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highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 19, No. 5 **March 1, 2017**

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6517633 Canada Ltd. v. Richardson International Ltd., 2016 SKCA 138

Whitmore, October 28, 2016 (CA16138)

Civil Procedure – Appeal – Stay of Execution Pending Appeal to Supreme Court

The appellant applied by notice of motion for an order pursuant to s. 65.1(1) and s. 65.1(2) of the Supreme Court Act directing the stay of execution of the judgment of the Court of Appeal, pending the filing of an application for leave to appeal the judgment. The respondent's action against the appellant in the Court of Queen's Bench was for credit advanced to the appellant for seed grain. The appellant counterclaimed for damages. The respondent successfully applied for summary judgment and the chambers judge granted it in the amount of $248,500. He directed that the counterclaim be severed from the main action to proceed independently because there was insufficient evidence presented at the hearing by the appellant. The judge exercised his discretion and declined to have the respondent's judgment stayed pending the outcome of the counterclaim. The appellant appealed on the ground that the chambers judge had erred in failing to stay the execution of the judgment. The court dismissed the appeal because of the discretionary nature of the chambers judge's decision under Queen's Bench rule 7-7 and because the appellant had not established that he had an arguable case or that he would

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suffer prejudice if the stay was not imposed.
HELD: The application for a stay was dismissed. The court reviewed the factors set out in Blass v. University of Regina Faculty Association regarding applications for stays under s. 65.1 of the Act and found that they were similar to the factors considered by the court in dismissing the applicant's earlier appeal to it. The appellant had not submitted any information to allow the court to provide a meaningful consideration of its application.

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R. v. Natewayes, 2016 SKCA 139

Whitmore, October 31, 2016 (CA16139)

Criminal Law – Judicial Interim Release Pending Appeal

The accused was charged with manslaughter in connection with a death resulting from a home invasion. At trial, she was acquitted of manslaughter but convicted of break and enter for the purpose of committing an indictable offence. The Crown appealed the acquittal and the accused was then convicted of manslaughter. The conviction for break and enter was stayed on the Kienapple principle. The accused appealed her manslaughter conviction to the Supreme Court and pursuant to s. 679(3) of the Criminal Code and applied for release pending her appeal. The accused argued that her appeal was not frivolous, that she would surrender herself into custody as required and her detention was not necessary in the public interest. She had no previous criminal record, had abided by all conditions imposed upon her and appeared in court when required. The Crown argued that the accused should not be released because, if her appeal is successful, the Kienapple principle would not apply and it would apply to the court to reinstate the break and enter conviction. In addition, it submitted that the factors set out in s. 515(10)(c) of the Code to justify detention in custody were relevant to the consideration of the public interest factor in s. 679(3). In this case, the Crown argued that the continued detention of the accused was justified here because it had a strong case, that the gravity of the offence was exacerbated because it occurred in the context of a drug deal and that the accused was going to have to serve a lengthy sentence regardless of her appeal.
HELD: The application was allowed. The accused was released on conditions pending the determination of her

manslaughter appeal. The court held that it was not necessary to detain the accused in the public interest because she did not have a prior criminal record, her risk to reoffend was low and she had abided by all conditions previously imposed upon her.

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R. v. Bear, 2016 SKCA 140

Richards Ottenbreit Herauf, November 2, 2016 (CA16140)

Criminal Law – Controlled Drugs and Substances Act – Possessions for the Purpose of Trafficking – Cocaine – Sentencing – Appeal

The Crown appealed the sentence of the accused. The accused pled guilty to five drug or drug-related offences: 1) possession of hydromorphone for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. This charge occurred after the accused was arrested following a search of her home by the police in August 2013; 2) possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the Act. This charge was laid in October 2014 as a result of a police search of the accused's house after they had attended at it to check on her conditions of release; 3) possession of hydromorphone for the purpose of trafficking, contrary to s. 5(2) of the Act; 4) possession of diazepam for the purpose of trafficking, contrary to s. 5(2) of the Act; and 5) possession of proceeds of crime under $5,000, contrary to ss. 354 and 355 of the Criminal Code. The police found $110 on the accused's person. The second, third, fourth and fifth charges were all laid at the same time in October 2014. At that time, the accused had been on judicial interim release. The Crown argued that the accused should receive a five-year incarceral sentence. The accused had 32 previous criminal convictions, of which six were for possession of controlled substances and five were for trafficking or possession of a controlled substance for the purpose of trafficking. The sentencing judge found that the aggravating factors included the accused's criminal record, that she had committed offences while on bail and had committed a series of offences over a lengthy period. He noted that the primary factors of denunciation and deterrence were to be emphasized. He did not determine what sentence would be appropriate for each of the offences but moved to a consideration of the totality principle to

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avoid imposing an unduly long or harsh sentence. He imposed a sentence of three years and six months incarceration on the first count and identical sentences on the remaining charges concurrent to the first count and to each other. On appeal the Crown argued that the sentence was demonstrably unfit and that the sentencing judge failed to consider the appropriate test for consecutive and concurrent sentences.

HELD: The appeal was allowed. The court found that the sentencing judge failed to determine whether any of the offences warranted consecutive sentences and arrived at a global sentence, which was then applied to each offence. The sentence was demonstrably unfit. There were two events of drug trafficking and the court found them to be distinct offences attracting consecutive sentences. The court considered the charges laid in October 2014 to be one event that would attract concurrent sentences in relation to each other subject to the totality principle. The court assigned sentences to each offence and whether they were consecutive or concurrent. As the sentences for counts two through five resulted in a total period of incarceration of seven years, the court applied the totality principle because the sentence would be unduly harsh taking into account the accused's record, future prospects and personal circumstances. It then gave a global sentence of incarceration for four years and six months. The sentences provided for each charge were: 1) three years and six months concurrent to all other sentences; 2) three years and six months concurrent; 3) 18 months concurrent; 4) 12 months consecutive to all other sentences; and 5) six months concurrent.

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Radu v. Radu, 2016 SKCA 145

Richards Lane Ryan-Froslie, November 15, 2016 (CA16145)

Family Law – Spousal Support – Appeal
Family Law – Spousal Support – Compensatory and Non-compensatory
Family Law – Spousal Support – Duration of Spousal Support
Family Law – Spousal Support – Indefinite Order
Family Law – Spousal Support – Review of Spousal Support
Family Law – Spousal Support – Spousal Agreement – Unconscionable
Family Law – Spousal Support – Variation

The parties separated in 2006 after 22 years of marriage. The

appellant argued at trial that the separation agreement should be set aside as unconscionable and that his spousal support obligation should be terminated. The trial judge ordered the appellant to pay spousal support pursuant to the agreement, but she amended the length of the obligation and the requirement that the appellant maintain life insurance for the respondent's benefit. The trial judge ordered a review of the agreement after December 31, 2016. At the time of marriage both parties had health issues: the appellant had mental health issues and the respondent had chronic pain. The respondent became a stay-at-home mom in 1991. The appellant's income varied between $81,000 and $57,000 for the years 2007 to 2012, with 2012 being the lowest. After separation, the respondent worked full-time until 2011 when she went on disability. Her income before spousal support was between $15,000 to $17,000 for the years 2007 to 2012. The respondent was in a new relationship. A neuropsychologist was qualified as an expert to provide opinion with respect to the appellant's level of cognitive and psychological functioning at the time of trial and when the agreement was signed. The issues for the court were the following: 1) did the trial judge err in the first stage of her Miglin analysis in determining there were no circumstances surrounding the negotiation and execution of the agreement that would lead to the agreement being discounted and in concluding the agreement substantially complied with the objectives of the Divorce Act at the time it was entered into; 2) did the trial judge err in the second stage of her Miglin analysis; and 3) the appropriate spousal support order as of the date of application in terms of a) entitlement to spousal support, b) quantum of support, and c) duration of support. HELD: The appeal court allowed the appeal. The issues were determined as follows: 1) the appeal court did not interfere with the trial judge's rejection of the expert's opinion and found that the appellant's counsellor's report indicated that the appellant was vulnerable at the relevant time. The trial judge erred in the first stage of the Miglin analysis by not focusing on vulnerability. The appeal court could find no basis to interfere with the trial judge's conclusions that the respondent did not take advantage of the appellant's vulnerability and that the appellant received legal or other professional assistance sufficient to compensate for his vulnerability. The appeal court also concluded that the agreement did not comply with the spousal support objectives of the Divorce Act. The affected paragraphs of the agreement should not have been given any weight by the trial judge; 2) the appeal court found that there was a change within the meaning of Miglin. The appeal court concluded

that at stage two what was left of the agreement should have been discounted and given no weight; and 3a) it was clear that upon marriage breakdown the respondent was entitled to spousal support on both a compensatory and non-compensatory basis. When the respondent was employed full-time and was living common law with a man also contributing to her financial support, she no longer needed support but she was entitled to support on a compensatory basis; b) the respondent went on disability shortly after the appellant's application and was receiving long-term disability of $18,000 per year. The disability she stated was anxiety and depression, not chronic pain. She did not provide any medical evidence. The trial judge erred, and an adverse inference should have been drawn against the respondent. There was no evidence anxiety and depression existed during marriage. The trial judge should have imputed an income of $32,000 to the respondent. The amount of spousal support ordered was $821 per month, which was in the mid-range of the Spousal Support Advisory Guidelines; and c) there was no genuine or material uncertainty that would warrant ordering a review. According to the Spousal Support Advisory Guidelines spousal support should continue indefinitely until there is a material change that warrants its re-evaluation.

