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Subject Index

R. v. Sabados, 2014 SKCA 74

Lane Jackson Whitmore, June 23, 2015 (CA15074)

Constitutional Law – Charter of Rights, Section 10(b)

The appellant was convicted of breaching his recognizance that included orders that he abstain from the use of alcohol or drugs and that he submit to the taking of a breath sample upon a demand from a peace officer pursuant to s. 143(3) of the Criminal Code. The appellant appealed the conviction on the ground that he had been denied his s. 10(b) Charter right to counsel, with respect to the charge that he failed to provide a breath sample. The charges arose after the police received a complaint that the appellant had brandished a knife and made stabbing motions at a party at his mother's house. When the police arrived at the house, they could smell marijuana and arrested the appellant for numerous offences. At the station, the appellant was given a warning with respect to the offences and was advised of his right to counsel pertaining to them. He indicated that he wanted to consult a lawyer but was unable to contact one and could only leave a message. He was then taken to an interview room where he gave a statement regarding the alleged stabbing incident. The officer testified that he could smell alcohol on the appellant's breath during this time, so reminded him that he was required to provide a breath sample upon demand. He was not advised a second time of his right to retain counsel with respect to this new potential charge that could result from failing to provide a sample. Initially the appellant agreed to the demand but then changed his mind and stated that he wanted to talk to his lawyer. He was then charged with a fifth offence, breaching his

recognizance by failing to provide a breath sample. The Crown argued that the appellant had waived his s. 10(b) rights when he entered into the recognizance.

HELD: The appeal was allowed and entered a verdict of acquittal. The court held that there was nothing in the recognizance that indicated that the bail review judge intended to take away the appellant's s. 10(b) rights. A recognizance should not be treated differently than the provisions of the Criminal Code. In this case, the appellant had informed the police that he wanted to talk to a lawyer but was unsuccessful. After being asked for a breath sample, he agreed but then changed his mind and asserted his request for counsel and was not given the opportunity to do so. The trial judge erred when he found that the appellant's right to counsel was not breached. Under the Grant analysis, the court found that the breach was significant as was the impact upon the appellant. The charge was not serious and excluding the evidence would extinguish the Crown's case. In view of all of the factors, the court decided that to exclude the evidence would not bring the administration of justice into disrepute.

 Back to top

R. v. Briltz, 2014 SKPC 54

Crugnale-Reid, April 7, 2014 (original date) April 21, 2014 (revised date) (PC14069)

Criminal Law – Driving While Disqualified
Criminal Law – Evading Police
Criminal Law – Evidence – Credibility
Criminal Law – Evidence – Identity of Accused
Criminal Law – Impaired Driving – Refusal – Breath Demand – Reasonable and Probably Grounds
Criminal Law – Refusal to Provide Breath Sample – Defences – Medical Issue
Criminal Law – Resisting Officers in Lawful Execution of Duty

The accused was charged with the following Criminal Code offences: 1) three counts of evading police contrary to s. 249.1(1); 2) three counts of operating a motor vehicle while disqualified contrary to s. 259(4); 3) one count of impaired driving contrary to s. 253(1)(a); 4) one count of refusing to provide a breath sample contrary to s. 254(3)(a); and 5) one count of resisting officers contrary to s. 129(a). One charge of evading police and a driving while disqualified occurred on July 4, 2013. One charge of evading police and driving while disqualified occurred on August 10, 2013, and the remaining charges occurred on August 14, 2013. On July 4, 2013, an officer was on bike patrol when she came upon a vehicle stopped on a hill. She stopped at the vehicle and the driver, who appeared impaired by something, said he was not the

6517633 Canada Ltd. v. Knudsen & Sons Muddy View Ranch Ltd.

9286594 Canada Inc. v. Advance Engineering Products Ltd.

Amey v. Omot

Borowski v. Stefanson

Filipone v. SV Rental Corp.

Frank v. Linn

Howe v. Whiteway

J. (L.M.) v. J. (R.G.)

Jorgenson v. ASL Paving Ltd.

McCheane v. Godfrey

Petrie v. Petrie

R. v. Aden; R. v. Thompson

R. v. Belfour

R. v. Bourassa

R. v. Briltz

R. v. Fast

R. v. Jereda

R. v. Peeteetuce

R. v. R. (D.)

R. v. Sabados

R. v. Straub

owner of the vehicle and that his female passenger was not related to him. When the officer got off her bike the vehicle sped away. The licence plate registration did not match the vehicle. Another officer located the vehicle and stopped pursuit for public safety. The biking officer identified the accused in court but did admit she had seen a photograph of him a few days before court. On August 10, 2013, the officer that had stopped pursuit on July 4, 2013, again located the vehicle and accused. The vehicle had a different licence plate this time and the officer stopped pursuit for public safety reasons. The vehicle was unique with only 50 of them registered in Saskatchewan. The officer said that the same person was driving the vehicle as in the first encounter. On August 14, 2013, the officer that had pursued the vehicle in the first two instances and his partner again located the vehicle and determined the licence plates did not match the vehicle but they were unable to ascertain the driver. A pursuit was again abandoned for public safety. The vehicle was located a few minutes later and both officers saw the accused, the lone occupant, exit the vehicle. The accused ran but the officer located him lying down with his left hand under him. The accused would not let the officers put his hands behind his back despite being told he was under arrest. When the officers removed the accused's arm and handcuffed him, it was discovered that a small multi-purpose tool with a knife had been under him. The accused slurred his speech, required assistance walking and smelled of alcohol. In the patrol car the accused was arrested with disqualified driving, evading police and impaired driving. The accused was given a breath demand but refused to provide a sample so was arrested with refusal. The accused also started complaining about sore ribs when he refused to provide a sample. The accused changed the side of his injured ribs after he returned from the hospital where no treatment was required. The accused denied driving on all occasions. The accused admitted to smoking marihuana and having a couple drinks on the last incident.

HELD: The accused was found guilty of all charges. The court found that the officers' testimony was credible and favoured over the accused's. The court applied s. 601(4.1) of the Criminal Code and determined that whether the one offence occurred on August 9 or 10 did not matter because the accused was disqualified from driving until August 14. The court did not find the biking officer's evidence of identity of the accused reliable because she said he had a tattoo on his arm, which he didn't, and she had viewed a picture of the accused prior to court. The court noted the similar fact evidence of the other officers and found that the Crown proved beyond a reasonable doubt that the accused was the driver on all three dates. On all three occasions the officers were trying to catch up to the accused to make him stop and in that regard they were trying to overtake him. The court held that overtake did not necessarily mean pass, it could also mean to catch up to. The accused was being pursued by the officers and the accused was found guilty of all three evading charges. The

R. v. Tannas

R. v. Varty

R. v. Wheaton

R. v. Wolf

Regina Qu'Appelle Health Region (Mental Health Inpatient Services) v. R. (M.M.)

Safioles v. Saskatchewan

Schwann v. RC2 Corp.

Thomson v. Thomson

Western Canada Lottery Corp. v. Harvey

accused argued that he was not guilty of the refusal charge because the officer did not have the requisite grounds to make the demand and also because he had injured ribs, which were a reasonable excuse not to provide breath samples. The officers noted numerous indicia of impairment and thus the court had no difficulty concluding that there were reasonable grounds to make a breath demand. The court also concluded that the accused's injuries were not an excuse not to provide a breath sample. The accused was able to yell at the officers throughout and the accused changed the side of the injured ribs. Also, the accused did not provide any medical evidence of his injury. The accused was found guilty of the refusal charge. Also, considering the evidence as a whole, the court convicted the accused of the impaired charge. Lastly, when the accused ran away from the officers and would not give his arms for the handcuffs he was found to resist the officers who were in the execution of their duties.

 Back to top

R. v. Fast, 2015 SKCA 56

Richards Herauf Whitmore, June 1, 2015 (CA15056)

Criminal Law – Appeal – Sentence – Parity
Criminal Law – Sentencing – Fraud
Criminal Law – Sentencing – Offender's Ill Health

The appellant pled guilty to three Criminal Code charges: 1) fraud over $5,000 contrary to s. 380(1)(a); 2) making false statements to induce third parties to invest in an enterprise contrary to s. 400(1)(c)(ii); and 3) possession of the proceeds of crime in excess of $5,000 contrary to ss. 354(1)(a) and 355(a). The appellant ran a Ponzi scheme that amounted to a $16.7 million fraud. The appellant was sentenced to seven years incarceration on each charge, to be served concurrently, and he was ordered to pay full restitution. The appellant appealed the period of incarceration arguing that it was demonstrably unfit because of his ill health. He submitted that the parity principle required the court to impose a sentence similar to those sentences imposed on similar offenders, in this case offenders with ill health. The appellant argued that his health had deteriorated to a point that he met the test for a conditional sentence.
HELD: The appeal was dismissed. The sentencing judge was alive to the appellant's ill health and considered cases where offenders had health issues. The appeal court concluded that the ill health of an offender is a factor a sentencing judge should be mindful of but does not necessarily mean that every ill offender is entitled to a lesser sentence than would otherwise be imposed.

