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R. v. Chu, 2015 SKCA 60

Ottenbreit, June 8, 2015 (CA15060)

Criminal Law – Judicial Interim Release Pending Appeal

The applicant applied for release pending his appeal of his convictions pursuant to s. 679(3) of the Criminal Code. He was convicted of trafficking cocaine and conspiracy to traffic cocaine and sentenced to seven and a half years in prison. The Crown agreed that the applicant's appeal was not frivolous but that there was some chance that he might not surrender himself into custody if his appeal was unsuccessful and because of the seriousness of the offence. The applicant's financial motivation to reoffend while on release was also high because he was at the top of the drug trafficking scheme. The applicant had a wife and young children, owned a house in Saskatoon and had complied with all the conditions imposed on him before his trial. He paid cash bail in the amount of $25,000 and would add another $10,000 as further security for his appearance.

HELD: The court granted the application. It held that although the offence was serious and the sentence substantial, that in the circumstances, the applicant would likely surrender himself into custody because of the property that he held in the province, the bail he had paid and that his detention was not necessary in the public interest.

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Rink v. Rempel, 2015 SKCA 62

Lane Jackson Whitmore, May 26, 2015 (CA15062)

Family Law – Custody and Access – Variation

The appellant mother appealed the decision in Queen's Bench chambers that denied her application in 2014 for permission to move with her three children to Grenfell from their residence in Prince Albert, pending a pre-trial or trial based on her contention that there had been a series of changes in her circumstances. After the parties' marriage had ended in 2011, the court had awarded shared custody of the children with their primary residence to be with the appellant. She had applied at that time to move with her children to Grenfell because she was in a new relationship with a man who lived there. The Queen's Bench judge denied the application then because the appellant's relationship was uncertain and that the respondent, an RCMP officer, would not be able to request a transfer from Prince Albert for some time since he had just received the posting. The judge ordered that the primary residence of the children would be with the appellant unless she moved to Grenfell, in which case the children would reside with the respondent. In 2014 the appellant had argued in her application to move that she and the children were going to be evicted from their rental home in Prince Albert and that she had been unable to find suitable accommodation there, whereas her partner had purchased a house in Grenfell in which they could live. The relationship had proved to be stable. Another material change was that the respondent was now eligible to transfer from Prince Albert. The chambers judge found that these did not constitute material changes in the circumstance and declined to order a pre-trial or trial. The appellant moved to Grenfell, which triggered the requirement of the 2011 order that the children reside with the respondent. The appellant appealed on the ground that the judge had erred in these findings and requested that she be allowed to move to Grenfell with the children as it was in their best interests pursuant to the Children's Law Act, 1997 and/or the Divorce Act or for the court to order that there be a new trial to determine the question with a direction that there be a Voices of the Children Report prepared.
HELD: The court granted the appeal and ordered that a trial should take place to determine the best interests of the children now compared to 2011. The trial should be expedited and the report prepared despite the fact that the eldest child was under the age of 12. The primary residence of the children would remain with the respondent to prevent disruption to them.

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Markwart v. Prince Albert (City), 2015 SKCA 63

Lane Jackson Whitmore, May 28, 2015 (CA15063)

Civil Procedure – Pleadings – Statement of Claim – Striking Out – Appeal

The appellant appealed the decision of a Queen's Bench judge in chambers striking his statement of claim against the respondent city as disclosing no reasonable cause of action and being frivolous, vexatious and an abuse of process. The respondent seized the appellant's property pursuant to its tax enforcement proceedings. The appellant had been sent a letter to the appellant's address as listed on the tax assessment roll as well as to another address that was known to the respondent, demanding payment of all tax arrears within the month. No payment was made and the respondent applied for title to the property and served the application by registered mail at two of the appellant's last known addresses. In 2012, the respondent filed a request for final application for title to the Provincial Mediation Board. The board sent a letter to the appellant by registered mail, but it was returned as unclaimed. An employee of the respondent deposed that she spoke to the appellant in a telephone conversation shortly thereafter in which she stated that the appellant had laughed when she requested his address and that he said he knew that the respondent was mailing him documents. The appellant had alleged in his statement of claim that the respondent owed him a duty of care relating to its operational decisions and that it took title to his property knowing that he had no knowledge of the tax enforcement proceedings. He also claimed that the proceedings were a nullity and that he had not been served properly, that some of the required documents were not sealed and were not signed by the proper person, contrary to The Tax Enforcement Act. The judge found that the claim was meritless regarding whether the proper person had signed the documentation and that the appellant had acted in bad faith and thus the claim was frivolous and an abuse of process.
HELD: The court dismissed the appeal. The judge had not erred in her findings. The respondent's evidence showed that the appellant knew that tax enforcement proceedings were being undertaken and refused to update his address on the tax roll.

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Markwart v. Prince Albert (City), 2015 SKCA 64

Lane Jackson Whitmore, May 28, 2015 (CA15064)

Civil Procedure – Appeal – Moot

The appellant appealed the decision of a Queen's Bench judge in chambers that upheld the decision of the Property Maintenance Appeal Board. In the appeal, the appellant sought an extension of time in which to sell the property or that the matter be returned to the board for rehearing. The board had found that the proposed sale of the property to a third party had not met certain conditions of sale imposed by the board. It therefore denied the sale, leaving an existing order to vacate and demolish the property in effect. The chambers judge dismissed the appellant's appeal of the board's decision on the ground that it had not exceeded its jurisdiction in the exercise of its discretion to deny the proposed sale to the third party. As a result, the court confirmed the board's decision and ordered that the existing order to vacate and demolish was enforceable. The City of Prince Albert then seized the property in tax enforcement proceedings and demolished the property. The appeal was therefore moot. The issue before the court was whether the appeal should be heard after weighing the factors: of sufficient adversarial representation in other proceedings; whether the hearing and decision in the appeal would be a proper use of judicial resources; and whether it would be a proper exercise of judicial function or whether the decision would intrude upon the legislative sphere.
HELD: The court dismissed the appeal. It found that the first two factors weighed against a hearing as there would be no effect upon the appellant's appeal of the tax enforcement proceeding (see: 2015 SKCA 63) and the appeal was so fact-specific that it had no broader importance. The court found that both of these determinations convinced it to decline to hear the appeal.

