The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 18, No. 9 **May 1, 2016**

Subject Index

Dukart v. Quantrill (Jones), 2015 SKCA 138

Caldwell Herauf Whitmore, December 10, 2015 (CA15138)

Family Law – Custody and Access – Appeal

The appellant father appealed from the trial decision of a Queen's Bench judge refusing his request to order a full shared custody regime (see: 2014 SKQB 391). The trial judge ordered that the child's primary residence be with the respondent and that the appellant would have weekend parenting time of 3 days and 4.5 hours in a two-week period. The parties had separated in 2010 and began a shared custody arrangement at that time. The appellant remained in the family home in Bienfait and the respondent lived in Lampman, a distance of 28 kilometres. The arrangement was acknowledged in a formal separation agreement executed in 2011, specifying that the parties would have joint and shared custody and that the appellant would have parenting time of 5.5 days out of a two-week period. Problems arose with respect to the parenting time and the appellant brought an application for a full shared regime. The appellant was able to change his shifts at a mine so that he worked days only from 7:00 am to 7:00 pm. An interim order was made in 2013 providing that the parties would have interim joint custody and shared parenting of the child and increasing the appellant's parenting time to six days per two-week period. The daughter attended school in Lampman and the appellant drove her each day to school during his parenting time. He also arranged that if he was unable to do so, his wife or his father would drive. The trial judge based her decision not to award shared parenting on the appellant's work schedule and the distance between the communities

in which the parties lived.

HELD: The appeal was granted and the judgment below set aside. The court ordered that the parties should have joint and shared custody of their daughter. The court found that the trial judge committed a number of errors in that: 1) she concluded the appellant's schedule was an impediment to shared custody without providing an explanation and in the face of the appellant's evidence, and therefore committed a palpable and overriding error of fact; 2) her finding that the distance between the two communities was an impediment to shared parenting as well as her concern about winter driving conditions and that the child would not be able to participate in extra-curricular activities at her school were reversible errors. A commuting time of 25 minutes was not a hardship and winter driving conditions affected many schoolchildren in the province. There was no evidence at trial regarding extra-curricular activities; 3) she failed to weigh the separation agreement, the interim order or to acknowledge the long-standing parenting arrangements and importance of the status quo, and thereby committed a material error; and 4) she ignored the principle of maximum contact with the appellant as stipulated in s. 5(a) of The Children's Law Act, 1997.

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R. v. Chanalquay, 2015 SKCA 141

Richards Lane Whitmore, December 17, 2015 (CA15141)

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

The respondent was convicted of sexual assault for having intercourse with a woman who had fallen asleep during the course of a drinking party. The Crown requested a sentence in the range of three to five years. The sentencing judge sentenced the respondent to imprisonment for two years less a day based upon his assessment of the Gladue factors present in the respondent's background affecting his moral culpability. The Crown appealed the sentence as demonstrably unfit. The respondent, a 48-year-old Aboriginal man, had lived on the Buffalo River Reserve for his entire life. His parents both abused alcohol and as a consequence, the respondent was partially raised by his grandparents. He lived a traditional life with them and did not achieve more than a grade eight education. He had managed to complete a heavy equipment operator's course and had worked as an operator in Fort McMurray. At the time of the offence, he was renovating homes on the reserve. He advised that he had been sexually abused as a child. His drinking pattern was to consume alcohol about two nights per month but before the offence occurred, he had been

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intoxicated for two days. The respondent had a dated and limited criminal record consisting of convictions between 1986 and 2006 for failing to remain at the scene of an accident and driving over .08. He was in a long-term stable relationship and his common-law spouse testified that she would support him after the conviction. Many letters were filed with the court advising of his good character and the valued role he played in the community. The respondent was also solely responsible for the care of his father. The trial judge found that the respondent's commission of the offence was out of character and that he would impose a lower sentence despite a three-year jail term being the starting point for this type of offence. This was in light of the Gladue considerations and the mitigating factors: 1) there had been no violence involved; 2)the accused had significant community support; 3) he did not have a significant criminal record; and 4) he had complied with his release conditions while awaiting trial.
HELD: The appeal was allowed. The court found that it could sustain the sentence imposed by the sentencing judge but added an 18 month probation order with conditions such as that the respondent would report to a probation officer and take such programming in relation to alcohol or sexual offending as directed by the officer. The court found that the sentence had not taken into adequate account the gravity of the offence, the situation of the victim, the need to reintegrate the respondent into his community and his need to address his drinking problem. The sentencing judge had not properly applied the principles set out in Gladue and Ipeelee. His finding of reduced moral culpability rooted in Gladue factors did not automatically lead to a shorter period of incarceration and he should have asked how a restorative justice approach might have allowed him to reduce or limit the term of imprisonment imposed upon the respondent while still meeting the sentencing objectives of the case before him.

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R. v. Larson, 2015 SKCA 143

Jackson Ottenbreit Ryan-Froslie, December 21, 2015 (CA15143)

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

The applicant applied for leave to appeal. He had been convicted after trial in Provincial Court on the charge of driving over .08 contrary to ss. 253(1)(b) and 255(1) of the Criminal Code. The applicant had argued unsuccessfully at trial that his s. 10(b) Charter right to counsel had been infringed. He appealed his conviction only on the s. 10(b) issue that the trial judge had erred in not finding a breach on the facts as

found. The summary conviction appeal judge reviewed the findings and the law and dismissed the appeal (see: 2014 SKQB 418). The issue was whether the appeal court judge erred when he determined that the trial judge correctly found that the applicant's right to counsel had not been denied by the police. The applicant had argued before the appeal court judge and the Court of Appeal that the arresting officer could have done more to help him contact his counsel of choice. The officer took control of the contact process and therefore took on extra duties in respect of contacting counsel, and that he failed to carry them out. In this case, the applicant argued that the officer should have tried to find another telephone number at which to call the lawyer when it was clear that he wasn't going to respond to the voicemail messages left at the number provided by the applicant.
HELD: Leave to appeal was granted and the appeal dismissed. The court found with respect to the applicant's arguments that: 1) the appeal court judge was correct in finding that the trial judge had not erred. The police may assume control of dialing the phone. The officer facilitated the applicant's request to contact a specific lawyer by giving him his cell phone so that he could retrieve from it and provide to the officer, the lawyer's telephone number. The officer tried several times to reach the lawyer at that number. The applicant never helped himself by requesting the officer to find another number. It would be unwise to place an obligation on the police to independently suggest such initiatives as that would encourage them to take over the contact process. When the applicant's counsel of choice had not responded, the officer reminded the applicant that he could contact Legal Aid. The applicant made the decision to do so and advised the police that he was satisfied with the discussion he had with duty counsel.

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R. v. Scott, 2015 SKCA 144

Jackson Caldwell Herauf, December 21, 2015 (CA15144)

Constitutional Law – Charter of Rights, Section 11(b) – Stay – Appeal

The respondent was charged with sexual assault under s. 271 of the Criminal Code and with sexual interference under s. 151 of the Code. He made a successful Charter application that his right to trial within a reasonable time pursuant to s. 11(b) of the Charter had been violated and the trial judge stayed the charges against him under s. 24(1) of the Charter. The Crown appealed the decision. It argued that the trial judge erred: 1) by finding a s. 11(b) violation based upon the entire delay, regardless of who caused it. The trial judge stated in her judgment that: "a period of 43.5 months to bring a matter, complicated only by a forensic DNA analysis but otherwise straightforward, to

Regina Qu'Appelle Health Region (Mental Health Inpatient Services) v. G. (L.)

Regina Soccer Association Inc. v. Saskatchewan Soccer Association Inc.

Tluchak Estate v. Bayer Inc.