 Back to top

R. v. Aden; R. v. Thompson, 2015 SKCA 59

Jackson Herauf Ryan-Froslie, June 5, 2015 (CA15059)

Criminal Law – Appeal – Controlled Drugs and Substances – Trafficking – Acquittal
Criminal Law – Appeal – Controlled Drugs and Substances – Trafficking – Conviction
Criminal Law – Appeal – Controlled Drugs and Substances – Trafficking – Sentencing
Criminal Law – Appeal – Proceeds of Crime – Acquittal
Criminal Law – Appeal – Proceeds of Crime – Conviction
Criminal Law – Appeal – Proceeds of Crime – Sentencing
Criminal Law – Arrest – Reasonable and Probable Grounds
Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 10(a)
Criminal Law – Evidence – Circumstantial Evidence
Criminal Law – Joint Enterprise – Criminal Code, Section 21
Criminal Law – Sentencing – Remand Time

Four individuals were charged with possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, and with possession of proceeds of crime exceeding $5,000, contrary to ss. 354(1) and 355(a) of the Criminal Code. One appellant, Mr. A., was convicted of all counts and he appealed his conviction and sentence. Two of the accused, Mr. T. and Mr. O., were acquitted and the Crown appealed. All accused were in a motel room that was the subject of police surveillance. Mr. T. was searched as an incident to arrest and 0.5 grams of crack cocaine was located in his wallet and $186.99 and two cell phones were in the vehicle he was driving. A search of the vehicle driven by Mr. O. revealed rental agreements for another vehicle and motel room as well as $80 cash. The police located two cell phones, a folding knife, a gold key, $570 cash and two plastic hotel key cards on Mr. O.'s person. A key card for the motel room was located in Mr. A.'s jacket. The police seized 226.1 grams of cocaine and drug paraphernalia from the motel room. The police also searched a suite rented to Mr. A. and located over $15,000 in cash, drug trafficking paraphernalia, a rental receipt for a car, Crown disclosure in relation to another matter of Mr. A.'s, etc. Mr. A. had seven grounds of appeal, he argued that: 1) his arrest was not lawful; 2) the search of his jacket was unlawful even if the arrest was lawful because he maintained a privacy interest in it even though he threw it on the ground while evading police. He also argued that because the jacket was not abandoned the police search of its contents was not an appropriate search incident to arrest; 3) his s. 10(a) Charter rights were breached because of one of the constable's unexpressed grounds for his arrest; 4) the trial judge improperly admitted evidence of other parties'

actions as evidence against him; 5) the trial judge failed to consider all of the evidence before him; 6) the trial judge improperly concluded that no other rational explanation could be inferred from the circumstantial evidence; and 7) the trial judge rendered an unreasonable verdict. Mr. A. appealed his sentence on the following grounds: 1) the trial judge treated Mr. A.'s personal circumstances and mitigating factors as aggravating factors. Mr. A. submitted that the trial judge was implying that he was trying to create the mayhem that his family had left behind in Somalia; 2) the sentence was demonstrably unfit in all of the circumstances; and 3) the trial judge erred by not granting Mr. A. enhanced remand credit pursuant to s. 719(3.1) of the Criminal Code. The Crown argued that the trial judge erred in acquitting Mr. T. and Mr. O. for three reasons: 1) applying the second arm of the Carter test for a joint enterprise incorrectly; 2) assessing circumstantial evidence incorrectly; and 3) failing to consider whether Mr. T. and Mr. O. were parties to the offence rather than principals. HELD: All of the appeals were dismissed. Mr. A.'s grounds of appeal were dismissed as follows: 1) the appeal court concluded that because of the questions asked of the officer her subjective belief could not be questioned; 2) the Court of Appeal could find no reason to interfere with the trial judge's conclusion that Mr. A. abandoned his jacket thereby also abandoning his privacy interest in the jacket. Also, the search of the jacket was a reasonable incident to a lawful arrest; 3) Mr. A.'s argument that his s. 10(a) Charter rights were infringed could not be considered by the appeal court because they were not argued or addressed during the trial; 4) the trial judge convicted Mr. A. on the basis of evidence directly implicating him, not evidence of his involvement in the joint enterprise; 5) the only evidence the trial judge did not seem to consider were papers relating to Mr. A.'s previous impaired driving charge, which were of limited value; 6) the Court of Appeal held that it was unable to perceive a rational alternative explanation for the evidence other than that Mr. A. had the requisite access, knowledge and control of the drugs in the motel room and the proceeds of crime in the suite; and 7) a review of the evidence and expert opinions led the appeal court to conclude that there was ample evidence linking Mr. A. to the motel room and the suite. Mr. A.'s grounds for his sentence appeal were dismissed as follows: 1) Mr. A.'s sentence was more than others convicted but he also had a somewhat lengthy criminal record where the others did not. The appeal court held that Mr. A. did not receive an increase to his sentence based on his personal circumstances; 2) the trial judge found that Mr. A. was one of the controlling figures and therefore his sentence was not clearly unreasonable; and 3) the time period in question related to 513 days during which Mr. A. was in custody on new charges. The appeal court found that the show cause hearing that took place was one required by s. 524(8) and therefore the exception created by s. 719(3.1), permitting the possibility of enhanced remand credit, did not apply. The Crown's grounds of appeal in relation to Mr. T. and Mr. O. were dismissed as

follows: 1) the appeal court found that the trial judge correctly stated the elements of the Carter test and then correctly applied them to each accused; 2) the appeal court found that it would be an error of law to conclude that the trial judge did not consider the whole of the evidence; and 3) the Crown mentioned that Mr. T. and Mr. O. were part of a joint enterprise pursuant to s. 21 of the Criminal Code at trial but then argued that all of the accused were principals.

 Back to top

R. v. Tannas, 2015 SKCA 61

Lane Ottenbreit Caldwell, June 12, 2015 (CA15061)

Criminal Law – Appeal – Conviction – Sexual Assault
Criminal Law – Assault – Sexual Assault – Child Victim
Criminal Law – Assault – Sexual Assault – Consent
Criminal Law – Assault – Sexual Assault – Victim's Age – Criminal Code, Section 150.1(4)
Criminal Law – Defences – Mistake of Fact

The appellant appealed his conviction of sexual assault contrary to s. 271 of the Criminal Code arguing that the judge erred in rejecting his defense. The appellant was 26 and the victim was 13. He argued mistake of fact in that he believed the victim was at least 16 years old and therefore consent could be a defence to the charge. The trial judge held that the appellant did not take all reasonable steps to ascertain the victim's age as required by s. 150.1(4) of the Criminal Code. The victim had a birthday party for her mother and the appellant attended with an invitee. The victim and appellant had never met before. They drank alcohol and smoked marihuana. Both defence and Crown witnesses testified that they believed the victim was 16 to 17 years old. The beliefs were based on the victim's attire and actions at the party. The appellant testified that he believed the victim to be 18, the same age as the girl she was hanging out with mostly at the party. The trial judge assessed the appellant's credibility positively. The victim testified that the sex was not consensual; however, the trial judge rejected her account and referred to some of her testimony as "flippant". The only issue on appeal was whether the trial judge erred by concluding that the defence of mistake of fact was not available.
HELD: The conviction appeal was allowed and an acquittal was entered. To invoke the defence of mistake of fact, the appellant had to meet the minimum evidentiary burden of establishing the defence had an "air of reality" to it. The trial judge found that the appellant held an honest belief that the victim was at least 16 years old. The defence of mistake of fact cannot be used unless the appellant took all reasonable steps in the circumstances to ascertain the victim's age, as per s. 150.1(4) of the Criminal Code. The appellant did not inquire as to the

victim's age, but what is reasonable depends on the circumstances and is largely an objective measure with subjective elements to it. The Court of Appeal found that the trial judge erred in law because he placed undue weight on the age disparity between the appellant and the victim and thereby overlooked other circumstances relevant to the objective assessment. It was clear to the appeal court that the Crown did not prove beyond a reasonable doubt that the appellant did not take all steps reasonable in the circumstances to ascertain the victim's age. Because the defence of mistake of fact negated the mens rea of the offence there was no evidence of mens rea to support a conviction and an acquittal was entered.

