellant with quiet enjoyment.

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SEIU-West v. Saskatoon Regional Health Authority, 2015 SKQB 61

Dawson, February 24, 2015 (QB15055)

Administrative Law – Arbitration Decision – Judicial Review
Administrative Law – Duty of Fairness – Breach
Administrative Law – Judicial Review – Standard of Review – Correctness
Administrative Law – Natural Justice – Procedural Fairness
Employment Law – Termination of Employment – Just Cause
Labour Law – Arbitration – Judicial Review

The appellant union sought an order quashing the arbitrator's decision and remitting the matter back on the basis that the arbitrator breached procedural fairness and natural justice and/or the decision was otherwise unreasonable. The grievor and her manager, Mr. N., had a "Level 1" attendance support meeting in April 2011 because the grievor had been absent without leave on several shifts between June 2008 and April 2011. The grievor was given a non-disciplinary letter indicating that she was expected to work the scheduled shifts and only approved leaves were allowed. Rumors were being circulated by co-workers that the grievor was having sexual relations with another employee. When she addressed her concerns to Mr. N., he told her to speak directly with the co-workers. He did not offer any other assistance. The grievor stopped attending work by February 2012 because she was embarrassed. The supervisor, Ms. W., tried to set up a "Level 2" meeting with the grievor and her union to discuss the further unapproved absences. The grievor did not attend. Ms. W. sent a letter to the grievor advising that she needed to contact her or she would be considered terminated. The grievor never contacted Ms. W. After a union representative contacted the employer, another letter was sent to the grievor offering support to return to work and asking for explanations of all the absences. The grievor did not return calls from her union offering to go to a meeting with her. The employer sent another letter to the union and the grievor advising of a termination of employment. A grievance was filed by the union on behalf of the grievor, alleging that the employer unjustly terminated the grievor. The arbitrator asked the parties if the "deemed quit" clause applied and both parties agreed it did not. The arbitrator found that the grievor quit her position with the employer because she did not work her 30 shifts over a period of three months. The employer was ordered to amend all documents to show that the grievor resigned her position.
HELD: The standard of review on issues of procedural fairness is correctness. The procedural fairness issue was the audi alteram partem rule, which is the right to be heard. The union argued that they were

not afforded the right to be heard by the arbitrator regarding the resignation issue. Neither party argued that the grievor had resigned nor did they present any case law or jurisprudence on the matter. The arbitrator did not make her decision based on article 9.04(c) of the collective agreement, but rather relied on two authorities not referred to by either party. A tribunal can reach a decision other than that in the pleadings if no party is surprised or prejudiced. When the arbitrator asked the parties about "deemed quit", it was clear that they thought she was referring to article 9.04(c) and not the common law. The court found that the union was put at a disadvantage because it thought it only had to meet a wrongful termination case. Even if the parties were aware that the arbitrator was referring to the common law, the arbitrator breached procedural fairness by not providing the parties with an opportunity to address the jurisprudence she relied on in her conclusion. The matter was remitted back to the same arbitrator.

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Prouse v. The Lands Appeal Board, 2015 SKQB 66

Megaw, February 27, 2015 (QB15060)

Statutes – Interpretation – The Provincial Lands Act, Section 80.1

The appellants appealed the decision of the Lands Appeal Board that had confirmed the decision of the Lands Branch to award two parcels of grazing land to each of the respondents. The parties had submitted applications to lease the parcels pursuant to The Provincial Lands Act. On the basis of the information provided in the applications, the branch scored them according to certain criteria and employed a computer program to calculate the score. As the appellants' applications were unsuccessful, they appealed to the board on the ground that the scores had been done incorrectly by the branch because it had not applied the branch's policy and guideline. The appellants relied on the same ground on appeal to the court that the branch and the board had failed to follow the Agricultural Crown Land Lease Policy and the Agricultural Land Lease Policy Guideline in arriving at the "scores" that were completed. They asserted that if the policy and guideline were followed, their scores would have been sufficient to require the branch to award to them the grazing land in question. They argued that the policy and guideline are part of the legislative framework under which the branch and the board operate. As a result of their failure to adhere to them, the appellants argued the board made an error in law in failing to follow its own legislation. HELD: The court dismissed the appeal. The Act provides on s. 80.5(1) that an appeal from the decision of the board on a matter of law may

be taken to court within 15 days of the decision. The policy of the Minister under the Act and the application of the policy were not questions of law reviewable on appeal because policies and guidelines are not part of legislation unless so stated, which was not the case here. The setting of the guideline and policy and the application of them are questions of fact for the determination of the branch and the board.

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622923 Saskatchewan Ltd. v. Wood, 2015 SKQB 69

Smith, March 2, 2015 (QB15062)

Landlord and Tenant – Writ of Possession
Statutes – Interpretation – Planning and Development Act, Section 242

The landlord applied for a writ of possession against the tenants respecting the site on which they operated a campsite pursuant to a lease, because the tenants had a non-compliant structure on its campsite. The rural municipality (RM) had issued a declaration requiring the landlord to remove the non-compliant structure to enforce their regulations as the RM has a program to ensure proper development in the area. The tenants claimed that the RM was wrong in concluding that their site violated the RM's regulations. The landlord stated that it was being forced to take action against them by the RM.
HELD: The court dismissed the landlord's application. The debate was not between the tenants and the landlord but between them and the RM. Under s. 242(2) of The Planning and Development Act, a development officer of the RM can issue a written order against the occupant of the land. The court directed that the RM issue an order of contravention against the tenants. The matter can then proceed without unnecessarily involving the landlord.

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