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Boudreau v. Boudreau, 2015 SKCA 65

Lane Jackson Whitmore, May 29, 2015 (CA15065)

Family Law – Child Support – Variation – Appeal

The appellant mother appealed from a decision of a Queen's Bench judge in chambers dismissing her application to vary a child support order. The order was made in Nova Scotia as corollary relief to the divorce of the parties in 2013. The appellant had argued in the application that there had been a change in circumstances since the order in that her income had declined, the respondent's had increased and that there had been a decrease in the respondent's costs to exercise access to the child. The chambers judge found that there was an insufficient change in circumstance to warrant varying the order. The appellant appealed on the ground that the judge erred in this finding based upon the same grounds of the application in chambers.

HELD: The court dismissed the appeal. It held that this was an appeal from an interim order and as such, the court's policy was not to disturb them. It found that the appellant had not provided sufficient documentary evidence to support her contention that her income had been reduced at the time of the application. The chambers judge had not commented on the issue of whether the respondent's income had increased and the matter was not raised in the appellant's notice of appeal or factum, but was presented by counsel in oral submission only. As the order was interim, the court declined to consider the issue unless there was a trial or a further application to vary was made.

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Branco v. American Home Assurance Company, 2015 SKCA 71

Richards Lane Herauf, June 19, 2015 (CA15071)

Damages – Punitive Damages – Award – Appeal
Damages – Mental Distress Damages – Award – Appeal
Insurance – Action on Policy – Personal Injury – Appeal

The respondent Branco was injured in 2000 while working at a mine operated by the appellant Kumtor Operating Company (Kumtor). Branco was covered by two group insurance policies. Kumtor had a policy with the appellant Zurich Life Insurance Company (Zurich) to provide 24 months of benefits for any of its injured employees who were unable to perform their own occupation, and after that, for benefits if any employees were unable to hold any other gainful employment. Another policy had been issued by American Home Insurance (AIG) to Kumtor that provided injured employees with workers'-compensation-type benefits. During the course of the next 13 years, Branco and the appellants were at loggerheads for many reasons regarding his entitlement to the various benefits under the policies and eventually Branco brought an action against them in an effort to secure all of the benefits that he considered to be owing under the policies. AIG resisted his claim on the basis that it had paid all that was owing. Kumtor resisted as well. Zurich acknowledged that Branco was entitled to the full suite of benefits. Branco was successful at trial. The judge ruled that AIG was liable to pay him additional benefits and that Kumtor was obliged to provide him with medical, dental and vision benefits. The judge also ruled that Zurich and AIG were liable to pay $4.5 million dollars in punitive damages ($1.5 million attributed to AIG) and $450,000 in damages for mental distress ($150,000 attributed to AIG) because of the manner in which they had administered Branco's claims (see: 2013 SKQB 98). Costs were awarded against Kumtor on a multiple of five times column four of the Queen's Bench tariff (see: 2013 SKB 442). AIG appealed, arguing that the trial judge

erred in finding that it had failed to make required payments to Branco and in finding it liable for punitive and mental distress damages. Zurich appealed on the grounds that the judge erred in the award of damages. Kumtor appealed on the ground that the judge erred in finding it liable to pay Branco the suite of health care benefits and the award of costs. Branco cross-appealed on the basis that if the appellants were successful in having the damage awards reduced, the question of costs should be referred back to the trial judge for reconsideration.

HELD: The court granted the appeal in part. The court determined that the trial judge made factual and legal errors in his judgment. With respect to AIG, it set aside the finding that it owed Branco for unpaid benefits because the trial judge had failed to examine the details of the policy and relied upon its general Workers' Compensation style. The court reduced AIG's share of the punitive damages award to $175,000 because of errors made by the trial judge regarding AIG's conduct and because the award was unwarrantedly high. The court found that AIG had acted improperly by suspending Branco's benefits knowing that he could not work at his original position and attempted to push him into accepting an unfairly low settlement. In addition, AIG demonstrated similar conduct in this case as it had in another Saskatchewan claim. The court reduced AIG's share of the mental distress damages award to $15,000 because the trial award was too extravagant to be sustained. The trial judge correctly found that AIG breached the "peace of mind" policy because it left Branco without funds for extended periods of time and he could not support himself or his family. His marriage ended and he suffered from multiple mental health issues. Regarding Zurich's appeal, the court reduced its share of the punitive damages award to $500,000. The trial judge erred in finding that the choice-of-law clause in the policy permitted it to be governed by Saskatchewan law, thereby allowing the judge to make the mental distress damage award. The court found that Swiss law, which prevented such awards, governed the policy but it invoked a public policy exception to displace the prohibition. The trial judge's award was too high and was set aside. He had correctly found though that Zurich's conduct was reprehensible: it had refused to pay a claim that it had actually approved and it failed to pay for a substantially longer period than had AIG. For these reasons, the court penalized Zurich with a larger share than AIG in the award for punitive damages. The court reduced the mental distress damages award against Zurich to $30,000, determined on the same basis as it had determined AIG's liability. Kumtor was required to pay the health care benefit costs with some modification to the period of coverage. The court reduced the costs award against Kumtor because the trial judge had incorrectly stated that Kumtor had made numerous and unnecessary interim applications during the proceedings. The court dismissed Branco's cross-appeal. The trial judge had rejected his request for full indemnification because the appellants had been sufficiently punished through the various damage awards.

