The Law Society of Saskatchewan Library's online newsletter
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Subject Index

Cowessess Indian Band No. 73 v. Brabent and Co. Law Office, 2015 SKQB 412

Brown, October 6, 2015 (QB15406)

Professions and Occupations – Lawyers – Fees – Assessment – Limitation Period

The applicant applied pursuant to s. 67 of The Legal Professions Act, 1990 for an assessment of all bills for legal services that the defendant law office, comprised of a sole practitioner, had rendered within the last six years. The defendant had begun providing legal services to the applicant in 1992, including general counsel advice and specific legal services on many files relating to a wide range of practice areas from corporate to land-claim negotiations. There was no formal written retainer between the parties, but the relationship had proceeded on verbal terms and a mutual understanding. The applicant paid all the bills for legal services without complaint. In 2013 a new chief and council were elected, and following it, the applicant failed to pay the defendant's invoices from January 2013 to October 2014. The defendant was advised in December 2014 that the applicant would pay the outstanding amount, but in February 2015 the applicant passed a resolution to have the defendant's legal services assessed. Sometime during this period following the election, the applicant had hired a new law firm. The application was beyond the 30-day period required under s. 67(1)(a)(iii) of the Act. The defendant had filed numerous affidavits from a previous band chief and previous members of the council, deposing that they had always been pleased with his work and took no issue with the amounts he had charged.

HELD: The application was dismissed. The court held that the request for an assessment was not fair to the defendant and would not be in the interests of justice. The court reviewed the factors set out in Machula v. Kuse and found that the applicant had failed to provide the specific information required to direct an assessment of six years of legal services covering a multitude of issues on a substantial number of files. The court distinguished the applicant from the case of Vo v. Phillips Legal Profession Corp. because the defendant was not an unsophisticated client. The length of time was unusual, which would further support the need for clearly outlined reasons to justify going back six years. Further, the applicant had not made any complaints to the defendant even during the post-election period and had assured him that he would be paid. The defendant would be severely prejudiced by the assessment requested because of the time that it would take him from his practice to review six years of billings on hundreds of attendances. The applicant had not provided any properly supported allegations of misrepresentation, fraud or dereliction of duty by the defendant, whereas there was plenty of evidence that his legal services were effective and appreciated.

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Roberts Properties Inc. v. Saskatchewan Power Corp., 2016 SKCA 31

Caldwell Herauf Whitmore, March 9, 2016 (CA16031)

Civil Procedure – Queen's Bench Rule 173 – Pleadings – Striking Out – No Reasonable Cause of Action
Civil Procedure – Queen's Bench Rule 173 – Pleadings – Striking Out – Scandalous, Frivolous, Vexatious
Class Action

The appellant appealed the decision that struck its claim against the defendants for disclosing no reasonable cause of action. The appellant attempted to certify a class action alleging that the defendants, all electrical service providers, had overcharged the potential class for certain electrical services. The proposed class were "bulk-metered service locations", which were properties that have multiple residential units but share one electrical meter for the entire location. The appellants claimed that the defendants were being unjustly enriched by excessive basic monthly charges because they were required to pay a basic monthly service charge for each unit on the meter even though there was only one meter for the entire complex. The appellants also argued that the main defendant was required to have the rate schedule available for public inspection. The chambers judge struck the portions of the claim regarding the rate schedule being available for public inspection, finding they were frivolous, vexatious, or an abuse of

Administration with Will Annexed

Cases by Name

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process. The chambers judge found that the rate schedule existed. The chambers judge found that the claim for unjust enrichment could not succeed because s. 8(3) of The Power Corporation Act gave the defendants a juristic reason for any enrichment. It was further determined that the appellant did not successfully articulate a common law duty of fairness in the first place. The entire claim against the main defendant was struck for no reasonable cause of action. The claim against the other defendants was found to be derivative of the claim against the main defendant and it was therefore plain and obvious that the appellant's claim against them could not succeed and was struck. The issues dealt with by the appeal court were: 1) the application to strike out under former Queen's Bench rule 173(c) and (e) by the main defendant; 2) application to strike out under former rule 173(a) by the main defendant; and c) application to strike by the other defendants. HELD: The appeal was dismissed. The issues were dealt with as follows: 1) the chambers judge did not make an overriding and palpable error in her review of the affidavit evidence. It was clear that the rate schedule existed and was available for public inspection in the manner provided by s. 8(4) of the Act; 2) the argument was not considered because the appeal court found that the defendant had satisfied its obligation pursuant to s. 8(4) of the Act. The appeal court also found that the chambers judge did not err in her conclusion that any common law duty of fairness was supplanted by s. 8(3) of the Act; and 3) the appeal court confirmed that it was plain and obvious that the claim against the other defendants could not succeed because they were a derivative of the claim against the main defendant, which had been struck. The parties agreed that the order for costs by the chambers judge should be set aside and no costs should be awarded.

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R. v. Protz, 2016 SKCA 40

Jackson Herauf Whitmore, March 17, 2016 (CA16040)

Criminal Law – Appeal – Conviction
Criminal Law – Controlled Drugs and Substances Act – Medical Marihuana Certificate

The appellant appealed his convictions contrary to ss. 5(1) and 5(2) of the Controlled Drugs and Substances Act. The trial judge concluded that there were reasonable grounds to arrest the appellant and, therefore, his rights under ss. 8 and 9 of the Charter had not been breached. The appellant was caught with 21 pounds of marihuana, but he argued that the certificate allowing him to possess 150 grams of marihuana for medical reasons should have been taken into account. The appellant also argued that he should be acquitted on the basis that

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the laws regarding possession of marihuana were going to change.
HELD: The trial judge did not make any errors. The appellant could lawfully possess 150 grams, not 21 pounds and the offences were offences on the date of the occurrence.

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R. v. Machushek, 2016 SKCA 41

Jackson Caldwell Herauf, March 24, 2016 (CA16041)

Criminal Law – Aid or Abet
Criminal Law – Appeal – Acquittal
Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine

The Crown appeal raised the issue of when the assistance to a buyer of drugs becomes the criminal offence of aiding or abetting the seller contrary to the party provisions of the Criminal Code. Two undercover agents and the respondent each purchased one gram of cocaine from the same seller. The respondent was charged with two counts of trafficking in cocaine contrary to s. 5(1) of the Controlled Drugs and Substances Act, and two counts of possessing proceeds of an offence, contrary to ss. 354(1)(a) and (b) of the Criminal Code. The trial judge concluded that the two officers and the respondent each purchased cocaine. The respondent purchased his cocaine for his own use and did not handle the officers' money or their cocaine and he did not receive any payment from the seller or the officers. The respondent did call the seller and all three buyers went to the seller together. The trial judge concluded that the respondent did not traffic nor did he aid and abet the seller of the drugs. The trial judge made findings of credibility against the officers and against the respondent. The Crown argued that the trial judge erred in applying ss. 21(1)(b) and (c) of the Criminal Code. The issues were whether the trial judge erred: 1) by misinterpreting the case law and setting the bar too high for determining what constitutes aiding or abetting the trafficker; and 2) in law by failing to find on the facts that the accused was guilty of aiding or abetting the seller.
HELD: The appeal was dismissed. The appeal court dealt with the issues as follows: 1) the Crown set the bar too low. The Supreme Court of Canada indicated that where the actus reus was no more than incidental assistance of the sale through rendering aid to the purchaser the proper charge is not trafficking, regardless of intent. Further, with respect to the mens rea, the test is whether the assistance was rendered solely to the purchaser. The Crown must prove that the offender intended to assist the principal trafficker in the commission of the offence. The trial judge did not misinterpret the case law or set the bar

too high; and 2) it mattered who the respondent was intending to assist: only the buyers, the seller, or both. The trial judge must have found that the respondent intended to assist the officers only, even though he did not specifically say as much. The trial judge did not find that the respondent intended to aid the seller. He concluded that the respondent's aid to the seller was intended to aid himself and the officers to buy cocaine. The appeal court did not find any error.

