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The appellant appealed his conviction of three charges: sexual assault; sexual interference; and invitation to sexual touching against a nine-year-old daughter of his co-worker. The appellant was 65 and the offences occurred in 1996 and 1997. The appellant had relocated to the United States, and when he came back to Canada in 2010, he tried to contact the complainant's father. When he was unable to do so, he sent a friend request to the complainant on Facebook to obtain the contact information. The complainant then reported the incidents. The main issue at trial was credibility. The complainant had told her mother of the incidents when she was 15, but it was not reported to the police. HELD: The conviction appeal was allowed and a new trial was ordered. The prior consistent statement could be used in assessing the truthfulness and credibility of the complainant but it could not be used to corroborate the allegation that an offence was in fact committed. The appeal court found the paragraph in the trial decision ambiguous as to whether the prior consistent statement was used properly. Therefore, the issue had to be resolved in favour of the

appellant, and thus a finding that the trial judge erred in law by relying on a prior inconsistent statement for the truth of its contents. The Court of Appeal was unable to determine how much of an impact the prior consistent statement had on the trial judge's assessment of the complainant's testimony and therefore a new trial had to be ordered.

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The Queen's Bench judge refused to amend the plaintiffs' statement of claim to add claims for aggravated and punitive damages under The Fatal Accidents Act, concluding that there was no basis under the Act for those claims. The plaintiffs argued that the non-pecuniary claims should be allowed because the actions involved evidence tampering by the respondents. An Alberta case involving the tampering of evidence allowed a claim for punitive damages under their similar Act.
HELD: Leave to appeal was granted based on merit and importance. There is nothing in the Act that specifically prohibits an award for non-pecuniary damages. Also, the appeal court noted that Saskatchewan courts had not clearly pronounced whether non-pecuniary losses can be the subject of a claim under the Act with respect to actions after the death.

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The defendant applicant applied to quash the appellant's appeal on the ground that the appellant had failed to obtain leave to appeal from a Queen's Bench order that was interlocutory. The matter arose as a result of the defendant applying for an order pursuant to Queen's Bench rule 215 for the plaintiff (appellant) to provide further and

better production of documents. The motion was made with others and the judge made certain oral rulings after hearing submissions but reserved on other matters, including the application here. When he ruled on the reserved matters, the judge referred to the application as having been disposed of in his oral fiat.
HELD: The court granted the application but on the basis that in order for it to hear an appeal, a decision is required pursuant to s. 2 of The Court of Appeal Act, 2000. Here there was no decision, so it was unnecessary to determine whether the order in question was interlocutory. The parties could return the matter to the Court of Queen's Bench.

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Saskatchewan College of Psychologists v. Sydiaha, 2014 SKCA 116

Jackson Ottenbreit Herauf, October 31, 2014 (CA14116)

Statutes – Interpretation – Court of Appeal Act, 2000, Section 7

The applicant, the Saskatchewan College of Psychologists (SCP) applied for an order quashing the appeal of the respondent, requesting that the Court of Appeal interpret s. 7 of The Court of Appeal Act, 2000. It did so in response to an appeal filed by the respondent. He had filed his appeal after a council of the SCP found him guilty of professional misconduct for failing to identify his non-practicing status and his appeal of the council's decision was dismissed by the Court of Queen's Bench (see: 2014 SKQB 112). The applicant argued that because The Psychologists Act provided for a right of appeal to the Court of Queen's Bench by an applicant from a council decision and was silent with respect to a further right of appeal to the Court of Appeal, it meant that the Act conferred only a limited right of appeal pursuant to s. 7(3) of The Court of Appeal Act, 2000.
HELD: The court dismissed the application. Section 7(2) indicates that whenever the legislature confers jurisdiction on the Court of Queen's Bench, and is silent with respect to an appeal from that Court, an appeal lies from it. The Psychologists Act does not state that there is no appeal from a decision of the Court of Queen's Bench.

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Criminal Law – Motor Vehicle Offences – Impaired Driving
Criminal Law – Motor Vehicle Offences – Impaired Driving – Refusal to Provide Breath Sample

The accused was charged with driving while impaired and refusing to provide a sample of breath for an ASD test contrary to s. 254(4) of the Criminal Code. The accused was observed by police officers driving her vehicle so that it was swerving and crossing the middle line of the road. When the officer stopped the vehicle, he noted that the accused had trouble opening her window, could not hold her head up and had a glazed look on her face, but that she was not slurring her words. He smelled alcohol coming from the vehicle and so formed the opinion that the accused was impaired. The other officer who had been at the scene testified that the accused was slurring her words and had trouble walking to the police cruiser. The accused testified that she was not impaired and said that she had had one glass of wine while at a casino. She was not feeling well possibly because she had had a Botox treatment earlier in the day. At trial, a video was played of the accused walking and driving away from the casino, which showed the accused walking steadily and driving properly. Regarding the second charge, the officer testified that he read the accused the breath demand and the accused responded: "I want to call a lawyer". The officer did not explain that her right to counsel had been suspended or the consequences of a refusal. He asked her if she was refusing and she replied: "Yes, I am afraid of you guys." She was then arrested and read her right to counsel. When asked if she understood, she said no. The accused was crying and shouting during this exchange.
HELD: The accused was found not guilty of both charges. The court found the video evidence to be probative as the accused had been arrested shortly after it was filmed. Regarding the second charge, the court noted that because of the emotional state of the accused, the meaning of her answer to the officer that she was scared was not clear. The officer should have made further inquiries and allowed the accused to compose herself. In the circumstances, the Crown had failed to prove that there was a refusal and that the accused had the requisite intent to refuse.