 Back to top

Jorgenson v. ASL Paving Ltd., 2015 SKCA 66

Lane Jackson Whitmore, June 17, 2015 (CA15066)

Contract – Breach – Warranty
Contract – Interpretation

Three equal shareholders and directors in a corporation sold their shares to a numbered company owned by two long-term employees of the selling corporation. The appellant was one of the selling shareholders. Because the purchasers were unable to secure all of the necessary financing for the purchase, the parties agreed that a portion of the purchase price would be paid in the form of a bonus that was calculated on the increase in the working capital for the fiscal period ending the day before closing. The appellant argued that the bonus was lower than it should have been because the corporation drew down working capital contrary to the agreement between the parties. The other two selling shareholders did not take issue with the amount of the bonus. The chambers judge concluded that the appellant had no possibility of success, finding that there was no issue between the appellant and the corporation under new ownership. If the appellant had an issue with anyone the chambers judge said it was with the other two vendors. The appellant appealed that decision arguing that the obligation to calculate and pay the bonus included a duty to operate in good faith. Further, he argued that the chambers judge erred by misapprehending the controlling operational structure of the corporation prior to the sale. He said the purchasers were actually controlling the corporation. The appellant also argued that the judge failed to consider the factual matrix giving rise to the agreement. The judge concluded the date of the agreement was when it was signed, which was the closing date. Therefore there was no bonus period. HELD: The Court of Appeal held that the chambers judge made no error. The agreement contained provisions to protect the purchasers

and required the vendors to indemnify them. Therefore the appeal court found that if the appellant claimed against the purchasers he was also required to indemnify them pursuant to the agreement. The appellant was asking the court to interpret the agreement so as to impose obligations on the purchasers where there were none. The purchasers had no retroactive obligation to operate in good faith in the pre-agreement period. The appellant warranted to the purchasers that the corporation had been operated in the ordinary course of business during the bonus period. If the appellant's argument that the corporation was not operated in good faith was successful, the vendors would be the party responsible for the breached warranty and would be liable to pay damages to the purchasers. The appellant could not succeed in proving that the purchasers owed him damages.

 Back to top

Borowski v. Stefanson, 2015 SKCA 70

Richards Jackson Ryan-Froslie, June 19, 2015 (CA15070)

Civil Procedure – Appeal
Civil Procedure – Costs
Civil Procedure – Queen's Bench Rule 5
Municipalities – Elections – Unlawful
Statutes – Interpretation – Converted Municipal Elections Act, Section 19

The appellant challenged the legality of the rural municipality election, pursuant to s. 19 of The Converted Municipal Elections Act, when he was unsuccessful in his run for council member. The appellant received 30 votes and the successful candidate received 37 votes. He had issue with at least eight ballots. The appellant determined that the required fiat had been issued whereas the respondents argued that it had not. The chambers judge agreed with the respondents and dismissed the application. The chambers judge found that the application must commence with an ex parte application and not just an affidavit as done by the appellant. The appellant's affidavit was within the six-week time frame but the ex parte application was not. The chambers judge did not apply rule 5 of The Queen's Bench Rules indicating that the rule could not create or abrogate time limits imposed by statute. The issues on appeal were: 1) did the chambers judge correctly conclude that no fiat had been issued pursuant to s. 19 of the Act; and 2) if there was no fiat, should rule 5 be relied on to prevent the procedural problems from defeating the appellant's effort to contest the election result.
HELD: The appeal was allowed. The issues were dealt with as follows: 1) the court found that no fiat issued pursuant to s. 19. The order requiring all materials be served did not assist the appellant. The

materials were ordered to be served when an ex parte order was granted preventing destruction of the ballots. The respondents did not contest that ex parte order but it was not a s. 19 order; 2) the appellant commenced the proceedings with the wrong originating documents. The section indicates that only an affidavit is needed; however, the court determined that the affidavit should be accompanied by an ex parte memorandum. That being said, the court also found that the appellant's materials did touch the important bases found in rule 441A, being: the material identified the provision that contemplated the ex parte proceeding; they identified the relief being sought; and there were no authorities to cite. The appellant did not identify the respondents' counsel but this was found not to serve any substantive purpose. The appeal court held that the appellant satisfied the important aspects of rule 441A before the six-week deadline. The court rejected the respondents' argument that the fiat must also be made within the six-week time frame. The respondents were not prejudiced by the error made and justice was found to require that the appellant's right to challenge the election results not be defeated by a procedural misstep of no real consequence. The chambers judge should have applied the then rule 5, now rule 1-5, to overcome the procedural problem. The court went on to consider the questions surrounding the s. 19 application. The appellant desired to set aside the election in its entirety; however, his affidavit did not provide grounds to suggest the election as a whole was unlawful. The affidavit did establish reasonable grounds to argue that the election in the appellant's division was not lawful. The appellant was required to enter into the required recognizance prior to proceeding with his challenge. The requirement for two sureties had already been met. The appellant was self-represented and was not awarded costs notwithstanding his success on appeal. The appellant's written materials did not comply with The Court of Appeal Rules and his oral argument was inflammatory. The award of costs against him at the Queen's Bench level was set aside. The costs against him at the show cause hearing at the Court of Appeal were maintained.

 Back to top

Howe v. Whiteway, 2015 SKCA 72

Jackson Caldwell Herauf, June 15, 2015 (CA15072)

Family Law – Custody and Access – Appeal
Family Law – Custody and Access – Interim Order

The appellant mother appealed the interim access order granting the respondent father the specified access he sought and granting him some compensatory parenting time. The respondent's application for a

change in custody was adjourned. The appellant attempted to tender evidence that the child did not wish to have access with the respondent.
HELD: The appeal was dismissed. The appeal court cautioned the appellant against failing to facilitate access. The court concluded that there was no error that would require the order to be set aside and that it was in the child's best interests to have an opportunity to develop a stronger relationship with the respondent. The court amended the order because the implementation of it had been delayed due to the appeal. Other adjustments to the order were also made by the Court of Appeal for ease of implementing the interim order. Details regarding a summer camp that was recently confirmed were also dealt with by the appeal court.

 Back to top

Western Canada Lottery Corp. v. Harvey, 2015 SKCA 75

Ottenbreit, June 24, 2015 (CA15075)

Civil Procedure – Appeal – Application for Leave to Appeal

The applicant Western Canada Lottery Corp (WCLC) applied for leave to appeal the Queen's Bench decision in chambers that permitted the representative plaintiffs in a class action suit against the WCLC to file their third amended statement of claim (see: 2015 SKQB 102). The applicant argued that the chambers judge had erred because she had not made final decisions on issues that the applicant had raised, such as whether the limitation period had expired, but left the issues for final determination at the certification stage. The applicant argued that by allowing the amendments, its position was prejudiced.
HELD: The court denied leave to appeal. The applicant's proposed appeal had not met the requirements of possessing sufficient merit or importance.

 Back to top

6517633 Canada Ltd. v. Knudsen & Sons Muddy View Ranch Ltd., 2015 SKCA 77

Richards, June 26, 2015 (CA15077)

Civil Procedure – Appeal – Application for Leave to Appeal
Statutes – Interpretation – Small Claims Act, 1997, Section 45

The self-represented applicant sought leave to appeal the decision of a

Queen's Bench judge who had heard the applicant's appeal from a decision rendered after trial in small claims court. The applicant appealed on a question of law pursuant to the requirement of s. 45 of The Small Claims Act, 1997. The applicant's company had made a contract to custom seed approximately 1,000 acres for the respondent. The respondent reneged on the contract but then advised the applicant that it could proceed until the job was done although between 70 and 100 acres had already been seeded. The applicant rejected the proposal and sued the respondent for the full amount of the contract, $19,290. The Small Claims judge found that the respondent had breached the contract but that the applicant had failed to mitigate its damages when it declined the opportunity to accept the proposal and awarded only $1,575. The Queen's Bench judge rejected the applicant's arguments that the trial decision was unreasonable, unsupported by the evidence and that the trial judge had not handled the trial fairly and properly. HELD: The court denied leave to appeal. The applicant's proposed grounds of appeal were not questions of law but of fact.