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R. v. Fiddler, 2016 SKCA 42

Jackson Herauf Whitmore, March 16, 2016 (CA16042)

Criminal Law – Appeal – Convictions
Criminal Law – Firearms Offences
Criminal Law – Identification – Eyewitness Identification

The appellant appealed his two Criminal Code convictions: discharging a firearm in a populated place, contrary to s. 244.2(1)(a); and possession of a firearm while prohibited from doing so, contrary to s. 117.01(3). The appellant: 1) challenged the eyewitness identification of him by the complainant; 2) claimed his counsel did not properly or competently represent him; and 3) made reference to evidence from witnesses that may have shown he did not commit the offences.
HELD: The appeal was dismissed. The appellant's arguments were dealt with as follows: 1) the appeal court was satisfied that the trial judge was alive to the issues surrounding eyewitness identification and properly instructed himself; 2) and 3) the appellant would have to adduce fresh evidence to prove the claims, but the appeal court held that he did not adduce any evidence to bolster his claims.

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Hunchak v. Anton, 2016 SKCA 44

Ottenbreit Caldwell Herauf, April 1, 2016 (CA16044)

Family Law – Child Support – Variation – Retroactive – Appeal

The appellant appealed an order made by a Queen's Bench judge in chambers that varied the amount of child support payable by him for his adult daughter and required him to pay retroactive support for her. The parties had consented to an order that gave custody to the respondent of their daughter in 1995 and required the appellant to pay child support in the amount of $360 per month plus a further $75 per

month for s. 7 expenses, based on the appellant's then annual income of $48,000. The respondent then earned a similar income. The respondent made a number of requests of the appellant to disclose his annual income but the appellant refused to do so and insisted on paying the amount ordered. However, between the time of the order and 2013, the appellant's annual income had increased to $122,500. The respondent retired and received approximately $12,000 per year in pension income. In November 2013, the daughter turned 18, and the appellant unilaterally stopped making payments on the order and began giving money to his daughter. He payed her expenses directly: he gave her $250 per month and additional sums as she indicated need, and payed 75 percent of her university tuition and other expenses. The daughter held a part-time position from which she earned $7,400 per year, but the appellant and the respondent agreed that they did not expect her to contribute to her own support and schooling from this income. In October 2014, the respondent made an application to vary child support and sought retroactive child support from August 2011 to August 2013. She also sought ongoing child support based on the appellant's current annual income, retroactive s. 7 expenses for three years prior to June 2013 to the date of the application and an order that the appellant pay a portion of their daughter's s. 7 expenses, including tuition, books and transportation costs. At the time of the variation application made by the respondent, the daughter was 19 years old and attended university full-time. The chambers judge determined that the respondent had some reason to explain her delay in bringing the application and found that the appellant had failed to disclose his increasing income despite requests to do so. Although the judge found that nothing suggested that the daughter had been detrimentally affected by the appellant's failure to pay an increased amount, there would be no undue hardship imposed upon him if he was required to pay retroactive support. He determined the amount of retroactive support for 2012 up to October 2013 to be $13,000 after crediting the appellant with the amount paid pursuant to the order, the other payments that he had made to his daughter directly and taking into account that the respondent should have taken steps earlier to vary the order. With respect to ongoing child support, the court reviewed Geran v. Geran and determined that the appellant should pay it in accordance with s. 3(2)(a) of the Guidelines in the amount of $1,031 per month commencing November 2013. With respect to the claim for retroactive s. 7 expenses, the judge found that the appellant's payments had been sufficient but for the purposes of ongoing expenses. The court imputed income of $47,000 to the respondent and adjusted the appellant's share to 72 percent. The appellant appealed on numerous grounds that included whether the chambers judge erred in: 1) failing to direct a viva voce hearing; 2) failing to require further information be provided regarding the daughter's financial situation; 3) in discontinuing the financial arrangement that had been in existence since October 2013; 4) his application of the factors set out in Geran; 5) applying s. 3(2)(a) of the

Guidelines. The appellant argued that his obligations should have been assessed under s. 3(2)(b) because of the financial arrangement whereby he paid his daughter's expenses directly; and 6) awarding retroactive child support in the amount ordered.
HELD: The appeal was dismissed. The chambers judge had not erred. The court found with respect to the grounds that: 1) a chambers judge is entitled to deference in his assessment of controverted affidavit evidence. In this case, the judge did not indicate in his decision that there were material contradictions or factual disputes. The court found that upon review of the affidavit evidence there was no substantial disagreement and thus the chambers judge was correct to proceed on the basis of them and did not need to order a hearing; 2) there was no indication that the chambers judge erred by not ordering further information based upon the financial material before him, and the appellant had not raised the issue before or during the hearing that the information was insufficient; 3) the chambers judge was aware that the appellant had agreed to pay 75 percent of his daughter's university expenses on the basis that he would not pay ongoing s. 3 support. There was no indication that the appellant challenged the university expense as not being valid s. 7 expenses; 4) the parties had agreed that their daughter did not have to contribute her income to her support or schooling, and therefore the chambers judge rightly found that the situation in this case was closer to the circumstances of a child under 18 living at home without income and correctly applied the Geran factors; 5) the chambers judge correctly reviewed the matter under s. 3(2)(a) of the Guidelines, which is the default provision. The appellant had not met the onus to show support calculated under it was inappropriate; and 6) the chambers judge correctly found on the evidence that the appellant would suffer no hardship if retroactive support was awarded. The calculation of the amount was based on the appellant's s. 3(2)(a) Guidelines obligations as of October 2013 regardless of his payments for university expenses.

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Greer v. Babey, 2016 SKCA 45

Richards Caldwell Herauf, April 1, 2016 (CA16045)

Contract Law – Arbitration Clause
Statutes – Interpretation – International Commercial Arbitration Act

The appellant appealed the decision of a Queen's Bench judge in chambers in which she declined the appellant's request to have a certain claim by the respondent referred to arbitration pursuant to The International Commercial Arbitration Act (ICAA) to avoid a multiplicity of proceedings (see: 2015 SKQB 219). The respondent had

entered a franchise-type of agreement with the appellant concerning the use of certain crop planning technology in North Dakota. The agreement contained an arbitration clause that covered any dispute, difference or question arising between the parties in connection with it. Babco and the other respondents subsequently sued Ag Global and the other appellants in the Court of Queen's Bench. They advanced a variety of claims but one aspect of the suit was an allegation that Babco had been induced to enter the agreement by fraudulent or negligent misrepresentations. The issues on appeal were whether: 1) the ICAA applied; 2) the North Dakota claim fell within the scope of the arbitration clause; and 3) the chambers judge erred by basing her decision on a concern about a multiplicity of proceedings.
HELD: The appeal was allowed. With respect to the issues the court found that: 1) the matter in issue here was international and was governed by the ICAA because both the place of business of Babco and Ag Global's was Saskatchewan and the place where a substantial part of the obligations of the commercial relationship was to be performed was outside of Canada, meeting the requirement of Article 1(3)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (referred to in the ICAA as the International Law); 2) the North Dakota claim fell within the scope of the arbitration clause because the question of whether alleged misrepresentations made by the appellant can been seen as a dispute arising in connection with their agreement and would require the production and review of factual evidence. In accordance with the Supreme Court's ruling in Seidel, in such a case, a court should normally refer it to arbitration; and 3) the chambers judge erred. The concern with a multiplicity of proceedings was no longer a relevant factor in refusing to refer matters to arbitration as described in Article 8(1) of the International Law.