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Green, October 17, 2014 (PC14162)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 8, Section 9

The accused was charged with driving while impaired and while over .08. The charges arose as a result of a police officer patrolling a parking lot owned by Potash Corporation. As a result of some problems, Potash had requested the police to show a presence at the mine site. On the night in question, the officer had seen the accused drive his vehicle in the lot. He checked the vehicle's licence plate number and the computer program indicated that the plate was expired. However, the officer had entered the wrong number, but without realizing his error, he followed the accused's vehicle and parked behind it when the accused pulled into a parking stall. When the accused exited his truck, the officer called to him that his plate had expired and the accused denied this. The officer approached him and based on his observations of the accused, such as his speech was slurred, he smelled of alcohol and walked unsteadily, the officer arrested him for impaired driving. Defence counsel brought a Charter application, arguing that the officer's actions had violated the accused's rights to be free from arbitrary detention and unreasonable search and seizure, contrary to ss. 8 and 9, and that, as a result, the evidence from the point of initial contact between the officer and the accused should be excluded under s. 24(2) of the Charter.
HELD: The court found the accused not guilty of the charges because it excluded all evidence from the point when the officer stopped behind the accused's vehicle. The court found that the officer was purporting to exercise authority under s. 209.1 of The Traffic Safety Act, but that authority did not exist in a private parking lot. From the point at which the officer pulled in behind the accused's vehicle, the accused was detained, because a person in his position would believe that they had no choice but to comply with the officer's inquiry and that he had been singled out by the officer for a focused investigation, and his right to be secure from unreasonable search and seizure was clearly violated. Although the officer had not acted in bad faith, the court found that because of the seriousness of the unauthorized detention and the impact on the accused's freedom and privacy interests, the admission of the evidence collected from the point when the officer stopped behind the accused would bring the administration of justice into disrepute.

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R. v. Duke, 2014 SKPC 175

Hinds, October 10, 2014 (PC14160)

Criminal Law – Motor Vehicle Offences – Driving With Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 9

The accused was charged with operating a motor vehicle while over .08 contrary to s. 255(1) and s. 253(1)(b) of the Criminal Code. Prior to trial, the accused filed a notice of charter application alleging that rights under s. 8, s. 9 and s. 10(b) of the Charter had been violated. A voir dire was held. The defence argued that: 1) the police arbitrarily detained the accused when he was asked to leave his vehicle to go to the police vehicle without giving him a reason, contrary to s. 9; 2) the police did not have a reasonable suspicion that the accused had alcohol in his body prior to making the ASD demand, contrary to s. 8; and 3) the accused had not unequivocally waived his s. 10(b) right. As a result of these breaches, the defence sought to exclude the Certificate of Analysis from evidence pursuant to s. 24(2) of the Charter. City police officers saw the accused driving with only his daytime running lights during the early morning. The officer stopped the accused and he told the accused that his lights weren't on. The accused said that his lights came on automatically. When asked if had had anything to drink, the accused said "nothing really". The officer asked the accused to come to the police cruiser. Once in the back seat, the officer demanded that the accused blow into an ASD. It showed a fail and the officer advised him that he was under arrest for .08. The officer read the accused his Charter rights from a police issue card and he was advised of his right to retain counsel without delay and the availability of Legal Aid counsel. When asked if he understood and if he wanted to contact a lawyer when at the station, the accused said yes and "I don't think so". The officer then told the accused that if at any time he changed his mind, to let him know. The officer did not offer the accused another opportunity and the accused did not request a lawyer either. The officer testified that he made the ASD demand based on his suspicion that the accused had alcohol in his body because the accused was driving without his lights on, he appeared unsteady on his feet, his speech was slurred and incoherent, he had bloodshot eyes and there was the smell of alcohol on his breath. The officer's in-car video indicated that the accused's lights were on prior to the police activating their siren and that the accused's speech was not slurred nor was he incoherent. There was nothing to show that the accused had problems with his balance or coordination.
HELD: The court found the accused guilty. It held with respect to each of the alleged Charter breaches that: 1) the accused was arbitrarily detained when he was asked to leave his car and go to the police vehicle without reasons, in violation of s. 9; 2) although the officer was untruthful with respect to the reason that he stopped the accused's vehicle because his lights weren't on, his testimony that the accused had bloodshot eyes and his breath smelled of alcohol could not be shaken. The court found that the officer had subjective grounds to support the ASD demand and it was objectively reasonable. Therefore there was no violation of the accused's s. 8 Charter right; 3) the accused received the right to counsel and understood it. The onus was on him to exercise it and he failed to do so. There was no breach

of s. 10(b). The court found that the breach of the accused's s. 9 right was not serious and because of society's interest in preventing impaired driving, the admission of the Certificate of Analysis would not bring the administration of justice into disrepute.

