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R. v. A. (R.D.), 2015 SKCA 100

Jackson Caldwell Herauf, September 23, 2015 (CA15100)

Criminal Law – Assault – Sexual Assault – Conviction – Appeal

The appellant appealed from his conviction on the charge of sexual assault, contrary to s. 271 of the Criminal Code, on the grounds that the verdict was unreasonable or unsupported by the evidence and because the evidence was insufficient to prove his guilt beyond a reasonable doubt. As a fresh argument at the hearing of his appeal, he also submitted the judge had made improper use of evidence that the complainant had immediately gone to the RCMP as being corroborative of the fact a sexual assault had occurred.
HELD: The appeal was dismissed. The court found that upon review of the whole of the evidence, the verdict was one that the judge, acting judicially, could reasonably have rendered. The major issue before the judge was the credibility of the accused and the complainant as both had testified. The judge rejected the appellant's account of what had happened. The judge addressed the inconsistencies in the complainant's evidence raised by the appellant's counsel and explained how he resolved his assessment of the complainant's credibility in light of them in a way that plainly supported his finding of credibility. The court found that the judge had not made improper use of a prior inconsistent statement. His remarks were made in the context of the judge's assessment of the complainant's credibility and he used the evidence of when the prior inconsistent statement was first made, admissible under the narrative exception to the rule against prior inconsistent statements, to draw an inference with respect to the

complainant's credibility but not the content of the statement to assess the consistency and thereby the credibility of the complainant's evidence at trial. His remarks regarding corroboration related to the legal fact that it is no longer required for a conviction for the offence of sexual assault in accordance with s. 274 of the Code relating to the offence under s. 271.

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R. v. Shaoulle, 2015 SKCA 101

Jackson Klebuc Ottenbreit, September 30, 2015 (CA15101)

Criminal Law – Murder – First Degree – Conviction – Appeal
Criminal Law – Evidence – Circumstantial

The appellant was charged with first degree murder committed contrary to s. 235(1) of the Criminal code. He was tried and convicted by a Queen's Bench judge without a jury. The victim had been sexually assaulted before her death, was killed by strangulation and her body partially burned and then hidden under brush and snow. The case for the Crown was composed of circumstantial evidence. The appellant had not called any defence evidence nor did he testify. The appellant's appeal was based on one ground, which was that the verdict was unreasonable and could not be supported by the evidence. The evidence establishing the following: 1) that the victim was physically assaulted, sexually assaulted and murdered sometime between 10:30 pm and 6:00 am; 2) the appellant's DNA was not found on or in the victim's body other than on nail clippings taken from her fingers; 3) the appellant knew the victim and she was with him in a hotel bar between 10:15 and 10:30 pm, as shown on the hotel's videotape on the night in question; 4) the appellant entered the Victoria Hospital Detox Centre at approximately 3:45 am the following morning, and at that time exhibited a depressive mental state, which he had experienced on prior occasions; and 5) he was examined and treated at the hospital's emergency unit and thereafter taken into protective custody by the police service until sometime after 6:00 am. The appellant's spouse testified that when he returned home, she could smell smoke on his clothing and that he had scratches on his hands and arms, which he explained were caused by handcuffs worn while he was in custody, although he had not been handcuffed. Uncharacteristically, he wanted to wash his own clothes immediately. He seemed morose and withdrawn. The doctor who examined him at the hospital and the officer who had talked to him at the police station testified that the appellant had not had any scratches on his hands. After the appellant was arrested, the police had videotaped him alone in the witness room and the appellant attempted to burn his glove there. Later an

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undercover police officer was placed in the same cell as the appellant and talked to him about his desire to get even with his girlfriend. The appellant advised him that if it were him, he would kill her and dismember, burn and bury the body. The trial judge based his decision that the appellant was guilty of murdering the victim on the combination of the inculpatory circumstances: notably, the video showing him as the last person to be seen with her, the evidence of the appellant's spouse, the fingernail DNA evidence, and the evidence of the undercover officer. He concluded that appellant's DNA was transferred to the victim during a violent altercation between the two that resulted in her death. He determined that the appellant caused her death by strangulation while committing, or after committing, a sexual assault on her. The trial judge stated that the most significant piece of evidence was the testimony of the appellant's spouse whom he found to be a very credible and compelling witness. He made a specific finding that her testimony was forthright and her observations were salient, cogent and reliable. He found her highly credible and rejected none of her evidence. He was satisfied that the only reasonable and rational conclusion to be reached, based on the whole of the circumstantial evidence, was that the appellant was guilty.
HELD: The appeal was dismissed. The majority found that the trial judge was aware of the inconsistencies in the evidence and had considered that there were alternative explanations offered for the circumstantial evidence. This was also an appropriate appeal in which to consider that the accused had not testified. The circumstantial evidence in this case demanded some explanation that was not provided. The verdict was not unreasonable and was supported by the evidence. The dissenting judge would have allowed the appeal and acquitted the appellant, holding that the verdict had not met the reasonableness limit articulated in Yebes and Binaris. There was no apparent motive and the post-offence conduct relied upon by the Crown fell short of establishing the essential link between the appellant and the victim's death.

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Saskatchewan (Maintenance Enforcement) v. Matchee, 2015 SKCA 102

Ottenbreit Herauf Whitmore, September 23, 2015 (CA15102)

Family Law – Child Support
Statutes – Interpretation – Enforcement of Maintenance Orders Act, 1997

The Director of Maintenance Enforcement appealed the order of a Queen's Bench judge in chambers. The matter before the judge was an application by the director to enforce payment of child support by the

R. v. Eby

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respondent. At the application, the respondent introduced results of a paternity test showing that he was not the biological father of the child with respect to whom he was ordered to pay support. The chambers held that the respondent was not liable for child support and struck the application. The respondent had not brought a variation application.
HELD: The appeal was allowed. A judge in a default hearing does not have authority to vary an existing support order without an application before him to vary, pursuant to s. 53(7) of The Enforcement of Maintenance Orders Act, 1997.

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Deer Lodge Hotels Ltd. v. Saskatoon (City), 2015 SKCA 105

Ryan-Froslie, October 6, 2015 (CA15105)

Municipal Law – Tax Assessment

The applicant applied pursuant to s. 33.1 of The Municipal Board Act for leave to appeal the decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board respecting the municipal tax assessment of a hotel owned by it in Saskatoon. The applicant questioned the methodology used by the city's assessor to calculate the capitalization rate, a component of the equation for determining the assessed value of hotels and motels for municipal tax purposes. The applicant also raised the onus a taxpayer bears in assessment appeals when alleging assessor error.
HELD: Leave to appeal was granted. The court applied the Rothmans criteria as it had in the past to s. 33.1 applications. The proposed appeal was neither frivolous nor vexatious nor was it prima facie destined to fail. The respondent's argument that the grounds of the appeal had not raised questions of law as required by s. 33.1 of the Act was rejected as whether the assessor had complied with the Act in conducting his assessment was a question of law as was the appropriate onus to be applied to the taxpayer. The proposed appeal was of sufficient importance to the municipal tax assessment process generally to warrant a determination by the court.

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R. v. Gaudet, 2015 SKPC 48

Jackson, March 27, 2015 (PC15124)

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

The accused was charged with having care or control of his vehicle while his ability to operate it was impaired by alcohol and that he failed or refused to provide breath samples at the detachment. The accused testified that he had started driving home from a party where he had been drinking and realized that he should not be driving. He pulled into a driveway, turned off the vehicle, put the keys in his pocket and fell asleep. The defence argued that the accused had rebutted the presumption in s. 258(1)(a) of the Criminal Code. An RCMP officer went to the scene in response to a complaint from the property owner who said that an individual parked in his driveway yelled and swore at him when the owner inquired if he needed help. The officer testified that he found the accused asleep in a vehicle that was parked in the middle of the driveway and that it took him ten minutes to rouse the accused, who finally responded with slurred speech. The officer formed the opinion that the accused was intoxicated and arrested him for impaired driving. The property owner advised the officer that he had not seen the accused drive the vehicle to the driveway. The officer then took the accused to the police cruiser and re-arrested him for care and control. As he walked to the cruiser, the accused was unsteady and once in the vehicle, the officer noted the smell of alcohol and made the breath demand, which he read from the police card. When asked whether he understood, the accused replied affirmatively. At the detachment, the accused refused to provide a breath sample despite being warned numerous times of the consequences. The accused admitted that he had refused but argued that the officer had not had reasonable and probable grounds for making the demand and that the officer had not made a formal demand.

