The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
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Subject Index

R. v. Klassen, 2015 SKQB 8

Megaw, January 12, 2015 (QB15408)

Criminal Law – Evidence – Conduct of the Complainant
Criminal Law – Assault – Sexual Assault

The accused was charged with sexual assault contrary to s. 271 of the Criminal Code. He applied pursuant to s. 276.1 of the Code to introduce evidence with respect to two prior incidents of sexual assault reported by the complainant involving two other individuals. At the time of this alleged assault, the complainant was 19. She had made a prior allegation when she was 9 that an elderly male, S.K., had done embarrassing things to her. In that case, the accused had pled guilty. There was no information regarding the circumstances. The second incident occurred when the complainant was 12. She alleged that a teenage male, J.N., had assaulted her at a party when she was intoxicated. At trial, witnesses were called, the accused testified and was acquitted. In this case, the accused applied to cross-examine the complainant with respect: 1) to the first incident involving S.K. on the basis of relevance. The defence suggested that it might reveal that the complainant might have confused her memories of it with the current allegation; 2) the second incident because it was relevant in that she had made the same allegations against J.N. The defence had submitted an affidavit wherein the affiant, J.N.'s sister, deposed that the complainant had told her that she had not been truthful about her allegations against J.N.; 3) the foregoing evidence was relevant to credibility.

HELD: The application was granted in part. The court found with respect to the requests that: 1) the defence had not met the requirements of the Code in that it had not provided any particulars of the nature of the evidence to be called or its relevance to the issues of this trial or to the content of the cross-examination. The accused would not be permitted to cross-examine the complainant or produce evidence related to the S.K. incident; and 2) there was no evidence that that there was any relevance; it would order a voir dire. The defence had suggested that the complainant had recanted the allegation against J.N. and would therefore attack the general credibility of the complainant. The defence would be given the opportunity at the voir dire to prove that there was a recantation. Following receipt of evidence from the voir dire, the court would then determine whether the accused could proceed with cross-examination of the complainant of her recantation.

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R. v. Dunford, 2015 SKQB 48

Krogan, February 13, 2015 (QB15409)

Criminal Law – Motor Vehicle Offences – Dangerous Driving Causing Death
Constitutional Law – Charter of Rights, Section 10(b)

The accused was charged with operating a motor vehicle in a manner dangerous to the public and thereby causing death, contrary to s. 249(4) of the Criminal Code, and with criminal negligence in the operation of a motor vehicle causing death, contrary to s. 219 and s. 220(b) of the Code. The trial commenced with a voir dire to determine whether a statement taken from the accused on the day of the offence should be excluded from evidence under s. 24(2) on the basis that his s. 10(b) Charter rights to counsel had been infringed. The RCMP officer arrived at the scene of the accident and found the accused standing beside the road. The officer testified that he spoke to the accused, noting that he was not impaired or injured. The officer had no concerns about the accused's ability to comprehend what was happening. He arrested the accused a short time later, informing him of his right to counsel. The accused said that he understood the information and replied that he did not want to call a lawyer. The officer provided the police caution that the accused also said he understood. The officer drove the accused to the detachment where he interviewed him. At the start of the interview the officer confirmed with the accused that he had been informed of

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R. v. Dunford

his right to counsel and asked him if he wanted to speak with a lawyer. The accused said that he did not know one and needed Legal Aid because he could not afford a lawyer. The officer asked him if he wanted to talk to Legal Aid, the accused answered that he did not and that he knew that he was at fault. The officer told the accused to let him if know if he changed his mind. Then he confirmed with the accused that he had been read the police caution and explained to him that anything he said could be used as evidence. The accused said that he remembered being told by the officer earlier. At the end of the interview the accused discussed with the officer what might happen to him in terms of penalties and became interested in speaking with a lawyer. The officer brought a telephone to the accused and he called Legal Aid. The accused testified that he could not remember that the officer had told him that he was arrested, of his right to counsel or to remain silent at the roadside because he was distraught. He remembered only parts of the interview and recalled that the Legal Aid lawyer advised him of his right to silence. The accused was a British citizen who had lived in Canada for three years. He said that he was not aware of his right to silence until the lawyer informed him. He knew of Legal Aid because it existed in Britain but not how it worked. If he had known he could telephone a Legal Aid lawyer he would have called one when he was first asked. The defence argued that since he expressed a desire to speak to a lawyer, the officer should have told him of the immediacy of Legal Aid assistance. The Crown took the position that the officer did everything constitutionally required of him. The accused had not given any indication to the officer that he did not understand the information that was given to him.
HELD: The videotaped statement of the accused was found admissible because the court found that the accused's s. 10(b) Charter right had not been violated. The court found that the accused's statement was voluntary. The evidence showed that the accused had understood the information given to him by the officer of his right to counsel. Even if he had not understood, there was nothing said by the accused to indicate that he had not understood.

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Harle v. 101090442 Saskatchewan Ltd., 2016 SKCA 66

Caldwell Herauf Whitmore, May 12, 2016 (CA16066)

Civil Procedure – Appeal – Fresh Evidence
Damages

Real Estate – Agreement for Sale – Breach
Real Property – Sale – Farmland – Breach
Sale of Land – Farmland – Specific Performance

The respondent agreed to purchase farmland from the appellants pursuant to an agreement for sale. The appellants ended up refusing to sell to the respondent as the value of farmland was rising. The respondent obtained an order for specific performance. The appellants' appeal was allowed and the matter was remitted back to the trial judge to assess the damages owing to the respondent as a result of the appellants' breach. The Supreme Court of Canada refused both the respondent's application for leave to appeal and the appellants' application to cross-appeal. At the initial trial, the respondent conceded that its damages would be the difference in value of the farmland and also agreed to the basis of assessing damages, which meant they were foregoing any claim for lost opportunity or other loss. When the matter was returned to the trial judge by the Court of Appeal, the respondent argued that the damages ought to be assessed as of the date the Supreme Court dismissed the applications for leave to appeal and also sought to adduce new evidence as to the value of its lost opportunity. The trial judge allowed the respondent to make the new arguments and to adduce new evidence. The appellants argued that the trial judge erred by exercising a discretionary power to permit the respondent to withdraw its previous concession and to reopen the trial to admit new evidence. The appeal court judge concluded that the trial judge found the respondent failed to prove that it intended to use the farmland for long-term residential development purposes. The appeal court judge specifically indicated that it was up to the trial judge to determine whether he would receive further submissions. The court considered the following issues: 1) did the majority in the Court of Appeal decision limit or curtail the trail judge's authority; and 2) did the trial judge exercise his authority appropriately.
HELD: The appeal was allowed, but only to permit the trial judge to assess the respondent's damages in the manner directed by the Court of Appeal decision. The doctrine of functus officio ceased to have application because the court of appeal remitted the matter to the trial judge; however, the question of the scope of the trial judge's competence remained. The trial judge misinterpreted the appeal court decision. The appeal court and the trial judge were correct in finding that the respondent did not have a plan or goal of long-term residential development for the farmland. The respondent was not granted specific performance and therefore its damages were limited to what it had conceded they were at trial. The appeal court judge indicated that it was up to the trial judge to decide if new

submissions would be allowed; however, that could not have meant that new evidence would be admitted on something that was already determined as fact, a plan that was found not to exist. The court did find some merit in the respondent's argument that it was open to the trial judge to choose a date of assessment that was after the initial trial, which would require adducing new evidence. The respondent was not allowed to resile from its concession that damages should be based on the difference in land values.