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Kalmakoff, October 20, 2014 (PC14164)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 8, Section 9, Section 10(b)

The accused was charged with driving while her blood alcohol content exceeded .08 contrary to s. 253(1)(b) of the Criminal Code. The defence brought a Charter application arguing that the breath samples relied upon by the Crown were obtained in connection with violation of her rights under ss. 7, 8, 9 and 10(b) of the Charter and that, as a result of the breaches, the analyses of breath samples should be excluded from evidence under s. 24(2) of the Charter. A voir dire was held and it was agreed that admissible evidence would be applied to the trial. On the night in question, a police officer had seen the accused leaving a bar with some friends, who appeared quite intoxicated. Although the accused did not appear so, when she got into her vehicle to drive, the officer suspected that she might have been drinking and decided to stop her vehicle to check her sobriety. The accused drove a short distance without any trouble and stopped immediately when the police vehicle's emergency lights came on. The officer spoke to the accused through the driver's side window and observed that her eyes were bloodshot and that the smell of alcohol was coming from the vehicle. When asked if she had been drinking, the accused said that she had two glasses of wine and a shot. The officer took the accused's licence and returned to his vehicle without saying anything further to the accused. He checked the vehicle registration and asked another officer to bring an ASD to the scene. Within five minutes, he returned to the accused and told her that she would be detained for the purpose of taking the ASD test. Six minutes later, the officer asked the accused to leave her vehicle to take the test, and at that point he could smell the alcohol on her breath. The accused failed the test and about 10 minutes later, the officer arrested the accused and took her back to the police vehicle, advised her of right to counsel and read the police warning. Within two minutes, the officer made a breath demand under s. 254(3) and took her to the station. The accused had a telephone conversation with a lawyer and then provided breath

samples. The accused's argument that her various Charter rights were breached hinged on the lawfulness of the roadside screening and breath-testing procedures. If the demand had not complied with s. 254(3) of the Code, then the accused's rights under ss. 8 and 9 were violated. The accused submitted that the officer had not said that he believed that she had alcohol in her body when he made the demand and thus it was made in the absence of reasonable suspicion and had not complied with s. 254(2). In her second argument, the accused claimed that the demand was not made forthwith because it was made 11 minutes after the stop, thereby violating her ss. 8, 9 and 10(b) rights to be free from unreasonable search and seizure and her right to counsel had been suspended by the demand. The third issue raised by the defence was that the officer did not have reasonable grounds to believe that the accused's ability to drive was impaired and therefore he did not have the necessary grounds for a breath demand under s. 254(3), thereby violating her ss. 7, 8 and 9 Charter rights.
HELD: The court found the accused guilty on the basis of the Certificate of Analysis. With respect to the accused's first argument, the court held that there were no magic words required in making the demand. On the evidence the officer made the demand with an honest subjective belief and the suspicion was objectively reasonable. Regarding the accused's second argument, the court found that the demand was not made forthwith. The officer chose to make the demand only after the ASD had arrived and the circumstances of the case did not justify such a delay. The court found with respect to the third issue that the demand was lawful. The officer testified that an ASD fail means that the accused is over the limit and he relied upon the accuracy of the device and took steps to make the evidentiary breath test demand and obtain samples. Based on the reading, the officer's subjective belief was objectively reasonable and there was no violation of the accused's Charter rights. Applying the Grant test, the court found that the breach of the accused's Charter rights when the ASD demand was not made forthwith was a minor breach and the officer had not deliberately violated her rights. The impact of the breach was not serious as the amount of time the accused was detained would have been the same if the demand had been made immediately. Admitting the evidence would not bring the administration of justice into disrepute.

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R. v. Mayoh, 2014 SKPC 178

Jackson, October 10, 2014 (PC14165)