Vlezko v. Toroshchin

Wal-mart Canada Corp. v. Saskatoon (City)

Western Honda v. Ferreira

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conclusion is not reasonable"; 2) in her miscalculation of the total time and misattribution of delay in: (a) assessing that the time runs from when the first information was sworn and relying upon the cases of R. v. Carter, R. v. Kalanj and R. v. Antoine. In this instance, the first information was sworn in October 2010 and withdrawn in February 2011 because of defective wording. The second information was sworn in November 2011; (b) in failing to infer that the respondent waived the delay; and (c) in making misattributions of institutional delay to inherent delay.
HELD: The appeal was dismissed. With respect to each ground the court found that: 1) the trial judge had not erred because the rest of the judgment explained how she had attributed the delays to both the Crown and the respondent; 2a)the trial judge had not erred in relying upon the decisions cited. The Crown failed in its attempt to distinguish them. The Crown had also failed to explain why it took eight months to replace a defective information with a minor change; 2b) the trial judge had not erred when she found no instances of waiver by the respondent and therefore the Crown had not met the burden of showing that a waiver should be inferred; 2c) the trial judge's conclusions that the period of institutional delay was within the Morin guidelines, regardless of some misattributions; and 3) that it would give deference to the trial judge's findings of prejudice caused to the respondent because of the delay.

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R. v. Madraga, 2015 SKCA 145

Ottenbreit Caldwell Ryan-Froslie, December 21, 2015 (CA15145)

Criminal Law –Appeal – Conviction – Disclosure
Criminal Procedure – Court of Appeal Criminal Appeal Rules (Saskatchewan)
Criminal Law – Appeal – Procedure

The appellant was convicted of sexual assault under s. 271 of the Criminal Code and sentenced to imprisonment for six years. He then appealed against the conviction raising a number of grounds in his notice of appeal, including issues regarding the effectiveness of his trial counsel's representation. At the time of appeal the appellant was self-represented and the court ordered that he have court-appointed counsel. The counsel who agreed to represent him filed the appeal factum and then advised the Crown that he intended to argue ineffective representation by trial counsel as a ground of appeal but needed disclosure, so that he could assess whether there was merit to the ground. Such a ground usually entailed a fresh evidence application. Counsel was unsuccessful in his negotiations with the

Crown to obtain both an adjournment and the same disclosure that it had provided to the appellant's trial counsel. He then filed a motion requesting an adjournment as well as an order compelling the Crown to provide him with the disclosure. Before the hearing, the appellant's trial counsel gave the appellate counsel part or all of his file, and at the hearing appellate counsel argued that, having received it, he would make an inventory of what disclosure he had and provide that disclosure to the Crown. If anything was missing from the original disclosure, the Crown would provide the missing material to him. The Crown argued that the appellant's rights to disclosure were curtailed because of his conviction. The Court of Appeal Criminal Appeal Rules required the appellant to address all of his arguments in his factum and to argue his case on only those grounds, and thus disclosure was unnecessary.

HELD: The application was allowed and the appeal adjourned. The Crown was ordered to provide the appellant's counsel the trial disclosure in its possession not received by him from trial counsel based on the inventory prepared by him. There was nothing in the Court of Appeal Criminal Appeal Rules that would, in the circumstances of this case, militate against the appellant having the opportunity to obtain disclosure to assess the merits of an issue in his notice of appeal. The court held that when disclosure is sought on appeal from conviction in anticipation of a fresh evidence application, the accused must show that there is a connection between the request for production of disclosure and the proposed fresh evidence application that such production will assist the accused in obtaining material that will be admissible as fresh evidence and that there is some reasonable possibility that the evidence to which the production request is linked may be received as fresh evidence on appeal.

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R. v. Franc, 2015 SKCA 146

Richards Whitmore Ryan-Froslie, December 21, 2015 (CA15146)

Criminal Procedure – Court of Appeal Criminal Appeal Rules (Saskatchewan)
Criminal Law – Appeal – Notice of Appeal – Extension of Time for Service
Criminal Law – Appeal – Procedure

The applicant respondent was acquitted of the charge of trafficking cocaine in Provincial Court. The Crown appealed the acquittal by electronically filing a notice of appeal within the 30-day period as required by rule 8(2) of The Court of Appeal Criminal Appeal Rules (Saskatchewan). It was unable to serve the applicant within that

period, but after serving him, it applied to extend the time for service in accordance with s. 678(2) of the Criminal Code. On the return date for that application, the applicant failed to appear in chambers. The chambers judge granted an order extending the time for service to a date one day beyond the actual date of service. The applicant then filed a notice of motion requesting a hearing of his argument against the Crown's application to extend time. The applicant submitted that he had not responded to the Crown's application because he had not understood the meaning of the s. 678(2) application. In light of the fact that the Code did not contain a right of appeal from an order granting an extension of time pursuant to s. 678(2), counsel for the applicant argued that s. 7 of the Charter trumped the Code section, thereby allowing the decision to be appealed.
HELD: The application was dismissed. The court had no jurisdiction to hear it as there was no right of appeal and found that s. 7 of the Charter was not applicable.

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Lukian v. Saskatchewan Government Insurance, 2015 SKCA 147

Richards Lane Ryan-Froslie, December 22, 2015 (CA15147)

Automobile Accident Insurance Act – Appeal
Automobile Accident Insurance Act – Burden of Proof
Automobile Accident Insurance Act – Income Replacement Benefits

The appellant was in a motor vehicle accident and was unable to continue to work as a waitress and housekeeper at a hospital. The respondent discontinued her benefits under The Automobile Accident Insurance Act (AAI) on the basis that she was able to substantially perform the essential duties of her employment. Her appeal to the Automobile Injury Appeal Commission was dismissed because the commission held that the appellant did not establish that lifting a mattress was an essential duty of her employment, and she did not establish that she could not safely lift a mattress. The appellant appealed on the basis that the commission improperly reversed the burden of proof with respect to her claim because they required her to show she could not perform the job rather than requiring the respondent to establish that she could perform it. The appellant had a witness testify before the commission that a housekeeper at the hospital was required to lift the heavy rubber mattresses to thoroughly clean them upon discharge of a patient. The witness also acknowledged that it was standard practice to have two people lift the mattresses but that because of staff shortages two people were not always available. The appellant also testified indicating that for normal cleaning, which sometimes involved lifting a mattress, two people

were not involved. The appellant indicated that she could not lift a mattress without "flare-ups".
HELD: The appeal was allowed because the commission improperly reversed the onus of proof. The commission's decision was set aside and the matter was remitted back for consideration. The respondent bore the onus of establishing that the appellant was no longer entitled to receive the income replacement benefits by establishing that she was substantially able to perform the essential duties of her employment.

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R. v. Wolfe, 2015 SKPC 161

Toth, December 14, 2015 (PC15160)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Impaired Driving – Blood Alcohol Level Exceeding .08 – Curative Discharge
Criminal Law – Sentencing – Impaired Driving – Blood Alcohol Level Exceeding .08 – Criminal Record of Similar Offences
Criminal Law – Sentencing – Pre-Sentence Report
Criminal Law – Sentencing – Sentencing Principles

The accused pled guilty to a charge of driving while over .08 in 2012 and sought a curative discharge. The accused had an extensive record of similar offences dating back to 1990 and six offences since, with the most recent being in 2006. He entered a 28-day rehabilitation program but was not following the relapse prevention plan recommended. The minimum sentence pursuant to s. 255(1)(a)(iii) of the Criminal Code is four months imprisonment.
HELD: The court concluded that the accused did not meet the criteria for a curative discharge. He had an extensive impaired driving record and did not demonstrate sufficient motivation to address his addiction. The court found that the accused continued to pose a risk to the public. The court considered the gap principle and concluded that the accused made a serious effort to rehabilitate himself from his alcohol addiction since his most recent conviction in 2006. The accused had relapsed in the last 12 months because he did not follow the relapse plan recommended. The court found the gap principle to apply, but his record was not completely disregarded because the gap in offending was not exceptionally long. An aggravating factor was the high readings of .180 and.170. The mitigating factors were the guilty plea and the significant Gladue factors present. The court determined that the appropriate sentence was one year followed by a period of probation of 12 months with terms requiring abstention from alcohol and a requirement to follow a relapse prevention program. The court also attached a recommendation to the warrant of committal that consideration be given to placement in the community residence.