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City Centre Equities Inc. v. Regina (City), 2016 SKCA 69

Ryan-Froslie, June 2, 2016 (CA16069)

Municipal Law – Appeal – Assessments
Municipal Law – Assessment Appeal – Capitalization Rate – Arm's Length Sale
Municipal Law – Leave to Appeal

The applicants applied pursuant to s. 33.1 of The Municipal Board Act for leave to appeal a 2016 decision of the Saskatchewan Municipal Board's Assessment Appeals Committee, which overturned a finding by the Board of Revision. The board concluded that the sale of an office building was not an arm's length sale and, therefore, should not have been used in determining the capitalization rate applied in assessing the applicant's property for municipal tax purposes. The three appellants each owned an undivided one-third interest in the office tower. One of the owners sold its one-third interest to one of the existing owners for one-third of the appraised value. The two owners were represented by the same management company at all meetings. The assessor treated the sale as an arm's length sale and it was used along with five other sales to determine the capitalization rate with a corresponding increase to the assessed value of the office buildings in the city. The appellants appealed the assessor's decision to the board arguing the sale of the office building should not have been included in determining the capitalization rate because it did not represent a typical market condition sale according to s. 163(f.1) of The Cities Act, because it was not a fee simple or arm's length sale. The board removed the sale form the calculation of the capitalization rate. The city appealed to the committee and the committee found the board made a mistake by excluding the sale. The appellants' grounds were whether the committee: 1) exceeded its jurisdiction by deciding the appeal before it on

grounds that were not raised in the notice of appeal; 2) erred by failing to apply the correct standard of review with respect to the board's factual findings; 3) erred by finding that whether a sale was arm's length was within the reasonable discretion of the assessor, as opposed to a question to be determined by the board based on all the evidence before it; and 4) identified and applied the correct legal test for determining an arm's length sale.
HELD: Leave was granted with respect to three of the grounds of appeal. The appeal court discussed the grounds as follows: 1) this ground of appeal was prima facie destined to fail; 2) the correct standard to be applied is a question of law. This ground of appeal was not prima facie frivolous, vexatious or destined to fail. Leave was granted with respect to this ground; 3) the appeal court found the ground to raise a question of law as to the effect of the assessor's discretion on municipal appeals and when the results of the assessor's exercise of discretion may be set aside by the board or committee. Leave was granted; and 4) what constitutes an arm's length sale under the new legislation was found to be an important legal question and, therefore, leave was granted.

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Cross v. Batters, 2016 SKCA 71

Richards Caldwell Whitmore, June 6, 2016 (CA16071)

Family Law – Child Support – Appeal
Family Law – Child Support – Determination of Income
Family Law – Child Support – Income in Excess of $150,000
Family Law – Child Support – Interim
Family Law – Child Support – Section 7 Expenses
Family Law – Child Support – Spousal Support
Family Law – Spousal Support – Appeal
Family Law – Spousal Support – Interim

The appellant and respondent were married for 15 years and were both high-income earners. They had four children, but one passed away. The appellant, mother, disputed the amounts awarded by the chambers judge for interim child and spousal support. The respondent was the sole shareholder, director, and officer of a construction company. The respondent's income was: $4,594,982 for 2013; $3,549,945 for 2014; and $6,359,000 in 2015. The appellant applied for interim child support of $139,923 per month as well as $120,000 monthly spousal support. The chambers judge ordered monthly child support of $20,000, which would allow the children to have the same standard of living as they did before separation. The chambers judge ordered $10,000

per month in spousal support, which, according to the chambers judge, was sufficient to meet the appellant's needs. The appellant argued that the chambers judge erred with respect to the child support by: 1) proceeding under s. 4 of the Guidelines; 2) failing to take the respondent's corporations' pre-tax income into account when assessing the respondent's income; 3) failing to specifically determine the respondent's income; and 4) not awarding a specific amount for s. 7 expenses.
HELD: The appeal was dismissed. The child support matters raised by the appellant were dealt with as follows: 1) the court indicated that the appellant's argument did not reflect the basic purpose of child support payments, which are to maintain children not to equalize household incomes or transfer wealth between spouses. The appeal court found that the chambers judge made a reasonable conclusion in light of the evidence before him that $20,000 per month would allow the children to have the same standard of living they enjoyed before separation. There was no evidence that, post-separation, either party had assumed a different lifestyle; 2) the respondent's income was already so high without including pre-tax income from the corporation that s. 4 of the Guidelines was engaged. The child support order would not have changed if the corporate income was included; 3) the court did not agree that, in the circumstances of this case, the child support order was void because the respondent's income was not specifically determined. The chambers judge did not award the table amount for the income suggested by either party, but instead invoked s. 4 of the Guidelines to move away from the table amounts; and 4) the appellant raised the issue of s. 7 expenses in her financial statements. The appeal court concluded that the chambers judge built the s. 7 expenses into the monthly support amount. The Guidelines do not require that the s. 7 expenses be separated from child support. The appellant's arguments regarding spousal support were also not successful: the court was not concerned with the fairness of any division of property at this stage; the interim spousal support order was sufficient to meet the appellant's needs; s. 15.2 of the Divorce Act is concerned with support of the payee not income equalization or property distribution; the appeal court did not see how the chambers judge erred by not considering the appellant's contributions to the corporation, pursuant to s. 15.2(4)(b); and spousal support orders are based on the specific circumstances of each case and not by superficial comparisons to amounts awarded in other cases.

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Scott v. Vanston, 2016 SKCA 75

Richards Herauf Whitmore, June 14, 2016 (CA16075)

Wills and Estates – Domicile of Testator – Appeal

The appellant appealed a decision of the Queen's Bench judge who found that the appellant's deceased father was not domiciled in British Columbia at the time of his death (see: 2014 SKQB 64). The respondent, the second wife of the deceased, submitted that the deceased was domiciled in Saskatchewan at the time of his death. She concurred with the appellant that the trial judge erred in finding that in the absence of any domicile of choice the deceased's domicile was in Alberta because he was born there. Both parties requested that a new trial be ordered because the trial judge failed to re-open the trial to hear new evidence on the issue of domicile of origin, on which neither party had adduced evidence. The trial judge held that the appellant had not established grounds for re-opening the trial, based upon the principles set out in Zhu v. Li because the appellant had not set out with particularity the specific nature of the evidence to be adduced. The appellant argued that the trial judge erred in law in raising an issue going to the merits and then declining to accept further evidence before reviving the deceased's domicile of origin as determinative. The trial judge also erred in holding that place of birth was the same as the individual's domicile of origin and more evidence was required. HELD: The appeal was allowed on the ground that the trial judge erred in refusing to re-open the trial as neither party had had an opportunity to lead evidence on the issue of the deceased's domicile of origin. As the parties had not known that domicile of origin would be in issue, it could not be said that the evidence could have been obtained before trial with reasonable diligence. The court ordered a new trial on that issue. The court found that the trial judge had not committed any palpable or overriding errors of fact with respect to his findings respecting whether the deceased had established a new domicile in British Columbia or abandoned his previous domicile in Saskatchewan.

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Scott v. Seier Estate, 2016 SKCA 76

Jackson Caldwell Ryan-Froslie, June 15, 2016 (CA16076)

Wills and Estates – Dependants' Relief Act – Application – Appeal

The appellant appealed from a judgment of a Queen's Bench

judge that denied her claim for relief against the estate of her deceased spouse, under s. 6 of The Dependants' Relief Act, 1996 (see: 2015 SKQB 244). The appellant's application to Queen's Bench had been by way of summary application. She deposed that she and the deceased began living together in 2005 and they stayed together until his death in 2014. Prior to their relationship, he had sold his farm. The proceeds of sale were paid into his farming corporation. In 2008 the corporation purchased another farm that was used for raising sheep. It was sold in 2012 for approximately $500,000. In 2010 the deceased bought a residence in Humboldt with title held jointly in his name and the appellant's. The deceased and the appellant managed their own assets during the relationship. The deceased specifically bequested all his residential property at the time of his death plus $250,000 to the appellant. As the house the deceased and wife lived in at the time of his death was in their joint names, it did not become part of the estate. The appellant sold it for $350,000. The grounds of appeal were that the judge erred: 1) in determining the matter on a summary basis because there were conflicts in the affidavit evidence that could only be resolved by a viva voce hearing or ordering a trial; and 2) in findings with respect to testator's legal obligations, such as: when the spousal relationship had commenced and the source and use of funds in the spousal relationship; that the appellant had received her one-half interest in the family home as a gift from the testator; that the sheep farm was not a residential property; that the estate's legal obligation to the appellant had been met under The Family Property Act; and failing to give weight to the testator's moral obligations to the appellant.