 Back to top

R. v. Wolf, 2015 SKPC 31

Gordon, May 11, 2015 (PC15081)

Criminal Law – Defences – Charter of Rights, Section 9, Section 10(a) (b), Section 24(2)
Criminal Law – Impaired Driving – Refusal – Breath Demand – Forthwith;
Criminal Law – Refusal or Failure to Provide Breath Sample – Approved Screening Device

The accused was charged with driving while his ability to do so was impaired by alcohol contrary to s. 253(1)(a) of the Criminal Code and with failing or refusing to comply with a breath demand without reasonable excuse contrary to s. 254(5) of the Criminal Code. The accused was driving a motorcycle and the officer could smell alcohol coming from him when he stopped the motorcycle. The accused indicated that he had two beer to drink. The officer sent another officer to get an ASD and the accused was placed in the back seat of the police vehicle. The breath demand for the ASD was not read until the accused was in the police vehicle. The accused indicated that he understood the demand but that he was not going to provide a sample. The accused was arrested for refusal to provide a breath sample. The accused argued that: 1) the ASD demand was not made in compliance with s. 245(2) of the Criminal Code, and therefore, the accused was not required to comply; and 2) his Charter rights under ss. 9, 10(a) and 10(b) were breached because the ASD demand was not made forthwith and the accused was not advised of the reason for his detention. The

accused argued that all of the evidence or events occurring after the accused was unlawfully detained at roadside should be excluded. HELD: The accused was not convicted on the impaired charge given the scant evidence as conceded to by the Crown. The accused's arguments were addressed by the court as follows: 1) the officer had a reasonable suspicion that the accused had alcohol in his body when he detected the smell of alcohol on the accused's breath. The officer did not explain why he did not give the ASD breath demand at the roadside or when the accused was first placed in the back seat of the police vehicle. The delay was unexplained. The demand was not made in compliance with s. 254(2) because it was not made forthwith; 2) because the demand was not made forthwith the accused's ss. 9 and 10(b) Charter rights were also breached. The officer did not inform the accused as to the nature of the detention nor did he explain what he was being detained for. The court undertook the s. 24(2) analysis as follows: the breach was found to be moderately serious. The officer could have easily advised the accused as to why he was being detained. The court declined to accept the Crown's argument that the accused should have inferred from the circumstances the reason for his detention. The impact of the Charter breaches was found to be minimal. There was no evidence obtained from the time the accused was placed in the police vehicle until the ASD demand was made; the third factor weighed in favour of including the evidence because the delay was not lengthy and the officer did eventually explain the procedure upon refusal to the accused. The officer was also pleasant, professional, and patient. The court balanced the factors in Grant and held that the admission of the evidence would not bring the administration of justice into disrepute. The Crown, however, did not prove beyond a reasonable doubt that the demand was made forthwith as required by law and therefore did not meet its burden in s. 254(2)(b). The accused was found not guilty of both counts.

 Back to top

R. v. Wheaton, 2015 SKPC 47

Jackson, March 27, 2015 (PC15079)

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

The accused was charged with driving while his ability to do so was impaired, contrary to s. 253(1)(a) of the Criminal Code, and driving while his blood alcohol content exceeded the legal limit, contrary to ss. 253(1)(b) and 255(2) of the Code. The defence brought a Charter application alleging that the accused's s. 10(b) Charter right to counsel

had been violated and that the evidence should be excluded pursuant to s. 24(2) of the Charter. A voir dire was held. The arresting officer testified that when he gave the police warning and advised the accused of his right to counsel at the time of arrest, the accused said that he wished to consult a lawyer and named a specific person. When they arrived at the detachment, the officer used the local and Saskatoon telephone directories with the accused trying to locate a lawyer by the name given by the accused. The officer then used the Internet to search for a telephone number. After spending approximately 35 minutes in an unsuccessful search, the officer asked the accused if he could suggest another way of finding the lawyer. The accused said to contact his brother, which the officer did, and was told by him the correct name of the lawyer to whom his brother wanted to speak. The officer called the number and left a message and then tried to find the lawyer's residential telephone number and left a message at one of the numbers listed. All of the foregoing took place in the presence of the accused, although the officer made the calls and left the messages. Two minutes after leaving the last message, the officer told the accused that Legal Aid lawyers were available 24 hours a day if he wanted to contact one and the accused advised that he did. The accused spoke to a Legal Aid lawyer and received advice. At this time, there was another 40 minutes left in the period before the two-hour window expired preventing him from relying upon the presumption under s. 258 of the Code. The accused testified that he accepted the officer's suggestion to call Legal Aid because he thought that it was his only option and didn't realize that there was time to wait. He did not ask again to contact his lawyer of choice after he had spoken to Legal Aid counsel nor did he ask if he could wait longer for the first lawyer to call back. The defence argued that the police failed in their implementational duties under s. 10(b), particularly focusing on the officer waiting only two minutes after leaving a message for the selected lawyer to mention that Legal Aid was available.
HELD: The application was dismissed as the court found that there had been no breach of s. 10(b) based upon the Supreme Court decision in R. v. Willier. The court found that the accused had the choice whether to accept or decline the suggestion to call Legal Aid. The court would have admitted the evidence under a Grant analysis if it had found a breach to have occurred.

 Back to top

R. v. Belfour, 2015 SKPC 49

Agnew, March 31, 2015 (PC15067)

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

The accused argued that his proceedings should be stayed because the Crown did not bring his trial within a reasonable time contrary to s. 11(b) of the Charter. The accused was charged with impaired driving and driving over .08 on September 30, 2011, and pled not guilty on November 3, 2011. The trial was set for July 23, 2012, as defence counsel was not available on an earlier date in March, 2012. The trial was brought forward to July 19, 2012. The trial was adjourned for both Crown and defence reasons. On November 29, 2012, the matter was brought forward and adjourned to December 10, 2012, to set a new trial date. The accused waived delay. The trial commenced on May 3, 2013, and did not conclude. On May 28, 2013, counsel met and the trial was scheduled for January 10, 2014. Neither party brought the matter before the judge advising her of the date months away. She had indicated she wanted to avoid a lengthy delay and would try to rearrange her schedule to accommodate proceedings sooner. Also, the defence counsel delayed in approaching the trial coordinator. The trial date was ultimately set for March 31, 2014, because Crown would be on parental leave in January 2014. On March 25, 2014, the matter was spoken to because the trial judge was ill and the parties decided to wait for her return rather than start over. The trial was set for September 23, 2014. In July 2014, the court advised the parties that the trial judge would not be back until January 2015 and may not be back full time for many months after that. Crown applied to have the case heard de novo before a new judge and the accused opposed it. The court set the date of March 31, 2015. The accused brought his application to stay the proceedings on March 25, 2015.

HELD: The total length of the delay was 1,278 days, which the court found sufficient to attract s. 11(b) scrutiny. The period to initial plea and trial date setting was 34 days and was inherent. The 259 days from plea to first trial date was institutional delay, which was within guidelines. The 133 days after the first trial adjournment was attributed equally to the parties because both had reasons for the adjournment. The next trial that was adjourned, the defence waived delay of the 180 days. Of the next 301 days, 154 were attributed to the Crown and the remainder to the accused. The next 371 days the trial judge was ill and therefore the question of when the Crown should have sought to remove the learned trial judge was of critical importance. The court did not accept the accused's position that he did not want a new trial judge but also that the Crown should have applied for a new one sooner than they did. The court concluded that the Crown acted at the appropriate time to request replacement of the trial judge. The 371 days was therefore inherent delay. Therefore 405 days were inherent, 259 days were institutional, 393 were waived, and 221 were Crown delay. The court also considered the alcohol prohibition the accused was subject to throughout as being prejudicial to him given it was his first criminal charge for drinking and driving. The court concluded that the delay was not unreasonable. The accused's s. 11(b) Charter rights were not breached.

 Back to top

R. v. Bourassa, 2015 SKPC 78

Gordon, May 25, 2015 (PC15082)

Criminal Law – Curative Discharge
Criminal Law – Driving over .08
Criminal Law – Sentencing – Pre-sentence Report

The accused pled guilty to driving over .08 contrary to s. 253(1)(b) of the Criminal Code and a pre-sentence report was ordered. The accused applied for a curative discharge. The accused had a previous related record. The accused's sister advised the court that they came from divorced, alcoholic parents. She attended AA with the accused and had not seen him have a drink since the offence. The accused's partner of 18 years, with whom he had two children, also testified. She indicated that the accused had ADHD and had not consumed drugs or alcohol to any great extent in the last 10 years. The accused attended a treatment facility post plea and prior to sentencing. The accused's partner indicated that the treatment program had a positive effect on the accused, his attitude, and conduct. The family was experiencing financial difficulties. The accused received the provincial training allowance and social services paid for some expenses. The accused had a grade nine education and was attending school to complete his grade 12 and hopefully train in the trades. The accused was 40 years old and had suffered sexual abuse in a foster home as a child. He had attended a treatment centre on two previous occasions. He had a treatment plan from his recent program that included attending meetings but he did not yet have a sponsor. He felt he had family support. The accused's addiction counsellor also testified and indicated that he had been doing very well and that she believed he could maintain sobriety. From the initial hearing to the adjourned date, the accused completed the necessary requirements to be accepted into the bridge program for more education. He was attending AA once a week and was also seeing a counsellor.
HELD: The first factor to consider was the circumstances of the offence, which the court found to be fairly standard. The second factor was the motivation of the offender. The court accepted the evidence of the accused and his family members that he had many reasons to continue a life of sobriety. Further, he had changed over the past year. The third factor was the availability and caliber of proposed treatment facilities. The accused had completed a program and maintained sobriety since the program ended in 2014. The court disagreed with the Crown's suggestion that the accused was not serious about his recovery because he was putting his education before programming. The court noted that changing one's environment was crucial to making any significant

change and being successful. The next factor was the probability that the treatment would be successful. The accused was sober for over a year and he was following his treatment plan. His overall risk to reoffend was assessed as medium. He had three drinking and driving convictions and one driving while disqualified. The court concluded that the circumstances of the offence and the accused's criminal record were not important factors in the case. The public interest was found to be served by a curative discharge provided proper safeguards were imposed. The accused proved on a balance of probabilities that curative treatment was likely to succeed. A curative discharge was granted and the accused was placed on probation for two years. Probation terms included reporting, counselling, abstention, providing samples, etc. He was also prohibited from operating a motor vehicle for three years.

