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R. v. Charles, 2015 SKQB 381

Danyliuk, November 13, 2015 (QB15376)

Criminal Law – Procedure – Mistrial

The accused and his co-accused were jointly charged with committing robbery contrary to s. 344(1) of the Criminal Code and having their faces masked with the intent to commit an indictable offence contrary to s. 351(2) of the Code. The co-accused elected trial by jury pursuant to s. 565(1)(b) and s. 567 of the Code, thereby binding the accused to that election. After the jury was selected the trial commenced. Evidence was heard from employees of the robbed bank and from a young offender who had already pled guilty before this trial. After a question arose as to his evidence, a voir dire was scheduled to be heard for two days following a statutory holiday, so the jury was sent out and directed to return on the following Monday. During that period, the co-accused informed the court that she changed her plea to guilty to both counts. The trial judge questioned the accused to satisfy himself as to the matters raised by s. 606 of the Code and accepted the pleas. The co-accused would then be a witness for the Crown and provided a statement to the police immediately. Counsel for the accused applied for a mistrial as the only realistic remedy to assure her client of a fair trial on the grounds that: the accused had not wanted to be tried by a jury and had to participate only as a result of his co-accused's election. It was therefore unfair for him to face a jury trial in the circumstances. The accused was prejudiced by a disclosure issue as counsel would not have sufficient time to prepare regarding the new statement from the co-accused. Further, the conversion of the co-accused to a Crown

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witness adversely affected the overall trial strategy of the accused, as his counsel submitted that she would have to run the trial differently from the outset and the knowledge of the change would affect how she questioned the other Crown witnesses. The co-accused had not been excluded from the trial and could now tailor her testimony. The Crown resisted the application and argued that there was no prejudice to the accused as the defence would have a full day to prepare based on the new statement. The Crown also suggested that the guilty plea ought to have occurred before the jury. The issues in the application were: 1) what the proper process was for accepting the guilty pleas; 2) had the accused met the test for granting of a mistrial motion; 3) if not, what remedy was available to the accused; and 4) if the trial continued, would it be as a jury trial or a non-jury trial.

HELD: The application for mistrial was dismissed. The trial judge held with respect to each issue that: 1) there was no requirement for the jury to receive the pleas and taking them in their absence shielded the accused from some of the prejudice arising from them. The jury would be instructed that the co-accused would be dealt with separately and to refrain from speculating on the reasons for the absence of the co-accused. Any prejudice that would arise from the jury learning of the guilty plea if the co-accused became a witness could be ameliorated through proper mid-trial and final instructions; 2) the accused had not met the test as this was not a clear case where no other remedies are available. By law the accused had to participate in a jury trial, and that did not make the trial unfair. The fact was not important that the accused would have elected differently if the co-accused had pled guilty earlier. Defence counsel had not provided information regarding how she would be prejudiced and had three days in which to prepare to respond to the statement. Similarly, counsel had not established what she would have done differently with respect to the witnesses who had already testified. The co-accused had the right to be present at the trial until she changed her pleas. If she was to testify as a witness, she would have to stay out of the courtroom until she did so; 3) he had dealt with this issue and the fourth issue in large part. There was no authority provided by the accused that the judge could discharge the jury unilaterally and without Crown consent. Consent was now required because the proposed re-election occurred more than 15 days following the preliminary inquiry. There was no evidence that the accused would not be fairly tried in front of this jury or that the change in the co-accused's status was so remarkable as to shift the course of the trial for the accused. The remedies, as discussed, would be provided by the preparation time available and the timing of the co-accused's testimony.

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Sheppard v. Hummel, 2016 SKCA 26

Richards ane Wilkinson, March 3, 2016 (CA16026)

Contracts – Formation – Intentions of Parties
Contracts – Sale of Land
Real Property – Land Titles – Miscellaneous Interest – Restrictive Covenant

The appellant registered a commemorative marker on the home quarter of his family farm and then registered a restrictive covenant against the title to the quarter in an attempt to protect the marker from interference. The appellant sold the quarter to the respondents who covered the marker and turned it into a flower planter. The appellant then commenced legal proceedings to enforce the rights he believed he had pursuant to the restrictive covenant. The Court of Queen's Bench held that the restrictive covenant was invalid and rejected the appellant's argument that there was a personal covenant between the parties preventing the interference with the marker. The appellant accepted that the restrictive covenant was invalid but continued to argue that there was an enforceable personal covenant. The contract of purchase and sale for the quarter did not refer to the marker. It did contain a clause that the contract referred to the offer being subject to the reservations and exceptions appearing on the title.
HELD: The appeal was dismissed. There was no personal covenant between the parties. The court examined the intentions of the parties. The lower court found, and was reasonable to do so, that the respondents did not have any knowledge of the content or nature of the so-called restrictive covenant when the contract was signed. Further, the chambers judge found that they did not know of the appellant's expectations about the ongoing display of the marker. The appeal court assumed that the restrictive covenant was a reservation and exception pursuant to the contract but the restrictive covenant did not mean that future purchasers would be bound by it. The appeal court could not find any error in the decision of the lower court.

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Saskatchewan (Workers' Compensation Board) v. Gjerde, 2016 SKCA 30

Jackson Caldwell Ryan-Froslie, March 9, 2016 (CA16030)

Administrative Law – Appeal
Administrative Law – Judicial Review – Workers' Compensation Board
Statutes – Interpretation – Workers' Compensation Act, 1979, Section 62(1)(a)

The respondent was injured in a workplace accident in 1987. His benefits pursuant to The Worker's Compensation Act, 1979 were

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terminated a few months after the accident by the Workers' Compensation Board of Saskatchewan when an orthaepedic surgeon wrote a letter indicating the respondent could resume normal activities. In 2007, the respondent requested a Medical Review Panel (MRP) to be established, pursuant to s. 60 of Act, to examine him and determine whether his chronic pain was related to the 1987 workplace injuries. The board endorsed the conclusion of the Medical Review Panel (MRP) that found the respondent was fit to work without determining the cause of the respondent's chronic pain. The respondent has not had lasting employment since the accident. He argued he cannot work due to soft tissue injuries sustained in the accident. The team leader with board services established the members of the respondent's MRP. She provided the respondent with a list of 29 doctors for him to choose his panel from. The respondent voiced his concerns regarding the fairness of the procedure because two of the doctors on the panel were orthopaedic surgeons who dealt with the skeletal system not soft tissue and also because one doctor had seen him before and said he could return to work. The MRP determined that the respondent could perform sedentary to moderately physical work. The board thus determined that the respondent was not entitled to further benefits under the Act. The respondent applied for judicial review 44 months later. The board argued that the application should be dismissed for undue delay, but the chambers judge found that any delay was adequately explained. The chambers judge found that the MRP had breached the duty to observe the rules of natural justice and procedural fairness because: neither orthapaedic surgeons nor neurologists are specialists in the classes of injuries that compensation was claimed for and one of the doctors previously treated the respondent leading to termination of his benefits. The board argued that the chambers judge erred by: 1) refusing to dismiss the judicial review application on the basis of undue delay; 2) receiving a doctor's affidavit stating that orthopaedic surgeons and neurologists were not specialists in chronic pain; and 3) finding the board had breached its duty of procedural fairness to the respondent by preparing lists of doctors for him and by finding that the doctor that had treated him before had provided a recorded opinion adverse to that stated in the medical certificate filed in support of the request for MRP.
HELD: The court analyzed the issues as follows: 1) the appeal court agreed with the chambers judge that, even if there was undue delay, the board failed to show any substantial hardship or prejudice to its rights, and given the merits of the application, it would be in the interests of justice to hear the matter; 2) the Act indicates that physicians who serve on MRPs must be specialists "in the classes of injuries for which compensation has been claimed". Without the ability to supplement the record in that regard, the judicial review of the board's decision would not be possible. Also, the board did not raise objection to the respondent filing the affidavit at judicial review, they only did so on appeal; and 3) the chambers judge did not review the

board's interpretation of s. 62(1)(a) using a reasonableness standard and she therefore erred. However, it was not found to be an error that affected the overall correctness of her decision. The board's interpretation was unreasonable. The certificate requesting the MRP clearly identified the medical condition to be determined was one of chronic pain and the issue to be resolved was the cause of the chronic pain. The appeal court did not find the board's argument that chronic pain was not a specialty persuasive. First, because chronic pain is not a branch of medicine for which a specialty designation can be obtained does not mean there are no specialists that deal with that medical condition, nor does it necessarily follow that it would be a difficult matter to determine the specialists that treat the condition. Second, whether a physician is a specialist in a particular class of injury is a question of fact. There was only evidence from the respondent that the specialists in his case were not chronic pain specialists; there was no evidence from the board that they were. Third, the board took an unduly narrow approach to the assessment of which physicians constituted specialists in the case. The chambers judge did not err in finding the board had failed to follow the legislated requirements set out in s. 62(1)(a) when it prepared the list of doctors to choose the MRP from. The board's appeal was dismissed and the chambers judge's decision was upheld.