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Haztech Fire and Safety Services Inc. v. M. Thompson Holdings Ltd., 2016 SKCA 146

Richards, November 15, 2016 (CA16146)

Civil Procedure – Appeal
Civil Procedure – Stay – Application to Lift Stay Pending Appeal

The applicant sought to lift the stay of execution of a Queen's Bench judgment under appeal. The stay was in place pursuant to rule 15(1) of the Court of Appeal Rules. The parties had a commercial lease agreement with a ten-and-a-half-year term. A few months after the respondent took possession of the property it notified the applicant that it was breaching the lease and it was formally terminated a few weeks later. The applicant applied for summary judgment and the respondent acknowledged the lease but disputed the calculation of damages. The application for summary judgment was successful in part and the respondent was

ordered to pay $500,041.15 plus costs of $25,000 to the applicant. The respondent appealed the decision, and upon filing the notice of appeal, the execution of the judgment was automatically stayed. The applicant's concern was that the respondent might dissipate assets in the interim.
HELD: It did not matter that the respondent acknowledged liability. The appeal court determined that the application as framed had to be dismissed. The applicant had to do more than point in general and abstract terms to the obvious reality that, pending resolution of the appeal, the respondent might dissipate assets. The respondent did not, however, contest all the damages. The court ordered that the stay imposed was lifted for $21,000 of the judgment.

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Kosowan v. Vanderstap, 2016 SKCA 149

Jackson Herauf Wilkinson, November 14, 2016 (CA16149)

Family Law – Child Support – Adult Child with Disabilities
Family Law – Child Support – Appeal
Family Law – Child Support – Arrears
Family Law – Child Support – Jurisdiction – Inter-Jurisdictional Support Orders
Family Law – Child Support – Retroactive

The appellant appealed the chambers judge's decision dismissing his application to expunge or reduce child support arrears. The chambers judge held the parties' child remained a child for support purposes until May 2014 when he graduated from high school at over 19 years old. The appellant was ordered to pay arrears in monthly installments. The parties entered into a consent order in 2006. The appellant terminated child support payments when he learned that the child was living with a family friend. The child was 17 at that time and was living with a family friend to participate in a learning alternatives program. The learning program was recommended to help the child attain his education goals given his ADHD diagnosis. The Ministry of Social Services paid $610 per month to cover the child's room and board while living with the friend. The respondent continued to be responsible for the child's other day-to-day costs. The chambers judge concluded that the child was unable to withdraw from the respondent's care until he graduated from high school. The issues were as follows: 1) did the chambers judge err in accepting the respondent's affidavit evidence that was based on hearsay and opinion; 2)

did the chambers judge have jurisdiction to vary the child support and award support past the age of majority. The respondent and child resided in British Columbia throughout, and the original consent order was made in British Columbia; and 3) should the chambers judge have found that the son had withdrawn from the respondent's charge at the age of 17, when he ceased to reside with her and became entitled to social assistance benefits.
HELD: The appeal was dismissed. The issues were resolved as follows: 1) the appellant did not deny most of the respondent's affidavit nor did he take issue with it at the time of the application. The appeal court did not entertain the application regarding the acceptance of the respondent's affidavit; 2) the father sought to have the Saskatchewan Queen's Bench Court exercise its jurisdiction when he made his application and the respondent acceded to the jurisdiction by appearing. The Inter-jurisdictional Support Orders Act provided the Saskatchewan court with authority to deal with the matter. The chambers judge found that a high school diploma was a worthy objective that required the child to remain under his parents' care financially. The appellant also argued that the court lacked jurisdiction to vary support after the date that the child no longer remained a child of the marriage, the date of high school graduation. The court dismissed the appellant's arguments; and 3) the test was whether the child was independent in the sense that no financial assistance or parental guidance was necessary. The child remained financially dependent on the respondent throughout.

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Bachman v. Scheidt Estate, 2016 SKCA 150

Herauf Whitmore Wilkinson, November 16, 2016 (CA16150)

Wills and Estates – Appeal
Wills and Estates – Capacity/Undue Influence
Wills and Estates – Proof of Will in Solemn Form

The appellant appealed the unsuccessful application to have the last will and testament of the deceased proved in solemn form. The deceased signed a will naming his son as executor in September 2009. The will was prepared with legal advice from a lawyer that had provided the deceased legal advice before, including a previous will. In 2006/2007, the deceased became confused over some everyday tasks and was

diagnosed as having mild dementia. In September 2009, he was diagnosed as having mild to moderate dementia. In 2009, the deceased instructed the same lawyer to appoint his son as his power of attorney with his daughter, the appellant, being the alternate. Later that year, the deceased advised the lawyer that he wished to arrange his estate and indicated that all farmland that was previously to be given to the appellant be given to the son because he was an active farmer. The lawyer suggested the son be required to pay something for the land, but the deceased said he was estranged from the appellant so it would be up to the son to contact the appellant. When the son contacted the appellant, she indicated that she wished to keep the land. A will was eventually executed whereby the appellant's gift of land was subject to a right of first refusal by the son. The chambers judge concluded that there was not a genuine issue to be tried on the issue of testamentary capacity or undue influence. The issues were: 1) whether the chambers judge misinterpreted the test to prove a will in solemn form; and 2) whether the chambers judge erred with respect to whether there was a genuine issue of testamentary capacity and undue influence.
HELD: The appeal was dismissed. The appeal court dealt with the issues as follows: 1) the chambers judge correctly recognized the procedure and test to be applied under the first stage of the process, to establish a genuine issue to be tried; and 2) the chambers judge identified the elements of testamentary capacity and carefully reviewed the affidavit evidence. The chambers judge made a reasonable conclusion.

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O. (L.S.) v. O. (S.), 2016 SKCA 151

Herauf Whitmore Wilkinson, November 17, 2016 (CA16151)

Family Law – Child in Need of Protection – Appeal
Family Law – Child in Need of Protection – Appointments of Counsel for Child
Family Law – Child in Need of Protection – Child and Family Services Act – Permanent Order
Family Law – Child in Need of Protection – Termination

The Queen's Bench judge declared an appeal under s. 63(2) of The Child and Family Services Act moot and struck it, returning the children to the care of the father. The two youngest children appealed. In 2011 and 2012, the father had six children apprehended. The children's mother passed

away before the protection hearing in 2015. At the protection hearing the three youngest children were found to be in need of protection and a permanent order was made pursuant to s. 37(2) of the Act. The oldest child was placed in the care of a person of sufficient interest and the remaining two children were ordered to be returned to the care of the father under the Ministry's supervision for a year. The father appealed the decision pursuant to s. 63(2) of the Act. A teleconference was held prior to the appeal date whereby it was learned that the Ministry no longer had protection concerns about the father and that one child was reluctant to return to his care. Two of the children that had been originally ordered to be in the care of the Ministry were now represented by legal counsel but were unavailable to participate in the teleconference call. After the teleconference call the judge issued a fiat outlining his conclusion that the appeal was moot, that there was no lis inter partes, and that there were no factors that impelled the court to adjudicate the appeal for broader policy reasons. He also decided that all the children should be returned to the father's care. The two youngest children obtained leave to appeal that order. The issues were: 1) what standing did the children have to bring the appeal; 2) did the judge err in law by finding the appeal moot and striking the appeal; and 3) did the judge err by ordering return of the children to the father.