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Saskatchewan Power Corp. v. Alberici Western Constructors, Ltd., 2016 SKCA 46

Richards Caldwell Whitmore, April 4, 2016 (CA16046)

Contract Law – Arbitration Clause
Statutes – Interpretation – Arbitration Act, 1992 – Section 7, Section 8
Statutes – Interpretation – Queen's Bench Act, 1998, Section 29, Section 37

The appellant appealed the decision of a Queen's Bench judge in chambers who had denied it its application to stay an arbitration. The application had been made as a result of a construction contract between the appellant and the respondent that contained an arbitration clause but did not refer to the inclusion of third parties. The respondent

negotiated other contracts with sub-contractors that incorporated the arbitration clause contained in the main contract. A dispute regarding the main contract arose and the respondent served a notice of arbitration on the appellant as well as a statement of claim in order to preserve its rights in the event that arbitration failed. The appellant took the position that the matter should be litigated. The respondent brought an application to stay the action it had commenced so that the arbitration could proceed and the appellant brought the application to stay the arbitration. The chambers judge based his decision on the principle that if parties freely contract to resolve disputes through arbitration, their agreement should be given effect. He saw nothing in The Arbitration Act, 1992 or The Queen's Bench Act, 1998 that would preclude this conclusion. As a result, the judge stayed the action commenced by AB Western and dismissed SaskPower's application to stay the arbitration. The issues on the appeal were as follows: 1) whether the appellant should be allowed to adduce fresh evidence. It filed an affidavit that explained that since its Queen's Bench application it had determined that it had identified other parties in the project who had caused the delay. This evidence supported its position that it would face multiple proceedings in relation to the same set of issues; 2) the chambers judge took an improper approach to s. 37(2) of The Queen's Bench Act in that he did not use the test set out in Farris v. Staubach Ontario and that he overlooked s. 29 of the same Act that states that the courts should make orders so as to avoid a multiplicity of proceedings; and 3) the chambers judge erred in failing to appreciate that pursuant to s. 7(c) of The Arbitration Act, an arbitration may be stayed in favour of litigation to avoid a multiplicity of proceedings. HELD: The appeal was dismissed. With respect to the issues the court held: 1) that it would admit the affidavit as fresh evidence but the contents were not necessary to the disposition of the appeal; 2) the decision in Staubach was not determinative of how applications for stays under s. 37(2) of the Queen's Bench Act should be handled. Furthermore, in this case, the chambers judge was correct in following the terms of The Arbitration Act. Although the judge did not refer to s. 29 of The Queen's Bench Act, the court applied the principle of statutory interpretation that the particular should prevail over the general and found that notwithstanding s. 29, the judge's assessment of the multiplicity of proceedings issue had to fit within the dispute resolution framework put into place by The Arbitration Act; and 3) that it did not accept the appellant's argument that multiplicity of proceedings qualified as unfairness under 7(c) of The Arbitration Act.

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Whatcott v. Canadian Broadcasting Corp., 2016 SKCA 51

Ottenbreit Caldwell Herauf, April 1, 2016 (CA16051)

Civil Procedure – Appeal – Re-hearing – Court of Appeal Rules, Section 47(1)

The applicant applied pursuant to s. 47(1) of The Court of Appeal Rules for a re-hearing of his appeal. He argued that the appeal court should not have reduced his damages.
HELD: The Court of Appeal determined that the application did not disclose a special or unusual circumstance warranting a re-hearing of the appeal. The applicant was the one that applied for summary judgment and therefore he must be presumed to have put his best case forward on the issue of damages. The chambers judge erred in law and the damages awarded were thus reduced after an appeal by the respondent to the Court of Appeal.

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Saskatchewan v. Saskatchewan Government and General Employees Union, 2016 SKCA 56

Caldell Herauf Ryan-Froslie, April 20, 2016 (CA16056)

Administrative Law – Appeal
Administrative Law – Judicial Review
Statutes – Interpretation – Superannuation (Supplementary Provisions) Act – Salary

The Government of Saskatchewan appealed the decision of the chambers judge that set aside a decision of the Public Service Superannuation Board and directed a rehearing before the board. The issue was whether the pension entitlement of a respondent should be based on his receipt of camp differential pay in addition to his regular salary. The board determined that the camp differential pay was not included for the purposes of calculating the pension entitlement. The respondent and his union applied for judicial review of the board's determination. The chambers judge found the board's decision unreasonable, set aside the decision, and remitted the matter back to the board. The respondent received additional remuneration for working camp shifts outside of urban centres (known as camp differential). The respondent and his union argued that, based on a memorandum of agreement that incorporated supplementary earnings, the camp differential earnings should be included. Further, the respondent argued that the camp differential amount should be included because it was in the calculation of his disability benefits. The board found that camp differential pay was not included in the definition of salary for the purposes of determining an employee's pension entitlement because it did not meet the definition of salary in s. 2(j)(I) or s. 2(j)(ii) of The Superannuation (Supplementary Provisions) Act (SSPA). The

chambers judge held that the board's decision with respect to s. 2(j)(i) was without analysis and was, therefore, not transparent. With respect to s. 2(j)(ii), the chambers judge concluded that the board's interpretation was unreasonable because the board ignored the plain and ordinary meaning of the section.
HELD: The appeal was allowed. The definition of salary in the long-term disability plan was different from that used to determine salary for the purposes of calculating pension. The board's conclusion was found to be within the range of acceptable outcomes. The chambers judge also found that the board should have considered provisions of the memorandum of agreement, collective bargaining agreement, and the long-term disability plan to interpret the meaning of salary in s. 2(j)(i) of the SSPA; however, the appeal court found the documents were not incorporated by reference into the text of the legislation.

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R. v. Bird, 2016 SKPC 37

Kalenith, March 14, 2016 (PC16034)

Criminal Law – Assault – Sexual Assault – Sentencing
Criminal Law – Sentencing – Long-term Offender

The accused was found guilty of sexual assault. The accused was intoxicated when he went to the victim's house, threw her onto a bed and held her down while trying to pull down her pants. The victim started screaming and the accused left. The Crown sought to have the accused declared a dangerous offender and receive a prison sentence for an indeterminate period. He had committed a serious personal injury offence pursuant to s. 752(a) of the Criminal Code. The Crown submitted that he had shown a pattern of aggressive behaviour that would likely continue or that he had shown a substantial indifference to reasonably foreseeable consequences of his behaviour to others. The accused had a lengthy criminal record involving a history of violence beginning in 2002. He had been convicted of assault, assault causing bodily harm, overcoming resistance by choking, sexual assault, and assaulting a police officer among others. The court received expert evidence from a psychiatrist who testified that the accused's record showed that all of his acts of violence (spousal, sexual and general) occurred because of his deficient impulse control and that his behaviour was reckless as an outcome of the lack of control rather than malevolent in nature. The accused's alcohol problem was the key immediate contributor to deficient impulse control. The court found that the accused's offending did not establish the required pattern of offending behaviour required to declare him a dangerous offender because the predicate offence was not similar in manner or degree to the violence

used in his other offences. He used a lesser degree and exercised some restraint when he chose to stop the sexual assault. The psychiatric assessment indicated a generic pattern of offending consistent with all violent offending and did not form a particular identifying pattern. The court found that he was unlikely to commit further sexual offences. The court then reviewed the requirements for a finding that the accused was a long-term offender. It found that the predicate offence required a sentence of greater than two years. The accused, a 35-year-old Aboriginal man from the Montreal Lake Cree Nation, had been convicted 60 times. He had been the subject of several probationary sentences and jail sentences ranging from 20 days to seven years. While in prison, he had participated in a wide variety of programming and was evaluated positively. However, he repeatedly re-offended after release from prison. The expert testified that the accused was at high risk to reoffend based upon his record. His long-term addictions continued to contribute to his offending. In addition, the accused had been exposed to violence throughout his childhood. The accused testified that he was highly motivated to succeed in a treatment program because he had committed to his father, who had recently died, that he would complete the program and abstain from alcohol. He had community support and access to resources in Montreal Lake to help deal with his addiction and anger management. The seriousness of his situation and the consequences of failure also motivated him to succeed. The psychiatrist suggested that the accused could undertake and internalize programming within a couple of years and there is some prospect that he could succeed and overcome his risk to reoffend. HELD: The accused was declared a long-term offender. Because of the need to extend his sentence to ensure that he was involved in programming for the appropriate length of time, the court sentenced him to five years in prison. Because he had served 27 months in remand and received credit at the rate of 1.5:1, the accused would serve a sentence of 33 months. He would be subject to a 10-year community supervision order after his release.