HELD: The appeal was dismissed and the judge's order under s. 22 of the Act affirmed. The court held with respect to the grounds that: 1) the appellant's originating application asked the judge to determine the merits of the matter raised in a summary way on the basis of her affidavit evidence. During the hearing the appellant had not requested an adjournment or a viva voce hearing. The judge was satisfied that there was no conflict in the evidence and it was open to him to determine the issue in a summary manner on the basis of the evidence before him; and 2) there was no basis to interfere with the judge's finding of facts or analysis to conclude that he misapprehended the testator's legal obligations to the appellant. Further, the judge had not erred in the exercise of his discretion under s. 6(1) of the Act in finding that the testator had made reasonable provision for the appellant in his will.

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Arslan v. Sekerbank T.A.S., 2016 SKCA 77

Lane Caldwell Herauf, June 20, 2016 (CA16077)

Debtor – Creditor – Preservation Order – Application to Terminate
Statutes – Interpretation – Enforcement of Money Judgments Act, Section 5, Section 8

The appellants appealed against the dismissal of their application to terminate a consent preservation order made in favour of the respondent bank pursuant to s. 8 of The Enforcement of Money Judgments Act (EMJA). The chambers judge found the circumstances were insufficient to justify termination (see: 2014 SKQB 215). The respondent had commenced an action against the appellant Arslan in debt enforcement in Turkey as guarantor for a loan it had made to another party. Because of the character of Arslan's assets, the respondent commenced two actions in Saskatchewan against him: one in debt and the other based upon an alleged fraudulent conveyance. With respect to the first action the respondent obtained an ex parte preservation order against Arslan's Saskatchewan assets pursuant to ss. 5(1)(a)((i) and 5(5)(a)(i) of the EMJA. The second action established a separate legal foundation for a preservation order pursuant to ss. 5(1)(a)(ii) and 5(5)(a)(ii). The respondent filed an application for an indefinite preservation order in the second action and it was granted by consent. The appellants then applied to terminate the consent order, which was dismissed. The chambers judge found that there had not been sufficient change in the facts or law related to any of the three conditions set out in ss. 5(5) and 8 of the EMJA. Based upon the evidence, the Turkish proceedings had not ended and that what had happened since the consent order issued did not satisfy him that the Turkish claim was groundless. The issues raised by the appellants were: 1) whether the chambers judge erred by failing to consider the opinion evidence of the appellant's qualified expert witness. First, they argued that the judge was confused as to whether the expert was acting as their counsel and was therefore biased or partial. Secondly, they submitted that the judge admitted and relied upon the affidavits of the respondent's Turkish lawyers when such evidence was inadmissible by reason of bias or partiality; 2) whether the standard for granting a preservation order is that the plaintiff's claim cannot be groundless; and 3) whether their application to terminate was subject to issue estoppel.
HELD: The appeal was dismissed. The court held with respect to each issue that: 1) it found no error in the chambers judge's decision to admit the evidence and to limit its use to proof of uncontroverted facts about the status of the Turkish proceedings

in this case; 2) the chambers judge had not erred in his interpretation of s. 5(5)(a) of the EMJA as setting a low threshold. He found that the respondent had commenced proceedings in both Turkey and in Saskatchewan and in the circumstances, Arslan was potentially liable for certain debts in the first action and both appellants were potentially liable under the second action and if the respondent was successful, would result in judgment in its favour. On the evidence, the court found that those actions did not appear to be groundless; and 3) the chambers judge had not erred in finding that the matter was subject to issue estoppel. The preservation order had been obtained by consent and the judge was correct in concluding that that was the equivalent of meeting the three conditions set out in s. 5(5). Under s. 8 of the EMJA, the appellants had not proven there had been a change in the circumstances regarding the three conditions pursuant to s. 5(5) since the order was made.

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R. v. Kunard, 2016 SKPC 22

Gray, February 16, 2016 (PC16065)

Criminal Law – Break and Enter – Acquittal

The accused was charged with the following Criminal Code offences: committing a break and enter contrary to s. 348(1)(b); possessing tools suitable for housebreaking contrary to s. 351(1); and possessing stolen property valued under $5,000. The charges were laid after the police stopped the accused who was riding his bicycle and carrying a safe. It was discovered later that someone had smashed a window of a local business and stolen a safe containing between $400 and $500. The theft would have occurred sometime after the business closed at 10:00 pm. It was 4:00 am and quite cold but the accused was perspiring profusely when the police questioned him. The police found a screwdriver under the bicycle seat. He appeared to be nervous and fidgety. He claimed that he had found the safe in a back alley and he explained that he used the screwdriver to fix his bicycle chain. When the police opened the safe, $315 was missing. The accused had $96 in his pants pockets, which he said was money left from his social assistance cheque. Although all of the circumstances were suspicious, the issue was whether an inference of guilt could be drawn from recent possession of stolen property. HELD: The accused was found not guilty of the first two charges but guilty of the third. There was insufficient evidence to support that the accused committed the break and enter as the

time of the theft was unknown, he provided an explanation for the money he had on his person and the amount did not match what was stolen from the safe. His explanation regarding the screwdriver was plausible and the theft occurred after a window had been broken by a rock. However, the accused had been willfully blind as to the possibility that the safe had been stolen.

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McKenzie, CPA Professional Corp. v. Ramsahoi Management Ltd., 2016 SKPC 29

Jackson, February 19, 2016 (PC16069)

Contract Law – Breach of Contract

The plaintiff accounting corporation brought an action for payment of an outstanding account owed by the defendant corporation in the amount of $7,579. The invoice for the disputed accounting services was dated March 31, 2014. The defendant terminated the services of the plaintiff on March 17, 2014. The principal of the plaintiff testified that he had acted as the accountant for the defendant since 1975. He prepared both the corporate returns for the defendant as well as the personal income taxes for the defendant's shareholders, a physician and his wife. The physician died in July 2013 and the shares of the defendant were passed to the physician's son. Although the defendant paid the plaintiff's invoice rendered after the physician's death, the defendant resisted payment of the next invoice. It argued that the plaintiff had no authority to do the work. The witness for the plaintiff testified that the defendant continued to provide information as requested by the plaintiff for the corporate accounting work done up to the spring of 2014 when the actual termination occurred. The defendant argued that it had terminated the services by an email sent in February 2014 in which the defendant's shareholder wrote that he would like to talk to the plaintiff before preparation for the 2013 corporate tax return commenced. The plaintiff had responded that the defendant was not in a position to take the tax work away.
HELD: The plaintiff was given judgment in the amount of $5,450, which represented the principal owing of $7,579 less $2,129 deducted from that amount for work performed by the plaintiff after the termination of March 2014. The court found that the defendant's email sent in February 2014 had not terminated the services nor could the plaintiff have realized that there was a prospect of such termination.

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R. v. Fellner, 2016 SKPC 30

Gray, February 29, 2016 (PC16066)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Sentencing – Curative Discharge

The accused pled guilty to one charge of driving while her blood alcohol content exceeded .08. She asked to be granted a curative discharge pursuant to s. 255(5) of the Criminal Code. The accused had been stopped by a police officer after the police had received a complaint that a vehicle was being driven over the speed limit and overtaking vehicles when it was unsafe to do so. The accused failed the ASD test and then provided breath samples that showed readings of .29. The accused admitted to the officer that she had been an alcoholic for many years. She had been charged with the same offence in 2006 and 2010 and had received treatment but had relapsed. After being charged with this offence she had returned to drinking again. A few months later, however, she realized that she would die if she did not stop and sold her home to finance treatment and admitted herself to a six-week program. After discharge she had joined Alcoholics Anonymous and attended meetings two to three times per week. She moved to Regina to be close to her family and friends who would support her. At the time of this application, the accused had been sober for 572 days and accepted that she could never drink again. A number of people testified on her behalf to describe the positive changes that the accused had made to achieve sobriety.
HELD: The accused was granted a curative discharge. The court found that the accused had met the required onus of this type of application in accordance with R. v. Ahenakew. The accused's conduct over the past 18 months satisfied the court on the balance of probabilities that hers was an exceptional case and that a curative discharge would not be contrary to the public interest. The court imposed numerous conditions on her, including that she could not have or consume alcohol and should report to a probation officer, receive addiction counselling, participate in AA meetings and provide proof of her attendance to her probation officer. Her driver's license was cancelled and she was prohibited from driving for two years.