HELD: The accused was found guilty of both charges. The court found that the accused had rebutted the presumption that he had intended to drive but that he had been found in actual care and control as there had been a realistic risk of danger posed in circumstances that he would waken and drive the vehicle. Regardless of the fact that the accused had not admitted consuming alcohol, based upon the observations of the officer, the court found that he had an honest subjective belief that the accused was intoxicated and that the conclusion was objectively reasonable. The formal breath demand was made and understood by the accused, and therefore a finding of guilt for the subsequent refusal could not be established.

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R. v. Wakeford, 2015 SKPC 91

Gordon, September 22, 2015 (PC15115)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol

Exceeding .08 – Breath Samples – As Soon As Practicable
Constitutional Law – Charter of Rights, Section 8, Section 9

The accused was charged with operating a motor vehicle while his blood alcohol level exceeded .08, contrary to ss. 253(1)(b) and 255(1) of the Criminal Code, and with operating a motor vehicle while his ability to do so was impaired by alcohol, contrary to ss. 253(1)(a) and 255(1) of the Code. The defence brought a Charter application on the grounds that the accused's ss. 8 and 9 Charter rights had been violated and a voir dire was held. It was agreed that all evidence from the voir dire would be applied to the trial proper. At the hearing, the defence counsel argued that the accused's s. 8 Charter right had been breached because after the accused had failed the ASD test, the officers arrested him for impaired driving, advised him of his right to counsel, read him the police warning, made the Intoxilyzer demand, but had not proceeded to the police station immediately. The officers had contacted a tow truck because of new SGI requirements and had dealt with the passenger in the accused's vehicle. They then locked the accused's vehicle before departing for the station. The requirement of s. 254(3) is that the accused provide breath samples as soon as practicable. Defence counsel submitted that the Certificate of Analysis should be excluded pursuant to s. 24(2) of the Charter because the officers had delayed by 23 minutes at the scene after the Intoxilyzer demand before proceeding to the station. The accused had provided his last breath sample at the station by 2:01 am but was held in the cells until 10:30 am. The defence alleged that the accused's s. 9 Charter rights had been breached by overholding. The accused had told the police that he did not want to contact his family to obtain a ride home but the police made no efforts to find out if there was someone else he could call. The police offered no explanation.
HELD: The court found in the voir dire that there had been no breach of s. 8. It did find that there had been a breach of s. 9 as there was no reason for the accused to have been held in custody for ten hours without any adequate explanation but that this was not one of the clearest of cases that required a stay of proceedings. The court suggested that if the accused was convicted, a reduction of sentence would adequately reflect the seriousness of the breach.

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R. v. Pollock, 2015 SKPC 113

Gordon, September 22, 2015 (PC15116)

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

The accused was charged with having operated a motor vehicle while his blood alcohol concentration exceeded .08, contrary to ss. 253(1)(b) and 255(1) of the Criminal Code. The defence brought a Charter application alleging that the accused's ss. 8, 9 and 10(b) rights were violated and sought an exclusion of evidence under s. 24(2) and a voir dire was held. A police officer had checked the accused's sobriety after finding the accused in his parked vehicle after a sports tournament. He noticed beer cartons on the floor of the vehicle, the accused's flushed face, glassy eyes and the smell of alcohol coming from him. The accused told the officer that he had consumed alcohol. The officer advised the accused that he was being detained to provide a roadside breath sample and asked him to come to the police cruiser. The ASD demand was then made by the officer, reading it from the police card, and when asked when he had had his last drink, the accused said about five minutes earlier so the officer decided to wait for ten minutes to allow mouth alcohol to dissipate. The accused failed the test and was arrested. He was read the Intoxilyzer demand and said that he understood. When asked if he wished to contact a lawyer, the accused said no. He was taken to the telephone interview room of the local detachment wherein there was a telephone book and notice advising of the right to counsel. The accused was not asked again if he wanted to consult a lawyer. The accused testified that he had thought that as he would be unable to reach a lawyer near midnight, he would not bother, but did not explain his thinking to the officer. He said that he did not see the notice regarding the right to call a lawyer and did not understand what Legal Aid represented, but again did not ask any questions. He thought that by saying no to counsel he was being cooperative. The defence argued that the results of the ASD test should be excluded because the officer failed to follow appropriate procedures while testing the accused because he waited too long. Therefore the officer did not have the grounds to make the Breathalyzer demand. The accused's s. 10(b) right was violated because he had only been asked once in the police vehicle and not been provided any information on who and how he could contact a lawyer when he was at the detachment.

HELD: The application was dismissed and held that the evidence would be applied to the trial proper. The court found that there had been no breach of the accused's ss. 8 and 9 Charter rights because the approximate 15 minutes that the officer waited to administer the ASD test did not constitute delay. The court held that when a detainee says no to the inquiry whether they want to contact a lawyer, there is no further obligation on the police.

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R. v. Eby, 2015 SKPC 117

Jackson, August 14, 2015 (PC15129)

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

The accused was charged with impaired driving, driving while over .08 and possession of marijuana under 30 grams. The accused brought a Charter application alleging that his ss. 8, 9, 10(a) and 10(b) rights had been breached and sought an exclusion of the evidence pursuant to s. 24(2). The charges arose after an RCMP officer received a report from a motorist following the accused's vehicle that the driver was swerving across both lanes of a highway and then lost control of the vehicle, which went off the road into a field. The officer arrived at the scene and another witness who had tried to help the accused advised the officer that he thought the accused was impaired. The officer saw the accused walk very slowly in a deliberate fashion across the field towards her. She smelled alcohol on his breath, and noted that his eyes were red and, when he spoke, his words were slurred. When asked, the accused said that he had consumed three or four beers earlier. Inside the accused's vehicle the officer smelled alcohol and observed a wet spot on the floor, a beer cap on the console and a cup on the floor. The officer arrested the accused for impaired driving and read him the standard warning, including his right to counsel, which the accused declined to pursue. At the detachment, the accused provided his first breath sample. Before the second one was taken, a small bag of marijuana fell out of his pants. The accused's ground for the challenge were that: 1) the officer had not had reasonable and probable grounds to make a formal breath demand, thereby breaching his ss. 8 and 9 Charter rights; and 2) the failure to immediately arrest the accused and provide him with his ss. 10(a) and 10(b) rights for the possession of marijuana charge would transfer and apply to all of his potential charges, such that the result of the second breath test should be excluded from the evidence.
HELD: The application was denied. The court found with respect to the grounds that: 1) the officer had reasonable and probable grounds to make the breath demand on the basis of all the indicia on both subjective and objective grounds; and 2) a breach may have occurred but it only applied to the charge of possession and not the unrelated driving offences as there was no nexus to the evidence-gathering process regarding the latter.