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R. v. Piapot, 2016 SKPC 38

Lang, March 23, 2016 (PC16035)

Criminal Law – Sentencing – Long-term Offender
Criminal Law – Assault – Assault with a Weapon – Sentencing

The accused was found guilty of the following offences: 1) common assault on his former girlfriend contrary to s. 265 of the Criminal Code; 2) evading the police and failing to stop his vehicle contrary to s. 249.1 of the Code; 3) operation of a vehicle in a manner dangerous to the

public contrary to s. 249(1)(a) of the Code; and 4) assault with a weapon, a motor vehicle, on the accused's former girlfriend and three others contrary to s. 267(a) of the Code. The conviction for the fourth offence led the Crown to bring an application to remand the accused for the purpose of an assessment respecting a potential dangerous offender or long-term offender designation pursuant to s. 752.1 of the Code. The accused was examined by a psychiatrist who then testified at the sentencing hearing. The accused, a 27-year-old Aboriginal man, was raised on the Piapot First Nation Reserve. His parents were alcoholics and violent to each other in the presence of their children. They neglected the accused and his siblings. He was placed in 16 different foster homes between the ages of 8 and 12 where he suffered emotional, physical and sexual abuse. The accused witnessed the murder of his father when he was 11 and he began abusing alcohol and drugs from that point on. The accused began offending at an early age and has been in custody most of his life since the age of 12. By the age of 17 he started to consume morphine and cocaine. The psychiatrist diagnosed the accused has having anti-social personality disorder, alcohol and substance abuse disorders and had shown a high vulnerability to negative peer influence, all of which caused his criminal lifestyle. The accused had 36 prior convictions, four of which involved violent offences. As soon as he was released from custody the accused would re-offend. In the case of the predicate offence, the accused drove his vehicle at high speeds to pursue the vehicle his former girlfriend was driving. When the police chased him, the accused drove through stop signs, school zones and almost hit a pedestrian within city limits. HELD: The accused was declared a long-term offender. The court found that the predicate offence warranted a sentence of more than two years. The circumstances of the offence were at the high end of the gravity spectrum. He threatened three people as well as the public. He had assaulted his former girlfriend only 18 days earlier. He knew the danger that his behaviour created and was reckless as to the consequences. The Gladue factors influencing the accused's behaviour had to be considered. The risk of the accused reoffending was assessed at the highest level of risk for violent reoffending if he did not received prolonged treatment. With such treatment, the expert believed that the accused would be able to adhere to the conditions of community legal supervision. The accused had not participated in any treatment while serving time in prison before. The court sentenced the accused to 36 months in prison to provide enough time for him to receive treatment essential for his rehabilitation. He was sentenced to a five-year period of long-term supervision after his release.

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R. v. S. (W.R.H.), 2016 SKPC 42

Harradence, March 21, 2016 (PC16037)

Criminal Law – Application for Assessment Order – Mental Disorder

The Crown brought an application pursuant to s. 672.12(3) of the Criminal Code for assessment to determine whether the youth being held in custody after being charged with assault with a weapon was suffering from a mental disorder at the time of the alleged offence. The youth had stabbed his grandmother. About six months before this alleged offence occurred, the youth had been charged with a number of other offences and had been held in remand. Two psychiatrists examined him for the purpose of a fitness assessment and noted that the youth appeared to be suffering from schizophrenia. After a fitness hearing did not proceed, a show cause hearing was held and the court ordered the youth's release on an undertaking. The next day the stabbing occurred and the youth was charged.
HELD: The application was granted. The court ordered that the youth be assessed to determine whether he was suffering from a mental disorder at the time of the offence so to exempt him from criminal responsibility by virtue of s. 16(1) of the Criminal Code.

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R. v. Renouf, 2016 SKPC 44

Jackson, March 22, 2016 (PC16038)

Criminal Law – Motor Vehicle Offences – Driving/Care or Control While Impaired

The accused was charged with driving over .08. The issues were whether: 1) the accused, on a balance of probabilities, rebutted the statutory presumption in s. 258(1)(a) of the Criminal Code, that he occupied the driver's seat with the intention of setting the vehicle in motion, and 2) if so, was the court satisfied beyond a reasonable doubt that he was in de facto or actual care or control of the motor vehicle while occupying the driver's seat. The accused's vehicle was pulled over, running, at the side of the highway at 1:45 am. The vehicle was parked at an angle with the front towards the ditch and the rear against the white line. When the officer approached the vehicle he could see the brake lights come on momentarily and the driver sat up from the reclined seat. The accused indicated he was heading back to his oil rig. The officer concluded that he must have turned the wrong direction on the highway because his vehicle was not pointing in the direction of the oil rig. The officer noted the smell of beverage alcohol on the accused and indicated he had red, glassy eyes and a groggy demeanour. The officer asked the accused to accompany him to the police vehicle for the purpose of providing an ASD sample. After failing the ASD the accused

was taken to the detachment to provide samples of his breath. The accused indicated he turned the wrong way on the highway because he had been arguing with his wife on the phone. He said he pulled over to continue the conversation. After the conversation he consumed four beer in 15 minutes. He said he then decided he shouldn't drive so he reclined the driver's seat to sleep. He said he left the vehicle running so it stayed warm and kept the lights on so it could be readily seen by other drivers. The lights included a bright after-market LED light bar. The accused said he intended to call his coworkers at 5:00 am to pick him up.
HELD: The issues were dealt with as follows: 1) the accused was deemed to have had care or control of the vehicle because he was in the driver's seat. The accused had to establish, on a balance of probabilities, that he did not occupy the seat for the purpose of setting it in motion. The court was satisfied that the accused rebutted the presumption. He made a conscious decision to pull over to the side of the road and to eventually get some sleep rather than continue on; and 2) a realistic risk of danger can arise by: waking up and changing one's mind to drive; unintentionally setting the vehicle in motion; or creating a risk of danger with the vehicle in its stationary position. With respect to the unintentional setting in motion of the vehicle, the court found it to pose only a remote risk of danger. The court also concluded that the position of the vehicle did not pose a danger to persons or property. The court concluded that there was little risk of the accused changing his mind and deciding to drive. The court found that the accused had made several good decisions. He also gave credible evidence as to why he did not contact his coworkers immediately. The accused was found not to be in actual care or control when encountered in his vehicle by the officer. The accused was found not guilty.

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R. v. Felix, 2016 SKPC 45

Harradence, March 23, 2016 (PC16039)

Criminal Law – Theft with Violence – Sentencing

The accused pled guilty to one charge of theft with violence contrary to s. 344(1)(b) and one charge of theft under s. 334(b) of the Code. The first offence was an armed robbery of a convenience store. During the robbery, a co-accused had stabbed the store clerk in the eye with a knife and the accused took packages of cigarettes. The accused was intoxicated at the time of the offence. The Crown argued that an appropriate sentence was three years because of the aggravating factors, which included: the victim was a convenience store clerk working alone; a knife had been used; the injury to the victim; the

accused participated in the planning of the robbery; and she was serving a conditional sentence order. The accused was raised by her paternal grandparents on the Sturgeon Lake First Nation. Although her upbringing was stable, the accused had developed a drinking problem because her parents had abused drugs and alcohol and she felt that they had abandoned her. She had expressed remorse for the offence and was horrified by what she had done. Her grandparents testified that they would support her and there was evidence presented to the court that there were resources available in her community to aid in her rehabilitation.
HELD: The accused was sentenced to 18 months in jail for the first offence and 30 days for the second to be served concurrently. Upon release the accused would be subject to an 18-month probation order with conditions such as participating in an addictions program and counselling and be prohibited from possessing or consuming alcohol.