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Livingston (Hi-Cam Builders) v. Span West Farms Ltd., 2016 SKCA 33

Jackson Ottenbreit Ryan-Froslie, March 14, 2016 (CA16033)

Statutes – Interpretation – Builders' Lien Act, Section 55

The appellants operated a partnership that provided services and material to the respondent, Span West Farms, that were used for improvements to property owned by the respondent Triple R. Ventures. The appellants submitted that they were never paid and registered a builders' lien against the property in December 2012. They then commenced an action in the Court of Queen's Bench to enforce the lien and collect the debt owing to them. In February 2015, the respondents applied for an order vacating the lien and dismissing the action on the grounds that it had not been set down for trial within two years of its commencement as required by s. 55(1) of The Builders' Lien Act. The appellants then made an application requesting amendments to their statement of claim and an extension of time to set down their action for trial. The chambers judge refused to grant the request for amendment on the ground that the appellants had not provided sufficient explanation for the delay and dismissed their court action in its entirety in accordance with s. 55(3) of the Act because their lien had

expired. The appellants appealed on the grounds that the chambers judge erred in: 1) refusing to extend the time; and 2) dismissing the action in its entirety.
HELD: The appeal was dismissed on the first ground but allowed on the second ground. The court found that the chambers judge had not erred in the exercise of her discretion pursuant to s. 55(1) in her denial of the application to extend the time to set the action down for trial. She correctly found that there was no evidence provided by the appellants that would justify their delay of fifteen and a half months. Regarding the second ground, the court found that the appellants' statement of claim sought to enforce their lien and to obtain judgment for the debt owing pursuant to their contract with Span West. The court interpreted the word "action" in s. 55(3) of the Act and held that the word should be interpreted as referring only to a cause of action with respect to a lien and because the appellants' statement of claim included a cause of action in debt, the chambers judge erred in dismissing their action in its entirety. Only the action pertaining to the lien should have been dismissed in accordance with s. 55(3) of the Act.

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Pilot Butte (Town) v. Aaron Enterprises Inc., 2016 SKCA 36

Jackson Herauf Whitmore, March 17, 2016 (CA16036)

Statutes – Interpretation – Planning and Development Act, 2007, Section 176

The town of Pilot Butte appealed from the decision of the Planning Appeals Committee of the Saskatchewan Municipal Board (SMB) on the ground that SMB did not have the authority pursuant to The Planning and Development Act, 2007 to impose terms and conditions in a servicing agreement between the appellant and the respondent. The respondent owned land that it wished to develop. The appellant required the respondent to enter into a servicing agreement for the development and the former provided a draft agreement, including servicing fees to be paid as contemplated by s. 172(3)(b) of the Act at a rate of $190,618 per hectare. The respondent refused to execute the agreement and applied to the SMB requesting that it set the terms and conditions of the servicing agreement related to: 1) the amount of the servicing fee; and 2) the timing of the payment of the service fee. The SMB held that $96,480 per hectare was a reasonable servicing fee and that 50 percent of the fee should be paid upon written approval of the proposed subdivision by the director of Community Planning, with the balance to be paid 180 days after that approval and the appellant's written construction approval. The appellant objected to this condition because it does not provide such approval to developers.

HELD: The appeal was dismissed with respect to the quantum of servicing fees. The court held that the standard of review was correctness. The court found that the SMB had the authority to set the amount of the servicing fees. It also had authority to impose a time limit for the payment of servicing fees but as the appellant does not provide written construction approval, it was logical to remove the term.

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Boardwalk General Partnership v. Olson, 2016 SKCA 38

Ryan-Froslie, March 16, 2016 (CA16038)

Landlord and Tenant – Residential Tenancies Act – Application for Leave to Appeal
Statutes – Interpretation – Residential Tenancies Act, 2006, Section 19

The prospective appellant sought leave pursuant to s. 72(2) of The Residential Tenancies Act to appeal a Queen's Bench decision. The proposed respondent had applied for an order pursuant to s. 70 of The Residential Tenancies Act, 2006, requiring that the proposed appellant pay him the rent amount of $1,284 paid by him for premises that he had vacated at the end of February 2015. The claim was based on the fact that the proposed appellant had not provided him with a copy of the written tenancy agreement as required by s. 19(2) of the Act and accordingly his obligation to pay was unenforceable. The hearing officer dismissed the claim on the basis that the proposed respondent had suffered no prejudice as a result of the omission. On appeal to the Court of Queen's Bench, the hearing officer's decision was overturned on the ground that he had made an error of law in concluding that a breach of s. 19(2) could be saved by a "prejudice analysis" as contained in s. 19(6). The proposed appellant's ground of appeal was the interpretation of s. 19 of the Act.
HELD: The application for leave to appeal was granted. The court found that the interpretation of s. 19, specifically s. 19(5) and s. 19(6) of the Act, had not been undertaken by the court. The proposed appeal merits consideration by the court. The interpretation was of general importance to landlord and tenants.

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Gray, February 5, 2016 (PC16009)

Criminal Law – Motor Vehicle Offences – Leaving the Scene of an

Accident
Criminal Law – Motor Vehicle Offences – Impaired Driving
Constitutional Law – Charter of Rights, Section 9, Section 10(b)

The accused was charged with driving a vehicle while impaired contrary to s. 253(1)(a) of the Criminal Code, refusing to provide a breath sample contrary to s. 254(5) of the Code, and leaving the scene of an accident with intent to escape criminal or civil liability contrary to s. 252(1) of the Code. The accused brought a Charter application alleging that her ss. 9 and 10(b) rights had been violated and asked that all of the evidence collected after the arrest be excluded pursuant to s. 24(2). A voir dire was held. The complainant had been rear-ended by a vehicle driven by the accused. The complainant called the police and advised that the accused appeared to be inebriated and had left the scene in another vehicle. The police located the other vehicle at the accused's residence because it was her husband who had picked her up at the accident site. The accused's husband told the police officer that the accused "had had a few". The officer observed that the accused smelled of alcohol and that her eyes were red and glossy. Because she matched the description of the driver who had left the scene, the officer arrested the accused for impaired driving and hit and run. He drove her back to the accident site in his cruiser. There he confirmed the time of the accident and the description of the accused with other officers and the complainant. The officer testified that in light of all of the information, he formed the opinion that the ability of the accused to operate a motor vehicle was impaired by alcohol and then read to her the demand that she provide samples of her breath suitable for analysis. Approximately seven minutes had elapsed between the time of arrest and the time at which the officer provided the right to counsel and made the breath demand. The accused was then taken to the police station and she spoke to Legal Aid duty counsel. She then failed to provide a proper sample. She made five improper attempts to blow and then refused to try again. The defence argued that because the officer did not have reasonable grounds to conclude that the accused was the operator of the vehicle responsible for the accident or reasonable grounds to conclude that her ability to operate a vehicle was impaired by alcohol, he had no basis to make a breath demand pursuant to s. 254(3) of the Code. Therefore the arrest and demand were not lawful and resulted in an arbitrary detention pursuant to s. 9. The alleged breach of s. 10(b) occurred because the accused was not given her right to counsel at the time of her arrest.
HELD: The Charter application was dismissed and the evidence admitted to the trial of the accused on the charges. The accused was found guilty of all charges. The court found that the officer had reasonable grounds to conclude that the accused had been the driver of the vehicle in the accident and had been impaired. Thus the arrest and breath demand were both legal and the accused was not arbitrarily detained. With respect to the alleged breach of s. 10(b), the court found that the officer explained the delay between the time of arrest and the

time that the accused was read her right to counsel. The evidence supported the officer's belief that the accused was impaired. The accused had not denied that she refused to provide breath samples and had not provided any excuse for that failure. The court did not believe the accused's explanation that she left the accident scene because she was in pain and needed medical help as there was no evidence of any injury.