 Back to top

Amey v. Omot, 2015 SKPC 81

Gordon, June 2, 2015 (PC15084)

Family Law – Child Support – Determination of Income
Family Law – Child Support – Imputing Income

The child support and child care expenses had to be calculated for the parties' child. The claimant argued that income of $21,216 per year should be imputed to the respondent because he was deliberately under-employed. The respondent had a non-work related injury and eventually lost his job. He was taking upgrading courses that were expected to be completed in a couple of years. The respondent argued that he was unable to work much because of the demands of his schooling. He was receiving the provincial training allowance of $744 per month for 10 months. The claimant's income was $26,312.
HELD: The court did not find that the respondent left his full-time employment to avoid his child support obligations. The respondent's return to school was a legitimate decision that would benefit himself and his child. The court imputed income of $6,788 to the respondent for part-time work and work during the summer. The respondent was ordered to pay $84 per month in ongoing child support and 33.52 percent of child care expenses, which was $45 per month. The respondent should have paid $119 per month for the first five months of 2015 so was in arrears of $595.

 Back to top

R. v. Straub, 2015 SKPC 84

Kalmakoff, June 10, 2015 (PC15070)

Criminal Law – Blood Alcohol Level Exceeding .08 – Breath Sample – As Soon As Practicable – Presumption s. 258(1)(c)
Criminal Law – Breathalyzer – Reasonable and Probable Grounds – Samples Forthwith – Tow Truck
Criminal Law – Defences – Charter of Rights, Section 10(b), Section 24
Criminal Law – Impaired Driving

The accused was charged with impaired driving and driving over .08. He argued that: 1) his Charter right to counsel, s. 10(b), was violated; 2) the breath samples should be excluded due to the Charter breach; 3) the Crown failed to prove that the breath tests were conducted as soon as practicable; and 4) the Crown failed to prove that his ability to drive was impaired at the time of driving. An officer observed the vehicle driven by the accused swerve across the highway four times. He also observed the vehicle make a complete stop during a turn with no oncoming traffic and then travel at 60 km/h in a 90 km/h zone. The accused was the sole occupant of the vehicle and he had difficulty finding his licence in his wallet and never did find his registration. The accused's movements were slow and there was a faint smell of alcohol coming from his breath. He indicated that he had been drinking and was given the ASD demand at 4:21 am. After failing the ASD, he was arrested for impaired driving and given his rights to counsel. He said he wanted to contact a lawyer and was given the opportunity 75 minutes later. A breath demand was made and the officer and accused waited for the tow truck to take the accused's vehicle before going to the detachment. The accused initially gave the name of a lawyer he wanted to call but then changed his mind and called Legal Aid. He provided breath samples over the legal limit.
HELD: The accused's arguments were dealt with as follows: 1) there was significant delay from when the accused was given his right to counsel and when he was given access to call a lawyer. The Crown therefore had to show that the delay was reasonable based on the facts. It would not have been onerous or dangerous to let the accused use the officer's phone in the police car to contact a lawyer while they were waiting for the tow truck. The officer also acknowledged that he could have afforded the accused the necessary privacy to make the call at the roadside. The court found that the accused's s. 10(b) Charter rights were violated by the delay in allowing him to contact counsel; 2) the seriousness of the violation was considered minor. The officer did not gain any evidence from the accused during the delay to contact counsel. No investigative steps were taken in the interim. The impact of the Charter violation was moderately serious. The wait of over an hour to contact counsel would have been stressful on the accused. There was no evidence that an earlier call would have led to different legal advice or to the accused conducting himself differently. The court held that society's interest in adjudication of the case on its merits, the

breath samples, was to use reliable evidence obtained in a relatively non-intrusive fashion. The admission of the evidence would not bring the administration of justice into disrepute. The evidence was not excluded; 3) the problematic time was again when the officer and accused were waiting for the tow truck. The officer had a legitimate reason for calling the tow truck and therefore the delay was reasonable. He was concerned that the vehicle may be damaged or stolen if left on the side of the road. The officer was, however, obligated to determine if there was a realistic way to reduce the delay rather than just sitting and waiting. The court was not satisfied beyond a reasonable doubt that the breath samples were taken as soon as practicable. The Crown could not rely on the presumption in s. 258(1)(c). The accused was therefore not guilty of driving over .08; and 4) the court also held that there was a reasonable doubt as to whether the accused's ability to drive was impaired. He was found not guilty of both charges.

 Back to top

R. v. Jereda, 2015 SKPC 90

Harradence, June 11, 2015 (PC15069)

Criminal Code – Not Criminally Responsible – Criminal Code, Section 16
Criminal Law – Wilfull Pain and Neglecting to Provide Adequate Care to Animal

The accused was charged with wilfully causing pain to a dog and wilfully neglecting to provide adequate care to a dog, contrary to ss. 445 and 446 of the Criminal Code, when he brutally attacked his dog by slitting its throat with a knife. He argued that his mental health disorders rendered him not criminally responsible pursuant to s. 16 of the Criminal Code. The accused was a former member of the United States Army and he had been diagnosed with post-traumatic stress disorder and other mental health issues. Psychiatrists disagreed on the effect of the accused's dissociated state, namely, whether it negated his ability to know the consequences of his actions.
HELD: There are two elements to s. 16: 1) a mental disorder or disease of the mind. The court was satisfied that the accused did suffer from a disease of the mind; and 2) the ability to appreciate the nature and quality of the act or omission or knowing it was wrong. Subsection 16(2) requires the court to presume that the accused was capable of appreciating the nature and quality of his actions and had knowledge of the wrongfulness unless the contrary is proven on a balance of probabilities. The court concluded that the accused was not acting voluntarily and he was incapable of appreciating the nature and quality of his actions or that they were wrong. The accused was found not criminally responsible. The court found it appropriate to conduct a

disposition hearing in accordance with s. 742.45 of the Criminal Code.

 Back to top

R. v. Varty, 2015 SKQB 51

Schwann, February 19, 2015 (QB15201)

Criminal Law – Child Pornography – Make Available
Constitutional Law – Charter of Rights, Section 8

The accused was charged with possession, accessing and making available child pornography contrary to ss. 163.1(4), 163.1(4.1) and 163.1(3) of the Criminal Code. The accused challenged the validity of a search warrant executed by the police pursuant to s. 8 of the Charter and the exclusion of the evidence under s. 24(2). The charges arose after an RCMP officer, working in the Saskatchewan Internet Child Exploitation Unit, conducted a search of the Ares file sharing network and identified a computer suspected to be accessing child pornography. Between that date and January 17, 2013, the officer was able to download files from that IP address, all of which appeared to contain child pornography. After the last date, he was unable to download again but was able to observe files logged to the address that he suspected were also child pornography. The officer made a law enforcement request (LER) directed to the internet service provider (ISP) to obtain the name and address of the person connected to the IP address. At that time, this was the method used by the police across the country to acquire information necessary to this kind of investigation until the Supreme Court prohibited it in R. v. Spencer. The ISP provided the name of the accused and gave his address as a legal land description, the post office box and the nearest town's name. To draft the information to obtain (ITO), the officer checked with SaskEnergy and the local RCMP detachment regarding the address and confirmed that the land description was the proper address. He then drafted a search warrant describing the land by quarter section, knowing that there were several buildings on the site and the justice of the peace issued it on March 27, 2013. The officer and seven other police officers executed it and seized two computers from the accused's residence. The computers were later searched at the RCMP detachment. The grounds of the challenge were that: 1) the LER directed to the ISP was not lawful; 2) the warrant contained an overly broad description of the land to be searched; 3) the ITO upon which the warrant was based had grown stale since it was issued two months after the last date that files were downloaded from the accused's IP address; and 4) the subsequent forensic examination of the computers required another search warrant.
HELD: The court dismissed the application and admitted the evidence.