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Phillips Legal Professional Corp. v. Mercredi, 2016 SKPC 58

Demong, April 20, 2016 (PC16045)

Small Claims – Practice and Procedure – Default Judgment
Small Claims – Practice and Procedure – Affidavits – Application to Cross-examine
Statutes – Interpretation – Small Claims Act, 1997, Section 37

The plaintiff law firm brought an action against numerous defendants for payment for legal services. It had difficulty serving each of them as they resided in Northern Saskatchewan and so applied for an order for substitutional service. The order was granted and the plaintiff was allowed to serve the defendants by faxing the summons and claim to the Fond Du Lac First Nation's fax address and by serving individual defendants by email. Prior to trial, the plaintiff filed an affidavit of service identifying which of the defendants it had been able to serve and those who were not. On the return date, none of the defendants who had allegedly been served attended the trial. The plaintiff obtained default judgment but only against those parties who had been identified as having been served and stipulated that it was abandoning its claim against the unserved defendants. The Certificate of Judgment named the defendants who were found jointly and severally liable. Pursuant to s. 37 of The Small Claims Act, 1997, a number of the defendants named in the original style of cause brought an application to set aside the default judgment. The plaintiff then requested an opportunity to cross-examine the deponents on their affidavits on the basis that some of their evidence conflicted with the averments set out in the plaintiff's affidavit of service. The s. 37 application was adjourned

to hear argument from the plaintiff regarding its desire to cross-examine. It sought direction from the court as to the scope of it, not only with regard to service but also on the substantive merits of the defence being proposed.
HELD: The court decided that it would permit the plaintiff to cross-examine the defendants on those averments relating to service but declined to make an order allowing it to cross-examine on the substantive merits of the defence. Section 37 applications were not designed to become a trial hearing on the merits of a claim by affidavit, as a precondition to determining whether or not a trial on the merits should proceed.

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R. v. McCaw, 2016 SKQB 76

Layh, March 14, 2016 (QB16077)

Criminal Law – Evidence – Identification
Criminal Law – Preliminary Inquiry – Committal for Trial – Application to Quash

The accused was charged with sexual assault contrary to s. 271 of the Criminal Code. He elected to be tried by judge and jury and a preliminary inquiry was held. The Provincial Court judge ordered him to stand trial at the next available sitting of the Queen's Bench Court. The accused applied for an order to quash the order committing him to stand trial because the preliminary hearing justice erred in law in ruling that there was evidence of identification, an essential element of the offence. At the hearing, defence counsel had informed the hearing judge of his concerns about the alleged insufficiency of the identification of the accused by the victim but the judge reviewed her testimony and held that he was satisfied that a properly instructed jury could convict him.
HELD: The application was denied. The committal order stood because there was evidence presented at the preliminary hearing that supported the Provincial Court judge's decision.

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Mosiuk v. Nagel's Debt Review Inc., 2016 SKQB 80

Schwann, March 9, 2016 (QB16073)

Civil Procedure – Queen's Bench Rules, Rule 7-2
Civil Procedure – Summary Judgment

The defendant applied pursuant to rule 7-2 of The Queen's Bench Rules for summary judgment dismissing the plaintiffs' claim in its entirety. The plaintiff, Midtown, owned a building in Kamsack. After receiving a notice from the town that it intended to demolish the building under an order made pursuant to its nuisance bylaw, the plaintiff Mosiuk, the principle of Midtown, contacted the defendant Nagel for counsel and advice. According to Mosiuk's affidavit, Nagel had acted as an advisor to him and Midtown for many years, forming the basis of a fiduciary relationship between them. Mosiuk claimed that Nagel informed him that a transfer of title would defeat the town's order and counselled him to transfer title to the building to him under an arrangement whereby Nagel Debt Review (NDR) would purchase the property and lease the building back to Midtown. The down payment for the purchase was provided by a loan from Mosiuk's wife. NDR would insure the building. After title had transferred, the building was destroyed by fire. The parties disputed entitlement to the fire insurance proceeds. The plaintiffs alleged that the parties intended and agreed to only transfer bare legal title to NDR with the beneficial interest remaining with the former owner Midtown and Mosiuk. In the alternative, the plaintiffs alleged that Nagel owed a fiduciary duty to them and breached it in failing to advise them of the effect of registration of title into the name of NDR and failing to prepare documents reflecting the precise nature of their agreement. These failures constituted a breach of trust, willful default and undue influence amounting to fraud. The defendants denied that the parties created a trust and denied that the plaintiff retained any beneficial interest in the property. Initially both parties were willing to proceed by summary judgment. Counsel for the plaintiffs then objected to resolution by summary procedure.

HELD: The application for summary judgment was dismissed. The court found that there was a genuine issue requiring a trial with respect to both claims asserted by the plaintiffs. The evidence regarding the agreement between the parties was diametrically opposed and gave rise to issues of credibility. Similarly, to determine whether there was a fiduciary relationship required a factual inquiry and the pleadings and affidavits were insufficient to permit the court to make a fair and just determination on the merits.

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R. v. Cameron, 2016 SKQB 83

Dawson, March 10, 2016 April 8, 2016 (corrigendum) (QB16075)

Criminal Law – Motor Vehicle Offences – Impaired Driving Causing Death – Sentencing

The accused pled guilty to two charges of driving while her blood alcohol content exceeded .08 and thereby causing an accident resulting in the death of one victim and bodily harm to another victim, contrary to s. 255(3.1) and s. 255(2.1), respectively, of the Criminal Code. She also pled guilty to a number of summary conviction offences related to complying with conditions of her bail contrary to s. 145(3) of the Code. The accused was 20 years old at the time she committed the offence. She drove after consuming enough alcohol to indicate that her blood alcohol content was twice the legal limit. On the night in question there was dense fog and the accused drove into the opposite lane and collided with the victims' vehicle. Her speed was not above the limit but was much faster than was safe in light of road conditions. The Pre-sentence Report indicated that the accused was raised by parents who abused alcohol and drugs and she was abused physically and emotionally by her mother. She was taken away from her parents at the age of 14 and lived with her grandparents, who provided and continued to provide her with a stable and safe environment. The accused started drinking when she was 12 and had later begun abusing drugs. Since the offence she had taken programs and received counselling for addiction. The accused had worked for a period of time and her former employer provided a letter of reference attesting to her good character. The accused expressed great remorse about the harm she had caused and had started drinking again to deal with her depression. She had no prior criminal record and the report indicated that her general risk for reoffending was assessed at medium if no targeted interventions were put in place. The Crown argued that the accused should receive an incarceral sentence of not less than three and one-half years followed by a five-year driving prohibition. The defence submitted that her sentence should be two years less a day to be served in the community.

HELD: The accused was sentenced to 32 months in prison for the first offence and 18 months for the second offence to be served concurrently. The court crafted the sentence on the basis of the gravity of the offences, the responsibility of the accused and parity with other like cases.

CORRIGENDUM dated April 8, 2016: [78] The sentence in paragraph 71 that reads:

>>>>Accordingly, I sentence Ms. Broadis Cameron to a period of incarceration of 32 months on the charge of impaired driving causing death.

Shall be amended to read as follows:

>>>>Accordingly, I sentence Ms. Broadis Cameron to a period of incarceration of 32 months on the charge of driving while over .08 causing death.

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N. (M.) v. B. (A.), 2016 SKQB 85

Elson, March 10, 2016 (QB16076)

Family Law – Custody and Access – Variation

The parties each brought an application to vary the parenting terms of a consent judgment issued in 2015. The judgment ordered that the children born during the parties' four-year relationship would have their primary residence in Willow Bunch with the respondent mother. The father, who lived in Medicine Hat but worked for two weeks of each month in Fort McMurray, would have access on his week off from Thursday or Friday to the following Sunday or Monday. The pickup and exchange of the children was to take place in Cadillac, Saskatchewan. The total travel time for the children was four hours each way. Less than six months after the consent judgment, the petitioner father married and moved closer to Edmonton without advising the respondent of the move. The petitioner explained that he had moved because it saved him travel time to Fort McMurray. The travel time to the petitioner's home for the children would increase to six hours one way. The respondent objected that the children were too tired when they got home from the scheduled visits and submitted that the petitioner should have access on long weekends only.
HELD: The court held that the additional travel time caused by the petitioner's relocation was a change in circumstances but that it would not change the existing parenting schedule except that the petitioner would pick up the children from Assiniboia and drop them off in Cadillac at the end of the visit. There was no evidence before the court that disclosed a better arrangement that would better accommodate the children and afford meaningful contact between them and the petitioner.