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R. v. Bonk, 2015 SKPC 169

Rybchuk, December 10, 2015 (PC15156)

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

The accused was originally charged with nine criminal offences. He pled guilty to several and some charges were stayed. The accused had been drinking at a bar. He discovered that his truck had been damaged by another driver who had left the scene. The accused called the police from the bar and then, as it was very cold, the accused got into the truck and turned it on to keep warm. When the officers arrived, they found the accused in the driver's seat. He turned off the engine by depressing the brake pedal and turning off the ignition by twisting a knob on the dash. The officers decided to arrest the accused because he had breached an earlier undertaking not to drink. It was later established that the accused's blood alcohol content exceeded .08. The accused left the truck and ran away from the police. One of the officers chased him and was able to stop him by tackling him. They both fell to the ground with the officer straddling the accused's back. The accused struggled and his arms were flailing. The officer testified that she felt a pull on the holster of her gun. The accused testified that he never intended to grab the officer's gun, nor did he – he was just trying to get away from her.
HELD: The accused was found not guilty of the charges of being in the care or control of a vehicle while impaired or over .08. There was no realistic risk that the accused would change his mind and decide to drive the vehicle. The accused was found not guilty of attempting to disarm a police officer as any contact he had had with the gun holster was accidental. The accused was found guilty of resisting arrest when he continued to struggle and fight with the officer.

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R. v. Burke, 2015 SKPC 173

Agnew, December 11, 2015 (PC15158)

Criminal Law – Child Pornography – Possession – Sentencing

The accused pled guilty to one count of possession of child pornography contrary to s. 163.1(4) of the Criminal Code. A sentencing

hearing was held during which the Crown made factual representations and called a police officer as a witness. The accused did not call evidence, but his counsel made factual representations on his behalf. The accused had installed on his computer a specialized piece of software that allowed him access to a very large, sophisticated and completely encrypted peer-to-peer network. No files were immediately available because the potential user had to locate bulletin boards advertising specific interests first and then persuade another user of the bulletin board to provide the software key to decrypt the particular file. The officer testified that the names of the bulletin boards in which the accused was interested involved themes of child pornography and pain, including violent assaults on children. It would have taken a concerted effort on the part of the accused to obtain the material in light of the encryption. After their initial search of the accused's computer the police were able to deduce that 4,900 separate files of child pornography had been downloaded. The accused admitted possession. The Crown proposed a sentence of two years less a day followed by three years' probation. The defence argued for a sentence of 12 months' incarceration followed by three years' probation.
HELD: The accused was sentenced to three years in prison with credit given of 1.5 for 27 days in remand. The judge made a mandatory DNA order pursuant to s. 487.05(1) of the Criminal Code, directed the accused to comply with the Sex Offender Information Registration Act for a period of ten years and to conditions prohibiting him from being near children under the age of 16 for three years. The court exceeded the sentencing proposals offered by the Crown and the defence on the basis that, aside from joint submissions, a sentencing judge's decision is unfettered by the submissions of the parties. The aggravating circumstances in this case included the nature of the accused's collection of pornography that focused on child torture; the large size of his collection and because of it, the accused had contributed to abuse of very young children. The accused did not appear to have any insight into his problem and had not expressed remorse, nor had he taken any treatment since he was charged over a year and a half before the sentencing.

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R. v. Honcia, 2015 SKPC 177

Henning, December 16, 2015 (PC15161)

Criminal Law – Defences – Charter of Rights, Section 7, Section 8, Section 9, Section 10(a), Section 10(b), Section 24
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08

The accused was charged with the following Criminal Code offences: 1)

driving while impaired by alcohol contrary to s. 253(1)(a); 2) driving while over .08 contrary to s. 253(1)(b); and 3) breaching a probation by failing to keep the peace and be of good behaviour, contrary to s. 733.1(1). The accused filed a Charter notice and a voir dire was held. A witness reported a vehicle, including the licence plate, being driven in a hazardous manner. The police attended the address of the accused because he was the registered owner. A friend of the accused indicated that he drank every day and had diabetes. She also stated that she had not driven the accused's vehicle. When the police arrived at the accused's home, the hood of the vehicle was warm. No one else was located in the house and the accused indicated that his friend, the witness, had been driving his vehicle. The accused was arrested for impaired driving and was escorted out of the house. An officer gathered up a liquor store bag and crumpled-up receipt located inside a pizza box. The keys to the vehicle were retrieved from the accused's jacket. The officer never informed the accused that he was detained and under suspicion or investigation prior to his arrest. The arrest was made more than an hour after entering the accused's home. There was some knowledge that he was under investigation before his arrest because he told police his friend had driven his truck. There was no specific request made by the police to enter the accused's house nor was any specific invitation given to enter. The Crown conceded breaches of ss. 10(a) and (b) of the Charter. The accused also alleged breaches of ss. 7, 8, and 9 of the Charter.

HELD: The touching of the hood of the vehicle and trying the doors was a breach of s. 8 but was a very minimal invasion when compared to the actual entry into the accused's home. The court concluded that because the first officer did not have permission to enter the accused's house, the other officers' entry was also unlawful, and also a breach of s. 8. The searches of the accused's jacket, even if with permission, and of the accused's counter were unlawful because the entry into the house was without authority, as was the accused's detention. The accused's cooperation with the police did not constitute consent to enter the house, search it, interrogate him without rights or warnings, and to give oral statements regarding his prior conduct. The evidence was derivative evidence from an illegal search. The court concluded that there were breaches of the accused's ss. 7, 8, 9, and 10 Charter rights and that the test in Grant was met. The evidence obtained was excluded from the time the first officer entered the house as was the derivative evidence from the liquor store employees and video. The administration of justice would be brought into disrepute if any other conclusion was reached.

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R. v. Douglas, 2015 SKPC 179

Anand, December 21, 2015 (PC15162)

Criminal Law – Driving over .08
Criminal Law – Driving Prohibition – Section 259
Criminal Law – Sentencing – Blood Alcohol Level Exceeding .08 – Curative Discharge

The accused pled guilty to driving over .08 contrary to s. 253(1)(a) and sought a curative discharge pursuant to s. 255(5) of the Criminal Code. The guilty plea was made July 8, 2015, and the sentencing hearing was originally scheduled for November 2, 2015. At that time, the accused requested an adjournment but argued that the court order a driving prohibition pursuant to s. 259. He also requested that a declaration be made that the driving prohibition commenced from July 8, 2015, because, according to the accused, that was the day he was convicted of the offence. The accused argued that conviction was broad enough to include a plea of guilty. The Crown argued that because the section indicates the driving prohibition be made after conviction or discharge it is only after sentence is imposed that an offender can be given the driving prohibition.
HELD: The court concluded that an offender is "convicted" of an offence, allowing the court to impose a driving prohibition upon him or her under s. 259(1) of the Criminal Code, only after a guilty plea has been accepted by the court and the court pronounces sentence. The accused's application was dismissed.

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Western Honda v. Ferreira, 2015 SKPC 182

Kovatch, December 29, 2015 (PC15167)

Contracts – Breach – Broker
Contracts – Breach – Privity of Contract
Contracts – Breach – Subcontract
Small Claims – Breach of Contract

The plaintiffs contracted with the defendants to have the defendants pick up a vehicle and deliver to their business in Moose Jaw. The vehicle was damaged during transport. The defendants argued that they were not responsible for the transportation of the vehicle, and that the plaintiffs should pursue a third party car carrier company. The defendant did not have a truck available to haul the vehicle the day the plaintiff required it, so they arranged for another company to haul the vehicle. No mention of the third party carrier was made to the plaintiffs. Upon delivery the plaintiff noticed damage to the vehicle. The plaintiffs claimed $5,658.20, the amount it cost to repair the vehicle.