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

The accused was charged with impaired driving and driving while over .08. An RCMP officer had seen the accused make a wide sweeping turn and so put on his emergency lights for the purpose of checking the accused's licence and sobriety. The accused made another wide turn and then pulled over. The officer smelled alcohol when he approached the vehicle's open driver's side window and when asked for his registration, the accused didn't respond, looked confused and dropped his registration twice because his hands were shaking. He had bloodshot eyes, had alcohol on his breath and admitted he'd been drinking. When asked to leave his car, the accused walked unsteadily, and the officer made an ASD demand as a result of his observations. The officer testified that he made that demand because he might have only suspended the accused's licence for 24 hours if he did not fail the test. At that point, he did not believe that he had sufficient information to arrest the accused for impaired driving. The accused did fail and the officer gave him right to counsel and read him the police warning. The accused was taken to the station and provided breath samples that indicated 140 milligrams. The officer was reluctant to release the accused unless there was someone over the age of 18 available to take care of him. This was not a formal policy but he used it as a safety precaution. The accused stayed in the cells overnight because he couldn't contact anyone to retrieve him.
The defence raised the issues: 1) whether the s. 254(2) demand was lawful if the officer had already formed reasonable and probable grounds to make a formal breath demand, and if not lawful, that the samples were not taken forthwith; and 2) that the accused was overheld due to police policy. This was alleged to be a Charter breach but defence counsel had not raised it in his advance Charter notice because he learned of it during the course of the trial.
HELD: The court found the accused guilty of driving while over .08 and not guilty of impaired driving. The court concluded that the use of the ASD was lawful in the circumstances and that the samples were taken forthwith. The officer used the ASD to ascertain the sobriety of the accused to give him the benefit of the doubt. The test was administered in a matter of minutes. The court decided to entertain the late alleged Charter breach because the issue arose from the cross-examination of the officer at trial. The court held that no overholding occurred on the facts. The court had been left with a reasonable doubt regarding the charge of impaired driving.

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R. v. McNab, 2014 SKPC 180

Plemel, October 28, 2014 (PC14172)

Criminal Law – Driving While Disqualified

The accused was charged with driving while disqualified pursuant to s. 259(1) of the Criminal Code when he was stopped while driving on a road on Gordon's First Nation (Gordon's). The issue was whether the location where he was driving was a street, road, highway, or other public place pursuant to s. 259(1) such that a licence to drive would be required. The road that the accused was driving on continued on to be a municipal road when it exited Gordon's. On the other end of the road in Gordon's, it intersected with a major grid road. The Gordon's road had a different speed limit than the municipal road but it did not restrict entry or limit the use to First Nation's residents. There were residences along the Gordon's road but no services. A crown witness, a farmer in the area, testified that he used the Gordon's road at times.
HELD: The accused was found guilty. The court was satisfied that someone travelling on the Gordon's road and municipal extension would notice little difference between the two. The road was open to and frequently used by people who did not reside in Gordon's.

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Rickard Construction Ltd. v. Burns, 2014 SKPC 182

Wiegers, October 25, 2014 (PC14169)

Contract Law – Formation of Contract – Oral Agreement
Contract Law – Quantum Meruit
Small Claims

The defendant hired the plaintiff to bury rocks on his farmland. The plaintiff did the work and charged the defendant $21,031.50, but he only paid $13,571.25. The plaintiff said that the defendant specifically requested a certain model of bulldozer. The plaintiff quoted the defendant his standard rate. The defendant acknowledged the hourly rate but said it was for a larger more powerful bulldozer. Also, he said that the rate for the track hoe given included labour and that the rate to move equipment was a flat rate not an hourly rate as argued by the plaintiff. The defendant took notes of the conversation. Other costs like additional expenses, the cost of a transport permit, the use of a service truck, the cost of labour while operators were transported to the work site were added to the invoice but were not discussed between the parties. The defendant or his wife recorded the minutes that the equipment was operated. The defendant argued that he was charged for approximately six and a half hours when the machines were not moving. The plaintiff argued that the industry standard was not to bill by the minute but to round time to the nearest hour or half hour. The issues for the court were: 1) were the parties bound by an enforceable contract and if so what were its terms; and 2) if the parties were not

bound by an enforceable contract, did the plaintiff have a valid claim for restitution on the basis of quantum meruit.
HELD: The court determined the issues as follows: 1) the court found the defendant and plaintiff were both honest and believed their recollection of the agreement. However, there was no meeting of the minds on the issue of price. Neither party would have intended to enter into a contract on the basis of the other party's understanding of the price. There was no valid contract; 2) the court found that the elements required for restitutionary quantum meruit were met, namely: a) the defendant was aware of the work; b) the work was done for the benefit of the defendant; and c) there was an expectation that the plaintiff would be paid for the work. The amount ordered must be what the court considered reasonable. The defendant's argument for minute-to-minute billing was found to be too restrictive and the plaintiff's rounded billing was reasonable. The court relied on evidence of the cost of another track hoe with operator and applied that in the case to find that the defendant owed the plaintiff an additional $1,884.50 for the track hoe and operator. The court did not increase the rate for the bulldozer to the more powerful one because the plaintiff did not inform the defendant of the cost increase. The defendant was ordered to pay for additional time of the bulldozer due to his minute-to-minute calculations. The defendant was also ordered to pay the additional amount sought for moving the equipment because there was actual cost to the plaintiff to move the equipment. The cost of the permit and wages for operators travelling to the site was also found reasonable because they were essential to completion of the work. The service truck charge was not found to be reasonable. There was no evidence that it could be used elsewhere and it was not discussed with the defendant. The plaintiff was entitled to an additional $3,928.50 plus GST.