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Kovatch, January 18, 2016 (PC16020)

Criminal Law – Sentencing – Breach of Recognizance
Criminal Law – Sentencing – Controlled Drugs and Substances Act – Possession of Marihuana
Criminal Law – Sentencing – Controlled Drugs and Substances Act – Trafficking in Cocaine
Criminal Law – Sentencing – Possession of Proceeds of Crime
Criminal Law – Sentencing – Pre-sentence Report
Criminal Law – Sentencing – Sentencing Principles

Police obtained a search warrant for an apartment they had done surveillance on. They seized drugs and items used to sell them. The accused admitted the drugs were his and that the sale of drugs subsidized his rent and drug use. The accused pled guilty to possession of cocaine for the purposes of trafficking and to possession of money knowing it was obtained by the commission of an indictable offence. He was released on a recognizance that required him not to be in possession of any alcohol or drugs and that he submit to a search. While released on his recognizance, the accused was charged with and pled guilty to further charges: possession of marihuana; simple possession of cocaine; possession of money obtained by commission of an indictable offence; and two breaches of recognizance by consumption of alcohol or illegal prescription drugs. A pre-sentence report was ordered and a number of affidavits and letters of support from various relatives were presented to the court. He was assessed as a medium risk to re-offend. The pre-sentence report concluded that, given the accused's record and the nature of the offences, a period of incarceration was appropriate. The accused was drug-free for a year prior to sentencing while working on his uncle's farm. The accused's record consisted of a conviction of possession of marihuana for the purpose of trafficking, for which he was placed on probation. The accused argued that the case had such exceptional circumstances that he should be given a suspended sentence and probation. He indicated he was not a large or commercial trafficker. He was just supporting his habit. The accused argued that rehabilitation should be the primary

focus of the sentencing court.
HELD: A number of Saskatchewan Court of Appeal decisions indicated that the sentencing range for possession of cocaine for the purposes of trafficking is a jail sentence between 18 months and four years. The court concluded that the Saskatchewan cases should be relied on over decisions of other provinces. The court determined that the accused's steps at personal improvement and the facts of the case led to some reduction in sentence length, but the sentence was still actual jail time. Rehabilitation was a factor but only secondary to denunciation and deterrence. Parliament removed a conditional sentence from the sentencing options for a trafficking charge, and therefore the court found that Parliament was indicating jail was the norm for the type of charge. The court concluded that a jail sentence of 15 months followed by two years probation was appropriate for the charge of possession of cocaine for the purposes of trafficking. The necessary ancillary orders were also made. The accused was sentenced concurrently on all the other offences: nine months jail time for the possession of money obtained by commission of an indictable offence charge; six months jail time on the charge of possession of cocaine; one month for each breach of recognizance; and three months for the charge of possession of money knowing that it was obtained by the commission of an indictable offence.

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Demong, February 24, 2016 (PC16022)

Contract – Breach – Repudiation
Contracts – Formation – Consensus Ad Idem

The corporate plaintiff alleged that it entered into an agreement to provide landscaping goods and services for the defendants and that they refused to pay when an invoice for some of the work was provided to them. The work was not completed. The defendants argued that the plaintiff abandoned the contract and that much of the work done was deficient and not of good workmanlike quality. They also disputed the quantum claimed. The defendants also commenced action against the corporate defendant and the primary shareholder of the corporate defendant. They sought damages for negligence and for breach of contract. The plaintiff indicated to the defendants that the contract was a lump-sum contract with full payment being sought after the work was complete. The plaintiff commenced work on June 9, 2013, and ceased on June 17, 2013. The defendant asked the plaintiff for an invoice for the work done so far and asked when the plaintiff would be back to complete the work. The defendant also advised the plaintiff that they

were not happy with the work done so far. There were various emails back and forth between the parties. The plaintiff provided the defendant with an invoice totaling $9,800.32 for the work done so far. The defendants had to arrange for alternative contractors to correct the deficient work and to complete their landscaping, at a total cost of $17,614.67. The issues were: 1) was there a contract between the parties, and if so, what were the essential terms; 2) did the plaintiff abandon the contract, and if so, how should the defendants respond; 3) were the defendants entitled to recover for repair of deficiencies and costs to complete the contract; 4) was the plaintiff entitled to recover from the defendants; and 5) was the plaintiff in his personal capacity responsible for any of the costs incurred by the defendants.
HELD: The court determined the issues as follows: 1) there was a lump-sum contract between the parties that anticipated three distinct areas of work: preparation of the property for the walkways and patio; tearing down the old deck and building a new one; and the garden area; 2) the plaintiff abandoned the contract and left the work unfinished; 3) the defendants were entitled to treat the plaintiff's decision as a repudiation of the agreement and accept the repudiation and thereby terminate the agreement. They were then free to engage other contractors to complete the project in an effort to mitigate the losses sustained from the repudiation. The court found that the defendants mitigated their losses in a timely fashion; 4) the court found that only a nominal amount of work was done under the contract and there was no substantial performance of the contract. The defendants did accept some of the work and materials provided by the plaintiff. Therefore, the court was entitled to imply a new contract. The amount charged by the contractor for the walkways and patio was found to be reasonable. After setting off the amount paid to the new contractor, the defendants owed the plaintiff $3,475.91 for the walkways and patio. The court did not award the plaintiff a restocking fee for deck materials or the cost of obtaining a permit. The plaintiff was awarded $367.50 for the deck. The plaintiff was awarded $950 plus GST for the work done hauling away material for the garden area. There was also not an agreement as to the final cost for work on the garden area. In the end, the plaintiff was entitled to judgment in the sum of $4,840.91; and 5) there were no special circumstances allowing the court to lift the corporate veil and hold the personal plaintiff liable. The plaintiff was awarded $4,840.91 plus prejudgment interest.

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Jatana v. Ferguson, 2016 SKPC 23

Monar Enweani, February 11, 2016 (PC16031)

Torts – Motor Vehicle Accident – Liability

Torts – Negligence

The plaintiff claimed against the defendant for the $100 insurance deductible payable as a result of a motor vehicle accident. The plaintiff asserted that the defendant's negligence was the cause of the accident and the defendant denied being at fault. The accident occurred in an uncontrolled intersection in a residential area. The plaintiff testified that his vehicle entered the intersection first and that he saw the defendant's vehicle about 30 meters back from the intersection. The road was slippery and the defendant's vehicle hit the passenger side of his vehicle. The defendant testified that he entered the intersection at the same time as the plaintiff and when he saw the other vehicle, he braked but could not stop. He testified that he believed he had the right of way as his vehicle was on the plaintiff's right.
HELD: The claim was dismissed. The court found that the vehicles entered the intersection at the same time, so that s. 219(1) of The Traffic Safety Act did not apply. There was no evidence that the plaintiff tried to slow down despite the fact that he saw the defendant's vehicle. The plaintiff failed to yield the right of way at an uncontrolled intersection. The court found that there was no contributory negligence on the part of the defendant who testified that he braked immediately but was unable to avoid the collision.

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Prebushewski v. Saccucci, 2016 SKPC 24

Monar Enweani, February 11, 2016 (PC16032)

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

The plaintiff appellant commenced an action against the defendant in small claims court. The parties both appeared at a case management conference when a trial date was selected. On that date, neither of the parties appeared and a default judgment was granted dismissing the claim. When the certificate of judgment was provided to the plaintiff, he immediately realized that he had mistakenly recorded the trial date on another day. He immediately telephoned the clerk's office and commenced this application to set aside the default judgment under s. 37 of The Small Claims Act, 1997. The appellant provided an affidavit as required by the section to set out his reasons for not appearing. The appellant advised that in addition to making a mistake about the date, he was in difficult circumstances because of marriage problems and a number of family members had died at or around the date of the trial.
HELD: The appeal was allowed. The court found that the appellant had intended to proceed with his claim. He made an inadvertent mistake

regarding the date of trial but diligently pursued his appeal. He was distracted by serious personal matters. The test of "reasonable excuse" had been met. A new trial was ordered. To avoid setting a precedent by creating an incentive for litigants to ignore a small claims summons, the court ordered the appellant to pay $200 in costs to the respondent within 30 days of the decision and to provide proof of payment to the court. If the payment was not made, the application would be deemed dismissed.