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R. v. Bone, 2016 SKPC 51

Singer, April 29, 2016 (PC16067)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Certificate of Analysis – Statutory Presumptions

The accused was charged with driving while his blood alcohol content exceeded .08. The Crown sought to prove the charge by filing the Certificate of a Qualified Technician pursuant to s. 258(1)(c)(iv) of the Criminal Code. After the accused had been arrested, he had been taken to the police station to provide breath samples. After the first sample was taken, the accused was observed as having burped by the arresting officer. The officer informed the breath technician and she decided that restarting the observation period was unnecessary and about seven minutes later, the accused gave his second sample. At trial, the technician admitted that her training material clearly directed that the proper procedure to follow if a suspect burped was that the observation period must be restarted. She agreed that she did not follow the correct procedure and therefore she could not say that the sample was suitable. The defence submitted that because there was a failure to restart the observation period, the taking of the second sample raised a reasonable doubt that the instrument was operated improperly and so the Crown did not have the benefit of the presumption in s. 258(1)(c)(iv). It relied upon the Queen's Bench decision in R. v. By, which held that it was enough that the suspect had not been under observation and could have burped to raise a reasonable doubt whether the machine was operated improperly. The Crown argued that the Alberta Court of Appeal decision in R. v. So was on point. It had held that although there may have been some deficiencies in the operation of the instrument, there was no evidence that the improper operation would cause it to be unreliable.

HELD: The accused was found not guilty. The court must accept the law as expressed in By, where the Saskatchewan Court of Queen's Bench had considered the decision in So but interpreted the law differently. It held that evidence to show that the machine was operated improperly was all that was required to raise a reasonable doubt as to the accuracy of the analysis, if the Crown does not show that the improper operation had no effect on the accuracy of the readings. In this case, the technician could not say that the second sample was proper. As there was no evidence of impairment except for the smell of alcohol on the accused's breath and his bloodshot eyes, the Crown had not proven its case beyond a reasonable doubt.

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Chowdhury v. Chongo, 2016 SKPC 62

Agnew, April 28, 2016 (PC16070)

Real Estate – Mortgage Broker – Mortgage Commitment
Small Claims – Breach of Contract – Tort

The defendant obtained a mortgage commitment for the plaintiff from a lender so that he could purchase a house. The mortgage commitment was later cancelled, but that was never communicated to the plaintiff. The plaintiff only learned of the cancellation from his lawyer when he attempted to close the purchase of the house. The defendant would not tell the plaintiff what the problem was with the mortgage commitment. The defendant texted the plaintiff that she would no longer be assisting him. He eventually secured another mortgage, but the interest rate was higher, the term was shorter, and the down payment required was higher. The plaintiff had to obtain loans at high rates to raise the down payment. The defendant sent the plaintiff another mortgage commitment with more favourable terms, but he had lost faith and would not deal with the defendant. The defendant argued that the plaintiff therefore failed to mitigate. The new mortgage commitment from the defendant required the plaintiff to show annual income tax filings with income of $113,000 per year, which was not possible for the plaintiff because he did not earn that. The original mortgage commitment obtained by the defendant only required an income of $54,000.
HELD: The court was satisfied that the plaintiff complied with the conditions of the original mortgage commitment and that he was never informed of the cancellation until his lawyer told him. The court also found that the defendant had a duty, through contract or tort, to advise the plaintiff of the cancellation. The duty was breached. The court found that the plaintiff was entitled to recover the $1,000 he had already paid to the seller of the house for late fees, but no more late fees were proved to the court's satisfaction. The court also concluded that the plaintiff did not prove that he was entitled to the interest paid on the $60,000 down payment required. The plaintiff provided precise figures as to the interest paid, but he did not provide any documentation to support those figures. The plaintiff was awarded the costs of the second mortgage he obtained to raise funds for the down payment for one year and for the legal expenses involved with that mortgage. The court also awarded the plaintiff the difference in interest for one year he had to pay

on the mortgage to purchase the house versus the interest he would have paid under the original mortgage commitment if it had not been cancelled. The plaintiff did not provide evidence as to what happened after the first year when his mortgage was up for renewal. The plaintiff was not awarded loss of rental income or loss of income for the time he lost from work dealing with the situation. The plaintiff's damages totaled over $20,000, but he abandoned the portion over $20,000 to comply with the then monetary limit of the court's jurisdiction.

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R. v. Halkett, 2016 SKPC 65

Robinson, May 12, 2016 (PC16068)

Criminal Law – Assault – Sexual Assault – Sentencing

The accused was convicted on a charge of committing a sexual assault, contrary to s. 271 of the Criminal Code, and the matter came before the trial judge for sentencing. The accused was arrested at his home because he was intoxicated and throwing furniture. He was put in a jail cell with another man who was also intoxicated. A video camera showed the accused committing or attempting to commit a sexual assault on the other inmate. Both the inmate and the accused testified that they could not remember being arrested or what happened while they were both in the cell. The accused was Aboriginal. He had not been abused by his parents but he had witnessed his father abusing his mother and both parents had drinking problems. When the accused was seven years old, he inadvertently caused the death of three young siblings because of a fire in the home, which occurred while his parents were out drinking. The accused was sent to live with his grandparents in another community. His schooling ended at grade six. He had few job opportunities because of his lack of education but had held some positions in construction and clearing bush. He began abusing alcohol at the age of 15 but had been sober for over a year. The accused had 16 prior criminal convictions but he had not committed an offence for 16 years. He had been in a stable relationship with his common law wife for 35 years. He lived with her in La Ronge with their 16-year-old daughter, the wife's son and the accused's elderly uncle. The defence argued that the accused should be given a restorative sentence that did not involve custody. In a similar case, R. v. Charles, the Crown appealed the original 18-month conditional sentence and the Court of Appeal increased it to 30 months imprisonment.

HELD: The accused was sentenced to an 18-month conditional sentence to be followed by probation for two years. The court noted that alcohol and substance abuse caused most of the charges that have to be dealt with by the Provincial Court. In this case, the court chose to impose a restorative sentence without custody because the accused suffered from a life-long addiction to alcohol and it led directly to his offending behaviour. A restorative sentence that prohibited him from drinking and required him to take counselling would help to ensure he maintained his sobriety and that he would not commit further offences. The sentence was proportionate because it addressed the accused's addiction as related to the accused's responsibility for the offence. From the point of view of parity of sentencing, the court distinguished the accused from the offender in Charles, noting a number of differences between them. In this case, the Gladue factors were significant: his parent's alcohol abuse; the suffering endured by the accused as a result of the tragedy that occurred when he was only six; his lack of education; and his own alcoholism.