Regardless of the reduction in the amount of the awards on the appeal, the court had properly determined the adequacy of the costs and there was no basis to refer the matter back to the trial judge.

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R. v. Rodriguez, 2015 SKPC 65

Toth, May 25, 2015 (PC15064)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Refusal to Provide Breath Sample

The accused was charged with refusal to provide a breath sample contrary to s. 254(5) of the Criminal Code. The accused had immigrated to Canada from Argentina in 2001 and his first language was Spanish. He had learned English during the course of his employment in restaurants. The accused was stopped by a police officer and the latter formed the suspicion that the accused had alcohol in his body because he admitted to having had a beer, the officer smelled liquor and the accused's eyes were red and glossy. The officer asked the accused to get into the police cruiser and when the accused asked why, the officer said that he wanted to get a breath sample on an ASD. The accused and the officer discussed the situation and the accused was informed he was being detained. The accused denied that the officer had legal authority to take the sample and the officer put him in handcuffs. The officer explained the ASD demand and what was required of the accused. The accused made one attempt to blow, which was insufficient to give a reading, and refused to make any further attempts. The accused was then arrested for refusal and read his rights and warnings. He stated that he did not understand them so the officer explained them in laymen's terms. When asked, the accused said that he understood the explanation and indicated that he wanted to speak to a lawyer. At the station, the accused contacted counsel and then informed the police that he would use the ASD. The arresting officer said that it was too late to do so. At trial, the accused testified that he had not understood the nature and extent of the questions being asked by the officer because of his problems understanding English and because the handcuffs made him nervous. He stated that the officer's explanation of the difference between .04 and .08 was confusing to him and that he understood that he had the ability to speak to a lawyer before blowing into the ASD. His counsel argued that the accused understood that he could postpone his decision until he spoke to a lawyer.

HELD: The court found the accused guilty. The officer at the scene noted that the accused had an accent but that he understood the ASD demand and his rights when explained in layman's terms. The accused

was given multiple opportunities to comply. Therefore the court found that the accused intended to refuse the demand. The court dismissed the accused's argument that he had an excuse because he misunderstood the officers.

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R. v. Mytroen, 2015 SKPC 83

Kovatch, May 25, 2015 (PC15076)

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

The accused was charged with driving while his blood alcohol content exceeded the legal limit. The defence made a Charter application to exclude the Crown's evidence under s. 24(2) because the accused's s. 10(b) right to counsel had been violated. A voir dire was held. An RCMP officer stopped the accused's vehicle to check sobriety. As he could smell alcohol coming from the accused, the officer asked him if he had been drinking, and when the accused replied affirmatively, the officer asked the accused to submit to an ASD test in his cruiser. The accused failed the test and was advised by the officer that he was under arrest and of his Charter rights. When asked whether he wanted to consult counsel, the accused said no. At the RCMP detachment, the accused was observed by another officer. This officer testified that while the accused was at the station he had not asked him, nor had the arresting officer, whether he wanted to contact a lawyer. However, the accused had asked to call his father so that he could come to pick him up. The officer said that he could make the call after the Breathalzyer tests were completed. The defence argued that the accused's rights under s. 10(b) of the Charter were breached because the accused was not asked again if he wanted to talk to a lawyer and that the same rights were violated because the accused was not allowed to call his father.
HELD: The court dismissed the application and admitted the evidence. The police officer was not under any obligation to reiterate the question to the accused after he had replied negatively when first asked. This was not a situation in which the Prosper warning had to be given. The accused had no right under s. 10(b) to call any person. The accused adduced no evidence to link his attempt to call his father to a call to counsel.

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R. v. Blaser, 2015 SKPC 85

Hinds, June 11, 2015 (PC15075)

Criminal Law – Assault – Assaulting a Peace Officer

The accused was charged with assaulting a peace officer, contrary to s. 270(1)(a) of the Criminal Code, and attempting to take the officer's firearm, contrary to s. 270.1 of the Code. The charges arose after two police constables received an unwanted-guest report and drove to the residence in question in their cruiser. They saw the accused fighting a smaller older man outside the building. Both officers described the accused as weighing about 220 pounds. While running up to the men, the officers, who were wearing their uniforms, identified themselves as police and ordered the men to stop fighting. After physically separating them, one officer attempted to subdue the accused and handcuff him, but he managed to flip the officer onto the ground on her back and then held her down with his body. He also put his hand on the officer's firearm. The other officer came to her rescue and together they handcuffed him and arrested him. In the police cruiser, the officer testified that the accused appeared as if he was in an excited delirium. The officers called EMS, who then took the accused to the hospital. They were unable to restrain him, and at the hospital the staff administered sedatives three times without effect. Eventually the accused calmed down and was taken to the police station, charged and given his warning and Charter rights. The officer who created the identity report at the police station testified that the accused weighed 149 pounds. The accused admitted to drinking a bottle of rum before the altercation and that he had no memory of the fight. The biochemistry report on the accused indicated that he had ingested opiates, cocaine and benzodiazepine as well. The first issue was whether the officer who was allegedly assaulted by the accused was engaged in the execution of her duty. The second issue raised by the defence was whether the evidence provided by the arresting officers was reliable because of the discrepancy between their testimony and the custody officer's regarding the weight of the accused.
HELD: The court found the accused guilty of both charges. The court found that the officer was acting pursuant to her common law duty to keep the peace and prevent crime. The court found the officer's testimony to be credible in spite of the discrepancy between the accused's actual and perceived size. The accused assaulted the officer, and his intoxication was not a defence. The court similarly found that the accused attempted to disarm the officer, and his self-induced intoxication was not a defence.