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McMurtry, February 5, 2016 (QB16039)

Criminal Law – Appeal – Conviction
Criminal Law – Defences – Charter of Rights, Section 8, Section 24(2)
Criminal Law – Driving over .08 – Breath Demand – As Soon As Practicable
Criminal Law – Driving over .08 – Presumption of Alcohol Content – Criminal Code, Section 258(1)(c)

The appellant appealed his conviction of driving over .08 contrary to s. 253(1)(b) of the Criminal Code. The appellant was detained at the roadside at 10:25 pm and was arrested at 10:39 pm after failing the ASD. The officer forgot to give the appellant the breath demand until the detachment, which was at 10:56 pm. The trial judge found a breach of the appellant's s. 8 Charter rights because the breath demand was not made as soon as practicable. The Certificate of Analysis was admitted, however, after the s. 24(2) Charter analysis. The breach of the appellant's s. 8 Charter rights was found to be technical and the officer acted in good faith. Further, the appellant was not found to suffer any real harm from the delay in providing the breath demand. The judge also noted that impaired driving cases are serious and the evidence obtained was reliable and essential to the Crown's case. The appellant argued at trial that the Crown could not rely on the presumption set out in s. 258(1)(c) of the Criminal Code because of the officer's failure to make the breath demand as soon as practicable. The trial judge followed Dolezsar and held that the Charter breach did not preclude the Crown from relying on the presumption.
HELD: The appeal was dismissed. The court disagreed with the appellant that it was entitled to disregard Dolezsar. The court agreed with the interpretation of s. 258(1)(c) in Dolezsar that it does not incorporate a requirement that the s. 254(3) demand be made as soon as practicable. Further, the court noted that the doctrine of stare decisis requires caution in departing from the decision of a judge of the same court. The issue of the admissibility of the Certificate was decided when the trial judge performed the s. 24(2) Charter analysis and that has not

been appealed by the appellant. Once the Charter claim was dismissed the Crown could rely on the presumption in s. 258(1). The driving prohibition made by the trial judge was stayed for a further seven days.

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Gabrielson, February 8, 2016 (QB16048)

Civil Procedure – Costs – Queen's Bench Rules, Rule 11-1, Rule 11-7
Statutes – Interpretation – Canada Elections Act

The applicants commenced an originating application pursuant to s. 301(1) of the Canada Elections Act seeking an order directing a judicial recount after a federal election. The respondent, a candidate of a political party, applied pursuant to s. 309 of the Act for an order that her costs of the judicial recount be paid by the applicants following taxation. The applicants argued that the respondent's opportunity to raise the issue of costs had lapsed because it should have been done upon the issuant of the Certificate of Judge on Judicial Recount, issued pursuant to s. 308(b) of the Act. The judicial recount was ordered on October 30, 2015, and was completed on November 3, 2015. A certificate was issued on November 3, 2015, upholding the result in the election. HELD: The court interpreted ss. 309 and 310 of the Act as ensuring that the cost of a judicial recount would not be so prohibitive that individuals would be unable to apply for a judicial recount, nor would a candidate whose victory was challenged be financially unable to respond to a request for recount. Section 309 was found, at the very least, to create a presumption that a candidate who successfully defends her/his election will receive an order for costs against the applicant for the judicial recount. The applicant did not rebut the presumption, but rather argued that an order could not be made after the certificate was delivered. The court did not agree with the applicant. Section 309 does not contain any time limits for awarding costs. There was no undue delay by the respondent in requesting an award for costs nor were the applicants prejudiced by the failure to award costs at an earlier time. Judges have a wide discretion with respect to costs pursuant to Queen's Bench Rules 11-1 and 11-7. The court ordered that the applicants pay to the respondent the costs of the action taxed in accordance with the tariff of costs.

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Saskatchewan (Attorney General) v. Lafrance, 2016 SKQB 45

Meschishnick, February 10, 2016 February 29, 2016 (corrigendum) (QB16040)

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Criminal Law – Defences – Charter of Rights, Section 10, Section 24(2)
Criminal Law – Driving over .08

The respondent was acquitted of driving over .08 contrary to s. 253(1)(b) of the Criminal Code. The trial judge found that his right under s. 10 of the Charter had been violated and the certificate of analysis was excluded as a remedy to the breach pursuant to s. 24 of the Charter. The Crown appealed both the trial judge's finding that there was a charter breach and the exclusion of evidence based on the s. 24(2) analysis. The respondent was pulled over at 9:55 pm in front of the police station. The respondent was arrested after he failed the ASD test. He was advised of his right to counsel and was given a breath sample demand. The respondent indicated that he wanted to contact a lawyer. At 10:20 pm he was in a phone room with a telephone and yellow pages from the phone book. The officers had to dial the phone from outside the phone room. The respondent told the officer who he wanted to call. There was no answer at the lawyer's office. Another lawyer's name was given and he too was not at his office. The respondent then gave the name of a law firm and their answering service tried to contact a lawyer. After 23 minutes of the officer observing the respondent hold the receiver to his ear and not speak, he went into the room. When there was no sound on the other end, the officer hung up the phone. No further attempts to contact that law firm were made. The officer advised the accused that the investigation had to keep moving forward and suggested that he contact Legal Aid duty counsel. The respondent spoke to Legal Aid. The trial judge concluded that the officer should have placed a second call to the law firm to see if the first call had been disconnected. Further, there was no urgency at the time the officer called Legal Aid because there was almost an hour before the samples had to be taken. The officer was found to have taken the responsibility for implementing the accused's right to counsel and therefore should have taken steps that a reasonably diligent accused would be expected to take. The Crown argued at trial and on appeal that the accused was not diligent in exercising his right to counsel.
HELD: The trial judge did not make a palpable and overriding error with respect to the findings of fact. Further the appeal court found that the evidence was reasonably capable of supporting the conclusion that the respondent remained reasonably diligent in trying to consult with counsel of his choice. If the officer thought the respondent had just been stalling he would not have given him a further opportunity to contact duty counsel. The appeal court did not find that the trial judge double-weighed certain factors in the Grant analysis, as argued by the Crown. Also, the Crown could not refer the court to a case where the Certificate of Analysis was admitted when there was a s. 10 breach of the Charter.
CORRIGENDUM dated February 29, 2016: [37] My name was

misspelled on the signature page of the judgment and accordingly should read "G.A. MESCHISHNICK".

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P. (Z.A.), Re, 2016 SKQB 47

Goebel, February 11, 2016 (QB16049)

Family Law – Child in Need of Protection – Child and Family Services Act
Family Law – Child in Need of Protection – Long-term Care
Family Law – Child in Need of Protection – Permanent Order – Adoption
Family Law – Child in Need of Protection – Reintegration
Family Law – Child in Need of Protection – Temporary Order

The Ministry of Social Services sought to have brothers, ages five and six, permanently committed pursuant to s. 37(2) of The Child and Family Services Act. The children were in care for five years, the youngest being apprehended at birth. They were not in the same foster home, but the Ministry intended to place them for adoption as a sibling group. The biological mother argued that she was ready to resume full-time care of the children. The biological father conceded that the children remained in the need of protection, but opposed a permanent order. The Ministry had concerns with the father's history of domestic violence, substance abuse, and conviction for sexual assault of a minor. Further, the applicant asserted that the mother had been given numerous opportunities to have the children returned to her care, but they all failed due to her unwillingness and/or inability to cooperate with the Ministry. The Ministry first became involved with the children due to concerns of domestic violence and substance abuse by the father. From mid-2013 to the trial the Ministry and parents did not cooperate with each other. In May 2014 the oldest child was diagnosed with ADHD and began taking medication. Speech and language development continued to be an issue. The child's doctor indicated that frequent moves would affect the child negatively. The oldest child had the same therapeutic foster parent for the past three years. Her home was very structured and consistent. The Ministry indicated that the oldest child would continue to be in therapeutic care as long as he remained in care. The foster parent indicated she was committed to caring for him long-term, if necessary. The younger child has asthma and eczema, but was otherwise healthy and energetic. The foster parent for the younger child was the sister-in-law to the foster parent for the older child. He had some speech delay, but was receiving assistance from his caregiver. The father completed numerous voluntary courses while incarcerated. He signed up for every voluntary program while incarcerated. The father quit using alcohol, but still used marijuana periodically. The father had various excuses for only exercising his