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Fancy Field Service (2007) Ltd. v. Dewey, 2016 SKPC 74

Bazin, June 18, 2016 (PC16072)

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Statutes – Interpretation – Saskatchewan Employment Act, Section 2-36

The plaintiff brought an action for payment of monies allegedly owed to it by the defendant. While the defendant worked for the plaintiff, he was given a company fuel card. The plaintiff alleged that the defendant purchased gasoline for his personal use on the card. The defendant stated that any purchases were authorized by the plaintiff and the gas was used for the benefit of the plaintiff, because the defendant drove his own truck to transport himself and other employees to the plaintiff's work sites. The plaintiff did not operate any gasoline-powered vehicles as part of its business. The plaintiff's president testified that in January 2011 he reviewed the defendant's gasoline purchases from November 2008 to December 2010 because the plaintiff's business was contracting and he needed to assess its costs. When he discussed the gas purchase receipts with the defendant in January 2011, the defendant said that if the plaintiff did not think that he was entitled to it, then "take it off my pay cheque." The plaintiff estimated the gasoline purchases and deducted amounts from the defendant's pay cheque pursuant to the plaintiff's belief

that the defendant had agreed to this method. The director of employment standards applied for and obtained intervenor status to address the claim.
HELD: The plaintiff's claim was dismissed. The court found that the defendant had charged his personal gas purchases to the plaintiff's card in the amount of $680 but that the defendant had believed the fuel card was part of his employment benefits. After January 2011, the defendant agreed to a change in those benefits. Regardless of agreement though, the plaintiff was not entitled to deduct the wages pursuant to the prohibition contained in s. 2-36 of The Saskatchewan Employment Act. Further, the plaintiff's claim was statute-barred by s. 5 and s. 6 of The Limitations Act because the plaintiff discovered the loss in 2011 but did not commence its action until 2014.

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W S White's Ag Sales & Service Ltd. v. Martin, 2016 SKPC 80

Green, May 31, 2016 (PC16061)

Civil Procedure – Interest
Civil Procedure – Limitation Period
Contracts – Set-off
Limitations of Actions
Small Claims – Debt for Service Supplied

The defendant had the plaintiff pick up his tractor in February 2013 for repairs and did not receive it back until June or July 2013. The defendant did not have another tractor and he used it to feed his livestock. The defendant did not pay the plaintiff's invoice of $11,105.99 dated September 26, 2013, and, therefore, the plaintiff issued the claim for payment on September 24, 2015. The issues were: 1) was the action barred by The Limitations of Act; 2) if not barred, how much did the defendant owe the plaintiff; 3) was the plaintiff entitled to interest; and 4) what amount was the defendant allowed to set-off against the amount he otherwise owed the plaintiff for the loss of use of the tractor, the delay in fixing the tractor, and the lack of communication.
HELD: The issues were determined as follows: 1) the court did not agree that the limitation period began as soon as the work was finished on the tractor. The court was satisfied that the action was commenced less than two years from when the plaintiff knew or ought to have known it had a claim in debt against the defendant; 2) the invoice was for $11,105.99, however, there was a double entry for a part reducing the amount owing to $8,452.79; 3) the plaintiff claimed two percent

interest per month on the unpaid balance based on the proviso on the invoice. The court was not satisfied, on a balance of probabilities, that the plaintiff proved there was an agreement for the defendant to pay interest. The only interest the court would order was under The Prejudgment Interest Act as claimed in the alternative; and 4) when the defendant arranged to have the tractor repaired he was advised that it would take seven to ten days. While his tractor was at the plaintiffs the defendant fed his cows with help from neighbours. He did work for neighbours in return and no money was exchanged. The court was satisfied that the delay was in large part due to the difficulty in getting a part to fix the tractor. The court did not find any legal basis for set-off. The plaintiff was given judgment for $8,452.79, plus interest under The Prejudgment Interest Act from September 26, 2013, and costs of $100.

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Zheng v. John Galon Insurance Services Ltd., 2016 SKPC 90

Demong, June 27, 2016 (PC16074)

Insurance – Home – Fire – Action on Policy
Tort – Negligence – Duty of Care
Professions and Occupations – Insurance Broker

The plaintiff sued his insurance broker and his insurance company for $20,000, the limit of small claims court jurisdiction. He suffered loss in the amount of $70,000 due to a fire that damaged his house. The insurer investigated and discovered that he lived in the house with three paying tenants. His insurance company denied coverage under his owner-occupied policy on the basis that his decision to rent his premises to the tenants was both a misrepresentation and material change to the risk within his control and knowledge. The plaintiff had met with an agent employed by the broker to purchase the insurance. The plaintiff testified that the agent had not explained the application form to him and he had merely signed it. The agent testified that because the plaintiff appeared to have some trouble understanding English, he read and explained the policy to him and went over the questions a number of times. The plaintiff did not advise that he would be taking in tenants. When the plaintiff received the policy renewal in the mail one year later, he had started renting to tenants. The renewal stated that the insured was expected to inform the insurer if the information was correct but the plaintiff did not notify the insurer of the tenants. The plaintiff's claim was based in negligence with respect to the broker. He alleged that it

breached the duty of care owed to him when the agent failed to advise him that taking paying tenants might have the effect of voiding his insurance. The plaintiff also sued the insurance company for breach of contract because it failed to cover the loss. The fire was not caused by a renter and he was not subjectively aware that renting to others would constitute a material change in risk. The insurer's witnesses explained that it would have demanded a much higher premium and have undertaken an inspection of the house if it had known that plaintiff was renting to tenants. The plaintiff failed to disclose that fact and his knowledge of whether it was material to the risk was not important.
HELD: The plaintiff's claims were dismissed. With respect to the alleged negligence, the court reviewed the relevant documents and compared the testimony of the plaintiff and the affidavit of the broker's agent. The court found that the broker had not breached its duty of care because the agent had in fact reviewed the application and the consent and disclosure form with the plaintiff. Although the application contained a provision for insurance for paying tenants, the plaintiff chose not to avail himself of the coverage. As the agent was not informed that the plaintiff would rent to tenants, he could not be expected to advise him that to do so would constitute a material change of risk that could void the insurance. With respect to the plaintiff's claim against the insurer, the court found that the plaintiff did not have to have subjective knowledge of whether or not a change in risk was material before the insurance can be voided. It was not necessary that the fire had to have been caused by a tenant in assessing whether or not the change in risk was material.

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Canadian Imperial Bank of Commerce v. Hartloff, 2016 SKQB 155

Tholl, May 2, 2016 (QB16150)

Civil Procedure – Queen's BenchRules, Rule 7-5
Civil Procedure – Queen's Bench Rules, Rule 11-1
Civil Procedure – Costs – Solicitor-Client Costs

The plaintiff bank issued a statement of claim in which it sued for the payment of funds owing to it by the defendant, a customer of the bank. The defendant had arranged first a deposit account with the plaintiff, later obtained a Visa account and then obtained a personal loan. In each case, the defendant defaulted

on his obligation to pay his overdraft, the balance owing on his Visa account and the payments on his loan on demand as required by the contracts. The defendant filed a statement of defence and a counter-claim. The plaintiff filed a statement of claim to it. It then applied for summary judgment pursuant to Queen's Bench rule 7-2. The defendant's statement of defence and counter-claim rested on discredited pseudolegal arguments. The issues were whether: 1) there was a genuine issue for trial; and 2) if summary judgment was granted, what level of costs should be awarded.
HELD: The application for summary judgment was granted. Under Queen's Bench rule 7-5(1)(a), it was an appropriate case because the amount claimed was readily quantifiable and the facts were uncontroverted. The defendant had not raised a valid defence to the plaintiff's claim and the counter-claim could not possibly succeed. The court granted costs to the plaintiff. It had requested full indemnity costs because two of the three contracts with the defendant contained terms giving it that right. The court found that, pursuant to its discretion to award costs under Queen's Bench rule 11-1, the plaintiff was also entitled to full indemnity on a solicitor-client basis because of the manner in which the defendant had conducted himself in the litigation by relying on pseudolegal arguments.