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R. v. Maudhub, 2015 SKPC 118

Klause, May 11, 2015 (PC15130)

Criminal Law – Defences – Charter of Rights, Section 10(b)
Criminal Law – Driving over .08 – Breath Sample – As Soon As Practicable
Criminal Law – Driving over .08 – Reasonable Grounds for Traffic Stop

The accused was charged with driving over .08 after he was stopped at 1:45 am in a routine traffic stop to check for registration and sobriety. The accused smelled like alcohol, had red, bloodshot eyes and advised the officer he had consumed alcohol. A roadside demand was made at 1:48 am and the accused failed the ASD at 1:59. He was arrested at 2:00 am and indicated he would try to contact counsel. At the detachment he indicated he would talk to Legal Aid. He had to wait until 2:30 to talk to Legal Aid because they were backlogged. He was finished at 2:37 am and gave his first sample at 3:01 am. On cross-examination the officer indicated he was not sure if the accused asked for Legal Aid or if he just assumed that is who he wanted. English was not the accused's first language. The accused testified that he had a phone book for only a short time and that he thought the words Legal Aid were the same as lawyer. The issues were: 1) was the accused given his appropriate Charter rights in a way that he could understand and properly implement them; 2) were the tests taken as soon as practicable; and 3) did the police have reasonable grounds upon which to stop the accused.
HELD: The issues were determined as follows: 1) the court found the officer and the accused to be credible witnesses. The accused did not fully comprehend the situation, which led to an imperfect understanding as to who to call for advice and what advice to take. The language barrier led to an improper or deficient informational and implementational component of the Charter right to counsel. The court undertook a Grant analysis and determined that: the breach was serious because an attempt should have been made to explain the accused's rights to him in French; the impact of the Charter breach militated in favour of exclusion of the evidence; and there is a high societal interest in having impaired driving cases tried on their merits. Overall, the court concluded that the inclusion of the Intoxilyzer test results would bring the administration of justice into disrepute and therefore the evidence was excluded; 2) the court held that the tests were taken as soon as practicable because the officer acted reasonably and responsibly throughout. The accused was found not guilty because there was no evidence to prove the over .08 charge.

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Breitkreutz v. Bolen, 2015 SKPC 148

Demong, October 20, 2015 (PC15132)

Torts – Motor Vehicle Accident – Liability
Torts – Negligence
Traffic Safety Act – Left-hand Turn

Three vehicles were damaged in an accident at an intersection. Each of the drivers sought damages from one or more of the other drivers. R.G. argued that he was driving a vehicle in a lane going straight through an intersection when the vehicle was struck by a vehicle driven by C.B., who was in a left turning lane of the opposing traffic street. The vehicle driven by R.G. spun and struck another vehicle, driven by J.B., which was in the second left turning lane of the opposing traffic street. R.G. conceded that his right turn signal was on even though he was proceeding straight through the intersection at between 60 and 65 km/hr. He argued that he had a green light to proceed through the intersection and therefore the other two drivers should not have been attempting a left-hand turn. C.B. indicated that R.G. was in the right-hand turning lane and not in the lane to proceed straight through the intersection. She did agree that R.G. would have had a green light but she thought he was turning right. J.B. also argued that R.G. was travelling in the right-hand turning lane. He indicated that he did not see R.G.'s vehicle until fractions of a second before the collision. C.B. and J.B. said that their light was either solid green or red with a flashing left-hand turn arrow.

HELD: The court had some concerns with C.B.'s testimony. She said that her view was blocked but the court found that there was nothing to block her view and she indicated R.G. was travelling much slower than anyone else indicated. The court was also concerned with J.B.'s evidence because his indication of the colour of the traffic light contradicted the others' evidence. Also, the court did not know how he could not have seen R.G.'s vehicle sooner when he had been stopped at a red light for several seconds. The court concluded that more likely than not the light presented to each of the parties entering the intersection was a solid green. The court also had concerns with the suggestion that R.G. was in the right-hand turning lane given the position of the vehicles during and after the accident. C.B. and J.B. could have been honestly mistaken as to the lane R.G. was in. They did not discharge their evidentiary burden of proving to the court that more likely than not R.G.'s vehicle was in the right-hand turning lane. The court found that R.G. was negligent in the operation of the vehicle he was driving because he proceeded straight through an intersection with his right-hand turn signal on. He knew or ought to have known that his failure to turn off his signal light would confuse other drivers and they would, more likely than not, operate on the reasonable assumption that he intended to turn right. The court also found C.B. negligent for attempting a left-hand turn directly into the path of the vehicle R.G. was driving. Section 219(3) of The Traffic Safety Act obligates a driver to yield the right of way if turning left. Negligence was not attributed to J.B. because there was no evidence that when he was hit he was in the lane of traffic that R.G. was travelling in. The

court held that C.B.'s evidence was more negligent and she was ordered to bear 60 percent of the responsibility for the accident and R.G. was ordered to bear 40 percent.

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Pryznyk v. Gilliland, 2015 SKQB 285

Laing, September 17, 2015 (QB15299)

Statutes – Interpretation – Evidence Act, Section 10
Statutes – Interpretation – Regional Health Services Act, Section 58
Civil Procedure – Evidence – Documents – Disclosure

The plaintiffs brought an application to request that redacted content of certain documents in the possession of the defendants and to which they have claimed privilege on the basis of s. 10 of The Evidence Act (EA), evidence before quality improvement committees, and s. 58 of The Regional Health Services Act (RHSA), critical incidents. The plaintiff gave birth in 2011 to a child diagnosed with spastic quadriplegic cerebral palsy. The claim alleged negligence in the plaintiff's prepartum treatment as the cause. The documents in issue included: 1) notes and letters prepared by the head of the Department of Obstetrics at Royal University Hospital arising out of his interviews with the defendant obstetrician following the birth, in which the head addressed the matter as a professional practice concern. The plaintiff argued that the head's interviews, notes and report predated the designation of the events as a critical incident and predated the preparation of the quality improvement report, and therefore the redacted portions of the documents were not protected by s. 10 of the EA; and 2) a report issued by the defendant Saskatoon Health Region Association (SHRA) that contained a reference to a nurse having made an observation to the defendant obstetrician. The defendants argued that in this fact situation, s. 58 of the RHSA and s. 10(b) of the Critical Incident Regulations were the applicable legislation as the matter was designated a critical incident. Alternatively, the head's interviews were conducted as part of a quality improvement committee and did not have to be disclosed pursuant to s. 10 of the EA. The defendant SHRA made a counter application to have the critical incident report disclosed to the plaintiffs ruled inadmissible in any further proceedings and for an order that the report be removed from the file or sealed. They submitted that aside from the factual information contained in it, the remainder of the document could not be disclosed or used in evidence by virtue of the prohibition contained in s. 58 of the RHSA.
HELD: The court dismissed the plaintiff's application and granted that of the defendants. It found with respect to the documents that: 1) the

head's notes were part of the critical incident investigation and rejected the plaintiff's argument that there had to be a formal designation of them before documents fell within the protection of s. 58 of the RHSA. The court reviewed the unredacted copy of the documents and stated that the redacted portions did not contain additional facts of the critical incident and did not have to be disclosed; and 2) the name of the nurse could not be disclosed pursuant to s. 10(b) of the Regulations, and the Queen's Bench Rules regarding discovery could not take precedence over them and the RHSA. Regarding the defendants' counter application, the court found that s. 58(6) of the RHSA stated that the critical incident report was inadmissible as evidence and therefore ordered that it be sealed and declared inadmissible in any further legal proceedings. The court held that s. 10 of the EA did not apply to the head's notes as he undertook the investigation as a department head and they were not prepared exclusively for the use of a quality information committee.

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Dembrowski v. Bayer Inc., 2015 SKQB 286

Gabrielson, September 17, 2015 (QB15287)

Civil Procedure – Affidavits – Admissibility
Civil Procedure – Brief of Law – Admissibility
Civil Procedure – Class Action – Certification
Civil Procedure – Queen's Bench Rules 5-37, 7-9, 13-30
Class Action – Certification