access to the children on five or six occasions in a year, notwithstanding being entitled to monthly visits. The issues were as follows: 1) were the children in need of protection; and 2) if so, what was the appropriate order under s. 37.
HELD: The issues were determined as follows: 1) the court found that much of the evidence respecting the parents' capacity was favourable or neutral. Neither suffered from mental illness and both were of average intelligence. The physical residence of the parents was also not of concern. The mother and father acknowledged that their relationship in the past had included domestic abuse but both indicated that was no longer the case and domestic abuse would not be accepted by them. The court indicated that some caution was required given there was a long history of domestic violence and the mother and father had not participated in couples counselling despite being recommended to do so. Further, the court could not see any resources the mother had in place to get herself and the children away from a situation while remaining in relative stability. The court was satisfied that the parents were not presently capable of providing a tolerable level of care to the children and found that the children were in need of protection pursuant to s. 11(b) of the Act; 2) the court considered the separate needs of the children. The court was satisfied that the parents were capable of putting in place sufficient supports and making sufficient progress within a reasonable time period to resume care of the youngest child. A six month temporary order for the youngest child's care was found to be appropriate. The oldest child required therapeutic foster care while in the Ministry's care. The court concluded that a temporary order was not appropriate for the oldest child. The parents were not capable of, nor were they likely to be capable within a reasonable time, of providing him with the level of structure, routine, supervision and proactive care that were crucial to the oldest child's well-being and progress. The court found that an adoption was unlikely to succeed with the oldest child and a placement for adoption was not in his best interests. The court placed the oldest child in the long-term care of the Ministry until he reached 18, unless otherwise varied by the court. The court found it appropriate to place conditions on the orders made with respect to both children, pursuant to s. 37(5) of the Act.

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P. (S.D.) v. T. (L.M.), 2016 SKQB 48

Allbright, February 11, 2016 (QB16046)

Family Law – Child Support – Adult Child – Adult Student
Family Law – Child Support – Family Maintenance Act
Family Law – Child Support – In Loco Parentis
Family Law – Child Support – Interim

The petitioner requested orders setting the respondent's income at $31,662 and requiring the petitioner to pay child support for three of her children on the basis that the respondent stood in loco parentis to the children. The respondent argued that he did not stand in loco parentis and that it was made very clear that the children's natural father had the parenting role. Two of the children were over the age of 18. The respondent also obtained an interim support order from the children's natural father, which required him to pay support of $447 per month. The respondent indicated that the natural father has not paid any of the ordered amount. The youngest children were seven and two years old when the parties began living together. The respondent argued that the petitioner provided the children with emotional support and tangible material items.
HELD: The court held that it was bound by the principle of comity of judgments to hold that the respondent was not entitled to an order pursuant to s. 4 of The Family Maintenance Act for the oldest children, who were over the age of 18 at the time of application. There was also a dearth of factual and financial information with respect to the older two children. The court interpreted the Act to mean that if a person was found to stand in loco parentis to a child prior to the child's eighteenth birthday that order could continue past the child's eighteenth birthday. The petitioner was found to stand in loco parentis to the youngest child while the parties lived together. The in loco parentis status continued one the parties no longer resided together. There was a child support order from the child's natural father that had to be considered in deciding the quantum of support payable by the petitioner. The court made an order for reduced payment of child support from $240 to $160 for the child under the age of 18.

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Ammazzini v. Anglo American PLC, 2016 SKQB 53

Currie, February 17, 2016 (QB16066)

Civil Procedure – Class Actions – Certification – Application to Stay

The plaintiffs brought an application for certification in a proposed multi-jurisdictional class action (except British Columbia residents) commenced pursuant to The Class Actions Act. Similar actions had been commenced in British Columbia, Ontario and Quebec. The British Columbia action is not multi-jurisdictional in nature but the Ontario action is. The certification application for the latter action is scheduled to be heard in April 2016. The plaintiffs in the BC and Ontario actions applied for a conditional stay of the Saskatchewan action until determination of the Ontario application.
HELD: The application to stay the action was granted to the

representative plaintiff for the Ontario action. The application brought by the BC representative plaintiffs was dismissed because it is a single-jurisdictional class action. The court found that under s. 6(2) of the Act, the Ontario action involves similar subject matter to that of the Saskatchewan action. The court then assessed the factors set out in s. 6(3)(b) in accordance with the objectives set out in s. 6(3)(a). It found that under ss. 6(3)(b)(ii) and (iii), the Saskatchewan plaintiffs had built on the work of the Ontario and BC actions and the lead had been taken in the Ontario action to represent the interests of Canadian claimants outside BC. The Saskatchewan action was duplicative and thus contrary to s. 6(3)(a). The stage and plan of each action favoured Ontario as the appropriate venue for the action. Because of this determination, the court did not have to determine whether to certify the Saskatchewan action. If the stay is lifted, it would revisit the question.

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Clare v. Kinar, 2016 SKQB 54

Smith, February 18, 2016 (QB16056)

Family Law – Spousal Relationship
Family Law – Spousal Support – Common Law Relationship
Family Law – Spousal Support – Determination of Income
Family Law – Spousal Support – Interim
Family Law – Spousal Support – Spousal Support Guidelines

The parties moved in together no later than September 2009 and separated in August 2015. The petitioner sought interim spousal support on the grounds that there was considerable discrepancy between the parties' incomes, the respondent had the means to pay, and the petitioner had the need. The petitioner argued that they were in a spousal relationship because they lived together for at least six years, shared the same bed, were sexually intimate, maintained the home together, took holidays together, etc. The respondent asserted that the petitioner was a boarder and paid her monthly for room and board with the parties never comingling their funds. Each party indicated they were single on their tax returns.
HELD: The court found sufficient badges of a spousal relationship so as to warrant an interim order. The petitioner's income was set at $30,000 per annum. The respondent's income varied from $67,540 in 2012 to $137,158 in 2014. She was a mortgage specialist and her 2015 income was expected to be over $300,000 due to a one-time project. Future years income were expected to be closer to 2014 income. The court held that it was inappropriate to put too much emphasis on 2015 income and determined the respondent's income to be $210,000. The court used the Spousal Support Advisory Guidelines to find the range of spousal

support to be $1,350 to $1,800 per month. The respondent was ordered to pay interim spousal support of $1,500 per month.

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Neumann v. Neumann, 2016 SKQB 55

Layh, February 18, 2016 (QB16057)

Estate Administration
Wills and Estates – Estate Administration – Executor – Removal

Three brothers, W.A.N., P.N., and W.J.N., were involved in disputes involving their father and mother's estates. The father died in 2002 and named the mother as executor, with P.N. as alternate executor, leaving his estate to the mother. In 2005 the mother renounced probate to the father's estate and Letters Probate were granted in favour of P.N. The father's estate, including jointly held property with right of survivorship, totaled $258,918.07. The mother died in 2009 and had executed a will in August 1999 when the father did. That will divided everything equally between the three brothers. P.N. presented a new will of the mother to his brothers that the mother executed in January 2005. The will appointed P.N. as executor and gave all farmland and farm equipment to him. W.A.N. and W.J.N. were each given a Guaranteed Investment Certificate. The residue of the estate was to be shared among the three brothers. The 2005 will was not prepared by a lawyer. P.N. had not yet applied for Letters Probate on the mother's estate. W.A.N. sought the following relief with respect to the mother's estate: 1) that P.N. be required to produce the mother's 2005 will; 2) that he be appointed as administrator with will annexed in place of P.N.; 3) that P.N. take no further action pending disposition of the application without leave of the court; and 4) costs on a solicitor and client basis. W.A.N. sought the following relief with respect to the father's estate: 1) that Letters Probate granted to P.N. be revoked; 2) that he be appointed as administrator with will annexed; 3) that P.N. produce a true and accurate accounting of his executorship of the father's estate; 4) that P.N. take no further action under the grant pending the disposition of the application without leave of the court; and 5) costs of the application on a solicitor and client basis.
HELD: The court first dealt with the issues regarding the mother's estate. The court found that W.A.N. could be appointed as administrator of the estate pursuant to s. 17(1)(b) of The Administration of Estates Act. P.N. had not applied for Letters Probate within 60 days as outlined in s. 14. Previous case law confirmed that ss. 17(1)(a) and (b) should be read disjunctively, not conjunctively, and therefore, a judge may consider insolvency or other "special circumstances" to determine whether a person other than that entitled by law should be appointed