HELD: The defendants argued a defence that was virtually impossible for them to establish. The plaintiff was granted judgment. The court concluded that the damage to the vehicle occurred during transport. The defendants attempted to establish, unsuccessfully, that they were a mere broker and not the carrier. A broker would not have been a party to the contract. The terms of the subcontract between the defendant and the car carrier did not alter the contractual obligations of the defendant to the plaintiff. Privity of contract also dictated that only the parties to the contract could sue each other for breach of the contract. There was no contractual relationship between the plaintiff and the car carrier. The court did not pierce the corporate veil to hold the personal defendant, the director of the corporate defendant, responsible because all of the evidence suggested that the personal defendant only took steps as personal representative of the corporate defendant.

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Regina Qu'Appelle Health Region (Mental Health Inpatient Services) v. G. (L.), 2015 SKQB 6

Schwann, January 6, 2016 (QB16006)

Mental Health Services Act – Certification – In-patient Detention – Section 24.1

The regional director applied, pursuant to s. 24.1(1) of The Mental Health Services Act, for an order directing that the respondent be detained at the hospital in North Battleford for a period not to exceed one year for the purpose of obtaining treatment and/or care and supervision. The respondent instructed his official representative to oppose the application. Unsuccessful attempts were made to contact the respondent's relatives. A doctor who qualified as an expert in the field of general psychiatry testified. The respondent was 23 years old and lived in numerous foster care for much of his youth. He has been in the care of Psychiatric Services in Regina since he was 12 or 13 years old. He was diagnosed with fetal alcohol disorder (FASD). According to the expert, the FASD and lack of social supports to deal with it lead the respondent to turn to alcohol, substance abuse, and problems with the law. The respondent spent his adult life alternating between in-patient care and incarceration. The current diagnoses of the respondent according to the expert were: FASD, ADHD, polysubstance abuse, bipolar disorder, and intermittent drug-induced psychosis. The expert indicated that long-term care, only available at the hospital, was necessary. The respondent did not testify.
HELD: The court was satisfied, on the balance of probabilities, that the criteria set out in s. 24.1 were satisfied. He was suffering from several mental disorders that required treatment, care, and supervision only

available at the hospital. The court was satisfied that the respondent's mental disorder would persist for longer than 21 days. He also had an inclination to self-harm. An order was made pursuant to s. 24.1.

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Harrison v. Mavin, 2015 SKQB 395

Schwann, December 11, 2015 (QB15387)

Statutes – Interpretation – Residential Tenancies Act, 2006, Section 32, Section 33, Section 34
Landlord and Tenant – Residential Tenancies Act – Security Deposit – Appeal

The appellant landlords appealed the decision of the Deputy Director of the Office of Residential Tenancies made pursuant to s. 33(8) of the The Residential Tenancies Act, 2006 that ordered them to return the $1,500 security deposit to their former tenants, the respondents. The respondents had vacated their rental unit and the appellants retained the full amount of the security deposit and had not served the respondents in the approved form of their intention to do so. They wrote instead to the tenant advising that they had concerns with the state of repair and cleanliness of the rental unit and after they had received the bills from tradespeople, the tenants would be informed of the amount of the deposit that would be refunded. The respondents then applied under s. 33(1) of the Act for an order directing the return of the deposit. The Deputy Director sent a letter to the appellants advising them of the application and setting out the facts: the amount of the deposit; that the respondents had provided a forwarding address; and that they had not received any written notice of the appellants' claims. The deputy director stated that if the information was correct, then he could make an order directing them to return the deposit without a hearing. The appellants responded that the facts were correct but that they did not feel obliged to return the deposit for reasons described in their documentation. The deputy director proceeded to make the order based on a finding that, contrary to s. 32 of the Act, the landlords failed to serve the respondents within seven days after vacating the premises with notice in the approved form (Form 13) of their intention to retain part or all of the deposit. The non-compliance of the appellants with the requirements of s. 32(1)(b) invoked ss. 34(1) and (2) of the Act, and therefore the director was required by statute to make on order under s. 33(8).
HELD: The appeal was allowed. The deputy director's decision was set aside and the matter remitted back to him to schedule a hearing under s. 33 and s. 70 of the Act. The court found that the deputy director had not followed the statutory procedure and was not permitted to make

the order he did absent a hearing.

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Abdellatif v. Abdellatif, 2015 SKQB 396

Goebel, December 14, 2015 (QB15394)

Family Law – Child Support – Arrears
Family Law – Child Support – Imputing Income
Family Law – Child Support – Underemployment
Family Law – Child Support – Variation – Arrears

The parties were together from 1999 to 2010 and had one child. At trial the respondent was imputed annual income of $75,000 and he was ordered to pay $750 per month in ongoing support. The arrears were set at $14,000. The respondent did not make any payments under the judgment and the arrears totaled $43,250. The respondent applied for an order expunging or reducing the arrears payable and for an order varying the child support order. He argued that after his bankruptcy in 2012 he was unable to obtain employment. He returned to Egypt in 2014 and obtained employment equivalent to $7,750 CDN. The respondent did not provide an explanation as to how he supported himself for 2013 and 2014.

HELD: The respondent's applications were dismissed. The arrears were not expunged because the court was not satisfied that the respondent could not and would not in the future be able to pay the arrears. The respondent was educated, experienced, and healthy so a temporary period of unemployment in an otherwise successful career path did not entitle him to extinguish past child support obligations. Also, the support order was a final order where the father was found to be underemployed. The fact that the respondent did not earn any income since the imputed income order was not enough to ground the application to vary when the order sought to be varied was based on imputed income. The court considering the application to vary must undertake a comprehensive analysis to ensure that the purpose of the original order is not undermined. The trial judge imputed income because the respondent did not participate in the trial and because the information before the court respecting his income did not reflect his capabilities. He was found to be underemployed. The court concluded that the only material change since the date of the trial was the respondent's unilateral decision to relocate to Egypt. None of the factors considered by the trial judge materially changed. The court was also not prepared to order that the matter be directed to pre-trial conference and, if necessary, trial because there was controverted evidence with respect to his current and future capacity to pay child support.

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Vlezko v. Toroshchin, 2015 SKQB 400

Chicoine, December 16, 2015 (QB15389)

Statutes – Interpretation –Traffic Safety Act, Section 211
Motor Vehicles – Accidents – Liability

The appellant appealed from a decision of a Provincial Court judge to dismiss her claim brought under The Small Claims Act, 1997. She had sought for the recovery from the respondent of the amount of the insurance deductible, which she was required to pay as a result of being assessed by Saskatchewan Government Insurance as the driver at fault in an automobile collision. The appellant had been driving through a parking lot. She came to an uncontrolled T-intersection and was turning left when the respondent's vehicle struck hers on the passenger side. Both parties testified that they could not see the other because of a large SUV parked next to the intersection. The trial judge found that the appellant failed to yield the right of way pursuant to s. 219(1) of The Traffic Safety Act.
HELD: The appeal was allowed. The court found that the trial judge had erred in law by failing to consider s. 211 of the Act, which requires drivers to drive with due care and attention or with reasonable consideration for other persons using the highway. The right of way rule is not necessarily determinative when dealing with parking lot situations. The respondent should have been more careful when he approached the T-intersection. From the damage, it was clear that the appellant's vehicle was already in the intersection. The court held that both parties were equally to blame and ordered the respondent to pay half of the appellant's deductible.

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Helgason v. Voisey, 2015 SKQB 401

Megaw, December 16, 2015 (QB15405)

Family Law – Custody and Access – Children's Law Act
Family Law – Custody and Access – Person of Sufficient Interest

The petitioner sought access to the respondent's child. The respondent opposed the application on the basis that she had moved on to a new relationship and wanted to foster the new relationship. The child was four years old and the biological father had never been involved in the child's life and had never paid child support. The parties cohabited for

approximately two years and the petitioner had not paid any child support since separation in January 2015, but offered to pay some based on a minimal imputed income because he had not disclosed financial information. The respondent was primarily responsible for the child during the relationship. The respondent agreed the petitioner was a person of sufficient interest pursuant to The Children's Law Act, 1997.

HELD: The court applied the factors set out in s. 9 of the Act. There was little evidence as to why the petitioner was in the child's best interests. The court did not find anything in the history of the relationship between the child and the petitioner to compel the court to continue their involvement. There was nothing to suggest the respondent was not a fit parent.