The plaintiffs applied for certification of the action as a class action pursuant to The Class Actions Act. The defendants brought two motions: an application to strike portions of two affidavits of doctors filed by the plaintiffs; and a request to strike portions of the plaintiffs' brief of law. The plaintiffs asserted that the Yasmin and Yaz birth control pills (collectively referred to as the bcp) were marketed by the defendants as having the same efficiency as other birth control pills in preventing pregnancy, but they failed to warn of two serious health risks compared to other birth control pills. The plaintiffs specified one class and three common issues. The court discussed the following issues: 1) the application to strike portions of the legal brief because they were scandalous or vexatious. The plaintiffs did not care whether the paragraphs were struck but they did question whether the court had the authority to make such an order; 2) the application to strike portions of the affidavit. The defendants argued that the paragraphs should be struck because: they were matters of opinion contrary to Queen's Bench rule 5-37(2); they did not meet the requirements for admissibility of expert opinion; and/or they were argument and/or not

fact or proper opinion contrary to rule 13-30; and 3) whether the plaintiffs met the requirements for certification.
HELD: The court determined the issues as follows: 1) the phrase "other document" in rule 7-9 is broad enough to encompass a brief of law. The court also held that it had authority to strike portions of the brief of law pursuant to an inherent jurisdiction. The court concluded that the paragraphs met the definition of scandalous and vexatious and were struck; 2) the court found that one of the doctors did not have sufficient expertise to provide opinion evidence in respect to the adequacy of the product monograph for the bcps. She was found to have expertise to review the monographs and provide the court with her analysis from an epidemiology point of view of the risks of usage of these drugs based on studies done by others, etc., and therefore the court did not strike paragraphs in that regard. The court found that the other affiant was allowed to provide an opinion as to whether the defendants failed to adequately warn of the health disorders as well as whether the defendants were overly reliant on studies from a single group or its conclusions. The application to strike the doctor's first affidavit was therefore dismissed. The court did not strike those portions of the affidavit that dealt with reviewing the defendants' affidavits as an epidemiologist. The portions of that affidavit regarding the defendants' affiants qualifications were found to be argument and struck pursuant to rule 13-30; and 3) the court reviewed the five subsections of s. 6(1) of the Act as follows: a) the plaintiff met the plausible basis test and the pleadings disclosed a cause of action; b) women who took the bcps after it was marketed in Canada and who suffered an adverse result in the nature specified were an identifiable class who had a potential claim. There was already a similar certified class action in Ontario and Quebec and those people were therefore not included in the class; c) the court reviewed each of the plaintiffs' asserted three common issues to determine whether they met the "some basis in fact" test. The first issue, which was regarding the causation of the dangerous conditions, was found to be an appropriate common issue. The court also found that there was some basis in fact for the second common issue, the breach of a duty to warn of an increased risk. The third common issue was whether the defendants should disgorge all or any of its revenue or profits from the sale of the bcps. The court concluded that the third common issue was not appropriate until such time as liability was established based upon individual member's personal circumstances; d) the action met the preferable procedure test for determining the common issues; and e) because the court determined that not all causes of action would proceed and that one of the proposed common issues was not a common issue, a revised litigation plan was ordered to be filed within 15 days of the date of the reasons. Any further submissions had to be filed within 30 days of the revised litigation plan being filed.

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Talarski v. Jones, 2015 SKQB 287

Rothery, September 17, 2015 (QB15288)

Civil Procedure – Costs – Solicitor-Client
Civil Procedure – Originating Application
Real Property – Land Titles Act , Section 109
Real Property – Joint Title – Undue Influence
Trusts and Trustees – Constructive Trust – Family Transactions

The applicant applied by originating application under Queen's Bench rule 3-2(4) for an order pursuant to s. 109 of The Land Titles Act, transferring the title to her home from joint names with the respondent to the applicant's name solely. The respondent argued that the matter could not be decided because there were contradicting affidavits filed. The respondent was one of the applicant's four children. The respondent had taken the applicant to an insurance agency and had her transfer the title to joint tenancy. At the same time the applicant executed a will dividing her estate between her three daughters, one being the respondent, noting that her son had been given right of survivorship of her farm. The applicant changed the locks on her house twice and the respondent drilled them out. The respondent also withdrew $19,000 from the applicant's bank account when she was her power of attorney. The respondent asserted that she had placed the funds in an account for the applicant but would not provide details in that regard. The applicant argued that she did not understand what she was signing at the insurance agency and that she had no intention of transferring ownership of her home to the respondent. The applicant argued undue influence and constructive trust.
HELD: The court held that the application could be decided on the affidavits filed without the need for cross-examination, or a trial of the issue. The applicant was in a relationship of dependency to the respondent and the presumption of undue influence on the respondent's part was raised. The court accepted that the applicant did not understand the ramifications of executing the transfer. Also, the will executed the same day as the transfer gifted property equally to all three of the applicant's daughters, which was opposite to an intention of benefitting only the respondent. The respondent failed to rebut the presumption of undue influence and the transfer of title had to be set aside. The court noted that the elements of constructive trust were also present and the transfer could have also been set aside on that basis. A restraining order against the respondent was also made and solicitor-client costs were awarded against the respondent given her reprehensible behaviour.

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Hennenfent v. Loftsgard, 2015 SKQB 289

Megaw, September 17, 2015 (QB15277)

Family Law – Child Support – Retroactive Support

The petitioner sought retroactive child support pursuant to s. 3 of the Guidelines and that he pay his proportionate share of s. 7 expenses for the two children of the marriage. The parties entered into a separation agreement in 2011. Its terms included that no child support would be payable by either party because of the parity in their incomes and that no retroactive payment would be requested if either party decided to vary the support arrangements. Between 2011 and January 2014, the parties shared parenting. At that time, the respondent requested that parenting arrangements be changed to reduce the amount of his parenting time because he was required to attend treatment programs after being charged with an assault on the petitioner in 2013. Following his completion of the program, the changed parenting continued until January 2015 when the respondent was informed that the petitioner was applying for child support. In March 2015, the petitioner discovered text messages on a phone given to one of the children by the respondent that included his expression of a desire to harm the petitioner. She then refused to allow the respondent to have parenting time. The respondent applied to the court and an order was granted in June 2015 reinstating the parenting time arrangements made between the parties after January 2014. The petitioner explained that her request for retroactive child support was delayed because she was afraid of the respondent. The respondent submitted that he was having financial difficulties and a retroactive award would cause him hardship. The petitioner was prepared to reduce her claim for s. 7 expenses and asked that the respondent contribute $96 per month, net of any tax credits. HELD: The court granted the application for retroactive child support. It accepted the petitioner's explanation for the delay as reasonable. The respondent knew when the treatment program came to an end and yet he did not resume his shared parenting obligations and failed to contribute to s. 3 child support. He could not rely on the agreement as it was based on shared parenting. The children could have benefitted from the additional funds. The hardship caused could be overcome by the amount of payment awarded. The court found that the appropriate date to determine when retroactive payments should commence to be September 2014 when the respondent's program ended. The court ordered the respondent to pay $250 per month to be applied against the arrears. The court accepted the petitioner's proposal that the respondent pay $96 per month for s. 7 expenses in addition to the monthly child support amount agreed to by the parties and the monthly arrears payment.

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R. v. Lewis, 2015 SKQB 291

Schwann, September 18, 2015 (QB15279)

Criminal Law – Sexual Offences – Obtain for Consideration Sexual Services

The accused was charged with obtaining for consideration the sexual services of K.O., a person under the age of 18 years, contrary to s. 212(4) of the Criminal Code. The accused and the complainant were the only witnesses who testified. The complainant stated that at the time of the alleged offences, she was 16 years old and soliciting to support her drug habits. She stated that she had not carried identification when she was soliciting. The accused had had sexual relations with her twice at his house. She recalled in detail the physical surroundings and the amounts that he had paid. The complainant said that she told the accused she would not ask his age if he would not ask hers. The accused was 48 at the time of the alleged incidents. He testified that he asked the complainant her age and she said that she was 23 and told him that she had a boyfriend who was 37. The accused was with the complainant when she purchased cigarettes and alcohol without being challenged, which led him to believe that she was the age she had given. He denied that he had paid her to have sex with him.
HELD: The accused was found not guilty. The court believed the complainant that the accused had paid her. However, the court determined that the accused could not take any further steps to ascertain the complainant's age apart from asking for her identification and she testified that she did not carry it when soliciting. The Crown had not satisfied the court beyond a reasonable doubt that the accused had not believed that the complainant was 18 years of age or older or proved beyond a reasonable doubt that the accused failed to take all reasonable measures to ascertain her age.