to administer an estate. The court found many facts suggesting that P.N.'s administration of the estate qualified as "special circumstances". One special circumstance was that P.N. had not applied for Letters Probate. W.A.N. brought an identical application four and one-half years previous. The application was adjourned sine die to permit P.N. to address further questions, which he never did. The mother's funeral expenses were still not paid because the mother died with insufficient cash assets to pay her own funeral expenses. The assets of the father's estate had apparently not been transferred to the mother. The court relied on s. 17 of the Act and the court's inherent jurisdiction to remove executors. The court ordered with respect to the mother's estate as follows: 1) P.N. was ordered to produce and deliver to legal counsel for W.A.N. the original 2005 will within 15 days; 2) P.N. was removed as executor; 3) W.A.N. was granted leave to apply for Letters of Administration with Will Annexed; 4) P.N. shall not do anything in connection with the estate; 5) P.N. was ordered to deliver all of the assets of the mother's estate to W.A.N.; 6) W.A.N. was granted access to the court file; 7) leave was granted to W.A.N. to apply to the court for further directions, if required; and 8) P.N. was ordered to pay costs of $700. W.A.N. requested that Letters Probate be revoked and he be appointed administrator of his father's estate pursuant to rules 16-47 and 16-49 of The Queen's Bench Rules and s. 3 of the Act. The court proceeded on the basis of its inherent jurisdiction to remove an executor. The court found it in the best interests of the estate for P.N. to be removed and be replaced by W.A.N. The land registered in the father's name at the time of his death was still in his name. All of the land rental was paid to P.N. even though the father's will gave everything to the mother. Similar orders were made with respect to the father's estate to allow W.A.N. to apply for administration and conduct the necessary administration of the estate.

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Baker Hughes Canada Co. v. Estevan Plastic Products Ltd., 2016 SKQB 56

Elson, February 18, 2016 (QB16050)

Civil Procedure – Expert Witness – Application for Leave to Call
Civil Procedure – Queen's Bench Rules, Rule 5-40

The defendant applied for leave pursuant to rule 5-40(2) of The Queen's Bench Rules, to call additional expert evidence for a five-day trial scheduled for May 2016. The plaintiff objected to the application on the basis of rule 5-40, which stipulates time requirements for the disclosure of expert opinions. The notes of the pre-trial judge indicated that the defendant was to advise the plaintiff by November 30, 2015, if they

would be retaining a further expert witness. The defendant filed the application to call an additional expert witness on November 30, 2015. The only affidavit supporting the applicant was from the defendant's counsel and it indicated that it became apparent to counsel at the pre-trial conference that further expert evidence would be required. HELD: The application was dismissed. The court decided that the impact of the defendant's failure to comply with rule 5-40(2) was more appropriately addressed by the trial judge. There are two circumstances that the court can grant relief to a party seeking to present expert evidence when they have not complied with the time requirements of rule 5-40. The first circumstance is pursuant to rule 5-40(2) when a party wishes to serve an expert report in advance of a pre-trial conference, but failed to meet the time requirements. The second circumstance is the right to present expert evidence at a trial where compliance with rule 5-40(2) was not met. Previous cases have properly left the decision to the trial judge. The court did not read the opening words of rule 5-40(2) as allowing the court to make the order. The pre-trial was concluded and a trial date was set, therefore, the defendant's application was beyond the chamber judge's ability to relieve against it at this stage.

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Street Capital Financial Corp. v. Millora, 2016 SKQB 57

Turcotte, February 22, 2016 (QB16058)

Foreclosure – Procedure – Leave to Commence
Mortgages – Foreclosure – Equitable Mortgage
Mortgages – Foreclosure – Intervening Interests
Mortgages – Foreclosure – Leave to Commence
Mortgages – Foreclosure – Rectification

The proposed plaintiffs applied for leave to commence an action under The Land Contracts (Actions) Act. The application was complicated by the fact that the mortgage sought to be foreclosed upon was only registered against one of the titles to the two lots comprising the residential premises. The mortgage documentation erroneously referred to and was registered against only one of the lots. The proposed plaintiff sought to commence an action that included a claim for rectification to cause the mortgage to be registered against the titles to both lots. Alternatively, they sought a declaration that they held a valid equitable mortgage against the second title so foreclosure proceedings would be in respect to both titles. There was an intervening interest that was the first charge on the title without the mortgage. The Public Guardian and Trustee for Saskatchewan registered a writ of execution against the lots. The issues were as

follows: 1) whether the notice of the hearing for leave should have been provided to the intervening interest holder; and 2) whether the proposed plaintiff should be required to apply for rectification of the mortgage or for declaratory relief regarding the validity of the equitable mortgage claimed prior to leave being granted to commence the action. HELD: The court held that notice of the hearing was not required to be given to the intervening interest holder and leave was granted subject to conditions. Section 3(4) does not require notice of a leave application to be given to anyone other than mortgagors or person(s) in personal occupation of the premises. There could be no prejudice to an intervening interest holder at the leave stage. The leave stage is not the forum for substantial rights to be determined. The court found that requiring an independent action to determine whether the mortgage was rectified or whether an equitable mortgage would result in multiple proceedings would be beyond the delay contemplated by s. 3 of the Act.

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Royal Bank of Canada v. Merk, 2016 SKQB 60

Barrington-Foote, February 24, 2016 (QB16051)

Contracts – Interpretation – Consensus Ad Idem
Professions and Occupations – Lawyers – Legal Fees – Taxation

The plaintiff bank commenced foreclosure action against the defendants and was granted a personal judgment against the defendants for $58,211.96, plus costs and an order for sale. The parties subsequently made an agreement reinstating the line of credit and resolving the foreclosure action. The agreement provided that legal fees and disbursements incurred by the plaintiff in the foreclosure action would be added to the line of credit. The issue for the court was whether the agreement was binding and enforceable, and if so, the amount of legal fees and disbursements to be added to the line of credit. The defendants applied for an order pursuant to s. 70 of The Legal Profession Act, 1990 for taxation of the bill for legal fees and disbursements paid by the plaintiff to its lawyer. The defendants argued that the amount added to the line of credit should be the amount assessed by the local registrar not the amount of the bill. The plaintiff argued that the agreement should be interpreted to mean that the defendants agreed to the amount billed. The plaintiff indicated that it would not have entered into the agreement unless the full amount was included, and if the court finds otherwise, there was no consensus ad idem between the parties, and the agreement is not binding. HELD: The court found that the phrase “fees and disbursements incurred by” was the amount the plaintiff was obliged to pay. If the

legal account was reduced by the local registrar, the plaintiff would ultimately be obliged to pay the amount specified in the assessment. If the bank chooses to pay the full amount of the original bill, it would do so voluntarily. The correct interpretation was the amount billed, or in the event of an assessment, the amount fixed by the local registrar. To determine the consensus ad idem the court had to consider whether a reasonable bystander, knowing the facts, would conclude that there was an enforceable agreement on the terms as interpreted by the court. The court held that the agreement should not be considered void because the plaintiff was mistaken as to the law relating to the assessment of lawyer's bills. Neither defendant was aware that the plaintiff believed they had agreed to pay the entire bill, and would not seek an assessment.

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Unifor Local 1-S v. Saskatchewan Telecommunications Holding Corp., 2016 SKQB 62

Barrington-Foote, February 24, 2016 (QB16052)

Labour Law – Arbitration – Judicial Review – Standard of Review
Labour Law – Arbitration – Termination of Employment – Arbitration

The employee's termination of her employment by the respondent was grieved by the applicant union. The grievance was dismissed by the arbitrator. The applicant then applied for judicial review of the arbitrator's decision, requesting that the decision be quashed and the grievance be allowed, or that the arbitrator be directed to rehear the matter. The appellant alleged that the arbitrator acted unreasonably as follows: 1) in allowing the respondent to reopen its case to lead further evidence, and relying on that evidence as an essential element of his reasoning; 2) in finding that the respondent had no duty to accommodate the employee's proven disability; and 3) in finding that the respondent would suffer undue hardship if the employee was reinstated, in the absence of any evidence of undue hardship. The employee was on sick leave and became addicted to cocaine. The employee admitted her drug addiction and theft from the respondent on January 18, 2013. The arbitrator found that she received $1,272 in fraudulent credits on her personal cell phone prior to her sick leave, and thus, prior to her cocaine addiction. The employee denied receiving the credits at the arbitration, indicating that she was just agreeing to everything at that time. The employee did admit that she: received $15,733 in fraudulent credits to her debit card through 18 separate transactions; received $600 in gift card certificates on her husband's account; reinstated her cell service on two occasions; and stole $200 from the cash drawer. The employee pled guilty to fraud over $5,000 on