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Khan v. K.Z.M. Logistics Inc., 2014 SKPC 183

Demong, October 23, 2014 (PC14170)

Contracts – Formation
Evidence – Admissibility – Hearsay
Small Claims – Breach of Contract

The plaintiffs claimed that they were owed $4,307 from the defendants either as wages pursuant to an employer/employee relationship or pursuant to an independent contractor arrangement. The defendant did not dispute that the money was owed but counterclaimed for the sum of $21,432 for damage to the defendant's truck that the individual plaintiff was driving and for which the defendant alleged they agreed

in writing to pay for. At trial it became evident that the relationship was one of independent contractor with the plaintiff corporation rather than employment with the individual plaintiff. The parties purportedly signed a written agreement. The plaintiffs used the defendants 2006/2007 semi-tractor for hauling. The semi-tractor started to have problems within one month of the plaintiffs starting to drive. The defendant indicated that he told the individual plaintiff on each occasion that the semi-tractor had to be fixed that the he would be responsible for the cost. The defendant said that he did not take payment immediately because the individual plaintiff convinced him not to. The plaintiffs alleged that they never attended upon the defendant and signed an agreement. The individual plaintiff tendered his log book to show he was working in Saskatoon the day the contract was allegedly signed. He also tendered evidence that the normal practice was not to be responsible for repairs if just driving someone else's truck.

HELD: For the individual plaintiff to drive to Regina to sign the contract as alleged, he would have had almost no rest between his shifts in Saskatoon. Further, the signature on the agreement appeared different from that on the individual plaintiff's licence and log book. The individual plaintiff was found to be a reasonable person, and one that would inquire into the type and condition of truck he would be responsible for repairing if he was agreeing to that. Also, in November 2012, after numerous repairs already, the defendant said to the plaintiff "I will not pay for any more damage that you cause". The court noted that the defendant would be unlikely to say that if he was expecting the individual plaintiff to pay for all repairs before that. Also, the defendant wrote two letters to the plaintiff after termination and neither referred to the repair costs or written agreement. The court accepted a hearsay statement as an expression against interest that the defendant told someone that the plaintiffs did not owe him any money. The court concluded that even without taking into account the hearsay evidence, the defendant did not on a balance of probabilities persuade the court that there was a written agreement. The plaintiff corporation was granted judgment.

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R. v. K. (J.M.), 2014 SKPC 186

Singer, October 28, 2014 (PC14173)

Criminal Law – Aboriginal Offender – Sentencing
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Criminal Law – Sentencing – Youth Criminal Justice Act – Violent

Offences
Criminal Law – Unlawful Confinement

The young offender accused was charged with two robbery charges, one break and enter charge, and one unlawful confinement charge. The charges all resulted when the accused was not admitted to a backyard bonfire. When he was pushed into the back alley, the accused produced a razor and slashed at the victims, significantly cutting one victim. The accused chased one victim down the alley and held the razor to his neck while he took his wallet. He then went to the front of the residence and threatened to kill the occupants while gathering them all in the kitchen. The accused demanded money but left because the police had been called. The accused indicated that he had little memory of the incident because he was high on cocaine and alcohol. The Crown applied to have the accused sentenced as an adult. The accused pled guilty and was granted a sentencing circle held over two separate days. The accused had a relatively lengthy criminal record, which included two previous robbery charges, five property related charges, five weapons offences, and 11 other charges. The accused's family was supportive throughout and sought counselling for him. The accused advised the probation officer that he recognized that what he was doing was wrong. He also admitted to daily use of cocaine. The probation officer concluded that the accused was a high risk to re-offend with a concern for violent offences. The psychological report indicated that the accused had begun to make significant improvement but still had a long way to go. During remand, the accused's behaviour improved to being described as exemplary and changing from someone who created violence to someone who created peace. The Assistant Deputy Minister of Justice filed a letter indicating that the accused qualified for an Intensive Rehabilitative Custody and Supervision sentence pursuant to s. 42(7) of the Youth Criminal Justice Act (YCJA).

HELD: The accused made significant progress and there was a plan in place to allow continued development. The court found that the Crown did not overcome the presumption that the accused's moral blameworthiness was diminished. A sentence under s. 42(7) of the YCJA was found to be of sufficient length to hold the accused accountable, and therefore the application for sentencing as an adult was dismissed. The accused was sentenced to three years concurrent on each youth charge with an order that the sentence be served as an intensive rehabilitative custody and supervision order, with 18 months in secure custody, six months in open custody, and one year under supervision.