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Bourelle v. Saskatchewan Government Insurance, 2016 SKQB 165

Danyliuk, May 6, 2016 (QB16157)

Civil Procedure – Queen's Bench Rules, Rule 5-49

The defendant applied for an order directing the plaintiff to attend for an independent medical examination. The plaintiff had been involved in three motor vehicle accidents in the late 1990s and alleged that she suffered injuries. She sought and obtained benefits from the defendant pursuant to The Automobile Accident Insurance Act (AAIA). After paying benefits for five years, the defendant decided to terminate the plaintiff's income replacement benefits based upon an opinion it had received from a doctor. The plaintiff requested a review and a hearing was held. The defendant denied the review and the plaintiff appealed. In 2002, the plaintiff's counsel then presented a consent order that was endorsed by the defendant's counsel. The order was granted by the court and its terms included that the Queen's Bench Rules would apply to the proceedings. An

examination for discovery was held in 2002 but the plaintiff failed to reply to any of the undertakings she had given. The plaintiff changed lawyers in 2013 and he dealt with the outstanding undertakings. The plaintiff then obtained a new medical report from a physician she had selected. In response, the defendant requested that the plaintiff undergo an independent medical examination with a physician it selected. The plaintiff would not consent to the request. The issues raised by the plaintiff to the application were that: 1) the court did not have jurisdiction under the Queen's Bench Rules to make the order because it was a statutory appeal under the AAIA, not a personal injury action; 2) the doctor selected by the defendant to conduct the examination was inappropriate. Research of the case law showed that he had been involved as an expert in eight decisions and had never acted for an insured; and 3) there was no proper basis for ordering the independent examination. HELD: The application was granted. The court held with respect to the plaintiff's arguments that: 1) the consent order signed by the parties and granted by court included the provision that the proceedings would be governed by the Queen's Bench Rules, which permitted the defendant to seek an independent medical examination; 2) the physician had appeared for both the insurer and the insured in trials. Further, the bare assertion of bias by the plaintiff was insufficient to support that the conclusion that the physician was unqualified to medically assess the plaintiff; 3) there was a proper basis for ordering an independent medical examination under s. 36 of The Queen's Bench Act, 1998 and Queen's Bench rule 5-49. The defendant had the right to select the doctor who would conduct the independent examination and that selection could not be vetoed by the plaintiff. The fairness of the trial required an independent examination. The court ordered that the plaintiff should submit to the requested medical examination and listed the terms and conditions.

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Patient 0518 v. RHA 0518, 2016 SKQB 175

Popescul, May 18, 2016 (QB16167)

Civil Procedure – Originating Notice – Permanent Publication Ban Physician Assisted Death

The applicant applied by originating notice for a declaration that she was entitled to a constitutional exemption authorizing physician assisted death. The applicant also applied for an interim order, which was granted, for confidentiality pending

the hearing of the permanent publication ban application. The court had to determine whether a permanent publication ban would be granted.
HELD: The onus was on the applicant to displace the open court principle. The court applied the Dagenais/Mentuck test. First, there was a consideration of whether the confidentiality order was necessary for the proper administration of justice. The court held that there was no reasonable alternatives to banning the publication of the names and identifying information of the interested participants to the application. A permanent publication ban and sealing order was necessary to prevent a serious risk to the proper administration of justice. Lastly, the court found that the salutary effects of the publication ban outweighed the deleterious effects. A publication ban would give the applicant the assurance that she would not suffer from any additional stress related to the application and would reassure her family that they could spend her last days as they choose. It also assured the health care professionals involved that they would be protected from harm. Future applicants and medical professionals would also not be discouraged from possible applications. The deleterious effects of the ban were minimal because the hearing was not in camera, just the identities were protected. The ban was made permanent.

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Patient 0518 v. RHA 0518, 2016 SKQB 176

Popescul, May 18, 2016 (QB16168)

Civil Procedure – Originating Notice
Constitutional Law – Charter of Rights, Section 7 – Constitutional Exemption
Physician Assisted Death – Criteria

The applicant applied by Originating Notice for a declaration that she was entitled to a constitutional exemption authorizing physician assisted death. The applicant had ALS and metastatic bone disease. The conditions caused her ongoing physical and mental suffering despite best medical efforts. No one opposed the physician assisted death. The Criminal Code prohibited physician assisted death, but the Supreme Court of Canada unanimously decided that the Criminal Code provisions prohibiting physician assisted dying violated s. 7 of the Charter. Therefore, the Supreme Court of Canada declared that ss. 14 and 241(b) of the Criminal Code were void in so far as they prohibit physician assisted dying. The provisions were not struck down

immediately, the invalidity was suspended for one year to February 2016. New legislation was not developed within the year and the four-month extension granted in Carter would expire in June 2016. During the four-month period the Supreme Court indicated that a prior judicial authorization was required for the assisted dying.
HELD: The court agreed with the Alberta case, H.S. (Re), that Carter did not merely permit a person to apply for a personal exemption during the extension period, but rather granted the remedy immediately to qualifying adults. The court discussed whether the applicant met the criteria set forth in Carter 2015 for a declaration: she was a competent adult. Three physicians assessed the applicant's capacity and all found her competent; she clearly consented to the termination of life as evidenced by three physicians filing affidavits that the applicant's consent to physician-assisted death was informed, free, voluntary, and clear; she had a grievous and irremediable medical condition; her condition caused enduring, intolerable suffering; and her suffering could not be alleviated by any treatment acceptable to her. The applicant met the criteria set out in Carter 2015 and, therefore, qualified for the constitutional exemption granted by the Supreme Court of Canada in that case.

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Regina Qu'Appelle Health Region (Mental Health Inpatient Services Division) v. R. (C.), 2016 SKQB 185

Megaw, May 25, 2016 (QB16180)

Mental Health – Patient Detention

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 period of one year for the purposes of treatment, care and supervision. The respondent was present at the hearing and was prepared to consent to the order. The respondent had been diagnosed with bipolar affective disorder in 2012. She had been admitted to a hospital in Regina involuntarily because she was not functioning well in society and there was a risk that she would harm herself or others. She had received treatment there for depression for more than 60 days but the medication had not been successful. The respondent's psychiatrist at the hospital testified that she needed to be in a long-term facility such as the Saskatchewan Hospital.
HELD: The application was granted and the order made that the respondent be detained in an in-patient facility in Saskatchewan

for a period of one year. The court found that the applicant had met the criteria set out in s. 24.1 of the Act.

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Northrock Resources v. ExxonMobil Canada Energy, 2016 SKQB 188

Currie, May 25, 2016 (QB16182)

Contract Law – Interpretation – Right of First Refusal
Contract Law – Breach of Contract

The plaintiff claimed that the defendants had breached the plaintiff's right of first refusal (ROFR) in connection with the sale of oil and gas producing assets in Saskatchewan in the Bantrum and Cantuar areas. The ownership and operation of the assets in these areas were governed by two sets of agreements (B-C agreements). The parties to the B-C agreements included both the plaintiff and ExxonMobil (Exxon), as well as Husky Oil. These agreements contained rights of first refusal. The plaintiff was a successor party to them. In 2005, the defendant numbered companies were incorporated as wholly owned subsidiaries of the defendant Exxon, described as Nova Scotia unlimited liability corporations (NSULC). In December 2005, Exxon and the defendant Crescent Point (CP) agreed in writing that the latter would acquire specific oil and gas producing assets in the Battrum and Cantuar areas of Saskatchewan. Exxon would transfer ownership of the interests to the NSULCs and then CP would purchase all of the shares of the NSLUCs. Exxon entered into negotiations with CP and accepted its offer because it appeared likely to yield the highest net financial benefit to it. When Exxon advised Northrock of its assignment of its B-C interests to the NSULCs, described as wholly owned subsidiaries, Northrock consented to the assignment on the basis that the agreements permitted it without triggering a ROFR. It then objected to Exxon's plans to transfer the shares to the NSULCs without issuing ROFR notices to it on the basis that under the agreements Exxon was not permitted to divest itself of the interests directly to an unrelated third party without issuing ROFR notice and therefore it could not divest itself of the interests indirectly to an unrelated third party without issuing ROFR notices. Exxon's position was that the ROFRs did not apply because its disposition to an affiliate was specifically excluded from the ROFR provisions. Further, its subsequent sale of the shares of the NSULCs to CP was a sale of shares of the owner of interests, to which the ROFR provisions did not apply.