October 30, 2013, and received a conditional sentence. At the arbitration the respondent applied for and was allowed to provide rebuttal evidence after the applicant argued its case. The applicant argued that the respondent was required to lead all of the evidence in its possession relevant to the propriety of the credits in its case-in-chief.
HELD: The application was dismissed after the court found in favour of the respondent on the first of the applicant's arguments. The standard of reasonableness was the appropriate one for the decision to permit the respondent to reopen its case and lead replay evidence. The court found that the arbitrator based his decision to allow the evidence on two primary grounds. First, a review of the evidence in chief regarding the credits led the arbitrator to conclude that the respondent could not be faulted for failing to lead the additional evidence it led in replay. Second, the evidence led by the employee could properly call for rebuttal by the respondent. The respondent could not have anticipated the employee claiming that her admission regarding the credits was not genuine when they met. The mere fact of the grievance was not enough to put the respondent on notice that everything was in issue, and that all relevant evidence in the respondent's possession had to be led in chief. The arbitrator's decision to permit the respondent to reopen to lead reply evidence was justified, transparent, intelligible, and defensible in respect of the facts and law. The arbitrator determined that the respondent was entitled to terminate the employee solely on the basis of the credit thefts prior to her cocaine addiction, therefore they could not be subject to the accommodation and undue hardship issues in the second and third grounds of appeal.

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Baumung Estate; Tluchak Estate v. Bayer Inc., 2016 SKQB 63

Barrington-Foote, February 24, 2016 (QB16053)

Class Actions – Carriage Motion
Class Actions – Certification Schedule – Suspending
Class Actions – Competing Actions

There were two class actions brought against similar defendants with respect to an anti-coagulant medication. In the first action the plaintiffs were proposing a carriage motion. The second action was further advanced than the first and the lawyer for the second action advised that it would be pursued in Saskatchewan and that the plaintiffs in the second action resisted the carriage motion. One set of defendants also wanted to make submissions on the carriage motion and the other set of defendants, who were only named in the first action, did not want to do anything that might be seen as attorning to the jurisdiction of the court in the action. If the carriage motion was denied, the first action would

be stayed. In the second action the court had already set the certification schedule. The applicants for the carriage motion argued that the certification schedule in the second action should be suspended pending the carriage motion. It was early in the certification schedule.
HELD: The court did not consider it appropriate to suspend the certification schedule. In a previous application the plaintiffs in the first action argued that a certification schedule should not be set. A certification timetable was set anyway and the court found that nothing of substance had changed. The carriage motion was ordered to proceed on the schedule proposed by the applicants for it. The carriage motion was set for hearing in May 2016.

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Regina Qu'Appelle Health Region (Mental Health Inpatient Services Division) v. K. (K.), 2016 SKQB 65

Barrington-Foote, February 26, 2016 (QB16061)

Mental Health Services Act – Certification – In-patient Detention – Consent Order

The applicant applied pursuant to s. 24.1 of The Mental Health Services Act for an order that the respondent be detained at the Saskatchewan Hospital for a period not exceeding a year. The respondent consented to the order being made. A psychiatrist testified that the respondent first presented with psychotic symptoms at the age of 17 and then again four years later. He had been detained in Regina for 95 days prior to the hearing. The respondent was diagnosed with schizophrenia and continued to suffer from paranoia and delusions. The psychiatrist said that the respondent was not well enough to utilize the services in the community and that only the Saskatchewan Hospital offered the necessary combination of services to treat and stabilize the respondent. A social worker also testified that the respondent was likely to cause harm to himself as a result of his mental disorder and he had done so in the past.
HELD: The court declined to grant a consent order because s. 24.1(3) indicates that a long-term order can be made only if the judge is satisfied that the criteria listed in s. 24.1(1) have been met. The jurisdiction could not be created by consent. The court noted that there would be a question of whether a person meeting the criteria could even consent to the order. The court was satisfied that all five criteria had been met. The court granted an order pursuant to s. 24.1 of the Act.

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Zhang v. Joginder, 2016 SKQB 67

Elson, February 29, 2016 (QB16062)

Real Property – Certificate of Pending Litigation – Application to Vacate

The defendants applied for an order pursuant to s. 47(1)(b) of The Queen's Bench Act, 1998 to vacate a certificate of pending litigation that had been registered by the plaintiffs against the corporate defendant's title. The plaintiffs had brought an action against the defendants on various grounds relating to a lease they had entered into with them. The statement of claim sought remedies in the form of financial damages. There was no claim either to recover land or for an interest in land. The defendants had filed their statement of defence and counterclaim, to which the plaintiffs had replied. They then had the certificate of pending litigation issued and registered against the corporate defendant's title.
HELD: The application was granted and the certificate was vacated. The plaintiffs' claim was confined to monetary damages, and if successful, they would not recover land or an interest in land.

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Smiroldo v. Momentum Health & Fitness Inc., 2016 SKQB 70

Allbright, March 2, 2016 (QB16068)

Landlord and Tenant – Commercial Lease – Breach

The appellant appealed the decision of a Provincial Court judge in a small claims matter. The respondent (defendant) had entered into a commercial lease with the appellant. The lease was signed by the respondent as a valid non-profit corporate entity and by the appellant as the landlord in his personal capacity. After signing the lease, the non-profit entity changed to a numbered company but with the same directors and registered office. Under that name, the respondent commenced the action. The numbered non-profit corporation was struck from the rolls about five months after the action was commenced. The lease contained an express provision that the appellant would supply the respondent with heating equipment that would allow the premises to be heated in a reasonable manner. After commencing business as a martial arts studio, the respondents had problems heating the space. The appellant made alterations to the heating system to increase the amount of BTUs it generated, but that proved insufficient. The respondents eventually installed a new furnace at a cost of $10,900 to remedy the problem. At trial, the defendants' witnesses included a heating and mechanical expert who testified that the original furnace was undersized to meet the demand of the building

and clients who used the facility testified, describing the studio as extremely cold. The trial judge found that the defendant could not comply with the term of the lease because the heating equipment was inadequate to do what was required. The plaintiffs were awarded judgment in the amount of $10,900. The appellant argued at trial that as the entity that signed the lease no longer existed, the action could not be maintained under s. 276(1) of The Non-profit Corporations Act. Further, the appellant assigned the lease to his corporation and argued that the respondent should have done the same. The trial judge found that the respondent's assignment could be inferred on the facts: the respondent had the same directors and the appellant testified that he was the only director of his company, there was no difference between them and thus the action could be continued by the successor corporate party against the present defendant as the assignee of the original defendant. The defendant appealed on the grounds that the trial judge erred in law by: 1) finding that the respondent had standing to bring the action; 2) misinterpreting the lease and failing to consider the lease as a whole if the respondent did have standing; and 3) finding the appellant personally liable for breach of the lease notwithstanding the fact that the lease had been assigned.
HELD: The appeal was dismissed. The court found with respect to each ground that the trial judge had not erred in: 1) finding on the facts that the respondent had standing based on the conduct of the parties after the lease was signed as being consistent with an ongoing lease arrangement between them; 2) his interpretation of the lease or the identification of the relevant provisions; and 3) finding the appellant personally liable because the appellant had not raised the issue at trial.

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Bear v. Government of Saskatchewan, 2016 SKQB 73

Smith, March 2, 2016 (QB16069)

Aboriginal Law – Treaty Land Entitlement

The plaintiff, Muskoday First Nation, ratified the Treaty Land Entitlement Settlement Agreement with the defendant, the Province of Saskatchewan, in 2007. It then advised the defendant that, pursuant to the agreement, it had resolved to acquire provincial lands in the Fort a la Corne Forest Reserve (FALC) and requested certain Crown lands and minerals therein as part of its outstanding treaty land entitlement. The defendant rejected the request on the grounds that it was in the public interest to retain administration and control of the Crown lands because the lands requested included a large portion of the defendant's known kimberlite deposits. These deposits were subject to the advanced exploration and would support the development of a new diamond

industry in the province. The defendant also denied the request on the ground that acceptance would create uncertainty for the mineral disposition holders at a time when they were making substantial investments in exploration and development. Legal certainty in ownership was required for the purposes of raising capital. Muskoday commenced an action against the defendant for breach of its obligations under the agreement and applied to the Court of Queen's Bench for an order declaring: 1) the letter of rejection invalid and inconsistent with the terms of the agreement and the honour of the Crown; 2) that the defendant misinterpreted and misapplied the favourable consideration standard of articles 4.06 and 5.03(a) and the principle of willing seller/willing buyer set out in article 4.05(a) of the agreement; and 3) the defendant could not invoke the public interest. The defendant filed affidavits prepared by the government officials who were responsible for dealing with requests under the agreement. In them, the officials described the procedures adopted by the defendant to explain the reasons for the rejection of Muskoday's request. The defendant argued that the honour of the Crown was not engaged and that the agreement was contractual and should be dealt with in a normal commercial fashion.