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Mehlsen v. Mehlsen, 2015 SKQB 292

Smith, September 21, 2015 (QB15289)

Family Law – Spousal Support – Determination of Income
Family Law – Spousal Support – Duration of Spousal Support
Family Law – Spousal Support – Retroactive
Family Law – Spousal Support – Spousal Support Guidelines

The parties separated after 29 years of marriage. At trial the court ordered that the petitioner husband pay the respondent wife monthly spousal support of $8,000 until December 31, 2019, and, thereafter,

$3,000 per month. On appeal the Court of Appeal confirmed the $8,000 per month payment only until December 31, 2014, after which the respondent could bring an application if she still required spousal support. The petitioner applied to examine the respondent on her affidavit. The respondent was a retired teacher earning $50,000 per year. At trial it was determined that the petitioner's income for the purposes of spousal support was $431,000. The respondent argued that the petitioner earned between $627,000 and $1,155,000 per year since trial. The petitioner's submitted incomes did not differ substantially. The respondent invited the court to use her pre-retirement income of $80,700 and to use the petitioner's three-year average of $863,000 for a monthly spousal support award of between $24,000 and $32,000 as per the Spousal Support Advisory Guidelines (SSAG). The petitioner ceased paying spousal support in January 2015. He argued, as he had at trial, that his income was going to substantially decrease. The respondent applied for continued spousal support in February 2015. HELD: The court dismissed the petitioner's application to examine the respondent on her affidavit. The court concluded that the only reason the petitioner wanted to examine the respondent was to harangue her for retiring early and living in a larger house than necessary. The court agreed with the petitioner that the SSAG was not an appropriate tool in this case. The length of the marriage and the discrepancy in incomes led the court to conclude that continued spousal support was warranted. The petitioner was ordered to pay $8,000 per month from August 1, 2015, until further order of the court. If the hearing had occurred in February 2015 when the respondent applied the spousal support would have been reinstated. Therefore, the court ordered retroactive spousal support from March 1, 2015, to July 1, 2015, in the amount of $8,000 per month. The respondent was also awarded $3,000 in costs.

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R v. Ackert, 2015 SKQB 293

Tholl, September 22, 2015 (QB15305)

Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Sentence
Criminal Law – Assault
Criminal Law – Firearms
Criminal Law – Intimidation

The accused became angry when another patron of a gas bar refused to move his vehicle so that the accused did not have to back up his vehicle. The victim did back up his vehicle after the accused came towards him with a metal jack handle. The victim indicated that he felt

the accused was going to hit him. The accused testified that he only had a snow brush that he was going to tap on the victim's vehicle with to get his attention. He said he never held any object over his head. The trial judge found that the accused intentionally threatened the victim with a metal bar and moved towards him as he sat in his truck in an aggressive and agitated state demanding that he back up his vehicle. After trial, the accused was convicted of three Criminal Code offences: use threat of violence to a person (intimidation) contrary to s. 423(1)(a); commit an assault contrary to s. 266; and fail to comply with keeping the peace and being of good behaviour pursuant to a probation order contrary to s. 733.1(1). The accused and Crown entered a joint submission on sentencing that was accepted by the sentencing judge. He was sentenced to a suspended sentence, 12 months probation, and a firearms prohibition. He appealed on seven grounds, including: 1) the trial judge made an erroneous finding of fact because he did not use the metal jack handle; 2) the Crown had not proved all of the elements of the intimidation charge; 3) the victim should have been charged under s. 423(1)(a) for intimidating the accused; 4) appealing his assault conviction; 5) another officer should have been called as a witness; and 6) he was concerned about the non-contact provision of the probation order causing him difficulties.

HELD: The grounds of appeal were dealt with as follows: 1) the trial judge's finding with respect to the use of the metal jack handle were well supported by the evidence; 2) the trial judge did not err in applying s. 423(1)(a) of the Criminal Code to the facts of the matter; 3) there were no facts to support the accused's argument that the victim was threatening him with his truck. Also, it is not a defence to an offence to claim that another person should have also been charged with an offence; 4) there was ample evidence for the trial judge to conclude that the accused intentionally threatened to apply force and cause the victim to believe, on reasonable grounds, that he could do so; 5) the Crown can determine the witnesses it calls; and 6) the after-effects of a jointly proposed sentence, well within the appropriate range, were not grounds for an appeal of sentence. The non-contact provision was clearly justified based on the evidence at trial. He could apply to modify his terms of probation. All three convictions and the sentence were reasonable and well supported by the evidence.

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Singh v. 1329369 Alberta Ltd., 2015 SKQB 294

McMurtry, September 23, 2015 (QB15290)

Civil Procedure – Pleadings – Statement of Defence – Noting for Default – Application to Set Aside

The defendant company applied pursuant to Queen's Bench rule 3-21 to set aside a noting for default and the plaintiff sought summary judgment against the defendants. It argued that the defence raised no arguable issue. The plaintiff claimed under a mortgage and an amending agreement made by the defendant in 2011 in favour of the plaintiff. The mortgage and agreement had expired and the plaintiff claimed $1,140,600 with interest accruing at 24 percent from June 1, 2014, and foreclosure of the mortgage and agreement or sale of the mortgaged land. The statement of claim was served upon the defendant on July 9, 2014, and the plaintiff noted it for default on August 6, 2014. In late October the defendant filed its application to set aside with an affidavit deposed by a director that, because of miscommunications among the directors of the defendant, it had missed the filing deadline. It submitted that it had a meritorious defence. In a draft statement of defence tendered with the application, the defendant admitted the mortgage but disputed the amount owed. It argued that the plaintiff was claiming a criminal interest rate. The defendant led evidence regarding a payment that it had made to the plaintiff's counsel. However, the funds had been held in trust by the plaintiff's lawyer and then returned to the defendant because the tendering of same rested upon conditions that the plaintiff could not fill. Therefore the tendered payment had no impact on the interest charged because the plaintiff was never in a position to apply the funds to the mortgage.

HELD: The court dismissed the defendant's application. It found that the defendant's statement of defence did not raise a triable issue. The funds paid in trust to the plaintiff's lawyer did not affect the accrual of interest on the debt and that the amount owing on the mortgage and agreement and the calculation of interest could be resolved by a reference to the registrar pursuant to Queen's Bench rule 6-58. The court held that, pursuant to Queen's Bench rule 7-5, it could grant summary judgment to the plaintiff.

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Kirkpatrick v. Kraushaar, 2015 SKQB 295

Smith, September 22, 2015 (QB15300)

Family Law – Custody and Access – Interim Custody – Primary Residence
Family Law – Custody and Access – Interim – Mobility Rights – Primary Residence
Family Law – Custody and Access – Joint Custody

The petitioner mother and the respondent father were never married and only lived together briefly after their oldest child was born. Their

children were 17 and 6. The oldest child was living with the petitioner's parents. The petitioner was the primary parent of the younger child. The petitioner was married with another child and wished to relocate to British Columbia with the youngest child. The respondent argued that the relocation should not be allowed on an interim basis and should only be considered at trial. The petitioner tendered text messages between her and the respondent where the respondent agreed to the move. After the respondent consulted a lawyer, he no longer consented to the move. By this time the petitioner had purchased a home and resigned from her teaching job. The respondent was enrolled in a residential drug rehabilitation program and would not be available to care for the child until July 2016. The respondent also suffered from some health problems. The respondent proposed that the petitioner could relocate but that he have primary care of the child, on an interim basis, and that the child live with the respondent's mother. The petitioner argued that there was no genuine issue for trial because there was no question as to who the primary parent should be.

HELD: The proposed relocation did not pose any safety concerns for the child. The court agreed with the petitioner that there was no genuine issue for trial. The court would determine that it was in the best interests of the child for the petitioner to be his primary parent because of the respondent's history of addictions, his current placement in rehabilitation, and his serious health problems. The court held that the petitioner be the primary parent and the parties have joint custody. The petitioner was given the sole and exclusive decision-making authority with respect to the child's education and health. The court also ordered that the petitioner could relocate with the child to British Columbia pending final determination at trial. The court ordered access for the respondent after he completed his residential rehabilitation with the costs of travel being borne by the petitioner.