The provisions did not address the sale of the shares of the owner of interests. Northrock argued that Exxon's transfer of its interest to the NSULCs and the subsequent sale of the shares in them to CP was a single transaction, structured to avoid honouring Northrock's ROFRs. Northrock asserted that Exxon breached its agreements with it by failing to provide ROFR notices. It also advanced other arguments including that Exxon and CP and the NSULC breached a duty of good faith to Northrock by failing to provide ROFR notices to it.
HELD: The claim was dismissed. The court found that Northrock and its predecessor interest-holders did not bargain to include a provision in the C-B interest agreements that would trigger an ROFR in the circumstances of this case. Therefore Exxon did not breach its agreements with Northrock by failing to provide ROFR notices. The court dismissed the plaintiff's claim that there had been a breach of good faith. The court accepted the testimony of Exxon's witness that he had been motivated to choose the sale structure employed here for tax reasons only and CP's witnesses that they had wanted to be the successful bidder.

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Laliberte v. Jones, 2016 SKQB 192

Danyliuk, May 30, 2016 (QB16192)

Family Law – Custody and Access – Interim Application
Family Law – Procedure – Unilateral Withdrawal of Application

The petitioner applied for interim relief with respect to her and the respondent's teenage child. After a report was prepared as to the child's wishes the petitioner wanted to strike her application and asserted that she could do so on her own initiative without agreement of the respondent or leave of the court. The issue was whether an interim family law application could be unilaterally withdrawn by the party bringing the application, or if the other side's consent or the court's leave had to be obtained.
HELD: The petitioner could not unilaterally withdraw the application. Family law required a different perspective than that required in other legal disputes. The action involved a child's best interests and the court does not have to just sit idly by and be a referee. The court is not restricted to narrow rules and procedures in family law. For example, s. 98 of The Queen's Bench Act directs a court to conduct family law proceedings as informally as the case allows. The court controls its own process. The court reviewed other cases and concluded that once the custody issue was brought forward the petitioner could not then

unilaterally withdraw the application.

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Sather v. Sather, 2016 SKQB 194

McIntyre, May 31, 2016 (QB16185)

Family Law – Child Support – Retroactive
Family Law – Costs – Queen's Bench Rules, Rule 4-31, Rule 11-1
Family Law – Custody and Access – Shared Parenting

The parties had joint custody of their five-year-old daughter. Pursuant to the judgment, each party parented the child for 14 nights out of 28. Prior to the judgment, each party served the other with an offer to settle. The respondent sought double costs pursuant to rule 4-31 of the Queen's Bench Rules arguing that his offer would have allowed the petitioner to remain in her small town and would have amounted to equal and shared parenting with the child residing in Moose Jaw. The petitioner argued that her offer was better than the judgment in terms of retroactive child support, and therefore, there was divided success and each party should bear their own costs.
HELD: The respondent's offer was not more favourable than the judgment; his offer would have had him parenting 17 nights out of 28. His offer also did not provide for the retroactive child support he owed. The court held that the respondent's offer to settle did not give rise to an order for double costs. The respondent was successful in part because the judgment required the child to reside in Moose Jaw and there was a shared parenting order. The court, therefore, used its discretion pursuant to rule 11-1 and ordered that the respondent have costs according to column 3, schedule 1B. No costs were granted with respect to the applications for costs.

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Mosaic Potash Colonsay ULC v. United Steel Workers, Local 7656, 2016 SKQB 195

Schwann, May 31, 2016 (QB16186)

Administrative Law – Arbitration – Judicial Review – Collective Agreement
Administrative Law – Judicial Review – Collective Agreement – Standard of Review – Reasonableness

Labour Law – Arbitration – Judicial Review
Labour Law – Collective Agreement – Interpretation

The applicant, employer, applied for judicial review of a labour arbitration decision respecting the scheduling of the grievor's work. The grievor was a journeyman welder working on the mill service division for the applicant. Prior to the occurrence he worked 10-hour shifts. The applicant determined that it required more coverage from the mill service division and therefore advertised 12-hour-shift jobs. In the meantime, the applicant required the grievor to work 12-hour shifts. The union objected to the implementation of the 12-hour rotating shift schedule and to changes to the grievor's schedule. One month after the grievance was filed, the parties negotiated a Current Practice Letter (CPL) that permitted the applicant to have the 12-hour rotating shift for the mill service division. The arbitrator upheld the grievance and declared that the applicant had violated four articles of the collective agreement. The judicial review application raised the following issues: 1) what was the appropriate standard of review and how should it be applied; 2) did the arbitrator err in determining that the applicant violated article 16.05(b) of the collective agreement by modifying the grievor's shift schedule. The applicant argued that article 2.01 gave them the right to manage and make decisions regarding the number and classification of employees. Further, they asserted that article 16.01 did not require the guarantee of work for any employee, or to maintain the work week or work hours in force at any time. Article 16.05(b) was limited to changes to departmental shift schedules not to an individual shift ; 3) did the arbitrator err in determining that the execution of the CPL failed to rectify any violation of article 16.05(b) and (f) of the collective agreement; 4) did the arbitrator err in finding that the assignment of the grievor to the rotating shift schedule within the mill maintenance division violated the seniority provisions of the collective agreement; and 5) did the arbitrator err in his assessment of damages.
HELD: The issues were dealt with as follows: 1) the parties agreed that the arbitrator's decision was to be reviewed on the standard of reasonableness; 2) article 16.05(b) imposed a clear obligation on the employer to consult with the union and the arbitrator's reasons were well reasoned with respect to the applicant's breach of the article. The court declined to rule on whether the article was not violated because it dealt with departmental shifts and not individual ones. That argument was advanced for the first time on judicial review; 3) the arbitrator's decision regarding the CPL and consultation was within the range of reasonable outcomes. It was justified, transparent and intelligible; 4) the applicant argued that immediate coverage was required in the mill maintenance division, and therefore, the

grievor could be appointed to the 12-hour shift even though there were employees with less seniority. The immediate 12-hour shift would have required additional training for those employees with less seniority. The arbitrator concluded that there was only one type of seniority, and it was companywide, not within a department. The arbitrator concluded that there were other employees with less seniority, although in other departments, that could have been given the 12-hour shift. The arbitrator concluded that there was a breach of article 8.01(a), but did not contain any reasons for the decision. The court found that the arbitrator must have concluded that moving the grievor to a 12-hour shift within his own department amounted to a shift assignment pursuant to article 8.01(a). That conclusion was a reasonable one. The arbitrator also concluded that the applicant's decision to move the grievor to a 12-hour shift rather than using overtime and call-out of employees was an arbitrary one. The arbitrator should have considered whether the requirements of the operations created an exception to the seniority principle and whether the applicant's evidence on the point was sufficient to fall within the exception. The court found that the arbitrator's factual finding that there was no evidence was at odds with the human resource employee's evidence. The arbitrator appeared to ignore the evidence. The court found was not satisfied that the arbitrator's decision had the necessary justification, transparency and intelligibility to support his conclusion. The court quashed the seniority issue, set it aside, and remitted it back to the arbitrator for a decision on that issue; and 5) the damages issue was also remitted back to the arbitrator for re-consideration.

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Federated Co-operatives Ltd., Re, 2016 SKQB 196

Scherman, June 1, 2016 (QB16199)

Cooperatives – Money into Court
Statutes – Interpretation – Co-operatives Act, 1996, Section 179

The cooperative sent a cheque to the registrar in the amount $81,301.06, asking the court to deal with the funds under s. 179(1) of The Co-operatives Act, 1996. A number of individuals applied to be paid monies out of the funds.
HELD: The registrar accepted the funds without a proper application to the court being made by a liquidator and without any proof that the requirements of the Act were complied with. The court ordered the funds to be returned to the cooperative. There was no evidence that a liquidator had been appointed.