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H. (A.) v. N. (M.), 2016 SKQB 87

Dawson, March 14, 2016 (QB16078)

Family Law – Custody and Access – Grandparents

The applicants applied for an order that they be named persons of sufficient interest and be granted interim access to their granddaughter, pursuant to The Children's Law Act. The respondent, their daughter, opposed the application. After the respondent's marriage ended, she and her daughter moved into the applicants' home, where they lived for more than a year. The applicant grandmother deposed in her affidavit that she was involved in every aspect of her granddaughter's care during that time. When the respondent purchased her own home

in the same village, the applicants continued their close relationship with their granddaughter. When the respondent remarried, she requested that her parents see less of their granddaughter. An open breach occurred at Christmas 2013 when the respondent alleged that her father showed inappropriate behaviour and since that time the applicants had not seen their granddaughter. The applicants denied the allegation and the respondent's siblings who were present at the time of the incident also deposed that their father had not acted inappropriately.
HELD: The application was dismissed. The court found that the applicants were persons of sufficient interest under s. 6 of the Act. The court declined to make an interim order for access because it would not be in the best interests of the child to place her in such a situation. The court could not resolve the matter on the basis of the conflicting evidence. It ordered that the matter proceed to pre-trial conference.

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R. v. Sikora, 2016 SKQB 89

Zuk, March 15, 2016 (QB16088)

Criminal Law – Sentencing – Break and Enter – Assault with a Weapon
Criminal Law – Sentencing – Pre-sentence Report

The accused pled guilty to breaking and entering into his estranged wife's home and, while therein, committing the indictable offence of assault with a weapon contrary to s. 348(1)(b) of the Criminal Code. A pre-sentence report was prepared for the court. The accused and his estranged wife separated in July 2013 and shared parenting of their three children. On the date of the offence the accused worked until 5:00 pm and then had two beers with a co-worker. He went home at 6:00 pm to care for the children and then at 9:00 pm went to his estranged wife's residence. He entered the residence and appeared to be angry because another man's vehicle was parked outside. He was carrying a piece of heavy wire cable. The accused approached the male and threatened to beat him up. The two had a physical altercation and the male received a superficial injury that did not require medical treatment. The Crown indicated that the accused did not mean to strike the man with the cable. The cable was used in a threatening manner but was only peripherally involved in the physical altercation. The estranged wife and male both indicated that they were fearful of the accused. The accused had no criminal record and had worked for a Crown corporation for sixteen years. The pre-sentence report indicated that the accused did not think he had a problem with alcohol, whereas his estranged wife did. He was assessed as a low risk to reoffend. The major risk factors were substance abuse and attitude. The accused's

conduct post-charge was impeccable and he voluntarily ceased consuming alcohol. The Crown argued that a custodial sentence was necessary while the accused argued that he should be sentenced to a non-custodial sentence.
HELD: The court found that the offence was at the low end of home invasions because: the accused entered through an unlocked door; the weapon used would not cause the same degree of fear as a machete or firearm; the weapon was used only incidentally; and the male victim was able to subdue the accused. The court found that the accused had more of a problem with alcohol than he admitted. The court held that denunciation and deterrence required a sentence of incarceration. The accused's moral culpability in relation to the offence was high. The mitigating factors were: there was only a very minor injury; the accused appeared to make efforts to apologize to the male; he voluntarily quit drinking alcohol; his post-offence behaviour was exemplary; he had an excellent employment record; and he appeared to be a good father and otherwise good citizen. Based on previous similar cases, the accused was sentenced to incarceration of 10 months followed by 18 months probation with conditions that included: a residence clause; not possessing alcohol or drugs; participating in assessments and programming for addictions and anger; and non-contact with the victims. Ancillary orders were also made.

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R. v. d'Abadie, 2016 SKQB 101

Layh, March 24, 2016 (QB16094)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking
Criminal Law – Habeas Corpus
Criminal Law – Legal Representative

The applicant sought release from prison based on his alleged right of habeas corpus. The applicant was convicted of trafficking cannabis marihuana, contrary to s. 5(2) of the Controlled Drugs and Substances Act, and was sentenced to 18 months incarceration. The day after sentencing the applicant prepared a hand-written notice and filed it with the court. The notice indicated that the applicant required a hearing because the sentencing judge obstructed justice by denying the common law. He attached a document to the notice alleging a claim of trespass against him with damages of $384,000. A friend of the applicant also contacted the local registrar requesting a hearing date for the trespass claim. The local registrar wrote to the friend advising of the proper procedures to initiate a claim of trespass. The friend then wrote to the judge requesting a hearing and an order of discharge for the

applicant in relation to the application for habeas corpus. The friend then filed an application for writ of habeas corpus as subjiciendum with a return date. A brief of law was also filed. The application was heard in March and the applicant was ordered to serve notice on the Crown and the Provincial Correctional Centre. The friend seemed to argue that because the applicant was an "idiot", statutory law did not apply to him, only common law applied.
HELD: The application was dismissed because it was based on misguided interpretations of certain supposed legal principles. The court found both procedural and substantive problems with the application. Procedurally, the court noted that there was nothing on the file confirming that the friend was the applicant's proper representative. Also, there was no proof of service on the correction centre even though the court had ordered the service. The application was found to be substantively meritless. Habeas corpus is not available to someone who has been tried and sentenced, without an appeal. The court found that the applicant was subject to a valid and existing exercise of judicial authority.

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Selsey Estates, Re, 2016 SKQB 104

Zuk, March 24, 2016 (QB16098)

Wills and Estates – Estate Administration – Application for Letters of Administration with Will Annexed
Statutes – Interpretation – Administration of Estates Act, Section 10, Section 17, Section 18.1

The applicant applied for letters of administration with will annexed to administer the estate of her deceased father and a separate application to administer the estate of her deceased mother. In the case of the former estate, the application was brought under s. 10 of The Administration of Estates Act, as the applicant was a beneficiary. The will of her deceased father appointed his wife as executor and alternately, a trust company. The will named the wife as his sole beneficiary if she survived him for more than 30 days. The will also contained a devise of real property to the wife. The applicant's mother died four months after her husband. She had not applied for letters probate. Her will appointed her husband as executor and named the trust company as an alternate and named him as her beneficiary if he survived her for more than 30 days. As he had predeceased her, the gift lapsed but the will transferred the remainder and residue of her estate to her children alive at the time of her death. The trust company had renounced its right to act as executor for either estate. Two sisters of the applicant filed their renunciation of right to act as administrators.

HELD: The applicant was given leave to file additional material. Regarding the applicant's deceased father's estate, the court found that her right to apply as administrator arose from s. 17(1)(a)(ii) of the Act because neither of the executors named in the will were willing and competent to take probate so that special circumstances applied under s. 17(1)(b). (The applicant did not qualify as a beneficiary of the estate under s. 10 of the Act because the testator's wife was the sole beneficiary and she could not apply under s. 18.1 of the Act, because she was not named the executor of her mother's will.) The court directed that the applicant obtain a renunciation of the Official Administrator as it was the administrator of last resort listed under s. 10(h). In addition, the applicant must disclose whether there were other siblings alive at the date of her father's death and if so, their consent to her appointment must be filed. As the application had not included any reference to the real property devised in the will, the court directed that evidence must be provided regarding its status at the date of death of the applicant's mother. With regard to the application for the mother's estate, the court noted that it required additional evidence establishing that there were no other siblings alive at the date of death.