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Kiss v. Kiss, 2015 SKQB 296

Zarzeczny, September 22, 2015 (QB15306)

Family Law – Family Property – Interim Distribution

The parties each brought numerous applications for interim relief regarding their family property. They had separated but continued to live in the same residence. They owned a family farm, which they operated through a corporate entity, and each held a 50 percent interest in it. The petitioner was responsible for the operation of the farming business and the respondent acted as bookkeeper. The corporation paid a salary of $2,000 per month to the respondent and issued

dividend payments to each. The petitioner inherited a large farm from a relative and the couple moved into the relative's farm house, and their son and his family moved into the family home. The parties also owned a home in Arizona. The petitioner and the respondent both sought exclusive possession of the relative's home. The respondent applied for interim distribution of family property and spousal support as well as continuing employment with the corporation. The court was requested to make an interim order for the disposition of family property and the regulation of the operation of the farming corporation and the petitioner's beneficial interest in the relative's estate.
HELD: The court ordered that the petitioner be given exclusive possession of the relative's home until further order or agreement. The respondent was given exclusive possession of the Arizona home. Rather than order spousal support and interim distribution of family property, the court ordered that the respondent continue as bookkeeper at the same salary and that the petitioner receive a salary in that amount. The corporation should pay each of them a further monthly sum of $2,500 as a dividend. The corporation's general operating account would require both parties' signatures on cheques and withdrawals. All income earned or received by it would be deposited in it with the parties each receiving copies of monthly operating statements for the account from the corporation's accountants. Counsel were instructed to confer on the terms of the draft interim order to be issued including any potential consent orders. If consensus could not be reached, the counsel were given leave to present the court with draft orders reflecting those orders authorized by the interim judgment within three days of it and the court would then authorize the orders that it could actually issue after taking the drafts under advisement.

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Prairie Water Ltd. v. Inland Aggregates Ltd., 2015 SKQB 297

Rothery, September 22, 2015 (QB15291)

Civil Procedure – Pleadings – Statement of Claim – Striking Out – Want of Prosecution

The defendant applied to the court pursuant to Queen's Bench rule 4-44 to exercise its discretion and dismiss the plaintiff's claim for want of prosecution. The plaintiff resisted on the ground that the delay was excusable and the interests of justice required the action to proceed. The plaintiff's former counsel issued a statement of claim against the defendant in June 2006 and pleadings were closed by the following August. The only document filed in court thereafter was a notice of change of solicitor for the plaintiff in July 2015. The change was

initiated when the plaintiff discovered that its counsel had been disbarred two years earlier. The directors of the plaintiff provided evidence that the delay in prosecuting the claim was caused by their preoccupation with illnesses and deaths of family members.
HELD: The application was granted. The court found that the delay of nine years was inordinate. It was also inexcusable. The excuses offered by the directors had not explained the delay; they had managed to continue to operate their business during the time in question. The defendant would suffer prejudice in mounting its case as none of its current employees were involved in the events. Witnesses would be asked to recall the events of more than 15 years ago. The issue of whether the defendants were required to remediate the land was a statutory obligation and not part of its contractual obligations to the plaintiff.

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Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. K-Bro Linens System Inc., 2015 SKQB 300

Barrington-Foote, September 23, 2015 (QB15294)

Administrative Law – Judicial Review – Labour Relations Board
Labour Law – Labour Relations Board

The applicant union was certified to represent a bargaining unit made up of employees at the Regina laundry facility presently operated by the Regina Qu'Appelle Health Region (RQHR). Prior to 2012, labour and human relations of the province's health regions were centrally administered by the Saskatchewan Association of Health Regions (SAHO). In 2012, it made changes to its organizational structure that involved establishment of a new mandate for the provision of shared services to the health sector, changing its name to Health Shared Services Saskatchewan (3sHealth) and transferring its responsibility for collective bargaining to it. 3sHealth then began providing administrative and support services to RQHR and other health regions. By a Master Services Agreement (MSA) entered into in December 2013, 3sHealth contracted with the respondent K-Bro Linens to launder linens for the RQHR and other health districts. K-Bro would provide the services in a new laundry facility owned by them in Regina that resulted in the closure of the RQHR laundry facility and the loss of the jobs of all employees there. The union applied to the Labour Relations Board for various forms of relief, including common employer and successor declarations. The board dismissed the application and the union's true employer application pursuant to s. 2(g)(iii) of the Act. The union then applied for judicial review of the decision. It argued that the board had failed to fulfil its statutory mandate to interpret s. 37

and s. 37.3 of The Trade Union Act, committing reviewable errors of fact. With respect to the first ground, the union submitted that the court should focus on the fundamental purpose of the Act in its interpretation of the sections in question, as recognizing and protecting collective bargaining rights. If the effect of re-organization or contracting out was to undermine an existing bargaining relationship, the board was obliged to find that successorship. The parties agreed that the standard of review was reasonableness.
HELD: The court referred the matter back to the board because of the board's failure to explain how it had dealt with the issue of whether K-Bro was a common and/or related employer. Otherwise, the court found that the board's conclusions related to the issues raised by the union were justified, transparent and intelligible and were possible acceptable outcomes.

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R. v. Charles, 2015 SKQB 302

Allbright, September 25, 2015 (QB15295)

Criminal Law – Assault – Sexual Assault – Sentencing
Criminal Law – Sentencing – Aboriginal Offender

The accused was convicted of committing a sexual assault on a 15-year-old victim, contrary to s. 271 of the Criminal Code. For the purposes of sentencing, an intensive Gladue report was prepared. The offence occurred in Grandmother's Bay, where the offender, a 33-year-old Aboriginal man, had lived for the majority of his life, except for a period of one year when he attended grade 9 at a school in Lac La Ronge. The offence had occurred at a party at the victim's grandmother's house. After she had consumed a substantial amount of alcohol, the victim fell asleep in the living room and was awoken by the offender having sexual intercourse with her. She managed to leave the scene and reported the crime to the RCMP. The Gladue report detailed the dysfunctional background of the offender. His grandparents and his parents had all attended residential schools and been harmed sexually and emotionally. As he was growing up, the offender witnessed the manner in which alcohol consumption led to sexual activity among the adults. His mother was 15 when he was born. He was disabled at three months of age as a result of his father leaving a candle burning by his crib. A blanket caught fire and the toes of both of the offender's feet were burned off. This injury impaired the accused's ability to walk and, later in his life, adversely affected his ability to work because of mobility problems. He had had a number of surgeries and hospitalizations to deal with the damage to his feet. The accused's parents both abused alcohol and his father physically abused

his mother. Although he had stopped attending school at the age of 15, the accused had obtained his GED during his twenties. This was his first criminal offence and he had no known cognitive deficits or mental disabilities. The offender has four children with his spouse of 18 years. They both had problems with alcohol and substance abuse but at the time of sentencing reported that their relationship was stable and that each of them were trying not to drink or use drugs. The accused recognized that he had problems with alcohol and was attending Alcoholic Anonymous meetings. The offender was employed part-time as a security guard at the Band school. He had expressed remorse for his actions. There were a lot of programs available to him through his band's health, addiction and sexual abuse counselling services within or near the community. The Crown submitted that the usual sentence for this offence would be between three and four years' incarceration. However in light of the Gladue factors, a sentence of two years less a day with a significant period of probation was recommended. The defence argued that as a first-time offender, the accused should be sentenced to one year imprisonment and a probation period devoted to rehabilitative program assistance.

HELD: The court sentenced the accused to 22 months incarceration in a provincial correctional centre to be followed by probation for a period of 18 months with strict terms and to be supervised by the offender's First Nation community. The aggravating circumstances were the young age of the victim and the nature of the assault. The mitigating factors were that the offender had no prior record and his sincere expression of remorse. The court considered the offender's disadvantaged background as especially important among the mitigating factors.