HELD: The appeal was allowed. Section 29 provides that a child shall not be considered a party to the protection hearing. The court found that a right to be heard can exist independently of party status. Section 6.3(7) of the Act outlined that counsel for a child has a right to participate in all matters relating to the protection hearing. The appeal court found that the viewpoint of the two children merited consideration. There was an error in principle when the hearing proceeded without hearing from the children's counsel and the children. If there was a right to be heard, there was also standing to appeal when the right was supplanted. The father was also concerned because the two youngest children referred to themselves as appellants on the appeal form. The court noted that s. 78 gave it broad power to waive any procedural defects or irregularities in any proceedings pursuant to the Act. The matter was returned to the Court of Queen's Bench to hearing the appeal.

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R. v. A. (J.), 2016 SKCA 153

Jackson Ryan-Froslie Wilkinson, November 7, 2016 (CA16153)

Criminal Law – Conviction – Appeal – Sufficiency of Reasons
Criminal Law – Sexual Offences – Sexual Interference – Person Under 14

The appellant was convicted of two counts of touching a person under the age of 14 for a sexual purpose, contrary to s. 151 of the Criminal Code as it read in 2008, and one count of inviting a person under the age of 14 to touch for a sexual purpose, contrary to s. 152 of the Code. The complainant testified at trial that the appellant, her stepfather, began abusing her when she was seven years old and continued to do so until she was 13. The appellant denied all allegations and contradicted the complainant's testimony in a few specific ways, such as that he was not circumcised. He argued that the allegations were spurious because the complainant's mother had informed him that she was going to get even with him and the complainant had not come forward until four years after the last incident of alleged abuse. She also lied to a police officer regarding her knowledge of the whereabouts of the boyfriend she had at the time of the alleged abuse. As she testified that she had told him of the abuse, then he should have been called as a witness. Defence counsel agreed with the trial judge that the issue to be determined was credibility under the principles of R. v. W. (D.). The trial judge stated that he found the complainant's testimony to be compelling, cogent and credible and that the denials given in the appellant's testimony were perfunctory. In conclusion, he accepted the complainant's version of events and without a reasonable doubt. The appellant argued on this appeal that the trial judge failed to provide sufficient reasons in his judgment in accordance with the requirements set out in the Supreme Court's decisions in Sheppard, R.E.M. and Vuradin.
HELD: The appeal was dismissed. The court reviewed the trial judge's reasons and found that read alone, they would not meet the requirements for sufficiency as they did not address the appellant's evidence or any of the conflicts identified by him. However, the court found that when the reasons were read in light of the of the transcripts containing the complainant's testimony and the submissions made at trial, including the exchanges between counsel and the trial judge, they did meet the test established in Vuradin.

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Schedlosky v. Weber, 2016 SKCA 158

Jackson Herauf Wilkinson, November 15, 2016 (CA16158)

Family Law – Custody and Access – Interim – Appeal

The appellant appealed from an interim custody and access order made by a Queen's Bench judge in chambers. The decision granted primary residence of the child to the respondent, and the appellant was given access on every second weekend. Pursuant to a written agreement, the parties had joint custody of their five-year-old daughter and they shared custody on a rotating two-week basis. The arrangement had been in place for 18 months prior to the application in chambers. The respondent failed to bring the agreement to the attention of the chambers judge and submitted affidavits that raised questions regarding the appellant's ability to care for the child. The appellant argued that the contents of the affidavits were both out-of-date and controverted.
HELD: The appeal was allowed. The interim custody order was set aside and the court directed the parties to move expeditiously to pre-trial conference. The court found that this case was among those rare cases in which it would intervene because of the respondent's failure to disclose the agreement and the character of the affidavits he provided to the chambers judge.

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R. v. Nowakowski, 2016 SKPC 129

Baniak, October 31, 2016 (PC16127)

Criminal Law – Procedure – Application to Quash Search Warrant

The accused was charged with multiple offences related to storage and unlicenced possession of an unsecured shotgun and ammunition, contrary to ss. 86(1), 86(2), and 91(1) of the Criminal Code, and possession of a controlled substance, cocaine, contrary to s. 4(1) of the Controlled Drugs and Substances Act. The accused brought an application for an order quashing the search warrant granted pursuant to s. 487 of the Code to search the residence of the applicant and for an order directing that all evidence obtained from the search

of his residence be excluded from the admissible evidence. A voir dire was held. The affidavit was sworn by a Saskatoon police officer who was not cross-examined at the voir dire. He had been assigned to investigate members of the Fallen Saints Motorcycle Club, of which the accused was President. This club was associated with the Hell's Angels Motorcycle Club. The information upon which the affiant relied was provided by a police agent. The agent had known the accused a long time. He advised his police handlers that the accused was involved in money laundering and drug trafficking. The affiant relied upon the summaries of the information provided to the handlers by the agent. The agent was paid $300,000 and had a criminal record. He was not charged in 33 firearm-related offences. The accused argued that it was unreasonable for the affiant to rely on the information that he received from his sources. He should have consulted the transcripts of the interviews the agent gave to his police handlers.
HELD: The application was dismissed. The court found that the affidavit established reasonable grounds upon which a justice could issue a warrant on the basis that an offence "has been or is suspected to have been committed" as per s. 487(1) of the Code.

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R. v. Charles, 2016 SKPC 144

Schiefner, October 31, 2016 (PC16117)

Criminal Law – Defences – Duress
Criminal Law – Impaired Driving – Driving over .08
Criminal Law – Theft of Vehicle

The accused was charged with the following Criminal Code offences: 1) theft of a motor vehicle, contrary to s. 333.1(1); 2) impaired driving, contrary to s. 253(1)(a); and 3) driving over .08, contrary to s. 253(1)(b). She admitted the actus reus of the offences but argued that the offences were committed under duress and were not voluntary. The accused was in a troubled relationship and she testified that her boyfriend had a knife that he said he would use if the accused did not agree to go with him to another city. The accused and boyfriend had been drinking and using drugs. They drove to the other city in a stolen car. They met up with another person after a few days of drinking and using drugs. The three were walking around and the accused testified that her boyfriend

and friend wanted her to steal a vehicle to get them back to the original city. She indicated that her boyfriend said she would get a "licken" if she did not steal a vehicle. The accused attempted to steal a couple of vehicles but was eventually restrained by a citizen who called the police. The accused was arrested at the scene. She was released on an undertaking at her first court appearance. Upon her release she met up with her boyfriend again and he indicated he wanted to go back to the city. The accused indicated that she began rummaging through vehicles again because her boyfriend told her to steal one and she was scared of him. The accused located a vehicle and began driving away when the owner came out of a store to see her vehicle that had her baby in it driving away. Police located the accused within minutes. She repeatedly told the arresting officers that someone else had been driving the vehicle. Breath samples revealed blood alcohol concentrations of .16 and .15.
HELD: The court found that both the actus reus and mens rea of counts 1 and 3 were proved beyond a reasonable doubt. The accused admitted to stealing a motor vehicle and the Crown proved through test results and presumptions in s. 258(1)(c) that she was over .08 when driving. Section 17 was the starting point for the court's analysis on the duress offence. The accused only had to lead evidence on each of the six enumerated elements sufficient to establish an "air of reality" to the defence. The Crown must prove beyond a reasonable doubt that the accused did not act under duress. The court found the accused to be candid and forthright, testifying against her own interests at times. There were also several points where evidence arose that undermined her credibility as a witness. The court reviewed the six elements of duress: 1) the court accepted that violence from the accused's boyfriend could be implied if she did not steal a vehicle; 2) the court found that a person in the same situation as the accused and with similar characteristics and life experiences would have reasonably believed that the accused's boyfriend's violence would be directed at them if they failed to comply with his instructions to steal the vehicle; 3) the court was satisfied, beyond a reasonable doubt that a reasonable person in the same situation as the accused, who wanted to get away from their boyfriend and who was prepared to exercise a modicum of fortitude, could have done so and done so safely. The defence of duress was therefore unavailable to her; 4) the court may have found a close temporal connection if the above element did not fail; 5) there was proportionality between the crime committed and the threat to which she was subject, assuming that the accused did not know there was a baby in the car; and 6) the

court declined to determine if the accused was part of criminal activity, conspiracy, or association. The accused was found guilty of the theft and driving over .08 charges. The accused was found not guilty of the impaired driving charge.