It found with respect to each ground that: 1) the submission of the law enforcement request for subscriber information constituted a breach of the accused's s. 8 Charter right; 2) the land description for the accused's premises as set out in the ITO was sufficiently precise in the circumstances. The police took all reasonable steps to ascertain and identify the premises in the ITO; 3) the currency of the information was only one factor to be considered in the totality of the circumstances of the case. A brief period of illegal activity here was sufficient to demonstrate a pattern capable of supporting the belief that evidence would be found at the targeted location some time later. The justice of the peace was entitled to infer that the information contained in the ITO was sufficiently credible and reliable to support an inference that child pornography remained on the accused's computer two months later; and 4) the ITO showed that the offences under investigation were computer-based and it listed all the things that would afford evidence of the offences such as computers, hard drives, flash drives and data stored within. The justice of the peace would be able to infer that the police sought authorization to examine any of the things seized pursuant to the warrant. As a result of the breach of the accused's s. 8 right because of the use of the LER, the court conducted a Grant analysis to determine whether the evidence should be excluded. It found that LERs were accepted police practice at the time. The violation was not serious. However, it had a serious impact upon the accused and that reason favoured exclusion. The evidence was essential to establishing that the accused had committed the offences. The court concluded that it would be in society's interests to admit the evidence.

 Back to top

J. (L.M.) v. J. (R.G.), 2015 SKQB 136

Maher, May 8, 2015 (QB15166)

Family Law – Family Property – Division
Family Law – Child Support
Family Law – Spousal Support

The parties were married in 1984 and had had four children. They separated in 2011. The respondent had worked during the course of the marriage as an investment advisor with a major bank. The petitioner mother had worked outside the home as a teacher-librarian until 1998, following the births of the two youngest children in 1996 and 1998. Since that time, she was the primary caregiver to the four children in addition to looking after the family home and cabin. She supported the work of the respondent by arranging social events and attending corporate functions. The two oldest children were living away from

home and supporting themselves. The third child was receiving treatment in a private clinic in the United States and then would become a resident of a program in Canada. Until the time of the application, the parties had paid for the fees from the child's trust fund. They had not agreed to sharing any additional costs of her future needs. The youngest child was still in high school. She lived with each parent in a shared parenting arrangement. Before the separation the family had been very affluent. After separation, the respondent remained in the family home and another smaller residence was purchased for the petitioner. The petitioner has been able to work part-time at a clothing store as of 2012. In February 2012, the court had made orders regarding interim child and spousal support. Based upon the respondent's income and imputing income to the petitioner, the court ordered the former to pay $6,000 per month for the two youngest children, commencing the month of the application. The respondent was ordered to pay interim spousal support in the sum of $5,000 per month. In the present application, some of the outstanding issues before the court related to: 1) the division of remaining family property; 2) the determination whether the respondent's book of business was family property subject to division and if so, what was its value; 3) the amount of child support; and 4) the amount of spousal support.

HELD: The court found with respect to each of the issues that: 1) because the respondent had retained the family home, the petitioner should receive title to the family cabin. The court established the equalization payment made to the petitioner after valuing all the property at $641,000; 2) the respondent's book of business was family property based upon the evidence that the respondent would not be prevented from taking a list of his book of business along with his experience to another brokerage firm and receive compensation for same. The court accepted the expert valuation of it submitted by the petitioner and valued it at $1,600,000; 3) the respondent's net income was determined on the basis of his 2013 income tax return at $856,000 and imputed to the petitioner, the amount of $100,000. The court was satisfied that it was not necessary to set child support for the child who was over 18 and whose health care costs were paid by her trust fund. If her circumstances changed, the parties could apply to the court. In the case of the youngest child, the court set the respondent's support at $6,537 and the petitioner's at $843 per month based upon their respective incomes. The net set-off was then $5,694; and 4) the petitioner was entitled to spousal support on both a compensatory and non-compensatory basis because she had given up her career and her pension opportunities to help raise the children to support the respondent in building his business and that the parties had agreed that the petitioner should leave her employment to look after the children and family. The petitioner still had the care of her youngest child and assisted the child who was receiving treatment. The petitioner's share of the family property was taken into account and

her monthly spousal support was set at $9,000 per month for an indefinite term.

 Back to top

R. v. R. (D.), 2015 SKQB 157

Dawson, May 28, 2015 (QB15147)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Murder – Second Degree
Criminal Law – Sentencing – Youth Criminal Justice Act – Violent Offence – Adult Sentence

The accused pled guilty to the second degree murder of J. and S. He was 17 years and nine months old at the time of the offence and the Crown sought imposition of an adult sentence. Two others, B. and K., also pled guilty to the second degree murders, and one was sentenced to life in prison with parole ineligibility for 25 years, and the other was sentenced to life in prison with parole ineligibility for 18 years. B. was the accused's cousin and K. was the accused's brother. The accused and K. were playing video games, drinking, and consuming marijuana when B. began texting K. about her desire to kill J. At 4:30 am, B., K. and the accused showed up at a friend's house and they had blood on them and a bloody toilet tank lid. B. asked the friend to call the police. B. told the friend how they had entered the back door of the victims' home and stabbed them. K. and the accused fled to Regina and went to their uncle's. They told him that they had stabbed two people and that the knife handles broke off. They also indicated that they hit the victims with objects. The boys' mother eventually picked them up so they could turn themselves in to police. Numerous reports were prepared for the court.
HELD: The court preferred the vive voce evidence at the sentencing hearing and preliminary hearing over the other evidence presented. The accused was found to intend to assist K. and B. The court also found that the accused stabbed victim S. multiple times. He also helped B. break into the bathroom where victim J. was hiding. The three were in the victims' home for about an hour with no attempt to call for help. All parties and the court agreed that s. 72 of the Youth Criminal Justice Act (YCJA) as it was prior to the 2012 amendments was applicable. The court had to look at the factors under ss. 3, 38, and 72 of the YCJA, and the Crown had the onus of satisfying the court that a youth sentence would not be of sufficient length to hold the accused accountable. The court reviewed the seriousness of the offences and was not satisfied that the accused planned or understood on the way to the victims' house that B. planned to kill them. He did understand that they were going there to assault them. The court described the accused's

participation as callous, brutal, and senseless, and as such the accused had a huge moral culpability. The accused would have foreseen that bodily harm would ensue. The accused had six prior youth sentences with his first offence at 12 and with nine charges for failing to comply with court orders. The accused mostly lived with his parents growing up and had a grade eight education. He was of First Nations ancestry and a number of the Gladue factors were found to be present. Family members attended residential schools and his parents struggled with substance abuse, as did the accused. The accused suffered from Alcohol-Related Neurodevelopmental Disorder (ARND) and sexual abuse. He did not have a major psychiatric disorder but did display depression and suicidal ideation. The accused's behaviour had improved in the last year in remand at a youth centre as compared to the first year in the youth centre. His likelihood of general reoffending was assessed at the highest level. He was a moderate to high risk for violent re-offending. The court concluded that given the serious nature of the offence there were no reasonable sanctions other than custody. There were two options for the accused if he was sentenced as a youth: 1) under ss. 42(2)(q)(ii) of the YCJA he could be sentenced to up to seven years, made up of a period of custody not exceeding four years from the date of committal, in conjunction with a period of conditional supervision in the community; and 2) an Intensive Rehabilitative Custody and Supervision order (IRCS) under ss. 42(2)(r) of the YCJA. Certain criteria must be met for an IRCS sentence to be available and the provincial director of the IRCS determined that it was available and the accused's participation in it would be appropriate. If the accused was sentenced as an adult, he would be sentenced to life imprisonment to be served in a federal institution. The court concluded that a youth sentence would be of insufficient length to hold the accused accountable. A youth centre would not provide for sufficient monitoring in the community. The accused was sentenced pursuant to s. 745.1(c) of the Criminal Code to life imprisonment with no eligibility for parole for seven years.

 Back to top

McCheane v. Godfrey, 2015 SKQB 158

Keene, June 1, 2015 (QB15155)

Family Law – Child Support – Imputing Income
Family Law – Custody and Access – Best Interests of the Child
Family Law – Custody and Access – Children's Law Act
Family Law – Custody and Access – Custody and Access Report
Family Law – Custody and Access – Joint Custody – Primary Residence

The parties began their common law relationship in 2002 and separated

in 2012. The respondent had two older children from a previous relationship who lived with her. The parties had one child together. At separation the respondent and the three children moved with the respondent to Melville from near Moose Jaw. The petitioner was to have access every other weekend and half of holidays. In 2014 one of the respondent's older children moved in with the petitioner and her other older child moved in with her biological father. The petitioner had no relationship with that child at the time of trial. The respondent had a new partner and they had a child together. An interim order in April 2013 granted the parties joint custody of all three children with primary residence to the respondent and access as already arranged. A consent order issued after a pre-trial conference that continued the previous interim order, ordered a Custody and Access Report included child support and s. 7 expenses. The report noted that the parties' child continued to struggle with being separated from the petitioner and concluded that the child's best interests would be met by him primarily residing with the petitioner. The petitioner worked eight to four and would be able to be there for the child in the morning and after school. His income was $77,400 per year. The respondent was on employment insurance (maternity leave) from her $22,000 per year income. She had not notified the child's school of the petitioner and she had not promptly notified him the four times she moved. Further, the respondent was consulting medical professionals regarding a possible diagnosis regarding behavioral issues without consulting the petitioner. She also indicated that she and her new partner were considering moving to Regina. The only issues at trial concerned the child that the parties' had together.