There was also no evidence that a liquidator had made reasonable efforts to locate creditors. The required steps had not been taken to pay the money into court.

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Coward v. Kramer Ltd., 2016 SKQB 205

Keene, June 14, 2016 (QB16195)

Damages – Punitive Damages
Statutes – Interpretation – Agricultural Implements Act, Section 36, Section 46

The plaintiffs purchased a high-clearance crop sprayer from the defendant. On the first day of use, the plaintiff complained to the defendant that the sprayer was underpowered. On June 4, 2010, the plaintiffs invoked s. 36 of The Agricultural Implements Act and sent a notice of rejection to the defendant. The defendant took no action within the seven days to fix the problem because they felt there was not a problem. The plaintiffs notified the defendant that they were rejecting the implement and sent a demand letter asking for their money back. The sprayer was never used again and the plaintiffs sold it at an auction in March 2012. The plaintiffs sued for breach of warranty, arguing that the sprayer did not perform well for the work it was intended. They also sued for punitive damages and claimed that they had exercised their option under s. 46 of the Act to void the contract. The issues were: 1) did the sprayer perform well for the work it was intended (s. 36(4) of the Act–statutory warranty); 2) did the plaintiffs provide written notice of their intention to reject the sprayer in accordance with s. 36 of the Act; 3) could the plaintiffs rely on s. 46 of the Act to void the contract as against the defendant; 4) damages; 5) were the plaintiffs entitled to punitive damages; and 6) costs.
HELD: The issues were determined as follows: 1) the court found that the evidence did not support the plaintiffs' argument that the sprayer did not travel fast enough or that it labored as it went up muddy inclines when the defendant's representative was with the plaintiff in the sprayer. The court found the defendant's experts' testimony to be credible and to support the conclusion that the sprayer was working properly. The claim of a breach of statutory warranty was dismissed; 2) the plaintiffs had used the sprayer for less than 50 hours and for less than 10 days when it was rejected. The notice provided to the defendant was adequate; 3) the original claim did not contain a claim to void the contract. The claim arose from the machine order document used

by the defendant. The court did not accept the plaintiffs' argument that because the machine order contained offending passages they should be able to consider the contract void and get their money back. Neither party considered the contract to be void. The defendant only used the machine order for their internal use to seek approval of the sale by management. The plaintiffs rejected the sprayer under s. 36. There was no evidence that they exercised any option to void the contract under s. 46 until sometime later when they amended their claim. The plaintiffs were estopped from electing a secondary option under the Act once they invoked s. 36. The machine order did offend the Act, but it was not the primary contract between the parties. The other documents removed any concerns, and there was no evidence that the wording of the machine order affected them; 4) the plaintiffs should have put the sprayer up for sale shortly after deciding they did not want it. The court assumed that the plaintiffs could have sold the sprayer for more if they had sold it sooner. The financing costs were not appropriate because the court concluded that the sprayer should have been sold sooner; 5) the evidence did not support punitive damages; and 6) the defendants were awarded costs.

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Pavement Scientific International Inc. v. Nilson, 2016 SKQB 209

McMurtry, June 17, 2016 (QB16197)

Injunction – Interlocutory Injunction – Requirements
Statutes – Interpretation – Builders' Lien Act, Section 2(1)(h)

Three applications were made to the court. In the first, the plaintiff, ABO Transport, sought an order for an interim injunction pursuant to Queen's Bench rule 6-48 and s. 65 of The Queen's Bench Act, 1998 to restrain the defendants from terminating the parties' contract, to continue to extract and remove gravel under the contract and prohibiting the defendants from taking possession or dealing with ABO's stockpile of extracted gravel on the defendants' land. In 2013, the parties had entered into a two-year supply contract that allowed ABO to gain access to the defendants' land and to remove and sell gravel found on it. ABO entered into a sub-contract with Pavement Scientific International (PSI) permitting the latter to excavate, haul and crush gravel for it on the defendants' land. When the contract with PSI broke down in February 2015, PSI filed a builders' lien against the defendants' land. In January 2015, the defendants and ABO entered into a new agreement. The

defendants argued at the hearing that as ABO had defaulted on it, they were no longer bound by it. Alleging that ABO had failed to pay on time and as well as changing the terms of the contract and unduly influencing them to sign it, they exercised their right to set-off their damages by holding onto the gravel processed by ABO. They could not provide particulars regarding their allegations. They acknowledged that after they barred ABO from the site, they permitted a neighbour to remove gravel from ABO's stockpile on their land and received $40,000 for the gravel. In the second application, the defendants brought an application that sought the removal of the lien. They argued that PSI had not provided services or materials that resulted in an improvement to the land as the gravel extraction was not an improvement pursuant to s. 2(h) of The Builders' Lien Act. The third application was brought by PSI. It sought an order pursuant to Queen's Bench rules 3-72, 3-84 and 3-86 granting leave to amend its statement of claim and to add two new parties. PSI had claimed against ABO in the amount of $571,500 for unpaid invoices and then registered its liens against the defendants' land. PSI stated that ABO received payment on account of the improvements made by PSI, and under s. 7 of the Act, the amounts were to be treated as a trust fund for its benefit as a subcontractor. PSI alleged that ABO breached its statutory trust obligations. It also alleged that the principals of ABO were liable for breach of trust as well because they assented to conduct by ABO regarding the removal of gravel after the liens were registered.

HELD: The first application by ABO for an interlocutory injunction was granted. The court was satisfied that the three requirements set out by the Court of Appeal in Potash v. Mosaic had been satisfied. The second application by the defendants to remove PSI's liens was dismissed. The court found that the lien was valid: PSI had provided services to the gravel extraction activity that occurred on the defendants' land with their knowledge and to their benefit. The third application by PSI to amend its statement and to add two new parties was granted.

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Frank and Ellen Remai Foundation Inc. v. Bennett Jones LLP, 2016 SKQB 213

Zarzeczny, June 21, 2016 (QB16206)

Statutes – Interpretation – Court Jurisdiction and Proceedings Transfer Act
Civil Procedure – Jurisdiction – Territorial Competence

The plaintiffs commenced one action in Alberta and some months later commenced another in Saskatchewan against the defendant law firm and one of its former partners. The plaintiffs alleged that the defendants provided negligent advice and breached their contractual and professional duties to them, resulting in financial losses to the plaintiffs. The defendants filed a defence to the Alberta action, but in the Saskatchewan action they brought this application, which sought an order staying it pursuant to the court's inherent jurisdiction and s. 37 of The Queen's Bench Act, 1998 because the action was an abuse of process. In the alternative, the applicants sought an order striking the action on the basis that the court did not have territorial competence pursuant to s. 4 of The Court Jurisdiction and Proceedings Transfer Act (CJPTA) and Queen's Bench rule 3-14. The plaintiffs undertook to discontinue their action in Alberta if the defendant's application was dismissed.
HELD: The application was dismissed. The court found that if the plaintiffs were allowed to pursue both actions, it would constitute an abuse of process and one or the other of them should be discontinued or stayed. The court concluded that the facts pled in the Saskatchewan action established a real and substantial connection to the province. The plaintiffs' assets were held in Saskatchewan by corporations and a charitable foundation, all of which were incorporated, located and operated in Saskatchewan. The court found that the defendants' evidence that the relationship between them and the plaintiffs was initiated in Alberta was insufficient to rebut the presumption that Saskatchewan had territorial competence. The court also rejected the applicants' argument that the Saskatchewan action should be stayed because it was forum non conveniens pursuant to s. 10 of CJPTA and rule 3-14. Because the majority of the plaintiffs were based in Saskatchewan, it found that Saskatchewan was forum conveniens. It noted specifically that the limitation period in Alberta could potentially deny the plaintiffs' access to the court for redress of their claims. The action in Saskatchewan was stayed until an appeal might be filed. When the plaintiffs had complied with their undertaking to discontinue the Alberta action, they could apply to lift the stay.

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