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R. v. Neufeld, 2015 SKPC 92

Kovatch, June 29, 2015 (PC15077)

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

The accused was charged with driving while his ability to do so was impaired and with driving while his blood alcohol content was over the legal limit. The defence made a Charter application to exclude the Crown's evidence pursuant to s. 24(2) of the Charter because it alleged that the accused's ss. 10(a) and s. 10(b) Charter rights had been violated. A voir dire was held. The charges arose a result of an RCMP officer receiving a call that there had been a disturbance at a store and that the individual who had caused it was driving a white truck. The officer saw the truck and followed it until it stopped in the driveway of a house. The officer then got out of his vehicle and asked the driver, the accused, to come back to speak to him. The accused complied. The accused told the officer that he had not been involved in the incident at the store but during their conversation, the officer could smell alcohol on the breath of the accused and noted that he had bloodshot eyes. The accused said that he had had a couple of drinks so the officer made an ASD demand. The accused agreed and provided a breath sample. He failed the test. The officer read him his Charter rights and asked him if he wanted to speak to a lawyer and the accused said no. The officer made the breath demand and the accused was taken to the police station and provided breath samples. The defence argued that the officer breached the accused's s. 10(a) Charter rights when he called the accused back to ask him questions and failed to advise him of his Charter rights. The officer then breached the accused's s. 10(b) Charter rights when the accused replied no, which was not a clear and unequivocal refusal, and the police were obligated to take further steps when the accused was at the police station.
HELD: The court dismissed the application. There had been no Charter breaches and the evidence from the voir dire would be admitted in the trial proper. At the time that the officer asked the accused to talk to him regarding the other matter he was investigating, the accused had not given any evidence or information in the ensuing conversation, so there was nothing to exclude. However, when the officer formed his suspicion that the accused had alcohol in his body, he was entitled to make the ASD demand and following it, the accused's Charter rights were suspended. As with the decision in R. v. Mytroen (see: 2015 SKPC 83), the court held that the police were under no obligation to make further inquiries of the accused about contacting counsel when they were in the police station.

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R. v. Nelson, 2015 SKPC 95

Harradence, June 18, 2015 (PC15078)

Criminal Law – Obstruction of Justice

The accused, a constable with the Saskatoon Police Service, was charged with obstruction of justice contrary to s. 139(2) of the Criminal Code. The accused had responded to a call of a domestic assault at the residence of Ms. Johnson. The accused obtained a written statement from her that stated she had been punched by Curtis Campeau. He then requested that Ms. Johnson attend at the station the next day to have pictures taken of her injuries. Ms. Johnson telephoned the accused later that day and told him that she did not want to proceed with the charges and that her statement had been false. The accused advised her that the charges would be laid by the police and it was unnecessary for her to rewrite the statement. Ms. Johnson visited the police station the next day and told the officer at the front desk that she wanted to recant her statement. The officer gave her a form and she wrote another statement and left it with the officer. There was a video-recording of Ms. Johnson's visit. The officer telephoned the accused and described Ms. Johnson's wish to change her statement and the accused told him that it could be ripped up. The conversation was recorded. The officer kept the statement and gave it to the accused. There was no record of any receipt of the second statement or the accused's contact with Ms. Johnson. The accused testified that he could not remember what he had done with the statement but that he might have thrown it away. When the Crown proceeded with the assault charge against Campeau, Ms. Johnson was called and testified about recanting and counsel initiated a KGB application. The accused complied with disclosure requests. At his trial, the accused testified that he had forgotten about the second statement and that he had never meant that the statement should be destroyed as was recorded in the telephone call from the other officer and that his failure to provide a report regarding the recanting statement was bad police work but not an intentional or willful attempt to influence the trial of Campeau or destroy the statement. The issue before the court was the credibility of the accused. HELD: The accused was found guilty. The court found the accused's evidence to be unreliable and incredible. The accused discussed the destruction of evidence and took deliberate steps to conceal its existence.

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J. (M.D.) v. S. (C.W.), 2015 SKQB 144

Keene, May 20, 2015 (QB15136)

Family Law – Child Support – Section 7 Expenses
Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Children Born Outside Marriage
Family Law – Custody and Access – Children's Law Act
Family Law – Custody and Access – Primary Residence
Family Law – Custody and Access – Sole Custody
Family Law – Division of Family Property – Valuation

The parties moved in together in the petitioner's house in October 2009 and their child was born June 2010. They separated in November 2012. Pursuant to an expedited pre-trial conference, the child primarily resided with the petitioner. The child stayed with her for nine nights and then stayed with the petitioner for five nights. The petitioner indicated that the respondent was receiving Worker's Compensation benefits during their relationship and was on pain medication that caused him to nap a lot. She said that she was therefore primarily responsible for their child's care. The respondent had two young children from a previous relationship. After separation the child began saying things concerning to the petitioner that indicated he was talking to the child about the failed relationship and her parenting skills. The petitioner was in a new relationship. The petitioner requested sole custody with the respondent having access, supervised by his mother, every other weekend. The petitioner indicated that she worked 14 to 20 hours per week and that seven of those hours were away from the house. One of the respondent's former spouses testified that the respondent verbally and physically abused her. The respondent was not working, he was receiving Workers Compensation benefits. He indicated that the petitioner went back to work when the child was six months old and that he was primarily responsible for the child's care. The respondent requested a 50/50 shared parenting regime. The respondent admitted on cross-examination to giving false testimony in his bankruptcy proceedings and to the sheriff regarding a boat. The respondent moved in with his mother after separation and continued to live there at the time of the trial.
HELD: The court concluded that the respondent was not a credible, trustworthy, or reliable witness for many reasons. The petitioner, on the other hand, was found to be a truthful and reliable witness. The court was also impressed with the petitioner's witnesses because they were close family members, long-time friends, and her live-in partner. By contrast, the respondent's witnesses were friends seen from time to time, neighbours, and his mother. The court found the respondent's mother to be evasive and guarded at times. To determine custody the court reviewed the factors set out in s. 8 of The Children's Law Act, 1997. The petitioner was found to be the primary parent of the child since his birth. The court was left with a degree of uncertainty as to the day-to-day activities of the child when he was with the respondent. The quality of the child's relationship with the petitioner was found to