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Ackerman v. Ackerman, 2016 SKQB 353

Popescul, October 27, 2016 (QB16348)

Family Law – Child Support – Determination of Income
Civil Procedure – Queen's Bench Rules, Rule 5-15

The applicant sought an order requiring the respondent, her former husband, to provide his unredacted and complete personal income tax returns for 2014 and 2015 for the purpose of determining annual income to calculate child support. He had provided these returns but had redacted from them his current spouse's income. The applicant also requested complete corporate tax returns and financial statements for the respondent's interest in a corporation for the same years. She also sought an order requiring the respondent's current spouse to provide her personal tax returns for the years in question and for the financial statements and corporate tax returns for her corporation from the date of incorporation to the present. The petitioner's request was based on her suspicion that the respondent was wrongly diverting income properly attributable to him to his current spouse so that his child support payments would be set improperly low. The parties were required by their divorce judgment to exchange financial information annually so that child support could be adjusted in accordance with the Guidelines. The non-parties, the respondent's corporation, his current spouse and her corporation were all properly served with the application. The respondent sought an order compelling the applicant to provide him with records of sale and other documents related to a business she started in 2016 selling craft items.
HELD: The applicant's application was granted. The respondent was ordered to provide unredacted copies of his annual tax returns and the returns and financial statements of the corporation in order for the applicant to obtain a full picture of his true annual income. The respondent's spouse was ordered to provide her income tax returns under Queen's Bench rule 5-15, which allowed documents to be obtained from non-parties. The evidence that the

respondent's income was 34 percent of what it was at the time of divorce satisfied the court that there was a real possibility that some of his income was finding its way to his current spouse. For the same reason, the court ordered that the respondent's wife disclose the financial information related to her 100 percent shareholder interest in a corporation. The respondent's application was dismissed because it was premature in that the applicant did not have to report her income for 2016 until her income tax return was filed in 2017.

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Richardson v. Richardson, 2016 SKQB 356

Megaw, October 28, 2016 (QB16338)

Family Law – Exclusive Possession of Family Home – Interim
Family Law – Child Support – Determination of Income
Family Law – Child Support – Interim

The petitioner was granted an order in early October 2016 giving the petitioner interim exclusive possession of the family home and primary residence of the two children of the marriage. The order was to continue for a short period so the petitioner returned to court to consider the ongoing issue of exclusive possession. She also sought child support. The petitioner had established an in-home salon business to help her support the children. One of them had severe allergies, which had made finding daycare quite difficult so the petitioner hired a nanny to look after the children in the home at a cost of $2,000 per month. The petitioner variously reported her gross income and net income for the previous three years without explaining her calculations. She claimed her annual expenses, including the salary for the nanny were $117,400. The respondent took the position that the petitioner's exclusive possession of the home could continue for two more months and then he should have exclusive possession of it. He submitted that it was exempt from family property distribution because of a prenuptial agreement between the parties. The respondent had substance abuse problems and a fairly erratic employment and income. He had worked in the oil patch until January 2015 when he quit and found work as a salesman in a car dealership. He quit that position and worked briefly at another dealership before being fired. At his latest job as a car salesman, he anticipated earning $30,000 and expected to

make $60,000 in a year. His income was $87,000 in 2013, $69,800 in 2014 and $60,800 in 2015. During his marriage to the petitioner and since their separation, his grandmother had provided funding for the family's lifestyle and his own, but according to the respondent, she now refused to provide further financial aid. The petitioner argued that the respondent should be imputed income of $60,000.
HELD: The petitioner was granted exclusive possession of the family home pending further court order or by agreement. The petitioner was to be responsible for the payment of the mortgage and the household expenses. The court found that it would impute annual income to the respondent of $60,000 under s. 19(1) of the Guidelines because he had endangered his own employment prospects and because of his lifestyle. He was ordered to pay $674 per month to the petitioner under s. 3 of the Guidelines. The court also imputed income to the petitioner of $50,000 because it did not accept her assessment of her income as accurate. The court found that the expense of employing a nanny was not reasonable and that the petitioner should find daycare. The respondent should pay his proportionate share of daycare costs.

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Cyr v. McNab, 2016 SKQB 357

Schwann, October 28, 2016 (QB16339)

Statutes – Interpretation – First Nations Election Act, Section 31
Statute – Interpretation – First Nations Elections Act Regulations, Section 21

The applicant applied pursuant to s. 31 of the First Nations Elections Act for an order setting aside the election of March 2016 in which a chief and eight councillors were elected. Three individuals ran for the position of chief, receiving 376, 368 and 333 votes respectively. Thirteen people stood for the eight council positions. The eight who were elected received from 403 to 291 votes each and the five remaining candidates received from 273 to 230 votes respectively. The applicant identified numerous contraventions of either the Act or the First Nations Elections Regulations. The alleged contraventions included the following: mail-in ballots that were duplicated or not sent to electors who requested them; rewards promised by third parties in exchange for votes;

ballot box irregularities in that the single box was neither sealed nor locked; improper handling of the ballots in that electoral officials took marked and completed ballots from 17 electors and failed to return the ballots to them so they could personally deposit their ballots into the ballot boxes; the failure to authenticate the identity of eight voters with proof of identity; and the electoral officer permitted the deputy electoral officer to observe electors casting their ballots. Some of the contraventions were challenged by affidavit evidence supplied by the appointed electoral officer in charge of the election and/or individuals who worked as electoral officials with him.

HELD: The application was granted. The court reviewed each of the alleged contraventions of the Act or the Regulations. It set aside the election of the chief because it found that the electoral officials had contravened s. 21(5) of the Regulations in that 17 votes for the position may not have been counted. The rejected number of votes outnumbered the winner's plurality of eight votes. The court also set aside the election of the eight councilors because of the same non-compliance. The 14 votes exceeded the plurality of victory at either end of the vote tabulation spectrum for the eight council positions, the true winners were in doubt. It would be unreasonable not to annul the election.

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Cupola Investments Inc. v. Remai, 2016 SKQB 359

Konkin, October 31, 2016 (QB16356)

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

The action arose out of the management and operation of three large retirement facilities, two in Manitoba and one in Ontario. The application alleged misuse of fiduciary positions for personal gains. The applicants, respondents in the action, applied pursuant to s. 10 of The Court Jurisdiction and Proceedings Transfer Act (CJPTA) requesting the court decline to exercise its territorial competence over the matter on the ground that the courts of Manitoba were a more appropriate forum to try the proceeding. The defendants were the general partners of the limited partnerships pursuant to three limited partnership agreements. The

corporate plaintiffs and defendants were incorporated in Manitoba with their registered offices located in Winnipeg, Manitoba. The individual defendants resided in Saskatchewan. The applicants conceded that the court had territorial competence over the matter but argued that the court could decline jurisdiction because Manitoba was the more appropriate forum. They indicated that the three limited partnership agreements contained identical forum selection clauses designating Manitoba as the appropriate jurisdiction for dispute resolution. Alternatively, they argued that the factors in s. 10 of the CJPTA supported their application. The issues were: 1) did the court have territorial competence over the proceeding; 2) if the court had territorial competence, did the applicant establish that the forum selection clause was valid, clear and enforceable, and applied to the cause of action; 3) if the forum selection clause was valid, clear and enforceable, and applied to the cause of action, did the plaintiff show a strong cause why the court should not give effect to the forum selection clause; and 4) if the respondent showed a strong cause why the court should not give effect to the forum selection clause, was it appropriate to transfer the proceedings to Manitoba pursuant to Part III of the CJPTA.

HELD: The application was dismissed. The issues were determined as follows: 1) the individual defendants all ordinarily resided in Saskatchewan and the central management of each of the corporate defendants was exercised in Saskatchewan. There was also a real and substantial connection with Saskatchewan because a considerable extent of the obligations between the parties were to be performed in Saskatchewan. The court had territorial competence over the proceedings; 2) there were forum selection clauses in the limited partnership agreements between the former general partners and the limited partnerships and the management agreement between the management company and each of the limited partnerships. The court distinguished the clauses in the limited partnership agreements from case law relied upon by the defendants because the limited partnership agreement clauses did not contain the word “exclusive” when referring to jurisdiction. The court concluded that the clause in the management agreement only applied to disputes arising out of or related to the contract that contained the clause. The management agreement clause included the phrase “in the event of a dispute arising in this agreement”. The limited partnership agreements indicated that the clause applied to all disputes “which may arise hereunder”. The court concluded that clause also limited its application to disputes

arising out of or in relation to the contract that contained the clause. The causes of action of the dispute were found not to be covered by the forum selection clauses and Saskatchewan was the appropriate forum; 3) this analysis was not done given the conclusion to the previous issue; and 4) the court addressed the considerations in the CJPTA: when the anticipated witnesses and available records were considered, the court found that the most convenient forum was Saskatchewan; a mix of Saskatchewan and Manitoba law would have to be applied so it favoured neither forum; the court indicated the primary matter between the parties should be heard in Saskatchewan with decisions filed in other jurisdictions determined once this decision was confirmed to proceed; the court suggested that since the bulk of the relief claimed related to actions outside the contracts and most of the parties, witnesses and documents were in Saskatchewan the matter should be heard in Saskatchewan with matters in Manitoba being finished here too; any judgment issued would need to be enforced in Saskatchewan; and just because there are other actions in Manitoba with some of the same parties does not mean that the fair and efficient working of the Canadian legal system would be jeopardized.