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R. v. Kaiswatum, 2015 SKQB 404

Danyliuk, December 18, 2015 (QB15397)

Criminal Law – Robbery – Sentencing
Criminal Law – Face-masked – Sentencing

The accused had been charged with joint counts of having committed robbery against a bank, contrary to s. 344(1) of the Criminal Code, and having his face masked with intent to commit an indictable offence, contrary to s. 351(2). To these charges he entered not guilty pleas. He was also charged individually with: 1) operating a vehicle in a manner dangerous to the public contrary to s. 249(1)(a) of the Code; 2) having in his possession a stolen vehicle contrary to s. 354(1)(a); 3) stealing property of a value not exceeding $5,000, contrary to s. 334(b) of the Code; and 4) breaking and entering a house, contrary to s. 348(1)(a) of the Code. The accused pled guilty to the first three of the four individual counts. After trial by jury, the accused was convicted of the two joint charges and of the remainder of the individual counts. The aggravating factors were enumerated as including that the accused: planned and directed the robbery; had involved two vulnerable co-accused, a female drug addict and a 15-year-old boy; and had used a stolen car to commit the robbery. In addition, the accused and his co-accused carried pellet guns that the bank employees and the customers believed to be real guns and wore masks whose design further terrorized the victims. The accused struck a teller on the back of the head with his pistol even while the teller was complying with the accused's order to give him money. After leaving the bank, the robbers fled from Saskatoon to North Battleford with $6,000 in cash. The accused stole a shirt from a shop there, and when the owner called the police, the accused fled. The police pursued him while he drove the

stolen car at high speeds through the downtown of the city. As the accused was Aboriginal and had spent his childhood with abusive alcoholic parents, both of whom had attended residential school, the court considered the Gladue factors. The accused completed high school while serving time in a federal penitentiary. He did not have problems with addictions. At the time of trial, the accused was 32 years of age and had 35 previous convictions that included committing two masked robberies, using a stolen car and subsequently driving dangerously. For those offences he was sentenced to five years' imprisonment and violated his parole four times when he then committed further offences. The accused had expressed no remorse for the offences in this case. He was apparently motivated only by greed. The Crown submitted that the accused should receive a sentence of 11 years and the defence argued that a global sentence of five years was appropriate.

HELD: The accused was sentenced to a total of nine years' imprisonment in federal penitentiary for the robbery conviction and one year to run concurrently for having his face masked. On the count of having possession of property obtained by an indictable offence, he received a sentence of one year to run concurrently to the first two sentences. On the count of dangerous driving, the accused received a sentence of six months to run consecutively to the first three sentences. For the theft charge, the sentence was six months to run concurrently to the dangerous driving count. The court gave the accused remand credit at the rate of one day for the 18 months served, reducing the sentence to seven and a half years. The defence counsel had not supplied any evidence to the court upon which it could award an enhanced remand credit. The court had regard to the Gladue factors in crafting the sentence and reviewed the aggravating factors listed above. The court rejected the defence proposal for a five-year sentence because the accused had received that sentence for similar crimes in the past and had not changed his behaviour and was motivated by greed to commit these crimes.

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Meigs v. Saskatchewan Penitentiary (Institutional Head), 2015 SKQB 405

Maher, December 18, 2015 (QB15398)

Criminal Law – Habeas Corpus
Criminal Law – Jurisdiction

The applicant sought an order quashing the directive of the respondent that had returned him to the Saskatchewan Penitentiary and a writ of habeas corpus directing the respondent to return him to the John

Howard Society apartments in Edmonton, where he had been living in accordance with his statutory release. The applicant's statutory release had been revoked by the Parole Board of Canada after a search of the applicant's effects revealed his notes describing the torture of a female corrections officer and other graphic depictions of violence. The parole board released its reasons to maintain the revocation of the applicant's statutory release and the applicant appealed the decision to the board's appeal division. The division affirmed the board's decision. The respondent objected to the application to quash the decision of the board and the division on the matter of jurisdiction as The Corrections and Conditional Release Act provided for a complete review process. HELD: The application was dismissed. The court held that there was a comprehensive judicial review procedure of decisions of the board and the division assigned to the Federal Court and as a provincial superior court it should decline to exercise its habeas corpus jurisdiction. The applicant's request for other relief fell within the exclusive jurisdiction of the Federal Court pursuant to s. 18 of the Federal Courts Act.

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R. v. Beaulac, 2015 SKQB 406

Maher, December 18, 2015 (QB15399)

Statutes – Interpretation – Traffic Safety Act, Section 284

The appellant appealed his conviction for operation of a motor vehicle while disqualified, contrary to s. 140(b) of The Traffic Safety Act, and his sentence of a fine of $200. The appellant had been stopped by an RCMP officer who then searched the appellant's license plate number. He discovered that the appellant's operating license had been suspended for failure to take driver improvement training. The appellant advised that he was not aware of the suspension. Three months later the officer served the appellant with a certificate of disqualification from SGI, as well as copies of letters sent from SGI to the appellant dated in June, August and September of the previous year. These dates were prior to the officer stopping the appellant and charging him. The letters stated that the appellant's driving privileges were suspended. These documents were made exhibits at trial. The appellant testified that he had not received the letters and explained that his rural route postal address often resulted in mail being delivered to the wrong person. The trial judge accepted the evidence provided by the Crown of the letters having been sent by SGI and held pursuant to s. 284(2)(b) of the Act that the Crown could rely upon the presumption that the documents had been delivered to the appellant and that there was no evidence that they had not been delivered. HELD: The appeal was allowed, the conviction set aside and an

acquittal ordered. The trial judge had erred in failing to apply the principles of s. 284 when he failed to make a finding on the fact that there was no evidence that SGI mailed the letters. The evidence tendered by the officer was letters received by him from SGI after the date on which he charged the appellant. The appellant testified that he had not received the letters in his mail and the court found that on the evidence it had been established that the appellant was not aware of his suspension and that he had established the defence of reasonable mistake.

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R. v. T. (D.N.), 2015 SKQB 408

Danyliuk, December 18, 2015 (QB15401)

Criminal Law – Evidence – Admissibility – Videotape Statement
Statutes – Interpretation – Criminal Code, Section 715.1
Criminal Law – Witness Under 18 – Testimony – Mode of Protection

The accused was charged with a total of nine counts related to different types of sexual offences committed against two complainants under the age of 18 contrary to various provisions of the Criminal Code. The accused pled not guilty to each charge and a trial was held. The complainants were sisters, C. and M. Each was under the age of 18 when the alleged offences occurred and when they provided statements to the police. At the time of trial C. was still under 18. During the trial, two issues arose for determination by the court: 1) the Crown applied to have the two complainants view their videotaped statements to the police for purpose of potential adoption of them pursuant to s. 715.1 of the Code. The defence objected to portions of M.'s statement being played to her for such purpose because they were descriptions of conduct unrelated to the acts complained of under s. 715.1 and other portions contained hearsay. The Crown argued that the entire statement should go in; and 2) the Crown applied under s. 486.2(1) regarding the mode of protection to be offered to C. during her testimony because of her age and vulnerability.
HELD: The Crown's first application was denied and the second one granted. The court held with respect to each application that: 1) s. 715.1 allowed witnesses to describe the acts complained of, not just the victim. However, if a statement contained outright hearsay, the court should consider editing to ensure admissibility of the contents. Further, s. 715.1 prevented a witness from referring to other conduct of the accused outside the scope of the indictment. The judge redacted the portions of M.'s statement that were hearsay or descriptions of acts not complained of; and 2) the decision regarding the mode of shielded testimony was to be made by the trial judge. In this case, the Crown's

application was granted for C. to be accompanied by a support person during her testimony and that a screen be placed in front of C. in the courtroom. The Crown's request that C. be able to testify from another room was denied because the credibility of the witness could be better assessed if she was in the courtroom.