substantially exceed that of the respondent's relationship with the child. The court accepted that the child said disturbing things upon his return to the petitioner from the respondent. The child's need for a stable, reassuring, and positive home were found to be met in the petitioner's home. The court indicated that decreasing the respondent's time with the child may ameliorate the adverse effect on the child's emotional needs. The child was also found to be afforded more social fulfillment in the petitioner's care. The petitioner also had more constructive plans for the child's future. The respondent's negativity towards the petitioner was found to negatively impact his ability to parent. The court concluded that it was in the child's best interests to primarily reside with the petitioner. The petitioner was granted sole custody of the child so as to minimize further conflict between the parties. The respondent was given unsupervised access every other weekend. The court added $5,000 to the petitioner's line 150 income for the personal component of her vehicle expense deduction. After determining the respondent's income the court found that the s. 3 Guideline child support due by the respondent to the petitioner was $676 per month and that he should be responsible for 37 percent of the s. 7 expenses. The petitioner did not request child support but instead asked the court to consider it in the distribution of property. The respondent discharged the onus of establishing a common-law relationship of two or more years. The respondent's pension value available for division was found to be $11,663.97. The court did not find an extraordinary circumstance to warrant an unequal division of the family home. The value of the home was $360,000. The court used the date of application to determine the amount owing on the home. The petitioner also had rental properties and was given an exemption of $90,641.43 for those properties. After taking into consideration all of the property and exemptions, the respondent failed to prove that he was entitled to any distribution under The Family Property Act. The petitioner did not claim an equalization payment. Costs were awarded to the petitioner and the respondent was restricted from bringing a further court application until those costs were paid.

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R. v. Osmond, 2015 SKQB 148

Currie, May 25, 2015 (QB15140)

Criminal Law – Sexual Offences – Touching for a Sexual Purpose – Young Person – Consent

The accused was charged with having touched a young person with her body for a sexual purpose and invited him to touch her for a sexual purpose, between February 1 and April 20, 2013, contrary to ss. 153(1)

(a) and (b) of the Criminal Code. At the time of the offences, the accused was 27 years of age and teaching in a high school on a one-year term. She became friendly with a 15-year-old student, and in early 2013 they acknowledged that they were romantically attracted to each other. In early February 2013, the student turned 16. A week later, the student approached the accused and asked her if they could meet to kiss. Although she was still his teacher, the accused did so because she thought that their relationship was ending as she was leaving the school in days and did not live in the same town where she had been teaching. After leaving the school, the student continued to contact the accused via text messaging and suggested that they should have sexual relations. In March 2013, they had intercourse and did so again a number of times. Their relationship ended in April when the relationship became public and the RCMP began investigating. The accused was charged under both subsections of s. 153(1) as a person who was in a position of trust and authority regarding the student. The charges covered the first incident, which involved kissing, and the second, which involved sexual relations. Although the student was of an age to consent at the time, consent was not a defence to s. 153(1) because the accused was an adult in a position of trust or authority under s. 150.1(1). The accused argued at the time of the first incident that she was in a position of trust and authority but that the kissing was not for a sexual purpose. In the second instance, the touching was for a sexual purpose but she was no longer in a position of trust towards the student.

HELD: The court found the accused not guilty. The court accepted the evidence of the accused. Regarding the first incident, it held that the accused was in a position of trust towards the student but that there was no evidence that it was for a sexual purpose. During the times connected with the second set of charges, the court found touching for a sexual purpose. The accused no longer had authority over the student because she was no longer the student's teacher. The accused was no longer in a position of trust during this second period because, based on the evidence, the student had taken control of the relationship.

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R. v. Ross, 2015 SKQB 150

Maher, May 26, 2015 (QB15151)

Criminal Law – Assault – Aggravated Assault – Sentencing

The accused was convicted by jury of the offence of committing an aggravated assault contrary to s. 268 of the Criminal Code. The accused, a 28-year-old Aboriginal woman, lived in the remote northern

community of Hall Lake. During a party the accused had been drinking heavily and became involved in an argument with her sister. After a physical altercation, the accused retreated to the kitchen and got a knife. She told her sister that if she came near her, she would cut her. The sister did so and the accused stabbed her sister's cheek. The wound required 30 stitches. The accused's childhood was difficult because her parents were alcoholics. She often rotated between the homes of her grandmother and great-aunt. The marriage ended when the accused was 13. At that point the accused herself started drinking. When she lived with her mother, the accused had to look after all of her siblings. She was very angry about her mother and had tried to wound herself. Otherwise she had no history of violence. The accused had no criminal record. The accused's aunt was consulted during the preparation of the pre-sentencing report and advised that the accused thought of her younger siblings as her children. She had been a good student and had finished high school. It was her plan to attend SIAST in Prince Albert or Saskatoon to further her education. Since committing the offence, the accused had participated in a 28-day addiction program in Saskatoon and had stopped drinking. Both the victim and her aunt felt that imprisonment would harm the accused and not be a benefit to anyone else. They were hopeful that she would be able to leave the community and pursue higher education.
HELD: The court sentenced the accused to a term of probation for two years with conditions regarding abstinence and participation in an addiction program and obtain personal counselling. The court found a non-custodial sentence to be appropriate considering all the circumstances and the Gladue factors.