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R. v. Slippery, 2014 SKPC 190

Metivier, October 30, 2014 (PC14174)

Criminal Law – Breach of Undertaking
Criminal Law – Defences – Alibi
Criminal Law – Evidence – Credibility
Criminal Law – Robbery

The accused was charged with robbery contrary to s. 344(1) of the Criminal Code and with two counts of breach of undertaking contrary to s. 145(3) of the Criminal Code. The robbery was against a victim with whom the accused was on an undertaking to have no contact with, resulting in one of the breaches. The other breach was for the statutory condition in the accused's undertaking of keeping the peace and being of good behaviour. The accused was charged with stealing the victim's iPhone using violence. The victim testified that she and the accused were at a friend's apartment. She said that the accused put his belt around her neck, pulled her hair, and beat her until she gave him her phone. The victim had marks around her neck, a bump on her head, loose hair and bruises. The accused testified that he was in North Battleford, not Saskatoon, on the day of the offences. He said that his niece took him to Saskatoon the evening after the offences because she had a cheque for him that he wanted to cash. The niece also testified, however, that she took the accused back to Saskatoon the night of the offences, but after they occurred.
HELD: Given the accused's alibi, the court had to assess the credibility of the witnesses. The accused had several opportunities to provide the police with his alibi, yet he didn't. The niece was a reluctant witness with the inability to provide details and she also admitted to lying to the police. The accused and the niece also said that the accused returned to Saskatoon on different days. The court did not believe the alibi evidence of the accused. The court was concerned that the victim could not produce proof of ownership for the iPhone and therefore there was a reasonable doubt that the accused committed theft and therefore robbery. The testimony regarding the assault was found to be credible and the accused was found guilty of the lessor offence of assault contrary to s. 662 of the Criminal Code. He was also found guilty of the two breaches.

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R. v. Pomeldi, 2014 SKQB 286

Scherman, October 28, 2014 (QB14337)

Statutes – Interpretation – Criminal Code, Section 258
Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Evidence – Appeal

Evidence – Admissibility – Certificate of Analysis – Proper Notice – Appeal

The Crown appealed the acquittal of the respondent of the charge of driving while his blood alcohol content exceeded .08. The trial judge found that the respondent had not received the required notice of intention to produce a Certificate of Analysis. The notice appeared below a copy of the certificate and stated: "…the prosecution intends to produce in evidence a copy of which appears above." The trial judge held that the notice was deficient on its face, as it did not describe the intention required by s. 258(7) of the Criminal Code and was not a proper sentence in English, and accordingly, no proper notice was given of the Crown's intention to rely upon the Certificate of a Qualified Technician.
HELD: The court allowed the appeal. The court held that the trial judge's interpretation of the language in the notice and its effect was a question of law and it was open to review by an appellate court, using the standard of correctness. The trial judge erred in law. The purpose of s. 258(7) was to ensure that an accused is given notice of the Crown's intention to rely on the certificate at trial so as to enable him to properly prepare his defence at trial. The section does not require specific words of notice or impose linguistic or grammatical standards to it. In this case, the respondent would have understood the notice. The Certificate of Analysis should have been admitted. The court returned the matter to the trial judge to consider what his decision would be if the certificate became part of the evidence.

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Goldsmith v. Mitchell, 2014 SKQB 297

Chow, October 17, 2014 (QB14306)

Civil Procedure – Queen's Bench Rule 15-36 – Adverse Inference
Family Law – Child Support – Arrears
Family Law – Child Support – Imputing Income
Family Law – Child Support – Variation

The petitioner requested that his child support obligations be varied, his child support arrears be reduced or expunged, and his passport and driver's licence suspension be cancelled. The petitioner was required to provide annual income tax returns and income information to the respondent; however, he failed to do so. The petitioner's notices of assessment showed that his income was reduced significantly starting in 2009 after being laid-off due to economic slow-down. Since that time the petitioner was self-employed in a landscaping business earning much less than when he was employed. The petitioner did not provide an updated financial

statement setting forth his income and expenses, nor did he provide full income tax returns.
HELD: The application was dismissed in its entirety. The petitioner's income did decrease but the court held that the arrears would not be reduced or expunged because the petitioner did not provide evidence to show how he was presently unable to pay the arrears. The petitioner was laid-off over five years ago and continued to choose to be self-employed making much less than previously. The court found that the petitioner had an obligation to pursue reasonable employment opportunities sufficient to meet his financial obligations to his child. The petitioner's decision of employment was found not to be reasonable in the circumstances. Also, he failed to provide the necessary financial information even though the respondent repeatedly requested them and the court ordered them to be produced. The notices of assessment did not show any business expenses and deductions. The court drew an adverse inference against the petitioner pursuant to rule 15-36 of the Queen's Bench Rules. The petitioner was found to be intentionally underemployed and the court imputed income to him in the amount of $35,845.

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R. v. Naistus, 2014 SKQB 333

Maher, October 17, 2014 (QB14322)

Criminal Law – Dangerous Offender Application – Dangerous Offender – Long-term Supervision Order
Criminal Law – Robbery – Armed Robbery
Criminal Law – Sentencing – Aboriginal Offender