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McGlynn Estate, Re, 2015 SKQB 409

Kalmakoff, December 21, 2015 (QB15402)

Wills and Estates – Letters Probate – Missing Will – Presumption of Animo Revocandi

Fiztpatrick, the executor of the estate of the deceased testator McGlynn, applied for letters probate in relation to a will made by McGlynn in 2006. He died in 2013. Ollenberger, the niece of McGlynn, applied for a grant of administration on the basis that McGlynn had revoked his will and died intestate. McGlynn had lived on the family farm all his life and increased its size by acquiring 11 sections of farmland during his 40-year career as a farmer. His two older brothers moved away from Saskatchewan during the 1950s and neither they nor their children had much contact with McGlynn. Fitzpatrick, his wife and his children lived next door to McGlynn and had been close to him for many years. They helped each other with their farming operations and McGlynn regarded the Fitzpatricks as family. McGlynn had to have emergency surgery in 2006 and the Fitzpatricks arranged for him to speak with a lawyer about making a will. The lawyer spoke to McGlynn by telephone while he was in the hospital, and after taking instructions, prepared the will and a power of attorney. In accordance with them, the lawyer prepared a will that named Fitzpatrick as executor and provided that McGlynn's estate was to be divided equally among the Fitzpatrick children. The lawyer attended at the hospital and reviewed the will with McGlynn, who then signed it in the presence of witnesses. Later that year, McGlynn called the lawyer's office and left a message saying that he wanted to cancel the power of attorney but to confirm his will instructions. The lawyer confirmed this in a letter that he sent to McGlynn afterward. In 2007 McGlynn suffered further illness and contacted the same lawyer by returning his letter and writing on it that he wanted the will and the power of attorney to be cancelled. The lawyer responded with two more letters requesting clarification. He did not receive a reply until February 2008 when McGlynn wrote "scrap the whole thing, all this has changed as of awhile back". The lawyer wrote numerous times asking whether McGlynn wanted the original will to be forwarded to him for destruction. Finally McGlynn wrote in his own handwriting on the last of the letters "that will be fine

if you would return the documents to me". The lawyer mailed the original will to McGlynn in January 2009. The will could not be found in McGlynn's house after his death. The issue was whether McGlynn had revoked the will he made in 2006 and had shown that intention to revoke it as required by s. 37(b) of The Wills Act.
HELD: The application for the grant of letters of administration was granted to Ollenberger. The court found that Fitzpatrick had not rebutted the presumption of destruction animo revocandi: that McGlynn had destroyed the will with the intention of revoking it. The court reviewed the close relationship McGlynn had had with the Fitzpatrick family and that McGlynn had said that he would be giving them his farmland but found that the communications by McGlynn to the lawyer satisfied it on the balance of probabilities that the former revoked his will by destroying it. McGlynn had been careful and organized with respect to important documents and the will had not been found with those documents.

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Hello Baby Equipment Inc. v. B of A Canada Bank, 2015 SKQB 410

Ball, December 22, 2015 (QB15403)

Class Action – Contingency Fee – Approval
Class Action – Legal Fees and Disbursements – Fee Sharing Agreement – Approval
Class Action – Settlement Approval

The plaintiff applied for orders pursuant to The Class Actions Act (CAA) to approve: 1) settlements reached with some defendants; 2) a contingency fee agreement entered into between the plaintiff and class counsel; and 3) class counsel's legal fees and disbursements relating to the settlements. There were similar actions in Alberta, British Columbia, Ontario, and Quebec. In all but the Ontario action the orders were approved without written reasons. In Ontario the settlements reached and the contingency fee were approved but the class counsel fee of $3,407,500 was not approved. A fee of $3,000,000 was approved. The court reduced the fee in part because the class counsel had agreed to share its fees with another law firm that had agreed to stay its rival actions in return for payments. The Ontario court found that the fee-sharing agreement may be unauthorized, unenforceable, and possibly an illegal agreement. Also, the class counsel did not serve the best interests of the class members by not disclosing the fee-sharing agreement. Lastly, the Ontario court found that costs were incurred that did not benefit the class members by unnecessarily pursuing separate proceedings in various jurisdictions.
HELD: The court approved all of the orders. The court found that the

settlements reached were fair, reasonable, and in the best interests of the class as a whole as required by s. 38 of the CAA. The fee-sharing agreement was not disclosed and it should have been, and it was not subject to s. 41 of the CAA because it was between lawyers not a lawyer and a representative plaintiff. The court accepted that counsel entered into the fee-sharing agreement because they believed that it was in the best interests of the class. The fees claimed by the class counsel were found to be fair, reasonable, and in the best interests of the class. The total amount claimed, including the fee-sharing agreement amount, was not an amount that would not have been approved.

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CIBC Mortgages Inc. v. Kjarsgaard, 2015 SKQB 411

Barrington-Foote, December 23, 2015 (QB15404)

Mortgages – Foreclosure – Leave to Commence Action – Affidavit of Default

The proposed plaintiff mortgagee applied pursuant to The Land Contracts (Actions) Act for leave to commence an action against the proposed defendant mortgagor. The applicant had successfully obtained an appointment in October for a hearing on the application. The appointment specified that the applicant would seek eight remedies against the proposed defendant. In support of this application for leave, the applicant filed an affidavit of default. HELD: The application was dismissed with permission given to the mortgagee to file a revised affidavit of default. The court found that portions of the affidavit submitted by the applicant were incorrect, inaccurate or misleading. The court identified the deficiencies as follows: 1) the paragraph that stated the mortgagor must pay NSF fees was incorrect. Regarded as collection costs, these fees are prohibited by s. 8 of The Limitation of Civil Rights Act; 2) it had not distinguished the amounts payable by the mortgagor before and after the action was commenced; and 3) it required the mortgagor to pay the cash back amount. The amount was not properly included in the principal amount that the mortgagor must pay in order to exercise his right to redeem.

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Regina Soccer Association Inc. v. Saskatchewan Soccer Association Inc., 2016 SKCA 4

Caldwell Herauf Whitmore, January 14, 2016 (CA16004)

Corporation Law – Non-profit Corporations Act, 1995
Corporate Law – Oppression Remedy

The appellant appealed the chambers decision that dismissed its application claiming that the respondent, a provincial sports regulatory body, usurped its rights of governance of the sport in Regina, and was, therefore, oppressive. The appellant decided to move from a four club model in the City of Regina to a one club model. One of the previous four clubs (academy club) objected to the new model. It applied for and was granted an academy membership, a restricted type of membership, with the respondent and was therefore not governed by the appellant. The academy club filed a complaint with the respondent regarding the appellant not allowing it to participate in the appellant's events and regarding the vote of the appellant's members to move to a one club model. The academy club applied for and was granted associate membership with the respondent on a one-year probationary basis. The appellant therefore brought an application under the oppression provisions of The Non-profit Corporations Act, 1995. The chambers judge concluded that the respondent's actions were not unfairly prejudicial and did not unfairly disregard its interests. The issues were: 1) did the chambers judge err in finding that the actions of the respondent were not oppressive or unfairly prejudicial and did not unfairly disregard the appellant's interests; and 2) if no, did the judge otherwise make an error in her findings and analysis of the actions of the parties.
HELD: The appeal was dismissed. The issues were determined as follows: 1) the BCE case was the authoritative statement on the oppression remedy test. The court determined that the chambers judge considered the bone fides of the respondent even though she did not specifically use that language in her decision. The appeal court reviewed the respondent's bylaws and found that there could be more than one governing body in an area. The appellant had, however, been the sole governing organization in Regina and therefore the court was satisfied that the appellant had met the threshold of having a reasonable expectation that it would be the sole governing body in Regina. The appeal court, however, agreed with the chambers judge that the appellant's reasonable expectation was not violated by conduct falling within the terms oppression, unfair prejudice, or unfair disregard as described in BCE. The academy club's associate membership recognized its interests in high performance play and traditional league play was still administered by the appellant; and 2) the court did not find any error with respect to the chambers judge referring to two avenues of possible relief for the parties. The avenues were just suggested and were not required before consideration of the appellant's application. The comments were obiter.