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Auchstaetter v. Evolution Homes Ltd., 2016 SKQB 360

Smith, November 1, 2016 (QB16357)

Civil Procedure – Queen's Bench Rules, Rule 7-2
Civil Procedure – Summary Judgment
Contracts – Joint Venture – Interpretation

The parties entered into a joint venture to build a home. The plaintiff commenced an action against the defendant for $100,000 he said the defendant owed him under the first joint venture agreement (JVA). The defendant argued that the first JVA was replaced by a second one and that the plaintiff owed the defendant for half the losses. Both parties brought a notice of application seeking summary judgment against the other pursuant to rule 7-2 of the Queen's Bench Rules. The house was built but took two years to sell. It was sold at a loss of $210,000. The first JVA required the defendant to pay the plaintiff $100,000 and the defendant would retain all profits from the sale of the house. The second JVA came about when the defendant went to the plaintiff requesting

more funds to build the house. The defendant required $153,263 more to build the house. Pursuant to the second JVA the plaintiff was first paid its cash injection of $153,263 and then the parties were to split the remaining profit. After the house sold, the defendant paid the plaintiff $153,263 to repay him for a cash injection. The defendant argued that the joint venture lost money and therefore it was entitled to $105,000, being half of the loss.
HELD: The plaintiff was not a joint venturer in the normal sense in the first JVA. He was a means to obtain financing and was to receive $100,000 for his signature. The nature and quality of the second JVA was completely different from the first JVA. The court concluded that the only common sense conclusion was that the provisions of the second JVA replaced and discharged the provisions and obligations contained in the first JVA. The plaintiff did not have to contribute to half of the losses because there was a clause that the defendant would be responsible for the liabilities and obligations of the joint venture. The statement of claim and counter-claim were dismissed.

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Lycan v. Winterton, 2016 SKQB 361

Goebel, November 1, 2016 (QB16349)

Family Law – Custody and Access – Primary Residence

Supplementary Reasons to 2016 SKQB 342: The court amended its order to delete the paragraph in which the respondent was to pay costs in the amount of $1,000 because he had commenced proceedings in another judicial centre when he knew that the petitioner had first commenced proceedings at another judicial centre. The amendment was made because the court had learned after the order issued that the parties had signed and filed a discontinuance of petition without costs in the proceedings commenced by the respondent.

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Canadian Bank Note Ltd. v. Saskatchewan Government Insurance, 2016 SKQB 362

Zarzeczny, November 2, 2016 (QB16350)

Statutes – Interpretation – Freedom of Information and Protection of Privacy Act, Section 19

The applicant applied for an order pursuant to s. 57(5) of The Freedom of Information and Protection of Privacy Act (FIPPA), requiring the respondent, SGI, to give it access to certain records. The applicant's initial request was refused by the head of SGI, whereupon the applicant made a review request to the Saskatchewan Information and Privacy Commissioner. The commissioner recommended that SGI release the information requested but SGI advised the applicant that it would not follow the recommendation. It continued to refuse to provide the applicant access to the requested information relying upon s. 19 of FIPPA. The applicant then sought a de novo consideration of its request by the court pursuant to ss. 57 and 58 of FIPPA. The applicant's business included providing identification solutions, including the supply of motor vehicle issuing systems, drivers' licences, identification cards and facial recognition services. It had supplied SGI with drivers' licences from 2011 until 2016. In 2015 SGI issued a competitive request for proposal (RFP) for the same services. The applicant and the third party, Veridos, both submitted a response. SGI awarded the contract to Veridos. The applicant then made its request for access to information related to the contract. At the de novo hearing it requested only the unit price per drivers' licence/card components. Affidavits were filed by senior officials for SGI and Veridos, which described in the case of the former, that pricing was very important to evaluating the proponents' RFPs. The officer of Veridos deposed in his affidavit that its unit price, including volume adjustments and discounts were the most significant factors in its success in competitive procurements. If this competitive advantage was reduced, Veridos would suffer financial loss. There were only four companies providing these motor vehicle registering systems. A very similar RFP had just been issued by the Alberta government.
HELD: The application was dismissed. The court concluded that the head of SGI properly refused to give access to that portion of SGI's contract with Veridos revealing the unit price information sought by the applicant. It reviewed s. 19 of FIPPA and determined that under s. 19(1)(b) the unit price supplied by Veridos to SGI was explicitly provided in confidence under the terms of the RFP and therefore exempted by the section. Under s. 19(1)(c), the court found that the unit price information sought by the applicant would give it and the other competitors within the small group a competitive advantage over Veridos to the prejudice

of its competitive position. This was made clear in the affidavit provided by the Veridos affidavit that the government of Alberta had recently issued an RFP very similar to that of SGI and disclosure of the unit price in Saskatchewan to the applicant could reasonably be expected to prejudice the competitive position of Veridos.

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R. v. Petrin, 2016 SKQB 363

Dovell, November 3, 2016 (QB16383)

Criminal Law - Conspiracy
Criminal Law – Evidence – Credibility – Vetrovec Statement
Criminal Law – First Degree Murder
Criminal Law – Party to Offence – Aid and Abet

A 34-year-old mother of four was killed when she went to see who rang her doorbell at 6:00 am. K. pled guilty to first degree murder in November 2013, and R., the actual shooter, was found guilty of first degree murder in May 2014. The accused was charged with two Criminal Code offences: 1) first degree murder, contrary to s. 235(1); and 2) conspiracy with K. and R. to cause T.J. to be murdered, contrary to s. 465(1)(a). A total of eight shots had been fired; seven casings were Winchester .40 caliber and one casing was a Luger 9 mm. The accused was the "Boss" of a number of drug operations for a gang. One of his closest right-hand men was T.J. T.J. was living with the accused and his girlfriend in the Spring of 2012, when one day he just packed some of his things and left. According to the accused's girlfriend, this infuriated the accused. The accused asked C.M. to come and take over T.J.'s operation, noting that there was $40,000 on T.J.'s head. C.H. and R. lived together as partners and they were both addicted to oxycontin. They owed the accused money, and according to C.H., R. was to be the person to do the accused's dirty missions for him. One of C.H. and R.'s clients buying cocaine was S.L. S.L. and R. often exchanged text messages, one of them being misinterpreted, resulting in R. thinking the victim's address was T.J.'s. R. provided that wrong address to the accused. The accused told K. and R. to find T.J. and to blast him that night. R. and K. wen to the neighborhood of the house they thought was T.J.'s. R. was getting impatient that they had not seen any action in the house, so he ran across the street and rang the doorbell. He started shooting through the front windows as soon as he

saw movement. According to C.M., the accused messaged him and told him to wipe out any debt R. owed the gang. The Crown argued that the accused was a party to the offence of first degree murder because he aided and abetted K. and R. to commit first degree murder because it was planned and deliberate, it was a contract murder, and the murder was at the direction of or for the benefit of a criminal organization. The issues dealt with by the court were as follows: 1) whether the court was required to give itself a Vetrovec warning when assessing the credibility of any of the Crown witnesses; 2) the murder charge; and 3) the conspiracy charge.

HELD: The court considered the issues as follows: 1) the court concluded that it was not necessary to give itself a Vetrovec warning with respect to K. given his substantial changes since the murder, but it did so out of an abundance of caution. The court considered whether a Vetrovec warning was required for five young people that were all involved in some criminal activity as a result of their involvement in a gang. The court concluded that it would give itself a vetrovec warning with respect to all five of the witnesses. The court noted that there was nothing to prevent it from using the confirmatory evidence of a potential unsavoury witness to confirm the evidence of another potential unsavoury witness; 2) the court agreed with the Crown that the accused was both an aider and an abettor to the murder pursuant to s. 21 of the Criminal Code. The court had no doubt that the accused intended to cause the victim's death or at the very least, meant to cause her bodily harm that he knew was likely to cause her death and was reckless whether death ensued or not. The Crown proved that the accused, as aider and abettor to first degree murder, had the necessary intent. Section 229(b) of the Criminal Code was applicable to make no difference whether the intent was actually to kill T.J. and an innocent victim was killed. The victim was killed by mistake or accident. The court concluded that the accused was guilty of first degree murder; and 3) the mens rea of conspiracy is the genuine intention to agree to commit the indictable offence and the actus reus is the completion of an agreement to commit an indictable offence. It is not necessary that all members of a conspiracy play, or intend to play, equal roles in the ultimate commission of the unlawful object. The fact that T.J. was not killed is irrelevant. The court addressed the three stages of the Carter test for criminal conspiracy: a) the court concluded that considering all of the evidence as a whole, a conspiracy was proved beyond a reasonable doubt; b) the court found the evidence overwhelming that, not only was the accused a

member of the conspiracy, he was the creator of it; and c) the court could consider K.'s evidence about what any of the three co-conspirators said and did in furtherance of the conspiracy as admissible for the truth of their contents at this stage. In doing so, the court concluded that the accused was an actual member of the conspiracy. The accused was found guilty of the conspiracy charge.