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R. v. Peters, 2015 SKQB 151

Elson, May 27, 2015 (QB15141)

Criminal Law – Firearms – Forfeiture – Appeal

The appellant appealed two orders made by a Provincial Court judge after a hearing held pursuant to s. 117.05 of the Criminal Code: firearms and ammunition belonging to the appellant were to be disposed of and the appellant was prohibited from owning such items for a period of two years. During the course of an investigation of the appellant's possession of firearms, the RCMP had found weapons and ammunition at various sites owned by the appellant's family members. The officers seized five handguns and three rifles. Based on the fact that the firearms and ammunition had not been properly and safely stored and their contention that the appellant lacked the necessary responsibility and discipline to be a gun owner, the Crown made the

application under s. 117.04. At the hearing, the appellant testified that it was his brother-in-law who was responsible for the storage of the firearms. One of the officers testified that the appellant had had various altercations with family members during the last ten years and that he exhibited erratic behaviour on occasions when he did not take his medications. On appeal, the appellant made the same argument that he had at the hearing.
HELD: The court dismissed the appeal. It found that the hearing judge's findings were supported by the evidence and upheld the orders.

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Bowen v. Halliday, 2015 SKQB 152

McMurtry, May 27, 2015 (QB15142)

Family Law – Child Support – Variation

The parties were married and divorced in New Brunswick (NB). The sole child of the marriage was born in 1999, shortly after the parties separated. In 1999, an NB court ordered that the respondent mother have sole custody of the child and gave specified access to the petitioner. The order also specified that the respondent could not leave the province without the petitioner's consent. Based upon the petitioner's income of $17,800, the petitioner was to pay child support in the amount of $144 per month starting in 2000. Until 2014 when DNA tests confirmed that the petitioner was the father of the child, the parties apparently conducted themselves in contravention of the order. The petitioner alleged that the respondent denied him his right to access because he wasn't the father and at some point removed the child from New Brunswick without his consent. The petitioner paid very little child support and amassed arrears in the amount of $13,100 by 2014. In 2014, the petitioner applied to the court in New Brunswick for an order expunging the arrears and terminating future child support. The orders were granted on the basis of the respondent's violation of the 1999 order. The court found that the respondent should repay $5,000 to the petitioner for monies that had been wrongfully garnisheed from the petitioner by the provincial support enforcement office. At the hearing in NB, the petitioner's annual income from 2001 to 2013 was presented. In most instances, it exceeded his income established in the 1999 order by as much as $20,000. He had remarried and had three children and his second wife was employed. The respondent was unemployed and received Social Assistance. She supported three children and did not receive child support for her two other children. The petitioner applied to the court in Saskatchewan to confirm the orders of the NB court.

HELD: The court denied the application with respect to variation but confirmed that the arrears be expunged. It found that due to the respondent's financial circumstances, it would not confirm the order requiring her to reimburse the petitioner. It would not vary the 1999 order because the petitioner's income was the same or had increased since the order was made and the evidence had not shown a change in circumstances sufficient to warrant variation. As the respondent had not sought payment of arrears, the court confirmed the NB order rescinding them and ordered that the petitioner pay $144 per month in child support commencing in September 2015.

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Delarue v. Morrison, 2015 SKQB 153

Zuk, May 26, 2015 (QB15143)

Civil Procedure – Pleadings – Statement of Claim – Striking Out
Civil Procedure – Queen's Bench Rule 7-9

The defendant Attorney General of Canada brought an application for an order pursuant to Queen's Bench rule 7-9(1)(a) striking out the plaintiff's claim on the grounds that it disclosed no reasonable cause of action against the Crown as no private law duty of care existed in the circumstances pleaded. The plaintiff's daughter had been killed with three other passengers in a vehicle when it was struck by the defendant Canadian Pacific Railway's (CPR) train at a railway crossing. The Attorney General was named as a defendant pursuant to the Crown Liability and Proceedings Act on behalf of Transport Canada, the federal department that has responsibility for the development and regulation of railway safety. The plaintiff claimed that under s. 31(2) of the Railway Safety Act, Transport Canada has a duty to inspect railway crossings to ensure proper maintenance of sightlines along the railway right-of-way and to notify the railway company if unsafe conditions exist. The plaintiff alleged in the claim that Transport Canada was negligent because it had conducted an inspection of the crossing prior to the accident and found that the sightline measurements failed its guidelines but did not convey that information to CPR. In order to meet the test establishing that a duty of care existed, both parties argued that the decision in Burgess v. CNR was applicable and decisive in their favour.
HELD: The court dismissed the application. After reviewing Burgess, the court found that the judgment supported the proposition that a private duty of care may be created where an agency is negligent in the performance of its statutory obligations. Based on the pleadings, it was not a plain and obvious that the plaintiff's case cannot succeed.

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R. v. Foster, 2015 SKQB 155

Allbright, May 28, 2015 (QB15152)

Criminal Law – Assault – Conviction – Appeal

The appellant was charged with two counts of assault contrary to s. 266 of the Criminal Code. The appellant was convicted after trial in Provincial Court and the trial judge gave him a suspended sentence and placed him on probation for a period of one year. The appellant appealed against both the conviction and the sentence. He represented himself on the appeal and argued that he had not committed the assaults. His grounds of appeal were that the trial judge erred in his application of R. v. D. (W.) regarding credibility and reasonable doubt and had also misapprehended the evidence.
HELD: The appeal was dismissed. The trial judge correctly applied the interrelated principles of reasonable doubt and credibility. It was open to the trial judge to reject the evidence of the appellant and the trial verdict was not unreasonable or could not be supported by the evidence.