The accused pled guilty to the following Criminal Code charges: 1) two counts of robbery using a firearm contrary to s. 344(1)(a.1); 2) two counts of committing a robbery with his face masked, contrary to s. 351(2); and 3) possession of a firearm while prohibited contrary to s. 117.01(1). An assessment pursuant to s. 752.1 of the Criminal Code was done. An agreed statement of facts was filed. The accused and another loaded rifles after they had been drinking. They entered a gas/convenience store with their heads covered with shirts and carrying the rifles. The accused shot the gas tank and they stole cigarettes. They then went to another store where the accused was on surveillance video pointing a rifle at the store clerk. He fired a round of shots at the wall behind the clerk. Cigarettes and money were stolen from the second store. The accused had been prohibited from possession of firearms for ten years commencing on March 18, 2009. The accused was an Aboriginal man and his co-accused was his adopted brother. The accused lived with his mom and dad growing

up; their home had no drug or alcohol use. His family was Christian and he said that he was bullied because of his family's Christian beliefs over the Native spirituality. The accused's paternal grandfather was abusive, including sexually abusive, to the accused. He had his GED high school equivalent but never had steady employment. The accused had a 12-year-old daughter from a prior relationship and a five-year-old son from a current relationship. His alcohol use consisted of quick consumption but not continuous use. He had experimented with drugs but was not a user. The accused's former common law spouse and sister indicated that the accused was tormented by dreams and frequently thought something was watching him. He frequently saw people or things that were not there. The accused's criminal record began in 2002 and he had committed violent offences, including two assaults causing bodily harm, aggravated assault and uttering threats. There was evidence that the accused's participation in programming was excellent. The doctor preparing the assessment for the court concluded that the accused suffered from schizophrenia and that as long as he took his medication and abstained from alcohol and drugs, he was treatable. The Crown argued that the accused should be declared a dangerous offender to serve an indeterminate sentence. The accused argued that he be declared a long-term offender with a determinate sentence.

HELD: The accused conceded that the predicate offence was a serious personal injury offence as required in s. 752 of the Criminal Code. Further, the court found that the Crown established a pattern of repetitive behaviour with a likelihood of death or serious personal injury to other persons pursuant to s. 753(1)(a)(i). The court also determined that the Crown had proven beyond a reasonable doubt that the requirements of s. 753(1)(a)(ii), a persistent aggressive behavior, had been met. The accused was declared a dangerous offender. The court concluded that there was a reasonable expectation that the accused could be safely managed in the community and that it was not necessary to impose an indeterminate sentence. The Gladue factors were considered, as was the accused's guilty plea. The accused was sentenced to a global sentence of nine years minus remand credit at a ratio of 1:1 for a remainder of 4.5 years. On release from custody the accused was ordered to be the subject of a long-term supervision order for a period of ten years.

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Prescesky v. Prescesky, 2014 SKQB 334

Turcotte, October 16, 2014 (QB14318)

Family Law – Child Support – Variation – Retroactive

The parties separated in 2005 and pursuant to a consent order entered in 2006, the petitioner father was to pay child support of $1,220 per month for the two children of the marriage, based on his income of $85,000 and the respondent mother's income of $20,000. The order stipulated that the parties were required to exchange tax information by June of each year so that they could adjust the amount of child support payable pursuant to the Federal Guidelines. In 2008, the petitioner brought an application to vary child support because he had lost his job in Alberta and had moved with his second wife and two children to Saskatchewan to work on his father's farm, where he earned only $1,500 per month. The petitioner indicated that he intended to continue to work on the farm and filed a sworn financial statement, but did not provide any financial information. The application was granted and support was varied to $769 per month commencing December 1, 2008. The order provided that the petitioner was to provide his income tax return to the respondent each June and leave was granted to her to proceed to trial on the issue of imputing additional income to the petitioner. In May 2011, the parties presented a memorandum for a consent order to the presiding judge that requested a variation of the December 2008 order. No financial information or evidence was provided to the court. The order was granted and set child support at $950 per month based on the petitioner's estimated income of $67,000. At that time, the petitioner's lawyer disclosed copies of the petitioner's 2008, 2009 and 2010 income tax returns and his pay stubs for 2011. The respondent's lawyer responded that in a spirit of cooperation, she would forego $7,250 in child support arrears potentially owing if she were to pursue a retroactive order. In December 2011, the petitioner applied to vary the child support order and the respondent brought her own application for variation seeking retroactive child support to January 2009, including sharing s. 7 expenses. In chambers, an interim variation of support was ordered in September 2012 that set the petitioner's payments at $1,822 per month based on his 2011 reported income of $129,495. The matter proceeded to trial on the issue of whether the petitioner should pay retroactive child support from January 2009 to August 31, 2012. At trial, it was shown that the petitioner had been employed since February 2009 at a mine in Alberta and his reported income for the period of 2008-2012 was $83,000, $78,000 and $90,000. His 2012 reported income was $134,800. The respondent's annual income for the same period fluctuated between $24,000 and $37,000. The respondent testified that after her second husband was diagnosed with cancer in 2008 until his death in 2012, her ability to deal with the petitioner's variation applications was limited. She stated that during that period, the petitioner bullied her, took advantage of her and claimed that he could only afford to pay $950 per month and refused to provide her with his financial information. She had accepted the amount of child support in the May 2011 order because she wanted to avoid further conflict. The petitioner denied the allegations and argued

that the respondent should have brought an application to determine his income and support obligations under the terms of the 2008 order. HELD: The court granted the respondent's application and ordered retroactive child support. It found that the petitioner failed in his obligation pursuant to the 2008 order to advise the respondent of his changed circumstances when he returned to Alberta and commenced his employment there in 2009. The change was also a change in circumstances under s. 17 of the Divorce Act and a variation order based on his increased income would have been warranted. The petitioner's failure to advise the respondent constituted blameworthy conduct. The court found that the petitioner should have paid $65,800 in child support for the period in question but had paid $36,900. The court reduced the shortfall of $28,895 by the amount of $7,250, which the respondent had indicated in 2011 she was willing to forego. The court ordered the petitioner to pay the respondent monthly installments of $601.25 per month until the arrears were paid in full.