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Pedigree Poultry Ltd. v. Saskatchewan Broiler Hatching Egg Producers' Marketing Board, 2016 SKQB 366

Barrington-Foote, November 7, 2016 (QB16355)

Civil Procedure – Application to Dismiss Action
Civil Procedure – Queen's Bench Rules, Rule 9-26
Torts – Misfeasance in Public Office – Category B Misfeasance

The plaintiffs were in the business of the production and marketing of broiler hatching eggs, which is supply managed. One of the defendants, the Saskatchewan Broiler Hatching Egg Producers Marketing Board, is the regulator. Two of the individual defendants were producers and board members. The plaintiffs claimed that the defendants committed the intentional tort of misfeasance in public office by carrying out actions they knew to be unlawful, and which they knew would damage the plaintiffs. The defendants applied pursuant to rule 9-26 of the Queen's Bench Rules for an order dismissing the action at the close of the plaintiff's case at trial. The barns of the corporate plaintiff, Pedigree Poultry Ltd. [Pedigree] were located on the same quarter section as the broiler breeder barn leased by the individual plaintiff, Mr. D., from a company owned by the owner of Pedigree. There was evidence that Pedigree administered the day-to-day operations for both plaintiffs. In 1998, the board wrote to producers inquiring as to whether they were interested in expanding. Both plaintiffs expressed interest. There was evidence that board members received the expansion quota, but the plaintiffs did not. It became evident that the board was concerned that Pedigree had an interest in Mr. D.'s operation, contrary to Board Order No. 1. Pedigree proceeded with an appeal when the board reduced its quota and the Agri-Food Appeal Committee ordered that the board's letter reducing the quota be rescinded in its entirety. Pedigree also appealed the cancelation of its 2000 licence to

the appeal committee. The appeal committee found that the board did not have proper grounds for failing to renew the licence and ordered the board to immediately issue the 2000 licence. Further issues led to the Minister of Agriculture and Food taking over the board's powers. In 1997, the appeal committee found that the board failed to comply with its board order and ordered the board to advertise Mr. D.'s quota for sale as he had requested. The board cancelled Mr. D.'s 1999 licence. On appeal, the appeal committee concluded that the board had sufficient cause to doubt whether Mr. D. was eligible to hold a license and quota, but allowed the appeal because Mr. D. was not given a reasonable opportunity to address questions set forth in the board's letter.

HELD: The non-suit applications by the defendants were dismissed. A breach of the duty of fairness may constitute misfeasance, if the necessary knowledge or recklessness is made out. The court concluded that a reasonable trier of fact could, based on the evidence and the inferences that could be reasonably and logically drawn, properly conclude that the board members and the board engaged in illegal conduct in the exercise of their public functions. Further, they were aware or recklessly indifferent as to whether their conduct was unlawful and likely to injure the plaintiffs. The evidence also supported the conclusion that the tortious conduct was the legal cause of injuries suffered by both plaintiffs, and that those injuries were compensable in tort law. There was evidence to support the inference that the defendants' actions relating to the quota cancellation were not driven by the failure to use quota at all, but by their suspicions regarding the relationship of the plaintiffs. The court listed many inferences that could be made from the board members' and board's conduct. The inferences were sufficient to enable the court to find that the defendants committed category B misfeasance in public office, and thus meeting the Kvello test. The court also found that the evidence could support the inference that the defendants carried out various functions and made decisions to favour the defendants over the plaintiffs in relation to quota allocation and placements, and that they did so knowing or being recklessly indifferent as to whether their actions were lawful or would damage the plaintiffs. The court found that the failure by the defendants to comply with the obligations regarding the issuance of new quota could constitute illegality for the purpose of the tort.

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R. v. Poitras, 2016 SKQB 367

Layh, November 9, 2016 (QB16359)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Assault Causing Bodily Harm
Criminal Law – Sentencing – Conditional Sentence
Criminal Law – Sentencing – Sentencing Principles

The accused was convicted of assault causing bodily harm to his domestic partner of seven years. The accused threw the complainant to the bed, pushed her through the hallway and into the kitchen where he continued the assault. The complainant sustained injuries that lasted over two weeks and she had to wear a tensor bandage around her chest to lessen the pain and discomfort. The injuries were found to interfere with the complainant's comfort in a way that was more than trifling and transient. The accused had previous convictions, also against a domestic partner, in 2005: assault with a weapon and use of firearm during the commission of an indictable offence. He received a one-year conditional sentence for the assault with a weapon and a 355-day custodial sentence for the firearm charge. A Gladue report was prepared for the court. The accused was 59 years old. Both of his parents attended residential schools and his father abused alcohol. The accused also attended residential schools from age six to eighteen. He was bullied and abused at school. In 2002, the accused witnessed the scene of his brother's suicide and his personal life deteriorated. The accused sought help after being released on the previous charges. He completed treatment and courses. He attempted suicide in 2008 and was in a coma for three days as a result. The accused worked on the reserve in road maintenance after his retirement from 36 years with the Ministry of Highways.
HELD: The mitigating factor was that the accused expressed remorse for the assault. The aggravating factors were that he committed an offence against his spouse and that he abused a position of trust or authority in relation to the victim. The court found rather minimal Gladue factors were at play given the accused's personal circumstances, and therefore, the sentence would only differ slightly from that of a non-Aboriginal person. The court was concerned that the conviction was the second for domestic violence, but also recognized the gap principle given the nine-year separation between offences. The court did not consider a conditional sentence because s. 742.1(e) of the Criminal Code precludes such a sentence if the offence resulted in bodily harm. A

conditional sentence would also not meet the need to denounce and deter incidents of domestic violence that have caused bodily harm and would not be proportionate to the gravity of the offence. The accused was sentenced to incarceration of five months followed by 24 months of probation. The probation terms included no contact with the complainant, not being present at establishments with alcohol, participating in counselling and guidance as recommended, and to enroll in the 52-week program "The Way". The required ancillary orders were also made.

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Major v. Major, 2016 SKQB 368

Wilson, November 10, 2016 (QB16370)

Family Law – Child Support – Retroactive – Jurisdiction
Family Law – Summary Judgment

The petitioner issued a petition for divorce in August 2014. She sought primary residence of the remaining dependent child (who was 15 years of age at the time), child and spousal support and division of family property. She filed a notice to file income information and her financial statement. In June 2016, the petitioner filed a notice of application for summary judgment. The application was before the court on four occasions but adjourned each time because the respondent had not filed his financial information. On the fifth occasion, the court granted the divorce and made an order for spousal support. The matter was adjourned until this hearing to determine whether the court could make an order for retroactive child support and distribution of family property on a summary basis. With respect to the first issue, the respondent argued that the court no longer had jurisdiction to order child support because the child turned 18 in 2015 and was no longer a child when the summary judgment application was filed. He also argued that because he had been making mortgage and other payments since the date of the petition, that they could be considered as the equivalent of support. The petitioner submitted that it was the respondent's delay in providing income information that led to her application for summary judgment. Regarding the division and distribution of family property, the parties disputed the value of the family home and the family property.
HELD: The court granted summary judgment regarding the

issue of retroactive child support. It found that it had jurisdiction to make the order under the Divorce Act because the material time to determine it was at the time of the petition and it continued to have jurisdiction because of the respondent's non-disclosure of income. The court rejected the respondent's argument that mortgage payments were in lieu of support. It found them to be insufficient to include his support obligations given his income during the period in question. The respondent was ordered to pay $15,000 in retroactive child support to cover the period of 13 months from the date of the petition until the child turned 18. The court ordered that the property division should proceed to trial. The court found that it could not reach a conclusion regarding values on the basis of the evidence before it.