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Swystun, Re (Bankrupt), 2015 SKQB 168

Gabrielson, June 17, 2015 (QB15159)

Bankruptcy and Insolvency – Conditional Discharge – Appeal

The appellant appealed the decision of the Registrar in Bankruptcy on the grounds that she erred in law, making the appellant's discharge conditional upon the payment of $17,238 to the trustee. This sum was the full amount admitted by the trustee for dividends (see: 2014 SKQB 323). The registrar placed too great an emphasis on the income of the appellant and failed to consider the health and personal circumstances of the appellant, being his disability and the three children that he supported. The objecting creditor took the position that the registrar had evidence before her to substantiate her findings regarding the income available to the appellant and that she properly took into account the appellant's misconduct regarding the non-reporting of his income and the hiding of assets.
HELD: The court dismissed the appeal. It found that the registrar had the jurisdiction to grant the conditional discharge on the terms that she did and there were no palpable or overriding errors in the registrar's findings of fact.

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R. v. Has, 2015 SKQB 169

Popescul, June 16, 2015 (QB15160)

Criminal Law – Summary Conviction – Appeal
Criminal Law – Evidence – Credibility – Appeal

The appellant appealed his conviction on a charge of confining his common law spouse contrary to s. 279(2) of the Criminal Code. At the trial in Provincial Court, the complainant testified that she had taken their child to her grandmother's house while she attended an appointment. When she returned to the home, she told the appellant that their relationship was at an end and the appellant became extremely upset about the fact that their child was not in the house. To stop her from leaving, the appellant barricaded her in a room. When she escaped, she went to her grandmother's house and shortly thereafter, the appellant arrived there with his parents and they began banging on the door in a threatening way and the grandmother called the police. The police visited the appellant's home but did not notice any signs of disturbance. The appellant's testimony at trial was completely different from that of the complainant's and he denied that he had confined her. The complainant had in fact become quite upset when he asked her where their child was, which seemed to trigger inexplicable agitation on the part of the complainant. He stated that he and his parents had merely knocked politely on the grandmother's door because they wanted to confirm the whereabouts of the child. The Crown asked the appellant if he had a criminal record in cross-examination and he responded that he been convicted once of possession of a controlled substance. The Crown then confronted him with his criminal record, which contained as well, two convictions for breach of undertakings. The appellant said that he wasn't trying to mislead the court but wasn't sure about the breaches. In his oral summation, the trial judge found that the accused was not a credible witness because of his failure to recall his convictions and also, because the appellant testified in a stilted manner. The trial judge then applied the R. v. D. (W.) tests and stated that because he could not decide who to believe, he would have to balance between them and chose to believe the complainant. The appellant appealed on the grounds that the trial judge erred in law when the wrong legal test was applied respecting credibility issues and that the verdict was unreasonable considering the whole of the evidence.

HELD: The appeal was allowed and a new trial ordered. The trial judge had erred in law by reducing the standard of proof to a choice between the appellant and the complainant. The trial judge's reasons for rejecting the testimony of the appellant was based on his

demeanour and damaged credibility regarding his criminal record. These considerations might have been sufficient to justify the conclusion reached by the trial judge had it not been for his comment made in the context of the R. v. D. (W.) analysis.

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Freeman v. Belmont Tire Corporation, 2015 SKQB 170

Schwann, June 17, 2015 (QB15161)

Statutes – Interpretation – Small Claims Act, 1997, Section 37
Civil Procedure – Default Judgment – Small Claims
Small Claims – Practice and Procedure – Default Judgment – Appeal

The appellant appealed against a default judgment for $8,700 obtained against him in May 2014 by the respondent. He wanted to present his defence and argue the matter on its merits. The respondent had initiated a small claims action against the respondent. The default judgment had been granted by a case management judge when the appellant failed to appear at a scheduled conference. The appellant promptly appealed the default judgment to the Court of Queen's Bench. He failed to serve the respondent with the notice of appeal. The respondent argued that the appeal was a nullity and the court lacked jurisdiction to hear the appeal because the appellant had not served it within the requisite time period. The appellant advised the court that he had been confused about the appeal process because he had been given misinformation about the appeal period given to him by a court registry official.
HELD: The court dismissed the appeal. The court held that as there had been no error made by the case management judge's issuance of default judgment authorized by s. 7.1(9) of The Small Claims Act, 1997, the court had no jurisdiction to hear the case based on the wording of s. 37 of Act that required appeals to be made to the Provincial Court. The court therefore did not have to rule on the failure to serve issue. The appellant was self-represented and assumed to know the law but because of the confusion created by the misinformation received by him regarding the appeal process, the court noted that it might be possible based upon obiter in Midwest Driveways v. Trull to apply to Provincial Court under s. 37 to open up the judgment.

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B. (N.), Re, 2015 SKQB 171

Megaw, June 17, 2015 (QB15162)

Family Law – Child Protection – Permanent Order

The Ministry of Social Services sought an order making two children permanent wards of the Ministry. The mother of the children sought an opportunity to prove that she in particular was capable of parenting the children and to solve the Ministry's concerns for the children. The children were approximately five and four years old respectively. There was a possibility that the siblings might be adopted together and adoptive parents generally prefer to adopt before children are older than six. The oldest child had been apprehended in 2009 because of concerns about drug and alcohol abuse and domestic violence between the parents. He remained in foster care until his sibling was born and the Ministry effected a family unification plan. Although concerns remained, the Ministry monitored the situation rather than re-apprehending the children until January 2014, when the parents were arrested for drug trafficking. After that incident the Ministry moved forward with a permanent wardship recommendation. The first issue was ongoing drug abuse by both parents and that they had made no effort to attend programming; secondly, the ongoing domestic violence, again without either party dealing with the problem; and thirdly, that the parents had never managed to arrange stable housing. At the hearing the mother testified that she had stopped taking drugs and will attend addiction programming and take treatment as recommended. She has looked into domestic violence counselling and will take it in the fall of 2015. She had severed her relationship with the children's father. She had found suitable housing and intends to remain there. Various Ministry officials gave evidence of the excellent parenting skills that the mother demonstrated during her visits with the children and that she and the children are clearly very attached to each other. The father had not addressed any of the concerns of the Ministry in any systematic way at this point but the court was impressed that he had tried to deal with them.