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R. v. Knapp, 2016 SKQB 107

McGaw, March 29, 2016 (QB16105)

Criminal Law – Self-represented Litigant
Criminal Law – Conduct of Trial

The accused was charged with and convicted of assault contrary to s. 266 of the Criminal Code. He represented himself at trial. He appealed the conviction on the basis that he incompetently represented himself by failing to testify in his own defence. He sought to have his own evidence admitted on this appeal to determine if the conviction should be set aside. At trial, the judge explained to the appellant that the Crown would call its witnesses first and he would have the opportunity to cross-examine them, and then he could present his own evidence by testifying himself and calling other witnesses. The appellant cross-examined the complainant and then called two witnesses. The appellant believed that the trial judge would realize that the complainant was fabricating her evidence and because of that belief, he did not think about the need to provide his own testimony. The complainant and the appellant had been in a dispute over the parenting of their child. As a result of his criminal conviction, he was not permitted to see his child for a period of time. The appellant did not identify the legal issues he sought to appeal. The court formulated the grounds of appeal as: 1) whether the trial judge failed to adequately assist the appellant in the

course of the trial such that a miscarriage of justice occurred and a new trial should be ordered; and 2) did the appellant's failure to testify result in a miscarriage of justice and a new trial ought to be ordered. HELD: The appeal was dismissed. With regard to the issues the court found: 1) the trial judge provided adequate assistance to the appellant and thus no miscarriage of justice resulted. She explained the procedure that the court would follow. She appropriately gave trial assistance rather than tactical assistance such as discussing with the appellant whether he should call himself as a witness. The charge was simple, the evidence straightforward and the trial of short duration. The court found the appellant to be intelligent and capable of understanding what the trial judge said to him; and 2) the appellant's failure to testify did not result in a miscarriage of justice. The appellant knew what the complainant was going to say at trial because he received disclosure. He had decided to represent himself and planned his strategy on the basis that the trial judge would not believe the complainant without offering his contrary version of events. Having chosen to represent himself and made tactical decisions, the appellant could not complain his actions fell short of what a competent trial counsel would have done.

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R. v. Ducherer, 2016 SKQB 110

Popescul, March 31, 2016 (QB16106)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Conviction – Appeal
Constitutional Law – Charter of Rights, Section 8 – Appeal
Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Breath Demand – Reasonable and Probable Grounds – Appeal

The appellant appealed his conviction of a charge of driving while his blood alcohol content exceeded .08 contrary to s. 253(1)(b) of the Criminal Code after trial in Provincial Court. The appellant had argued at trial that his s. 8 Charter right had been violated because the investigating officer did not have reasonable grounds to justify making a breath demand within the circumstances of the case, but the trial judge found no Charter breach and admitted the evidence of the Breathalyzer readings. The appellant's ground of appeal was that the trial judge erred in law when she concluded that his Charter rights had not been infringed. The appellant had been stopped by RCMP officers after they had recorded his vehicle travelling over the speed limit. The officer noted the odour of alcohol coming from the breath of the appellant and asked him if he had been drinking. The appellant said that he had had a couple and the officer advised him that he would like

the appellant to take an ASD test. The appellant's driving had not been irregular and he did not show any symptoms of drinking. Before administering the test, the officer asked the appellant if he had had anything to drink in the last 15 minutes and the accused said no. The officer explained that if he had consumed alcohol within that period, it would create a problem with the reading and the appellant again confirmed that he had not. The appellant failed the test and the officer arrested him. About 15 minutes later the appellant told the officer that he had been drinking a beer in his vehicle just before being stopped. An empty beer can was found in the vehicle. The officer testified that he believed the appellant's new version of what had occurred. The officer then took the appellant to the detachment where he provided breath samples showing that he was over the legal limit. At trial, the defence argued that the officer's modified belief that the ASD test was unreliable meant that he did not have reasonable grounds to make the breath demand and proceed with the Breathalyzer test. Therefore there was a Charter breach and the evidence of the Breathalyzer readings should be excluded. The trial judge rejected the argument and found that the relevant time to assess the validity of the demand was when the demand was made. Thus the appellant's later admission of prior consumption of alcohol was of no consequence.
HELD: The appeal was dismissed. The court found that the trial judge erred in law when she concluded that once a valid demand had been made, nothing could negate or diminish the ground upon which the demand was made. As soon as the officer believed the appellant's statement that he had consumed alcohol within the 15 minute window, he knew that the test upon which he exclusively relied to raise his suspicion to reasonable grounds to make a demand was unreliable. The court found that the officer should have proceeded with further investigation that could have included re-administering a second ASD test. The appellant's s. 8 right was infringed. The court conducted a Grant analysis and decided that the breach was not serious, it was technical in nature and the officer acted in good faith. The mistake arose because the appellant initially lied to the officer. A Breathalyzer sample collected as a result of such a breach is considered to be on the less intrusive end of the scale when considering the impact on the appellant's rights. It was in society's interests to admit the evidence and in the final balancing of factors, the court concluded that evidence should be admitted.

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Fawcett-Kennett v. Kennett, 2016 SKQB 111

Barrington-Foote, April 1, 2016 (QB16101)

Family Law – Child Support – Determination of Income

The petitioner brought an application for interim corollary relief pursuant to s. 15(2) of the Divorce Act for the payment of child support for the three children of the marriage. The parties had divorced in 2013 and child support had been dealt with in a separation agreement between them in 2012 but disputes had arisen regarding how the respondent should pay support, which led to this application. The respondent had significant variations in his annual income. The agreement was designed to result in the payment of support on the basis of actual calendar year income despite such variations by providing for an adjustment of the amount payable after the receipt of the final income information. In early 2013 the respondent began working outside the country and his employment income doubled and included bonuses. The bonus amounts were established after the end of the calendar year. He also started and incorporated his own business in Saskatchewan that year. In 2013 the respondent's support payment was based upon his line 150 income and he paid some additional lump sum amounts. In early 2015 the respondent advised the petitioner that his base salary would be reduced by 10 percent and proposed that his monthly payment be reduced to an amount based upon the Guidelines for that income rather than the amount he was paying based on his last known calendar-year income. The petitioner refused and took the position that he should pay the same amount of support subject to adjustment only, as in the past, when his 2014 income was finally known. The petitioner sought an order for child support retroactive to January 2014. She argued that the respondent's income should be deemed to be $154,100 based upon his line 150 income for 2013 ($138,400) plus company business income and mileage. Using the Guidelines, the respondent should pay arrears in the amount of $6,700 for 2014. The petitioner also sought an order as to the monthly support amount payable from and after January 1, 2015, including whether the amount payable should continue to be adjusted when the respondent's income was finally known. The respondent proposed that he should make monthly payments based on his base salary, plus 10 percent attributable to the anticipated bonus with provision for later adjustments.

HELD: The respondent was ordered to pay the petitioner interim child support based upon his line 150 income for 2014 of $138,400. The table amount payable on that income ($2,400) equaled $28,840. The respondent claimed that he paid $25,595, so the court established tentatively the arrears as being $3,245. The respondent's business income and mileage should be addressed at pre-trial or trial. With regard to the issue of determining the amount of monthly child support payable in the future, the court accepted the respondent's proposal because his line 150 income for 2014 was not the best evidence of his current income nor was there enough history of bonus income to predict its size for 2015 and beyond.