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Whitworth Estate, Re, 2016 SKQB 369

Mills, November 10, 2016 (QB16371)

Wills and Estates – Letters of Administration – Administrator – Application to Remove

The applicant filed an originating application in which he sought to be appointed as a joint administrator of the estate of his deceased father or, in the alternative, to have a trust company be appointed sole administrator. The deceased died intestate. The respondent, his second wife, was granted letters of administration and became the administrator in August 2016, approximately eight months after the death of her husband. The applicant and his sister (children of the deceased from a previous marriage) and the respondent were beneficiaries under The Intestate Succession Act, 1996. The applicant alleged that the respondent had not kept him and his sister informed about the administration of the estate. After the respondent refused to accede to the applicant's request to be a co-administrator, he advised her that he wanted to have direct communication with the estate lawyer, and if she didn't consent, then she would appear to be hiding something. He then hired his own lawyer to monitor the estate administration. The applicant also objected to property being listed as part of the estate that he alleged that the deceased had promised would pass to him and his sister directly upon his death.
HELD: The application was dismissed. The court found that the applicant's allegations were without merit. The

respondent was administering the estate in accordance with the requirements of the Act. The applicant had been provided with more information about the deceased's assets and efforts to locate them than what was normal, thanks to the efforts of the estate lawyer. The court ordered the respondent to pay costs of $1,000 for making an unnecessary application. He was not entitled to receive compensation from the estate for the legal fees incurred by him in pursuing the application.

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R. v. Christensen, 2016 SKQB 371

Zuk, November 14, 2016 (QB16360)

Criminal Law – Driving over .08 – Approved Screening Device
Criminal Law – Driving over .08 – Mouth Alcohol – Dissipation
Criminal Law – Defences – Charter of Rights, Section 10(b)

The appellant appealed his conviction for driving over .08 contrary to s. 253(1)(b) of the Criminal Code on the grounds that the trial judge erred: 1) in concluding that it was reasonable for the arresting officer to rely on the "fail" obtained on the Approved Screening Device (ASD) for his grounds to make the demand pursuant to s. 254(3) of the Criminal Code; and 2) in concluding that the appellant's s. 10(b) Charter rights were not breached. The appellant was pulled over when two officers were pulling over every vehicle to check for driver's licence, registration, and driver's sobriety. The appellant had glassy, glazed-over eyes with an odour of alcohol coming from the vehicle. The appellant advised the officer that he had not had anything to drink that night and that there was no alcohol in the vehicle. There was a case of beer in the back passenger seat. The odour of alcohol was determined to be coming from the appellant's breath when he was in the police vehicle. When the officer made an ASD demand, the appellant admitted to drinking four beer. The appellant failed the ASD and was arrested. When his rights to counsel were read, the appellant indicated that he wished to speak with legal counsel, specifically, a lawyer in Edmonton. An officer located the lawyer's office number and called it. A message gave an after-hours number for the lawyer. The number was dialed and the phone was given to the appellant and the officer left the room. When the officer returned, the appellant said he received another

message at the Edmonton lawyer's number and he requested a phone book to look up a Saskatchewan lawyer's number. That number was called, but no effort was made to locate the lawyer's home number or other contact information. The appellant did not ask the officer to look up any additional phone numbers. The officer did explain that the appellant could contact Legal Aid. The officer dialed Legal Aid and handed the phone to the appellant and left the room. The appellant was done talking to the lawyer three minutes later and indicated that he was satisfied with the lawyer's advice. Breath samples were taken and the appellant was charged with driving over .08.

HELD: The appeal was dismissed. The appeal court determined the grounds of appeal as follows: 1) the appellant argued that the ASD result should not have been allowed because the appellant had consumed alcohol within 15 minutes of the test. The officer testified that she was trained to ask when alcohol was last consumed because a period of 15 minutes is required. The trial judge accepted that the officer did not wait 15 minutes before administering the ASD, but he also found as a fact that the appellant had not consumed alcohol within four or five minutes of the test being administered. The trial judge had grounds to conclude that the appellant's testimony was untruthful and a fabrication. The court did not overturn the trial judge's finding of fact; and 2) the officer provided the appellant with a telephone book and he controlled the lawyer that he called and at what location. The appellant had the ability to select the lawyer of his choice. The appellant failed to establish that the police failed in their implementational duty. The officer did not coerce the appellant or limit his options by suggesting that Legal Aid had a 24-hour duty counsel available. There was no evidence to suggest the appellant was not satisfied with the legal advice that he obtained. The police performed both their informational and implementational duties in relation to the appellant's right to counsel. The officer was entitled to rely on the appellant's expression of satisfaction with his discussion with Legal Aid duty counsel. The court concluded that it was not necessary for the police to provide the appellant with a Prosper warning. The appellant was not diligent in pursuing his rights to counsel.

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Kolitsas v. Rathod, 2016 SKQB 372

Megaw, November 16, 2016 (QB16361)

Family Law – Custody and Access – Disclosure of Documents – Immigration Documents
Family Law – Custody and Access – Primary Residence

The petitioner sought disclosure of documents relating to the respondent and the parties' daughter's status in the United States. He argued that the information was required to advance the issues at the trial. The petitioner lived in Saskatchewan and the respondent lived in Denver, Colorado. When the respondent commenced proceedings in Colorado, the petitioner pursued the return of the child to Saskatchewan through the Hague Convention on the Civil Aspects of International Child Abduction. The Colorado action was dismissed, acceding to the Saskatchewan court. An agreement specified that the petitioner agreed not to initiate any immigration action against the respondent. The child had been travelling back and forth between Saskatchewan and Denver on a bi-weekly basis. The respondent and child held green cards to allow entry and work in the U.S. The issues were as follows: 1) was the petitioner prevented from bringing his application because of his failure to pay the November spousal support payment and the award of costs. The petitioner was ordered to pay monthly spousal support and there was an outstanding costs award against him; 2) was the application made in violation of the agreement entered into between the parties; 3) was the petitioner entitled to disclosure of the documents sought in accordance with The Queen's Bench Rules; and 4) was there any residual reason for the court, exercising its discretion, to dismiss the application for disclosure.
HELD: The issues were determined as follows: 1) this was not found to be a flagrant case, there was no suggestion that the petitioner was attempting to impede justice. The November payment was only four days late as of the date of the hearing and the issue of costs was only a failure to pay, it was not contempuouis behaviour; 2) the petitioner's application was for document disclosure. The court did not find it to be an attempt to interfere with the respondent's immigration process or to initiate immigration action against the respondent; 3) an issue in the matter between the parties was where the child was to reside. The respondent indicated his concern about the respondent's and the child's legal status in the U.S. The court concluded that the requested documents were both logically and materially relevant to the issue of the respondent's and the child's eligibility to remain in the U.S., and that issue impacted the determination of custody in the proceedings. The status of the respondent and

the child in another country was material to one of the central issues raised in the action, where the child should reside. The court ordered the respondent to disclose documents; and 4) the respondent argued that the inquiry for information would raise a "red flag" on her immigration file and may cause her difficulty with any immigration issues. The court did not find anything to suggest that was a real concern.

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Alford Holdings Ltd. v. Moose Jaw (City), 2016 SKQB 375

Megaw, November 18, 2016 (QB16363)

Municipal Law – Tax Assessment – Appeal – Board of Review – Decision – Interpretation

The applicant applied to the court to determine what a Board of Revision decided with respect to the assessment and classification of a property owned by it. Prior to 2015 the property was classified for municipal tax purposes as multi-family residential. Renovations were undertaken and the property was reassessed by the Saskatchewan Assessment Management Agency (SAMA). It determined that it had a higher value ($5,990,700) and classified it as 100 percent commercial. The applicant appealed to the board. The board heard argument regarding assessed value and the use of the property. Under the heading "Conclusion", the board determined that the property was a mixed-use property containing residential rooms comparable to other assisted living facilities and another portion of it contained hotel rooms. It requested a revised assessment from SAMA. Once received, the board then concluded that the multi-residential portion had a value of $2,171,500. The board indicated under the heading "Decision" that the new assessed value of the property was to be $4,062,031. The applicant then sought to have the board's decision implemented but the respondent's officer, the city assessor, determined that all that could be implemented was that portion entitled "Decision" and not the classification under "Conclusion."
HELD: The court ordered that the respondent amend the assessment roll to reflect the decision of the board classifying the applicant's property as a mixed-use commercial and multi-family residential property such that $2,171,500 of the total assessed value was to be taxed at the rate set by regulations for multi-family residential property. The court

rejected the position taken by the respondent that it could not implement the board's decision as to classification because it had been placed under the wrong heading. The position was contrary to the modern rules of interpretation of documents.