HELD: The court granted the Ministry a temporary six-month order. The order would not interfere with the Ministry's plans unduly and by the end of the time period, the parties will have a very good indication of whether or not the mother can follow through on her plans. The court found that it was in the best interests of the children to attempt a reunification of the children with their mother. If the father continued to work on his issues, he would be included. The order then was made subject to a number of conditions pertaining to the submission by both parties to drug screens three times per week, that the mother continue to reside at the same address and that the father establish stable housing and that they remain in separate establishments. Both parties were to attend addictions and domestic violence counselling.

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Kramer Ltd. v. Mooney, 2015 SKQB 172

McMurtry, June 17, 2015 (QB15163)

Civil Procedure – Queen's Bench Rule 3-47
Limitation of Actions – Counter-Claim – Statute-barred
Civil Procedure – Queen's Bench Rule 7-2

The plaintiff, an agriculture and construction equipment parts dealer, sought summary judgment against the defendant in the amount of $5,900 for his debt for parts and labour supplied to the defendant between April and November 2008. It also sought an order dismissing the defendant's counter-claim and claim for set-off as the counter-claim was statute-barred by The Limitations Act and its predecessor, The Limitations of Actions Act, and that set-off was not appropriate in the circumstances of this case. The defendant acknowledged the debt but counterclaimed for damages arising from a breach of contract and/or negligence by the plaintiff in its failure to repair the winch of his Caterpillar in June 2004 and again in June 2009. He also claimed a set-off of the amount paid in 2004 for the defective work on the winch in the amount of $6,137. Because the defendant acknowledged the debt to the plaintiff, the plaintiff argued that this was an appropriate case for summary judgment. The defendant described that repairs made to the winch of his equipment in 2004 cost him $9,167 but that the winch never worked again. He continued to use the Caterpillar during the 2004 to 2008 fire seasons but lost work over the years because the Caterpillar could not perform all the required functions. In 2009, the plaintiff took possession of the winch again to perform repairs. The plaintiff claimed that the winch was brought to it in pieces and to reassemble it would cost $4,000 and would not result in correction of its deficiencies. The defendant claimed that it was the plaintiff who disassembled the winch and since it was worth $12,000 prior to disassembly, he claimed a further set-off of $12,000 against the plaintiff's claim on the 2008 invoice.

HELD: The court found that the defendant's claim for set-off was based upon different contracts and not related to the 2008 debt so that he had not met the requirements of Queen's Bench rule 3-47. Without this, the defendant was left without a defence to the plaintiff's claim. The plaintiff was entitled to summary judgment in the amount of $5,900. The defendant's counterclaim for the work done on the winch in 2004 was statute-barred as the counter-claim was filed more than six years after the cause of action arose, contrary to the requirements of ss. 3(1)(e) and (f) of The Limitations of Actions Act. The defendant had raised a separate cause of action in breach of contract and negligence in relation to the second contract of repair in 2009 and the defendant was given leave to pursue his claim.

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Li v. Zhang, 2015 SKQB 173

Gunn, June 17, 2015 (QB15164)

Landlord and Tenant – Residential Tenancies – Appeal

The landlord appealed the decision of a hearing officer of the Office of Residential Tenancies on the grounds that she disagreed with certain facts and conclusions described in the decision.
HELD: The appeal was dismissed. The court found that the hearing officer had jurisdiction to hear the claim and made no error of law.

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R. v. Keller, 2015 SKQB 174

Gunn, June 17, 2015 (QB15165)

Criminal Law – Judicial Stay – Appeal
Criminal Law – Procedure – Stay of Proceedings – Abuse of Process

The respondent had been charged with indecent exposure contrary to s. 173(1)(a) of the Criminal Code. The first trial date had been adjourned over the objections of the respondent's counsel due to the fact that the complainant was not present. At the next trial date, the Crown advised that it had four witnesses present, including the complainant, but that a fifth witness who had been served with a subpoena had failed to attend. The Crown wished to proceed with the witnesses present but as the fifth witness was a required witness for the Crown, it would seek an adjournment of the trial after the four witnesses had testified. The respondent's counsel again objected but the trial judge decided to hear the four witnesses and to adjourn for the evidence of the fifth witness. The complainant testified but then the trial judge announced that she could not proceed because she knew the respondent. Another judge was found and the trial resumed. This judge adjourned it because the Information had been misplaced. The matter was adjourned again and when it resumed some weeks later, the respondent's counsel raised Charter issues, notably ss. 11(b) and s. 7 without having served a Charter notice. The Crown was not willing to waive notice and it argued whether a new trial date should be set at which time the issue of delay could be addressed. The trial judge adjourned all issues for argument to a later date. At the time, the Crown submitted that the judge should be bound by the first judge's decision to permit the Crown to split its case. The Crown and defence disagreed whether the trial could have been concluded on the day it commenced. The judge's response was to note that the accused had wanted to proceed expeditiously with the trial because of the impact of the charge on his

reputation. Because of the two Crown adjournments due to the failure of witnesses to appear, it could not be reasonably expected that a third trial go ahead. He denied the Crown application for an adjournment and entered a judicial stay of proceedings. As a result, he did not have to deal with the Charter application. The Crown argued that the trial judge erred in dismissing the Crown's application for a new trial and entering the judicial stay without considering s. 7 of the Charter or the issue of abuse of process.

HELD: The court directed that the file be returned to the trial judge for him to consider the Charter motion brought before him. The court found that on the facts of this case that the trial judge had erred in entering a stay of proceedings.

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