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Shirkie v. Shirkie, 2015 SKQB 303

Elson, September 25, 2015 (QB15296)

Bankruptcy and Insolvency – Family Property Division – Provable Claim
Family Law – Division of Family Property – Bankruptcy

The respondent applied pursuant to s. 69.4 of the Bankruptcy and Insolvency Act (BIA) to the court seeking an order that the stay of her family property claim, caused by the petitioner's assignment in bankruptcy, be lifted and the matter be permitted to continue but only with respect to property exempt from seizure by the trustee. The petitioner petitioned for divorce in 2008 and the respondent filed her answer and counter-petition in 2014. The petitioner sought equal division of the matrimonial home and the matrimonial property and in his property statement he set the value of all assets at $1,200,800 with

total debts of $391,900. The respondent sough an unequal division of the family property and ascribed a higher value to the real estate but was not able to provide values of the petitioner's registered saving plans. In May 2014 the respondent successfully applied for interim spousal support in the amount of $7,500 per month. On June 23, 2014, the petitioner filed an assignment in bankruptcy. In November 2013, the trustee had given notice of a proposal to creditors but the list of creditors had not included the respondent. The trustee's statement of affairs listed the petitioner's assets and valued them at $1,099,600, which included the value of assets jointly held with the respondent as well as property categorized as exempt. The latter included the household furnishings, personal effects, the Saskatchewan Pension Plan, two RRSPs, two life insurance policies, a truck, computer and tools, estimated as having a value of $158,600. The list did not include the petitioner's interest in the family home. The trustee took the position that his interest was not exempted and proposed that all real property, including the family home, be sold or that the respondent acquire the petitioner's interest in the properties from the bankrupt estate. The respondent argued that she should be able to pursue her family property claim with respect to the exempt assets and that her claim would have no impact on the assets within the estate but for her right to file a provable claim for those assets. The trustee contended that the respondent's application was improperly before the court as she was neither a creditor to the estate nor was she a director of a corporation with an interest in the estate. The stay should not be granted because the respondent had no vested title or interest in the assets with the trustee for the benefit of the creditors. The assets consisted of all of the property in the petitioner's name as well as his interest in the jointly held property that by virtue of the bankruptcy had become severed from the respondent's interest. Without a judgment for a liquidated sum, the respondent had no claim or interest in any of the property. Further, the respondent had not produced any evidence that she was prejudiced by the stay.

HELD: The court found that the respondent's family property claim was provable in bankruptcy pursuant to ss. 121 and 135 of the BIA. Her claim arose before the date of the bankruptcy and at the date of the property division application. As a creditor, the respondent's provable claim was stayed by s. 69.3(1). The court granted the application to lift the stay of proceedings in respect of the respondent's claim for an unequal division of family property only with respect to the division of assets exempt from seizure. The court found that the continued operation of the stay would prejudice the respondent because it would prevent her from pursuing her family property claim in respect of exempt assets. With respect to the non-exempt assets, the court found that a lifting of the stay was not required because it had found that her family property claim was a provable claim in bankruptcy, which she could pursue similar to any other creditor. The court had jurisdiction to hear the matter on the basis of s. 183 of the BIA.

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Stockton v. Simoneau, 2015 SKQB 304

Elson, September 25, 2015 (QB15297)

Family Law – Child Support – Variation

The petitioner applied for variation of a child support order on the grounds of a change in income. He argued that the reduction in his income constituted a material change in circumstances justifying a reduction in the amount of support from $800 per month for his child's support, based upon an annual income of $95,000, to $583 per month, based upon his current annual income of $70,200. The petitioner explained that he had retired from his position as an engineer with CP Rail because he had 35.8 years of pensionable service, which was more service than required to reach the maximum pension payable. His second explanation for retiring was that he had heard that CP Rail was inclined to dismiss long-time employees for even minor infractions in order to avoid paying their pensions. By retiring early, he protected his pension.
HELD: The application was denied. The material change in circumstances did not justify a variation. The petitioner had not presented any evidence as to the source of his belief regarding his former employer's practice, the nature of the pension plan and whether his interest in it was vested. The court found that pensioner's interest was vested pursuant to s. 17 of the Pension Standards Act, 1985, regardless of whether he was dismissed. The court found that the decision to retire was not reasonable in light of his support obligation and that the petitioner was intentionally underemployed.

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Toronto Dominion Bank v. Mitchelson, 2015 SKQB 305

McMurtry, September 25, 2015 (QB15298)

Civil Procedure – Pleadings – Statement of Defence – Striking Out

The plaintiff applied, pursuant to Queen's Bench rule 7-9, for an order to strike the defendants' statement of defence to their claim under a mortgage and a collateral mortgage made by the defendants in favour of the plaintiff. Under rule 7-5(1), they sought an order for summary judgment and for an order nisi for judicial sale. The plaintiff claimed that the defendants defaulted and owed $302,400 and $242,500 on each of the mortgages. The defendants' statement of defence asserted that

they disagreed with the amount claimed by the plaintiff but acknowledged the mortgages and that they were in arrears. They requested mediation of the matters in dispute. The plaintiffs argued that the statement of defence raised no reasonable defence as the matter could be dealt with by reference under Queen's Bench rule 6-58 and that it had served notice of its intention to commence an action against the defendants on the Provincial Mediation Board a year earlier. The board had met with the parties to endeavor to reach an arrangement for payment of the defendants' indebtedness so they had had their opportunity to mediate.
HELD: The court granted the application and made an order striking the statement of defence. If the defendant wished to seek an accounting of the amount owing, they could make that request to the chambers judge hearing the plaintiff's application for order nisi. The court agreed that an order nisi for sale was appropriate but that the plaintiff had to make amendments to the draft order before it could be issued.

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Hilbig v. Pasloski, 2015 SKQB 306

Danyliuk, October 1, 2015 (QB15307)

Statutes – Interpretation – Adult Guardianship and Co-decision-making Act, Section 67
Guardianship – Dependant Adult – Review of Appointment

The applicant husband was married for 69 years to his wife, Agnes, who had been placed in a nursing home because of her dementia. The couple's daughter, the respondent in this application, had been designated as her mother's guardian by an order made in 2013. The applicant initiated a review a year later, which was directed into mediation. An agreement was reached wherein the respondent's role was continued. Access to Agnes was set for the applicant to three days per week from 3:00 to 6:30 pm with the stipulation that a family member be present at the end of each visit. A healthcare provider was to be present only to observe and assist. Any problems were to be directed to the respondent. The applicant experienced problems with his access and filed a number of affidavits indicating that the respondent was preventing him from seeing Agnes sufficiently and expressing fears that the respondent was conducting his wife's affairs improperly. For example, the applicant took exception to the respondent's use of Agnes's funds to pay legal costs of these proceedings. His lawyer had requested that the company that held his wife's funds not permit any withdrawals from her investments and the company assented. The funds were owned by Agnes and the applicant's consent was not required, but the respondent was unable to

draw down moneys she needed to pay her mother's expenses. The applicant's lawyer had also arranged for a retired police officer to enter the nursing home to investigate the situation without the consent of Agnes, the respondent or even with the knowledge of the applicant. The investigator misrepresented himself and was able to film Agnes without her consent. The affidavit of this investigator was submitted to the court. The applicant brought this application to remove the respondent and be substituted himself. He also sought specific access to his wife without interference from his family and for the respondent to provide an accounting. The respondent resisted removal of her guardianship and agreed to the accounting. She also requested the court to deal with the applicant's blocking of her access to her mother's funds.

HELD: The court dismissed the application to remove the respondent as guardian. The court ordered that the applicant have access to Agnes under specific terms, listed in detail as part of the judgment. It also ordered that the respondent should account for her handling of the financial affairs and that the company in charge of Agnes' affairs be advised that the respondent had the ongoing authority to deal with her mother's assets. With respect to costs, the court denied the respondent's claim for solicitor-client costs. However, as the applicant's position was fundamentally flawed and the respondent had met with substantial success, costs were set at $1,000. In addition, the court struck out the affidavit of the investigator, censured the applicant's counsel and awarded costs to the respondent in the amount of $500 because of the hiring of the investigator and the submission of his inappropriate affidavit.