HELD: The court reviewed the considerations outlined in s. 8 of The Children's Law Act, 1997. The petitioner had a relationship of greater quality with the child than the respondent did. The Report concluded that the child's emotional needs were better fulfilled by the petitioner as were his psychological needs. The court had concern regarding the respondent's approach to parenting. The petitioner was found to be more responsible and open to sharing information regarding the child. The petitioner was also found to be able to offer a better home environment. The report also suggested that the child preferred to live with the petitioner. The court found that it was in the child's best interest to primarily reside with the petitioner. The respondent would have the same access as the petitioner had. The court imputed income of $22,000 to the petitioner. With respect to child support the court amended the amount the petitioner should have paid to the respondent when the older children moved out. Also, the court ordered ongoing child support and s. 7 expenses.

 Back to top

Frank v. Linn, 2015 SKQB 162

Megaw, June 3, 2015 (QB15153)

Family Law – Costs – Queen's Bench Rule 11-18(2)
Family Law – Division of Family Property – Valuation – Expert Opinion
Family Law – Post Judgment Interest – Queen's Bench Act, Section 77

After a trial the judge ordered that the respondent pay the petitioner $1,166,331 with a portion paid immediately after trial and the balance within 120 days. The petitioner argued that post-judgment interest should be payable on the payment from the date of judgment whereas the respondent argued that interest should not start accruing until after the 120 days. The petitioner had vive voce expert evidence from a certified business valuator who completed a valuation report on the parties' major asset, shares in a company. The respondent did not call expert evidence and instead relied on the formula in the unanimous shareholders agreement to calculate the value of the shares. The parties attempted to simplify the valuation by agreeing that the trial judge could accept either the petitioner's expert's value or the respondent's value. The trial judge accepted the petitioner's expert's valuation. He ordered that the petitioner receive 70 percent of her costs and 100 percent of her allowable disbursements with respect to her expert. The expert's total account was $66,462.12 plus another $2,100 to review the matter to file the affidavit in support of the petitioner's costs. The issues were the expert witness fees and the post-judgment interest. HELD: The expert's account had to be reviewed to ensure the charges related to the production of an expert opinion and no more. The award of costs should not be the expert witness's entire account because to do so would be to award solicitor-client costs. The court did not remove the invoice entries that related to discussions between the expert and petitioner's counsel. The suggestion that the discussions were to educate the counsel were dismissed. The expert's services were also found to be reasonably necessary to the petitioner's case. The expert's invoices were found to be duplicative in one regard; he had invoices to attend trial twice. The first time the expert attended was when he did not actually provide vive voce evidence and the second time was because the trial judge requested the vive voce evidence from the expert. An amount of $9,056.05 was found to be duplicative. The court determined that payment from the respondent to the petitioner in the amount of $50,000 for expert fees would be reasonable and appropriate in the circumstances of the case. The court reviewed s. 77 of The Queen's Bench Act, 1998 and concluded that there is a presumption that interest accrues unless the court indicates otherwise. The petitioner's entitlement to the money crystallized as of the date of the judgment and she should not be penalized for the 120 days allowed for the respondent to come up with the funds. The trial judge did not indicate that the 120 days was interest free. The petitioner was awarded costs of $3,500 for the application.

 Back to top

Regina Qu'Appelle Health Region (Mental Health Inpatient Services) v. R. (M.M.), 2015 SKQB 163

Dawson, June 3, 2015 (QB15156)

Mental Health – Patient Detention
Mental Health Services Act – Certification – In-Patient Detention

The applicant health region applied pursuant to s. 24.1 of The Mental Health Services Act for an order of involuntary detention of the respondent for a period not exceeding one year for treatment at the Saskatchewan Hospital. The respondent's mother did not oppose the application but wanted any order to include terms that she could seek a review of the order, that she be kept informed of the treatment provided, and that she be notified of and given the opportunity to provide input into any future decisions regarding his care. The respondent was almost 24. The respondent had been admitted to hospital under psychiatric care numerous time between 2008 and 2014. In November 2014 the respondent was admitted again and his psychiatric diagnosis was Schizoaffective Disorder. He was discharged for ten days in early 2015 but had been in hospital since then on the basis of an involuntary committal. His condition and circumstances had deteriorated considerably over the last few years. The respondent's psychiatrist indicated that he needed a facility that provided the type of treatment that only the Saskatchewan Hospital could provide.
HELD: The court reviewed the criteria set out in s. 24.1(a) to (e) of the Act: 1) the respondent suffered from a mental disorder, namely Schizoaffective Disorder, that required treatment and supervision that could only be provided in an inpatient facility; 2) the respondent was incapable of self-sufficiency or providing for his own safety; 3) the respondent put himself and others in danger; 4) the respondent's committal orders exceeded 60 days; and 5) the respondent's mental disorders were likely to persist for a period longer than 21 days. All of the criteria in s. 24.1 were met and the order for committal was granted. The order included a term allowing review of the order. The court declined to include terms requiring that the Saskatchewan Hospital provide the respondent's mother with his treatment or allowed her to have input on future plans. The respondent's privacy rights as an adult may have been breached by such a terms.

 Back to top

Filipone v. SV Rental Corp., 2015 SKQB 165

Layh, June 4, 2015 (QB15181)

Landlord and Tenant – Appeal – Damages
Landlord and Tenant – Appeal – Residential Tenancies Act
Landlord and Tenant – Interpretation – Lease
Landlord and Tenant – Termination of Lease – Cause
Landlord and Tenant – Termination of Lease – Damages – Liquidated Damages

The appellants, tenants, appealed an order of the hearing officer ordering them to pay damages of $5,337.50 to the respondent, landlord, for a lease the tenants terminated because of an infestation of bedbugs. The hearing officer determined that the tenants caused the bedbug infestation. The parties had a lease to September 30, 2015. In September 2014 the bedbugs became apparent and the landlord arranged for an exterminator to treat the premises. The landlord advised the tenants that they were responsible for the infestation and should pay for the costs of the treatment. The tenants advised the landlord that they would not pay for the treatment and were ending the tenancy for cause. The tenants moved out but left their furniture for fear of contaminating their new home. The landlord had a trained dog attend at the townhouse and it was found that only the tenants unit was infested with bedbugs. The lease contained a "penalty" clause that the tenants argued precluded the landlord from collecting damages. The hearing officer found that the tenants were responsible for the bedbug infestation and therefore they could not unilaterally terminate the lease. The hearing officer allowed the following damages: $3,628.75 for inspection and extermination; $168.75 for cleaning; $500 for painting; $2,240 for loss of rental income. The tenants were ordered to pay damages minus the forfeited security deposit. The tenants then unsuccessfully invoked s. 76 of The Residential Tenancies Act. The issues on appeal were: 1) should the court accept the evidence that the tenants now wish to provide to the court showing the purchase of the couch pre-dated the bedbug infestation and thereafter, based on this new evidence, review the decision of the hearing officer that found the bedbug infestation was the result of the tenants' conduct; and 2) did the landlord's request for damages under the lease create an election for damages that terminated the lease and precluded a claim for loss of rental income.

HELD: The tenants' appeal was dismissed. The issues were determined as follows: 1) the court did not permit the evidence of the couch purchase. The evidence was not admitted based on legal principle and because, even if it were accepted, the hearing officer's finding that the tenants caused the infestation would not have been changed. The hearing officer only said the couch "likely" caused the infestation, but there was other evidence to conclude that the tenants were responsible for the bedbugs. Because the cause of the bedbugs was found to be the tenants, the hearing officer correctly concluded that they could not terminate the lease for cause; and 2) the hearing officer found the early

termination of lease clause to be a penalty clause and not a genuine pre-estimate of liquidated damages. The clause did not impose upon the landlord an obligation to choose to terminate the lease in order to claim liquidated damages. The hearing officer was not precluded from awarding damages because the landlord contemporaneously claimed for liquidated damages (called penalty in the clause) under the lease.