HELD: The claim was struck. The court found that although the defendant had erred in its interpretation of the agreement and its obligations, the errors were not sufficient to negate the process undertaken by defendant and the reasons given in the letter denying Muskoday's request for the FALC lands. The court held with respect to the issues that: 1) the honour of the Crown was applicable to the agreement. Under the agreement though, the defendant was not obligated to sell any specific parcel of land. The honour of the Crown required that the defendant act honourably and with intellectual honesty and to avoid the appearance of sharp dealings; 2) it agreed with Muskoday that the defendant had misinterpreted the phrase "willing buyer/willing seller" in the agreement. In this case, applying the honour of the Crown as the lens through which to view the defendant's obligations and despite the fact that the court found that it had misinterpreted the phrase, the court concluded that the defendant had approached Muskoday's request in good faith and reviewed the issues in an intellectually honest fashion and without sharp practice and discharged its obligations under the agreement; and 3) the defendant could invoke the public interest. It had a duty to do so. The agreement does not displace the defendant's obligation to the province as a whole.

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Michalishen v. Urbanoski, 2016 SKQB 78

Mills, March 4, 2016 (QB16071)

Torts – False Imprisonment
Civil Procedure – Queen's BenchRules, Rule 421
Torts – Negligence – Duty of Care
Debtor and Creditor – Seizure – Sheriff – Duty of Care

The plaintiff brought an action against the various defendants as follows: RMCP for false imprisonment; the Attorney General for Canada as liable for the actions of the RCMP; a sheriff in negligence; and the Government of Saskatchewan as liable for the actions of the sheriff. After the conclusion of family law proceedings in 2001, the plaintiff, who operated a cattle farm, was ordered to pay his former wife the value of her share of the family property. A writ of execution was taken out by her in 2003 in the sum of $113,500 and registered with the sheriff. The sheriff advised the plaintiff of the writs and asked for proposal for payment, but no payment was made. The sheriff seized and sold some of the plaintiff's farmland but the proceeds did not pay out the writs of execution. Counsel for the plaintiff's former wife directed the sheriff to seize the plaintiff's cattle in an effort to collect the balance of the debt owing. The sheriff visited the plaintiff's farm and seized 80 cows and 40 calves. He left the cattle at the farm under a bailee's undertaking signed by the plaintiff. The plaintiff's lawyer wrote to the sheriff, suggesting that s. 66 of The Saskatchewan Farm Security Act (SFSA) might exempt the cattle and that any seizure would be subject only to the writ obtained by the former wife, not to other writ holders as per The Exemptions Act. The ex-wife's lawyer confirmed that he wanted cattle seized sufficient to answer the ex-wife's writ only. The plaintiff testified that he believed that there was nothing he could do with respect to his cattle in the circumstances. Approximately five months after seizure, the sheriff arranged for individuals who had experience with cattle to attend at the farm and assist with the removal of the cattle and for two RCMP officers to be present to keep the peace. With respect to the claim of false imprisonment, the plaintiff testified that the RCMP officers showed up without warning and told him that he was not allowed to leave his house, and if he did so, they would arrest him. They parked their car about two feet from the only entrance to his house and stayed there the entire time. The officers testified that they would not have told the plaintiff they would arrest him if he left his house as they had no right to do so and said that they parked about 40 feet from the plaintiff's door. With respect to the claim of negligence against the sheriff, the plaintiff alleged that he owed him a duty of care and he breached it by: 1) seizing cattle exempt under the SFSA. The plaintiff argued that because his lawyer's letter to the sheriff raised the issue of a possible exemption and because the judgment creditor was notified and responded, the sheriff had to place the matter before the court by way of interpleader under former Queen's Bench rule 421; 2) seizing the cattle in a manner that caused damage to them and to the plaintiff's fence; and 3) selling them in a fashion and for a price less than obtained in comparable sales.

HELD: The action was dismissed. With respect to the claim of false imprisonment, the court found that there was no confinement by the RCMP. The plaintiff exaggerated in his testimony and the court accepted the RCMP officers' testimony. With respect to the claim for negligence on the part of the sheriff, the court held that in this context, a sheriff did owe a duty of care to treat the judgment debtor's assets in regard to seizure, storage and sale in a reasonable fashion consistent with the nature of the assets seized. The court found with respect to each alleged breach that: 1) the plaintiff's lawyer's letter did not identify that he was claiming an exemption for the cattle in relation to seizure of them by the judgment creditor and that it did not automatically flow that the sheriff had breached the duty of care even if the plaintiff had properly raised an exemptions issue in the interpleader process; 2) the sheriff hired people who he reasonably believed were knowledgeable in the transportation of cattle. The plaintiff did not witness the seizure and saw after the fact that his fences had been damaged and that a number of cattle that had not been seized had been frightened into running into the bush. The court found that the plaintiff exaggerated what had occurred; and 3) regarding the sheriff's sale of the cattle, which was conducted at a local cattle auction business, the court found that he had sold them in a commercially reasonable fashion and had not breached any duty of care owed to the plaintiff.

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Trend America Inc. v. 101180736 Saskatchewan Ltd., 2016 SKQB 79

Megaw, March 7, 2016 (QB16072)

Corporations – Shareholder Remedies – Fraud or Oppression

The applicants sought various types of relief under the Business Corporations Act. The application brought by Trend America was dismissed as having no connection to the numbered company respondent (corporation). The remaining applicant, Bhatt, invested in a restaurant/bar that was owned by the corporation. He provided $175,000 initially in 2011 and later made further cash injections into the business. The respondents Zipchian, Patel and Scott, each provided $75,000. There was no documentation of how Bhatt's funds were to be utilized. The later advances were apparently understood to be a loan and not further shareholding investment. There was also confusion regarding the shareholding structure despite the fact that a shareholders' agreement was executed in 2013. In it, the respondents were issued 20 shares each and Bhatt received 40. There were no records before the court as to the share structure, directorships or management structure and no corporate records describing the injection of funds into the business. Over time, payments were made

from the corporation to the shareholders that were not characterized either as dividends or as repayment of loans. One of the respondents was involved in a family property dispute and another was interested in pursuing a separate corporate venture and the applicant suspected that corporate funds might be mismanaged as a result. A shareholder' meeting was held in 2015 at which the three respondents offered to purchase the applicant's share for $300,000. The applicant rejected the offer as he thought that his shares were worth $500,000. Concerned about his investment, the applicant was able to persuade an employee of the bank holding the corporate bank account to put his name as a signing officer for the corporation and then proceeded to withdraw $148,000. Later told that this action was improperly taken, the applicant transferred the funds to his lawyer to be held pending determination of the shareholding dispute. When the three respondents learned of what had happened, they prepared a joint resolution of participating directors and shareholders. In it, they stripped the applicant of his shareholdings and his directorship. They determined that the combined value of his shares and shareholder loans would be considered to be $148,000 and thus the funds that he had taken would be treated as payment of his complete interest in the corporation.

HELD: The application was granted in part. The court found that the respondents' actions qualified as oppressive under s. 234 of the Act and the applicant was put back into the position he was in prior to them, and because he had raised legitimate questions about the corporation's finances, it was appropriate to order production of information under s. 234(33) of the Act. The court ordered the corporation to provide to the shareholders the financial statements and a complete accounting of all payments made by it, for or on behalf of the individual shareholders. The court denied the application for an investigation and permission to commence a derivate action under ss. 222 and 232, respectively, of the Act as premature. It was adjourned to be brought back by either party upon seven days' notice. It declined to liquidate the corporation, remove directors or issue an interim restraining order.

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