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Law Society of Saskatchewan v. Mattison, 2015 SKQB 323

Layh, October 13, 2015 (QB15319)

Professions and Occupations – Lawyers – Injunction from Practicing
Professions and Occupations – Lawyers – Law Society
Statutes – Interpretation – Legal Profession Act, Section 30, Section 32, Section 82

The applicant Law Society applied for an injunction to prevent the respondent from practicing law on the grounds that he was or was likely to act in contravention of The Legal Profession Act, 1990 or the Rules of the Law Society of Saskatchewan. The respondent changed his status to "inactive" at the end of 2012. Thereafter the applicant received a number of complaints that the respondent was practicing as a lawyer. He was placed on interim discipline suspension on December 1, 2013. The issue was whether, pursuant to s. 82 of the Act, the court should

enjoin the respondent from doing any act or thing that contravenes the Act or Rules. Specific inquiries dealt with by the court to make the determination were: 1) whether the respondent was a person that could be the subject to an injunction under s. 82 of the Act; 2) if he was, was the respondent "acting" or "likely to act" in contravention of the Act; and 3) if yes, should the court grant the injunction.
HELD: The court dealt with the inquiries as follows: 1) the respondent was unlike most respondents in s. 82 applications because he held a law degree, had been admitted as a member of the applicant society, and had never been disbarred from the practice of law. The applicant argued that ss. 30 and 32 of the Act are broad enough to include the respondent as a person against whom an injunction may be ordered. The court had to determine first whether the respondent was a member of the applicant society or whether he held a certificate. He did not hold an annual practice certificate so could not do any of the things enumerated under s. 30 of the Act. The respondent was also unable to hold himself out to be a lawyer or use a name that may imply he was one, pursuant to s. 32(1), because he did not have a certificate and did not come within a rule created under ss. 10(i) of the Act. The respondent was also prohibited from using certain nomenclature as outlined in s. 32(2) of the Act because he was not a member in good standing due to his suspension. Therefore, the respondent was a person subject to the injunctive powers given to the court under s. 82; 2) no proof of actual contravention was necessary. The court easily concluded that the respondent was likely to act in contravention of the Act given the affidavits sworn by members of the public. The court determined that a summary hearing was not precluded even though the respondent contradicted some of the facts in the affidavits filed in support of the applicant. The court held that the respondent's past conduct informed what he was likely to do in the future; and 3) the public's interest was paramount and little hardship would be occasioned on the respondent if he was prohibited from doing what he was already not supposed to be doing. The applicant was successful and the court ordered the injunction with nine specific terms outlining what the respondent was enjoined from doing.

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Ottenbreit v. Paul, 2015 SKQB 326

Barrington-Foote, October 15, 2015 (QB15321)

Landlord and Tenant – Appeal – Residential Tenancies Act, Section 72
Landlord and Tenant – Appeal – Damages
Residential Tenancies Act, Section 72 – Appeal

The landlord appealed the decision of a hearing officer pursuant to s.

72(1) of The Residential Tenancies Act, 2006 that found the landlord liable to pay the tenant $8,325 for personal property retained by the landlord and the tenant liable to pay the landlord $4,450 for loss of rental income and repairs to the rental unit. The landlord was ordered to pay $3,875. The landlord indicated that there was no evidence at the hearing as to the value of the tenant's goods but the notes of the hearing officer provided to the court did refer to evidence of their value. There was an original order awarding the tenant $8,700, but that order was rescinded and the matter was reheard because the landlord did not have notice. There were eight grounds of appeal argued by the landlord. The court analyzed the following issues: 1) whether the hearing officer's notes should form part of the record on the appeal; 2) charter issues and breaches of the Act; 3) whether the hearing officer erred in law by awarding the tenant compensation in an amount in excess of that specified in his claim form; 4) whether the hearing officer was biased because he rendered the first and second decision or because of his demeanour; 5) did the hearing officer err in law by awarding compensation of $8,325 to the tenant because there was no evidence as to the goods left at the rental unit, and as to the value of those goods; 6) whether the hearing officer erred in law by failing to take account of relevant evidence relating to the credibility of the tenant, or to provide adequate reasons relating to his assessment of credibility.

HELD: The issues were discussed as follows: 1) case law supported the conclusion that the notes should form part of the record; however, the court determined that there was no way to assess their accuracy, completeness, or to confirm that all the notes were made at the time of the hearing. Therefore, the notes were not part of the record on appeal; 2) the landlord's Charter rights were not engaged because s. 7 does not oblige state actors to guarantee security of the person or to conduct every hearing in accordance with the principles of fundamental justice. There was no legislation or other state action in this case that deprived the landlord of her security of the person. The landlord's additional Charter arguments were also dismissed because the court found them irrelevant; 3) the tenant only claimed $2,000 in his claim form. The court held that it was not open to the hearing officer to award $8,700 to the tenant in the first decision when the landlord did not have notice; however, that decision was rescinded and the landlord knew of the award. The landlord never took issue with the tenant's claim for $8,700 prior to the new decision being issued. The court dismissed the appeal with respect to this ground; 4) just because a decision maker has previously decided a case does not necessarily raise a reasonable apprehension of bias if it is reheard by the same decision maker. The first decision was rescinded because the landlord did not have notice of the hearing and no conclusions were made regarding credibility. Also, the landlord should have raised the issue of bias before the next hearing. The court also found that the facts identified by the landlord as evidence of bias were not sufficient to demonstrate a real likelihood

or probability of bias caused by the hearing officer's demeanour; 5) there was some relevant evidence because the tenant gave oral evidence as to the goods left at the rental unit and their value. The court did not find anything to suggest that the hearing officer ignored relevant evidence, considered irrelevant evidence, or mischaracterized the evidence; 6) credibility was the central issue relating to the tenant's claim for compensation for lost goods. Credibility is a question of fact and therefore the hearing officer's findings as to credibility were not subject to appeal under s. 72 of the Act. The landlord, however, alleged an error of law by arguing that the hearing officer failed to take into account evidence that was relevant to credibility. The hearing officer did provide reasons but the court found that they failed to meet the minimum standard, and there was, therefore, an error of law. It appeared that the hearing officer accepted the evidence of the landlord wherever that evidence conflicted with that of the tenant and yet he did not explain why he chose to accept the tenant's evidence as to the nature and value of goods. The appeal was allowed and a rehearing by a different hearing officer was ordered.

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Brayford v. Brayford Estate, 2015 SKQB 336

Zuk, October 26, 2015 (QB15336)

Wills and Estates – Will – Specific Gift
Adult Guardianship and Co-decision-making Act – Personal and Property Guardians
Wills and Estates – Estate Administration – Right of Retainer

The applicant was the second wife of the deceased testator. In 2006 the deceased made a will appointing his sons (the respondents) as his executors and among the bequests, he gave the applicant the balance in a bank account. In 2008, the applicant was granted an order appointing her as her husband's personal and property guardian. The deceased held joint investment accounts with two firms. Before his death and after her appointment as guardian, funds from these accounts were transferred to a bank account in the joint names of the applicant and the deceased. The respondents brought an action against the applicant, alleging that she either personally caused the transfer to be made or allowed the deceased to make the transfer when he was not mentally competent, thereby breaching her fiduciary duty as his property guardian. But for these withdrawals, the funds in the investment accounts would have formed part of the residue of the estate. The applicant stated that the deceased acted on his own, and the financial firms were satisfied that he was mentally competent to do so and she was not involved in the transfers. The applicant then brought this

application for payment by the respondents of the deceased's specific bequest to her under his will. At the time of his death, there was more than $99,000 in the bank account. The respondents had refused to pay her, arguing that they were entitled to withhold payment pending the outcome of a court action against her. They asserted their right to set-off and withhold payment of the account proceeds to the applicant as she was holding an asset belonging to the estate and it would be unjust to be forced to pay her bequest while their counter-claim was pending. The applicant relied on the exception to the principle of Cherry v. Boultbee, namely that executors were not entitled to claim a right of retainer (a form of set-off) against monies allegedly owing to the beneficiary of the estate where the will makes a specific bequest gift to them.

HELD: The application was denied. The court found that the deceased's testamentary bequest to the applicant fell within the exception to the right of retainer. However, the respondents established their claim to equitable set-off: 1) as the parties relying on set-off, they showed equitable ground for protection from the demand; 2) the equitable ground went to the very root of their claim; and 3) the respective claims of the parties were so closely connected that it would be unjust to allow the applicant to enforce payment to her of the funds without taking into account the executors' cross-claim.

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