 Back to top

R. v. Peeteetuce, 2015 SKQB 166

Zarzeczny, June 12, 2015 (QB15188)

Criminal Law – Criminal Negligence Causing Death – Sentencing

The offender had been charged with: 1) criminal negligence causing the death of S.W.; 2) criminal negligence causing death of J.H.; 3) criminal negligence causing bodily harm to K.M.; 4) possession of a stolen vehicle; 5) impaired driving; 6) failing to stop a vehicle to evade a peace officer; and 7) breaching of her probation order. The Crown submitted that the offender should be sentenced to an eight-year sentence of imprisonment for each of the first two counts and to a further five-year sentence on the third count. Each of these sentences are to be served concurrently with a one-year term of imprisonment to be served consecutively for the remaining four counts, resulting in an aggregate 12-year sentence. Defence counsel stressed that the offender had pled guilty immediately, waived her right to a preliminary inquiry and stayed in custody for a full year without applying for bail. While on remand she participated in programming to deal with her personal issues. The offender wrote letters to each of the victims' families, apologizing for her actions. Most importantly, the defence argued, the Gladue factors should be taken into account in her sentencing. The offender, who was 21 years old when the offences were committed, was a member of the Beardy's and Okemasis First Nation. She had never known her father and her mother was addicted to alcohol and drugs. The offender and her siblings were witnesses to the physical abuse that her mother suffered at the hands of their mother's boyfriend. She had only completed grade eight and had to drop out of high school in grade nine when she had a baby. She too could not look after her child and her daughter was being raised by her mother and she too had endured a physically abusive relationship with a man. The child born of it had died mysteriously at the age of one. At that point, the offender's drug and alcohol abuse spiraled out of control and she joined the Indian Posse and worked as a prostitute. In spite of all of this, the offender had a limited criminal record. The pre-sentencing report indicated that the offender had a 92 percent risk to reoffend unless she could find a stable place to live, acquire academic or

vocational skills, obtain employment, control her alcohol and drug abuse and improve her self-esteem and self-management skills.
HELD: The court sentenced the offender with respect to the first two counts to five years imprisonment and regarding the third, to two years imprisonment, all to be served concurrently. Regarding the fourth count, the court sentenced her to three months imprisonment, three months imprisonment on the fifth count, and six months imprisonment the sixth count. These sentences were to be served consecutively. For the seventh count, the offender was sentenced to three months imprisonment to be served concurrently. The offender was given credit for remand for 20 months based on a 1:1.5 ratio. The court made a number of recommendations regarding the placement of the offender at the Okimaw Ohci Healing Lodge and to be afforded the opportunity to participate in various programs.

 Back to top

Safioles v. Saskatchewan, 2015 SKQB 183

Keene, June 23, 2015 (QB15192)

Class Action – Certification

The plaintiffs brought a claim under The Class Actions Act and sought certification of a class action against the defendant. The defendant had established and operated residences and facilities at the Saskatchewan Training School, the Valley View Centre and the North Park Centre that were created for individuals with intellectual difficulties. The proposed class sought damages for negligence and breach of fiduciary duty with respect to maltreatment of class members. The character of the action, the class members and a number of other issues had been examined by the court in an earlier application (see: 2014 SKQB 260). The defendant argued that when considering s. 6(1)(d) of the Act, that a class action would not be the preferred procedure for the resolution of the common issues. It cited Rumley v. British Columbia as supporting the view that certification of institutional abuse cases may result in unworkable litigation because of individualized complaints and damages, limitation periods and shifting standards of care during the temporal period.
HELD: The court dismissed the application for certification. The plaintiff had failed to set out common issues in such a way that the proposed class action would produce a fair, efficient and manageable method of advancing the claims.

 Back to top

Schwann v. RC2 Corp., 2015 SKQB 188

Keene, June 24, 2015 (QB15172)

Civil Procedure – Amendment – Statement of Claim
Civil Procedure – Class Action – Pleadings
Civil Procedure – Class Action – Costs
Civil Procedure – Queen's Bench Rule 3-72

The plaintiff in a class action proceeding applied pursuant to rule 3-72 of The Queen's Bench Rules for leave to amend the second amended statement of claim. The amendments sought included the addition of another party, a subsidiary of an existing defendant and re-introducing allegations that the defendants deliberately kept their business relationship a secret from her.
HELD: The court allowed the amendments. It was not plain and obvious that the pleadings disclosed no reasonable cause of action. Costs were awarded against the plaintiff.

 Back to top

Thomson v. Thomson, 2015 SKQB 189

Scherman, June 24, 2015 (QB15173)

Corporate Law – Ordinary Course of Business – Substantially All of the Assets

The applicant sought an order pursuant to s. 240 of The Business Corporations Act restraining the respondents from selling eight quarter sections of land owned by the corporate respondent and assigning 12 quarters of leased land owned by the Crown. The agreement for sale of the land and assignment of the leases was for $1,300,000. The applicant relied on s. 183(2) of the Act that requires a special resolution of the corporation's shareholders approving a sale of all or substantially all of the property of a corporation made other than in the ordinary course of business. The respondent corporation also owned 18 more quarter sections not being sold, valued at $2,041,000. The land being sold was all grassland except for one quarter. The corporate respondent had not had any livestock since 1997 and was renting out the land. One of the personal respondents indicated that the rents received for the land was not enough to cover the ongoing expenses. He further indicated that the maintenance for the quarters has all fallen to him and he has not received compensation. The issues were: 1) was the proposed sale in the ordinary course of business of the corporation; and 2) if not, were the subject lands all or substantially all the property of the corporation.
HELD: The application was dismissed. The court determined the issues

as follows: 1) in recent years the ordinary course of business was to lease its landholdings to others. There was no evidence that buying and selling was part of its business. The proposed sale was not in the ordinary course of business; and 2) the court found that it could not be concluded that all or substantially all of the assets were being sold just because one third were being sold when the same business would continue after the sale. The sale was also a wise business decision given the lack of profits from the land rent. The board of directors had an obligation to maximize return. The respondent directors were found not to act improperly. The court did not accept the applicant's argument that this sale was the first step in liquidating all of the assets and therefore a special resolution should be required.

 Back to top

Petrie v. Petrie, 2015 SKQB 190

Currie, June 25, 2015 (QB15174)

Civil Procedure – Costs
Civil Procedure – Pre-trial Brief
Civil Procedure – Queen's Bench Rule 4-13(1)

The petitioner requested that the respondent pay costs for filing his pre-trial brief three days late. Rule 4-13(1) of The Queen's Bench Rules requires that the briefs be filed no later than 10 days before the pre-trial conference date. There was a lot of property between the parties and a wide range of valuations. The respondent's counsel indicated that the brief was late because it was discovered that additional documentation was required and the counsel was in trial.
HELD: The explanation for the late brief was understandable but not sufficient to excuse the non-compliance of the rule. Costs of $400 were awarded to the petitioner.

 Back to top

9286594 Canada Inc. v. Advance Engineering Products Ltd., 2015 SKQB 196

Gabrielson, June 30, 2015 (QB15195)

Debtor and Creditor – Sale of Assets – Sales Process

The consortium, a group interested in participating in the sale process proposed by the monitor (Ernst & Young) in respect to the sale of assets of Advance Engineered Products Ltd. (AEPL), brought an

application for an order that they be treated as a qualified bidder. Counsel for AEPL brought an application simultaneously for approval of the sales process. In April 2015, the court had granted AEPL's application made pursuant to ss. 9, 10, 11, 11.2 and 11.3 of the Companies' Creditors Arrangement Act. The court appointed Ernst and Young as monitor at that time. During the subsequent two months, AEPL sought and obtained extensions of the court's initial order based upon the monitor's first report, but it did not seek an order confirming the sales process proposed by the monitor in its first report. Even though court approval of a sales process had not been obtained, the monitor proceeded to solicit letters of intent from interested parties, in reliance upon the report. It then filed its second report to the court and applied for approval of the sales process in this application, which prompted the application by the consortium. The second report varied from the first as it did not contain a stalking horse sales process, added two new criteria and limited the final sale negotiations to four parties. The consortium submitted that it had submitted its letters of intent believing that there would be a second round of bids to be taken by a stalking horse process or further tender process. As a result, the process became unfair to the consortium and it had been misled. It argued that it should be added to the proposed list of qualified bidders. The issues were: 1) whether the consortium had standing to oppose the sales process proposed by the monitor; and 2) whether the court should disregard the recommendation of the monitor concerning the sales process and order that the consortium be included as a qualified bidder.

HELD: The court granted the application. It found with respect to each issue that: 1) the consortium, as an interested party that sought to purchase the assets of AEPL, had standing to bring the application to determine whether the process previously followed was fair to it as a prospective purchaser; and 2) the monitor had offered no valid business reason for the changes made to the sales process and the consortium was misled. This unfairness gave the consortium the standing to challenge the sales process. It may have suffered prejudice as a result of being misled and the court therefore granted the consortium's application to be included in the group of qualified bidders. The court granted the sales process proposed by the monitor but amended it to include the consortium as a qualified bidder, allowing it to take part in the second round of negotiations. The court would not comment on the change in criteria listed in the monitor's second report but would await the results of the second round of negotiations and the monitor's recommendations regarding the approval of any sale.

 Back to top