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R. v. Trinh, 2016 SKQB 376

Elson, November 11, 2016 December 19, 2016 (corrigendum) (QB16364)

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

The accused was charged with possession of a controlled substance, cocaine, for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, and with possession of methylenedioxyamphetamine (ecstasy) for purpose of trafficking, also contrary to s. 5(2) of the Act. The accused sought a judicial stay of proceedings pursuant to s. 24(1) of the Charter on the grounds that his s. 11(b) rights had been infringed or denied or that there had been unreasonable pre-trial delay. The application was heard 52 months after the accused was arrested and charged. The trial was to be in Provincial Court. The accused contended that the delay, excluding delay attributable to the defence exceeded the presumptive ceiling set by the Supreme Court in R. v. Jordan. The issues were: 1) the calculation of the period of delay, excluding defence delay, and whether it exceeded the presumptive ceiling set out in Jordan; 2) if so, whether there were exceptional circumstances suggesting that a judicial stay was not justified; and 3) if the delay exceeded the presumptive ceiling and the Crown failed to establish exceptional circumstances, whether there was a transitional circumstance where the parties reasonably relied on the law as it existed prior to Jordan.
HELD: The application was allowed. The court directed that a stay be imposed on the counts in the indictment. The court found with respect to the issues that: 1) the passage of time between the date of charge and the preliminary inquiry was 10 months and it was not presumptively unreasonable. Between the date that the preliminary hearing transcript was filed to the date of this application was 41 months. The court noted that defence delay resulted in 10 months and one week of delay. The bulk of the time consisted primarily of plea negotiations, which the court characterized as waiver

because the accused was foregoing a more timely trial in favour of achieving a bargained resolution; 2) the Crown's argument that a large portion of the time was spent trying to arrange that the accused's waiver of his guilty plea to the British Columbia courts was rejected as an exceptional circumstance. The Crown failed to rebut the presumption of unreasonable delay; and 3) the Crown's argument that that it was entitled to rely on the fact that the delay in the cases had not caused the accused any prejudice was also rejected. The Crown had not established a transitional exceptional circumstance that would justify the delay. The accused had agreed to a two-year custodial sentence in late 2014. Regardless of whether the accused's release conditions were lenient, the burden of waiting for his sentencing carried on for 15 to 18 month after the accused should reasonably have expected it to end.
CORRIGENDUM dated December 19, 2016: [1] In paragraph 3 of the judgment, the words "presumptively reasonable" in the first sentence are amended to read "is presumptively unreasonable" and the paragraph will now read as follows: >>>>>[3] For the reasons that follow, I am satisfied that the delay in the prosecution of this case is presumptively unreasonable. I further find that the Crown has not shown that the presumption should be rebutted.

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Tsatsi v. College of Physicians and Surgeons of Saskatchewan, 2016 SKQB 389

Pritchard, November 25, 2016 (QB16374)

Torts – Defamation
Civil Procedure – Queen's Bench Rules, Rule 7-5

The defendants applied for summary judgment dismissing the plaintiff's claims against the applicants pursuant to Queen's Bench rule 7-2. The plaintiff claimed that the defendants had defamed him and that they had conspired to do so. He sought unspecified aggravated, punitive, general and special damages and reinstatement to his previous position as a practicing radiologist in Saskatchewan. The defendants raised the defences of justification and qualified privilege. The plaintiff argued that this was not a case for a summary disposition because there was conflicting evidence on the issue of whether the defendants' defamatory statements were actually true. The defendants submitted that

there was no genuine issue requiring a trial within the meaning of subrules 7-5(1)(a) and 7-5(2) and all of the allegedly defamatory statements attributed to them were written or recorded. The plaintiff had practiced radiology in Yorkton under a provisional licence pending successful completion of the radiology examination of the Royal College of Physicians and Surgeons of Canada. The defendant College of Physicians and Surgeons had undertaken a review of the imaging facility in Yorkton. In its 2006 report, the committee identified the plaintiff's practice as not meeting the standard of care for provincial radiologists and a competency assessment of him was recommended. Two successive committees comprised of radiologists undertook the competency assessments in 2006 and 2008. The committee's 2009 competency report concluded that the plaintiff lacked adequate skill and knowledge to practice radiology and recommended one year of remedial training. The committee notified each of the other defendants of its findings. The defendant Health Authority suspended the plaintiff's practice and it and the College released a statement and press release identifying the plaintiff and the findings of the committee. The Health Authority also indicated its plan to review all of the cases in which the plaintiff had interpreted results. The defendant Minister of Health responded to questions from the press and his comments were published on the radio and in the newspapers. These publications were the basis of the plaintiff's claim in defamation. The plaintiff alleged that the defendants conspired with each other to release their statements on the same day, which they had arranged with common malicious intent.

HELD: The application for summary judgment was granted under Queen's Bench rule 7-5 and the plaintiff's action dismissed. The court found that there was no genuine issue that required a full trial. It would deal with the allegations of defamation and conspiracy on the basis of the extensive pleadings, affidavits and exhibits filed. It found the statements issued by the college were defamatory in that they were injurious to the plaintiff's reputation. The statements accurately reflected the conclusions of the 2009 competency report and the court found that they were essentially true. The college's statement prompted the Health Authority and the Minister to take special measures to mitigate patient concerns and ensure their safety. The defence of truth or justification applied to the otherwise defamatory statements. The identification of the plaintiff in the impugned statements was humiliating, but his claim that they were motivated by bad faith and malice was rejected.

The court concluded that naming him was neither excessive nor evidence of malice by the defendants. Therefore, the defence of qualified privilege was available to the defendants. Regarding the allegation of conspiracy, there was no evidence that the defendants conspired to harm the plaintiff.

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Gurniak v. Saskatchewan Government Insurance, 2016 SKQB 391

Danyliuk, November 29, 2016 (QB16384)

Automobile Accident Insurance Act – Appeal
Automobile Accident Insurance Act – Duty of Good Faith – Appeal
Civil Procedure – Amendment – Statement of Claim
Civil Procedure – Application to Strike Statement of Claim – Reserved Decision
Civil Procedure – Queen's Bench Rules, Rule 3-72, Rule 7-9

The defendant applied to strike the defendant's statement of claim, and while that decision was reserved the plaintiff filed an amended statement of claim. The defendant objected and filed another application to set aside and disallow the amendment. The plaintiff was involved in a motor vehicle accident in 2005 and claimed under the no fault provisions of the the Automobile Accident Insurance Act for his back injuries. In 2013, a doctor recommended a third surgery. The defendant insurer made two decisions. First, that the recommended surgery was not related to the accident so the plaintiff was not entitled to any benefits for the procedure under the Act. Second, the defendant made a determination as to the plaintiff's degree of permanent impairment and corresponding benefits. The plaintiff appealed the defendant's decisions by issuing a statement of claim in November 2015. The statement of claim also included a claim of bad faith. The issues were: 1) should the plaintiff's amendment of its statement of claim, done while the defendant's application to strike had been heard and was on reserve, be allowed; 2) should the statement of claim be struck due to lack of jurisdiction; 3) should the statement of claim be struck pursuant to rule 7-9 of The Queen's Bench Rules; and 4) what is the proper cost award.
HELD: The issues were determined as follows: 1) the plaintiff relied on rule 3-72(1)(a) to allow his amended statement of claim without judicial leave. The court found

that the plaintiff's position did not consider the overall context of the rules nor the duty one lawyer owes to the other and the court. The application of the court's rules is not absolute or inflexible in nature. The court concluded that while the decision on the first application was on reserve, the plaintiff did not have the unfettered right to amend the statement of claim. The court also noted that the amendment added aspects that were not in the original claim; the amendments were not curative to the defendant's complaints in the original application. The plaintiff had plenty of time to amend the statement of claim before the original application was heard by the court. Allowing the amendment could be an abuse of process and it was, at the very least, an improper step in the litigation. The amended statement of claim was disallowed; 2) the defendant argued that the original claim should be struck because it co-mingled the statutory appeal with a claim in tort. The jurisdiction and appeal from a decision of the defendant are defined by the statute creating the right of appeal, the Act. The court concluded that the plaintiff could not combine his s. 191 appeal with a bad faith claim. The processes would be different for the bad faith claim and the statutory appeal. The plaintiff was not just joining two claims; he was appealing and making a true civil claim. In Saskatchewan, the plaintiff could have appealed to the statutory board or to the court. The statutory board could not entertain the bad faith claim. In previous cases, the court concluded that the process for an appeal to the statutory board or to the court should be the same. The plaintiff's claim for bad faith was struck; 3) the remainder of the statement of claim could have been drafted better, but the court was not prepared to strike anything further from it. The plaintiff was given the opportunity to revisit and possibly amend his claim regarding the s. 191 appeal; and 4) the defendant was awarded fixed costs of $1,000 for each application.

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