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R. v. Saskatchewan Power Corp., 2016 SKPC 2

Wiegers, January 29, 2016 (PC16001)

Regulatory Offence – Occupational Health and Safety Act – Strict Liability – Defence of Due Diligence

The accused, Saskatchewan Power Corporation, was charged with four offences under The Occupational Health and Safety Act, 1993. The victim was a member of the utility crew employed by the accused at the Shand Dam. The supervisor of the utility crew decided that there was a potential problem of flooding on a road at the site created by ice forming in a culvert. Each morning the supervisor met with a production team to assess whether the utility crew's schedule for the week should be changed and new work orders issued if a problem had arisen after the schedule had been set. On this occasion, the supervisor mentioned the ice formation at the meeting, but he was not advised by the team to do anything about it. Without a work order, the supervisor decided to deal with the ice himself by lighting a long torch attached to a propane tank and placed it against the ice mass in the culvert. He placed a tarp around the end of the culvert to trap heat. Later the supervisor asked the victim to check to see if the flame was out. Because the supervisor was under the impression that the victim was familiar with this specialized equipment, he did not give him any further instruction. The victim found the torch unlit and when he lit it, a fireball formed and burned the victim's face, arms and hands. The accused was then charged that: 1) it caused the victim's injuries contrary to s. 57 of the Act through inadequate training and supervision in moving the victim from one work activity to another as required by s. 19 of the Act; 2) failed to ensure that all work was sufficiently and competently supervised as required by s. 17 of the Act; 3) failed to prevent the development of the explosive atmosphere at the culvert, contrary to s. 367 of The Occupational Health and Safety Regulations and s. 57 of the Act; and 4) failed in its general duty to ensure the victim's safety as required by s. 3 of the Act.
HELD: The charges were dismissed. The court found that the Crown had proved the actus reus of all of the offences but that the accused had proven on a balance of probabilities that it took all reasonable care to prevent the prohibited acts. The court held with respect to the charges that: 1) the accused could not have reasonably foreseen that training in the use of the specialized equipment was required. The supervisor circumvented the work process, which was designed to promote safety; and 2) the accused took all reasonable care to train the supervisor to be an effective supervisor to avoid the type of incident. It could not have reasonably foreseen that the supervisor or the victim would use the specialized equipment. The two other offences were dealt with by these reasons.

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Khawar v. Constantinoff, 2016 SKPC 10

Agnew, January 15, 2016 (PC16005)

Small Claims – Practice and Procedure – Issuance of Claim
Insurance – Automobile Accident Insurance Act

The proposed plaintiffs were taxi drivers who shared a cab. The proposed defendant's vehicle was in accident with the cab. The proposed defendant was insured by the proposed defendant, SGI. The plaintiffs alleged they suffered losses as a result of the accident and their proposed action was to enable them to recover them. The plaintiffs applied to have their draft claim reviewed by a Provincial Court judge pursuant to s. 7 of The Small Claims Act, 1997 to determine whether to issue a summons if satisfied that the plaintiff might have a valid claim. The judge found that the draft could not issue because the claim did not state whether SGI was being sued as the appellant's insurer and the basis of that claim, or if the plaintiffs were suing SGI as the defendant's insurer. The plaintiffs requested further clarification because of s. 45(1) of The Automobile Accident Insurance Act.
HELD: The fiat was confirmed. The plaintiff must obtain judgment against the proposed defendant insured and then an action could be commenced against SGI.

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Marshall v. Rediron, 2016 SKPC 18

Martinez, January 26, 2016 (PC16006)

Torts – Negligence – Animal Attack

The plaintiff raised horses and cattle on the family farm. The defendants lived on an acreage in the vicinity. They kept five dogs as pets who were not confined during the day when the defendants were away at work. On the day in question, the plaintiff noticed two dogs chasing the horses. She did not recognize the dogs at the time but later identified one of them when she visited the defendant's yard. After the incident, the plaintiff found one horse, a specially bred mare, had damaged her hind leg so badly that she had to be destroyed. The plaintiff believed that the mare ran into a fence while being chased because she found some of her hair and blood on the fence. The

plaintiff alleged that the defendants owned the two dogs and that they were negligent in not taking precautions to ensure their dogs did not stray from home when the defendants were away. The plaintiff claimed damages in the amount of $18,900 to compensate her for the loss of the mare. The defendants denied that they owned the dogs who chased the horses, and if they were involved, they had not caused the mare's injury. They argued that they had met the standard of care of dog owners who lived in rural Saskatchewan and were not negligent. If they were negligent, the plaintiff's claim for damages was excessive. The issues were: 1) whether the defendants had owned any of the dogs involved in the incident; and 2) whether the defendants were negligent and if their negligence had caused the mare's injury.
HELD: The plaintiff was given judgment and awarded damages in the amount of $7,800. The court found with respect to the issues that: 1) the defendants owned at least one of the two dogs that chased the plaintiff's horses when the mare was injured. The mare was a protected animal as defined by s. 19(c) of The Animal Protection Act, 1999. Section 22(2) of that Act and s. 380 of The Municipalities Act relieved the plaintiff from the burden of proving that the defendants knew of their dog's propensity to pursue and injure animals. The court found that the defendants were negligent because they had a duty to take reasonable care to see that their dogs did not injure their neighbour's livestock. The standard of care regarding dogs in rural areas was not established, but the court held that the defendants should have restrained their dogs when they were not at home and had breached this standard and were found negligent. The plaintiff proved a causal connection between the injury to the mare and the defendants' negligence because, but for their negligence, the interaction between their dogs and the horses would not have happened. The plaintiff's damages were reduced to cover the replacement cost of the mare.

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Baillie v. Betham, 2016 SKQB 5

Dawson, January 6, 2016 (QB16005)

Landlord and Tenant – Residential Tenancies Act – Hearing – Appeal
Landlord and Tenant – Residential Tenancies Act – Jurisdiction

The landlord appealed the decision of the hearing officer made pursuant to The Residential Tenancies Act, 2006. The landlord's application for an order for possession alleging that the tenant was over-holding after service of a notice that terminated the tenancy was dismissed. The landlord had previously made applications with respect to the tenant farming on the property and then made the current application under a different property description. The tenant

indicated at the hearing that he continued to raise livestock and that the property consisted of 40 acres of pasture land that he farmed. The hearing officer therefore concluded that there was a lack of jurisdiction because the Act did not apply to the tenant pursuant to s. 5.
HELD: The submissions confirmed that the tenant was living in rental accommodation from the landlord and that he was engaged in farming on the property subject to the tenancy arrangement. The landlord failed to satisfy the court that the hearing officer made an error in determining that she lacked jurisdiction.

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McHale v. Clark, 2016 SKQB 9

Scherman, January 7, 2016 (QB16010)

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

The numerous defendants applied to the court to have the plaintiffs' claims stuck out against them. The exceptions were the defendant employer, with whom the plaintiffs had an employment contract, and the sole director of the employer, who was also the person that negotiated the contract. They argued that the plaintiffs resigned from their employment but were nonetheless suing all of them for wrongful dismissal, deceit, and fraudulent misrepresentation when the only employment contract was with the employer. The defendants argued that the claims be struck because they were an abuse of process, disclosed no reasonable cause of action, and the allegations were scandalous, frivolous, and vexatious. The plaintiffs argued that they properly claimed against each of the 17 named defendants because they were common employers of them and were therefore vicariously liable for their wrongful dismissal. Further, they argued that the corporations owned or controlled by the director were vicariously liable for his actions of fraudulent misrepresentations and deceit. The court considered the abuse of process and no reasonable cause of action arguments made by the defendants.
HELD: The plaintiffs did not provide allegations of fact that would involve or link the defendants, other than the employer and director. The only allegation against the remaining defendants was the bare one that they were all common employers of the plaintiffs. There were no allegations of fact to found the conclusion of vicarious liability and only the pleadings could be considered on whether they disclosed a reasonable cause of action. The pleadings indicated that the director

was the "sole, common director" of the defendant corporations but that did not lead to the conclusion that he was the sole director of each corporation. Corporations are controlled by the majority of the board of directors and, therefore, a statement that he was the sole common director does not mean he controlled the corporations. Similarly, the pleadings did not meet the requirements to plead that the director was the controlling mind of the limited partnerships. The material facts were not pled. Material facts were needed so that it could be found that there was a reasonable case made that the corporations and limited partnerships were common employers that were vicariously liable for all of the person's actions. The pleadings did not disclose a reasonable cause of action. The claims against all the defendants other than the employer and director were also found to be an abuse of process for numerous reasons. The affidavits on the motions could also be considered in this regard. The court found the plaintiffs' departure from the principle of proper pleadings to be egregious and therefore ordered costs on the basis of a contested matter.