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Kreway v. Kreway, 2016 SKQB 115

Tholl, April 5, 2016 (QB16112)

Contracts – Frustration
Contracts – Mutual Mistake
Family Law – Division of Family Law – Pre-Trial Conference – Enforcement
Family Law – Formation of Contract – Negotiated Agreement

The parties were married in 1987 and separated in 2011. In 2014 the parties resolved their matters in a pre-trial conference. The minutes of the pre-trial conference required the petitioner to do the following within 120 days: pay the respondent $750,000; pay out a joint line of credit; and remove the petitioner's name from the mortgage on the family home. The petitioner paid the respondent $100,000 and removed her name from the mortgage but failed to satisfy the remainder of the minutes. The respondent therefore applied for an order that the petitioner comply with the minutes and for an order for enforcement. She also requested an order that farm assets be sold to satisfy the petitioner's obligations under the minutes. The farm assets were owned by a non-party corporation so the petitioner argued that an order could not be made against the corporation because it was not a party to the litigation. The farming corporation was formed in 2006 and the parties were the sole shareholders and directors of it. The farmland was never actually transferred to the corporation from the parties as outlined in the agreements. In 2011, the petitioner became a farm manager for a large farming corporation and the parties leased all of their land to the large corporation. In 2013, the petitioner unilaterally decided to give a guarantee from the parties' corporation in the amount $1.88 million for repayment of the large farm corporation's debt. The respondent was not aware of this guarantee until after the pre-trial conference and she never consented to it. The large corporation was granted creditor protection prior to the pre-trial conference, a fact the petitioner was aware of. The petitioner indicated that he was told the large corporation had sufficient assets to pay its creditors so he never mentioned the issues at the pre-trial conference or to his counsel. The petitioner indicated that he fully believed he would be able to obtain financing. The most recent report indicated that the creditor was likely to be paid by the large corporation, however, the creditor was not prepared to release the parties' corporation from the guarantee until payment was made in full. The issues were: 1) were the minutes enforceable: a) was there an implied term that the agreement was subject to financing being available; b) were the minutes frustrated pursuant to ss. 4 and 5 of The Frustrated Contracts Act or the common law. The petitioner argued that his inability to obtain financing was a critical and unforeseen event that was sufficient to frustrate the contract; and c) was there a mutual

mistake because the petitioner believed he had financing and he advised the respondent of the same; and 2) what enforcement, if any, should be ordered.
HELD: The issues were determined as follows: 1a) there was no explicit term indicating the minutes were subject to financing. If the petitioner had concerns about financing or was unwilling to settle unless he obtained financing, he should have included that term. The respondent agreed to accept $750,000, and she did not care how it was raised. The court held that there was no implied term in the minutes that they were only enforceable if the petitioner could obtain financing; b) the court concluded that the minutes were not frustrated. The petitioner's inability to obtain financing was not the type of event that reached the level to frustrate the contract. The alleged frustrating event was in part self-induced. The event was also not a permanent event because it would be released once the large corporation paid its creditor. The petitioner could also still perform the contract by selling assets; and c) the court rejected the petitioner's mutual mistake argument. The parties reached a consensus ad idem and there was no cross-purpose. There was no common misapprehension or latent ambiguity. The court held that a reasonable observer would have concluded that the parties had reached an agreement; and 2) there was a declaration that the minutes were valid and enforceable contract. The petitioner was ordered to pay the respondent the remaining $650,000 forthwith and was further ordered to pay off and close the joint line of credit forthwith. The parties' corporation had a claim to the land remaining in the parties' names. The parties' corporation was not a party to the matter, so an order could not be made against it. The respondent was given leave to bring an application to add the parties' corporation. The court adjourned the enforcement issue and expected the parties to find a date within 30 days to further consider the enforcement steps to be ordered.

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Sturgess v. McIntyre, 2016 SKQB 120

Tholl, April 12, 2016 (QB16116)

Automobile Accident Insurance Act – Income Replacement Benefits
Automobile Accident Insurance Act – Future Care Costs
Civil Procedure – Queen's Bench Rules, Part 7
Civil Procedure – Summary Judgment
Insurance – Automobile – Saskatchewan Government Insurance

The applicant and respondents were both victims of injuries caused by the negligence of their co-worker, Mr. H. After work one evening the parties were passengers in Mr. H.'s vehicle when it rolled. Mr. H. died and the parties both sought damages, above SGI's benefits, from his estate. The parties' actions were made pursuant to s. 103 of The

Automobile Accident Insurance Act (AAIA). Mr. H.'s estate consisted of a one-million-dollar insurance policy. An order was made paying the applicant $425,000 of the insurance. Some costs and small amounts were also paid to the respondent, leaving $370,000 in trust to be paid out. The applicant suffered serious injuries and he was rendered an incomplete quadriplegic. The respondent suffered less serious injuries. The applicant's claim was in excess of the one-million-dollar policy. The applicant applied for summary judgment. The applicant claimed $4,453,935 from Mr. H.'s estate and the respondent claimed $304,748.32. The issues were: 1) were certain documents filed by the applicant inadmissible. He filed numerous documents that were not attached as exhibits to any affidavit; 2) was there a genuine issue for trial; and 3) should the court grant summary judgment even it is found that there was a genuine issue for trial.

HELD: The issues were determined as follows: 1) rule 7-2 states that "other evidence" may be used to determine whether summary judgment should be granted. However, the evidence must be admissible on the basis of a rule or evidence to qualify. The court could not find any basis for admitting the majority of the documents objected to by the respondent; 2) the court first analyzed whether the respondent suffered a loss as a result of the accident that he had not been fully compensated for. He was off work from July to November due to the accident. He received income replacement benefits from SGI during that time. The respondent argued that he would have earned over $10,000 more during that period if he had not been injured. The respondent also claimed that, although he could return to full-time work, he was unable to work as much overtime as he did prior to the accident. A medical report confirmed the respondent's claims. A critique of the medical report questioned the methods and conclusions made. A supplemental report addressed the concerns. There was also disagreement as to the actual job the respondent had and the amount of money the respondent could have made. The court concluded that there was sufficient evidence to establish that the respondent suffered an injury that he may not have been fully compensated for. The applicant provided evidence supporting a different conclusion. The court therefore found that there was a genuine issue for trial in the matter. There was also highly controverted evidence regarding the assessment of each party's damages and the court found the assessment of damages for each party to also be a genuine issue for trial; and 3) there was a significant sum at stake, which usually justifies a fuller process. The trial, however, would be lengthy and a more expedited process would be preferred. The court concluded that the issue regarding the respondent's injuries and loss could not be resolved on a summary judgment application. The damages suffered by the respondent also required fuller examination to quantify the total income he would have earned but for the accident. The applicant's future care costs were also disputed. Summary judgment was not granted and each party was ordered to exchange an updated affidavit

of documents within 30 days. There were unresolved credibility issues and there were too many controverted issues related to the applicant's injuries and each party's damages.

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Kroczynski v. Regina Soccer Association Inc., 2016 SKQB 133

Barrington-Foote, April 21, 2016 (QB16130)

Statutes – Interpretation – Non-profit Corporations Act, 1995, Section 135, Section 225
Corporations – Non-profit Corporations – Oppression

The applicant was the former vice-president of the respondent association. He resigned that office during an annual general meeting (AGM) of the respondent. He had been a director since 2012 and vice-president since 2014. In October 2015, the president resigned and the applicant assumed the role. Prior to the AGM, the applicant alleged that a series of events occurred that were improper and were targeted at removing him from his position. He sought an order pursuant to s. 135 and s. 225 of The Non-profit Corporations Act, 1995 reinstating him as vice-president and for relief relating to business conducted at the AGM. The issues before the court were: 1) whether the election of directors be set aside under s. 135 of the Act; and 2) if the respondent or any of its directors acted in a manner that was oppressive, unfairly prejudicial to the applicant or unfairly disregarded his interests pursuant to s. 225 of the Act.
HELD: The application was dismissed. The court found with respect to the issues that: 1) there were no irregularities in the election process. The evidence related to the alleged series of events, such as bylaw amendments, the leak of confidential information, subsequent social media postings, and the hostile environment at the AGM, did not constitute irregularities; and 2) the applicant's reasonable expectations were accepted by the court. The court reviewed each of them and found that they may have been breached. For example, the applicant's reasonable expectation was that the board would not breach confidentiality relating to its discussions. There was a breach of that expectation but the evidence did not support the conclusion that the breach resulted from the actions of the board or the respondent as opposed to an unidentified director acting for his own purposes. The evidence did not support the conclusion that the applicant's interests were unfairly prejudiced or establish causation and injury.

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