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R. v. Lofstrom, 2016 SKQB 12

Acton, January 8, 2016 (QB16012)

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

The appellant was convicted of driving while his blood alcohol content exceeded .08 contrary to s. 253(1)(b) of the Criminal Code. The trial judge dismissed the appellant's application under s. 10(b) of the Charter that his right to counsel had been breached (see: 2014 SKPC 91). The appellant appealed the decision on the ground that the trial judge erred in findings that the police had not breached his s. 10(b) right and that he had not acted diligently. The evidence presented by the Crown on the voir dire was that the appellant had advised the police officer that he wanted to contact a lawyer and been left alone in the telephone room to make the call. After waiting for approximately an hour, the officer entered the room and suggested that the appellant contact Legal Aid. The appellant agreed and after speaking with duty counsel did not indicate again that he wanted to obtain his own counsel. The appellant presented no evidence at the voir dire that contradicted the officer's evidence.
HELD: The appeal was dismissed. The court found that the trial judge had correctly applied the legal principles involved respecting the issue of a breach of the accused's Charter rights and that her decision was reasonable and supported by the evidence.

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Tluchak Estate v. Bayer Inc., 2016 SKQB 13

Barrington-Foote, January 8, 2016 (QB16009)

Class Action – Carriage Motion
Class Action – Certification
Class Action – Procedure

A case conference was scheduled to consider the plaintiffs' request to schedule court dates for a certification hearing. The day prior to the case conference the court received a letter from an Ontario law firm indicating that they were working on a national class action regarding the same drug and that a class action had been filed in Saskatchewan as well as an action in Ontario. The Ontario firm also requested attendance at the case conference, indicating that they intended to file a carriage motion in Saskatchewan. The court allowed the firm to attend the case management. The firm argued that the carriage issue between them and the Saskatchewan firm should be determined in Ontario first. The Saskatchewan law firm argued that the late filing of a competing action in Saskatchewan should not be permitted to delay the action. The case conference was adjourned to January 2016 so the law firms could advise one another of their positions in relation to the Ontario carriage motion and to exchange and file briefs relating to the carriage issue in Saskatchewan. The Saskatchewan firm advised they were not pursuing its Ontario action and argued that the carriage application in Saskatchewan should only be dealt with after certification due to The Class Actions Act and case law.
HELD: The judge indicated that he was not the designated judge for the certification application and there was no carriage motion before him. The court determined that the best procedure was to deal with any carriage motion at the certification hearing. There may be some duplication in the procedure but the Ontario firm could move expeditiously to apply for carriage. The certification schedule proposed by the Saskatchewan law firm was not realistic. The court set a certification schedule.

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Armstrong, Re (Bankrupt), 2016 SKQB 14

Thompson, January 12, 2016 (QB16013)

Bankruptcy and Insolvency – Discharge – Income Tax Debt

The bankrupt applied for discharge after he had assigned in bankruptcy for the first time in December 2014. The trustee had admitted one claim

from the Canada Revenue Agency of $276,500 for dividend. It submitted that the bankrupt had met his duties pursuant to the Bankruptcy and Insolvency Act. Because his personal income tax debt made up over 75 percent of the unsecure proven claims in bankruptcy, the bankrupt was not entitled to automatic discharge under s. 172.1 of the Act. The Minister of National Revenue opposed an absolute discharge and argued that the bankrupt should pay $22,000 to the bankruptcy estate as a discharge condition because he failed to disclose that he had transferred a vehicle worth that sum to his fiancé's company for insufficient consideration within the five years preceding the bankruptcy.

HELD: The application was granted without condition. The court found that the bankrupt's fiancé had accepted the vehicle in exchange for her assistance in making tax payments of more than $8,400 on behalf of the bankrupt. The court reviewed the factors associated with disposition of a high-tax bankruptcy pursuant to s. 172.1 of the Act and found that: 1) it had difficulty ascertaining the personal circumstances of the bankrupt at the time that the original personal income tax debt was incurred in 2002 and 2003. The CRA had reassessed him numerous times. The bankrupt had successfully appealed some of them. The effect of time resulted in the amount of principal debt owed by the bankrupt to be much lower than the amount owed for penalties and interest. By 2008, the bankrupt was not even earning a taxable income; 2) the bankrupt had paid over $75,000 towards the personal income tax debts; 3) the bankrupt had not made payments of other debts while failing to make reasonable efforts to pay the tax debt; and 4) the bankrupt financial prospects were not good. He was 48 years old and had income of less than $3,000 per month.

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Wal-mart Canada Corp. v. Saskatoon (City), 2016 SKQB 19

Scherman, January 13, 2016 (QB16016)

Municipal Law – Tax Assessment
Administrative Law – Judicial Review – Procedural Fairness
Statutes – Interpretation – Cities Act

Wal-Mart and the City of Saskatoon each brought an application for judicial review to quash the same decisions of the city's Board of Revision (BOR). The applications arose as a result of Wal-Mart appealing the city's 2014 assessment of its Saskatoon properties because the assessments had not met the market valuation standard required by s. 163 of The Cities Act and failed to express the requirement of equity required by s. 165 of the Act. The assessments were between 75 and 100 percent higher than those of the previous

years. To prepare for its appeals, Wal-Mart asked the assessor to provide it with disclosure of documents and information used to populate its computer model for assessment. The assessor advised that because such information was confidential, it would not disclose it unless the BOR so ordered. Wal-Mar then applied to the BOR requesting that it order the assessor to provide it with, among other things, the rent data used to create the Retail Non-CBD model used to assess the subject properties and a comparison of actual versus assessed rents for properties assessed with the model. It made an additional request for the actual rents for properties excluded from the model because the information pre-dated the period 2008–2010 selected for the model. Wal-Mart offered to undertake under s. 201 of the Act to keep the information confidential. The BOR granted the request for information relating only to a list of contract rents and building sizes for the period but denied any other information could identify the specific properties listed and refused to grant an order for the additional information without giving its reasons. An appeal of the decision to the Saskatchewan Municipal Board (known as the committee) was turned down on the ground that because the decision was interlocutory, it did not have jurisdiction. Proceeding next to the application for judicial review, the city argued that the BOR acted without jurisdiction and erred in law in ordering the disclosure of confidential information under the Act. It submitted that the information was not relevant to the issues in Wal-Mart's appeal or necessary to have for an effective appeal. The city submitted that as the BOR's decision not to grant Wal-Mart's request for additional disclosure was an interim one, it should not be quashed because Wal-Mart had not exhausted the other methods set out in the Act that would permit disclosure. Wal-Mart took the position that the right to order pre-hearing disclosure was implicit since the Act expressly provided for appellants to seek disclosure by any other process and the BOR was a body that it had the power to control its own procedures. The common law requirement of due process and fair hearing could only be achieved by pre-hearing disclosure.

HELD: The court noted that the Court of Appeal had recently granted leave to appeal to the city in an another action against Wal-Mart, which involved the issue of disclosure under the Act (see: 2015 SKCA 125). The court decided that, pending that appeal, it would be appropriate for it to undertake the judicial review in the meantime. The court ordered that the decision of the BOR to deny Wal-Mart disclosure of additional information be quashed. It declared the BOR to have the authority to grant pre-hearing disclosure of information under the Act and at common law because failure to do so could deny the appellants due process and a fair hearing of their appeal. The court declined to declare what specifically must be disclosed and ordered BOR to proceed to hear an application to determine what additional information was necessary to permit Wal-Mart to prepare its case.

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