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R. v. Getz, 2014 SKQB 335

Barrington-Foote, October 17, 2014 (QB14319)

Criminal Law – Theft – Sentencing
Criminal Law – Procedure – Stay of Proceedings – Abuse of Process

The accused was found guilty of stealing natural gas with a value exceeding $5,000 contrary to s. 334(a) of the Criminal Code (see: 2014 SKQB 105). Prior to the trial, the accused represented himself at a preliminary hearing and then had unsuccessfully applied for court-appointed counsel in Provincial and Queen's Bench Court because he was found by the latter to have sufficient means to afford to hire a lawyer. The Queen's Bench judge concluded that the accused could represent himself but warned that he might expose himself to incarceration if found guilty (see: 2013 SKQB 345). Before and after the preliminary hearing, the accused was offered a plea bargain that if he agreed to plead guilty and paid restitution, the Crown would seek a community sentence order; otherwise, it would ask for incarceration if the accused was found guilty. The accused then represented himself during a Charter application that he brought related to the search of his premises (see: 2014 SKQB 92) and then at trial. At the sentencing hearing, the Crown took the position that the accused should be incarcerated for 12 months with probation to follow. The accused advised the court that the Crown had stated during the applications for court-appointed counsel that it would not seek incarceration. The court adjourned the matter to enable the preparation of transcripts. When completed, the transcripts confirmed that the accused was

correct. The court then advised him that there was an issue as to whether the Crown's actions constituted an abuse of process. Following another adjournment, the court heard the parties' submissions on that issue and sentencing. At this hearing, the Crown changed its position and submitted that a community sentence of 15 months should be imposed. The accused sought a stay of proceedings based on the Crown's change of position announced at the sentencing hearing. He denied that the Crown had advised him that it would seek incarceration if he did not plead guilty and that he had not understood the Queen's Bench judge's warning about incarceration. The accused stated that if he had known that the Crown might ask for incarceration he might have accepted the plea bargain and avoided the lengthy and highly stressful proceedings. He had expressed remorse for his actions and had committed the crime to keep his business going. There was no danger created by his actions as natural gas is a stable fuel. The Crown argued that it had the right to change its position to the appropriate sentence and that it had not intentionally misled the court. Alternatively, the Crown could justify its conduct because the offence was premeditated and motivated by greed. The theft of gas from SaskEnergy, which itself posed an inherent danger and was analogous to a breach of public trust, as what occurred in cases of social services fraud. There were no mitigating factors, as the accused had not shown remorse for his crime. In a victim impact statement, SaskEnergy had reported that there were a significant number of incidents of tampering with its equipment and it was concerned with the safety of the public.

HELD: The court dismissed the application for a stay of proceedings. The court agreed with the factors expressed by the Crown with respect to sentencing and gave the accused a custodial sentence of 15 months to be served in the community pursuant to s. 742.1 of the Code with conditions. He was ordered to pay SaskEnergy restitution in the amount of $20,000, payable at a rate of no less than $250 per month. The court found that the accused's evidence had not established the necessary foundation to establish that the Crown might have been guilty of the type of egregious conduct that would have shifted the burden to it. However, the Crown's explanation had not constituted an acceptable justification but its decision to change its position regarding sentence demonstrated that it was acting in a proper manner with respect to the conduct of prosecutions and therefore there was no abuse of process, and if it had been found, the stay would not have been granted for past misconduct.

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Boudreau v. Boudreau, 2014 SKQB 336

Elson, October 16, 2014 (QB14320)

Family Law – Child Support – Variation
Family Law – Child Support – Variation – Retroactive

The petitioner mother brought an application to vary a child support order to increase it pursuant to the Federal Guidelines. The parties were married in 2004 in Nova Scotia. They have one child, a son, who was born in 2005 and the respondent adopted the petitioner's daughter from another relationship. In 2010 the parties separated. In May 2012, the petitioner moved with their son to Fort McMurray. In June 2012, the petitioner signed a separation agreement without representation by counsel. The respondent's counsel was concerned by this and prepared an affidavit for the petitioner to sign, indicating that she understood the agreement and she was not signing it under duress. The agreement stipulated that the parties would have joint custody of the children and that the primary residence of their son would be with the petitioner. The respondent was provided with regular specified access. The petitioner's income was given as $80,000 and the respondent's as $70,000 for child support purposes and child support would be payable by the latter at $75 per month in recognition of the cost to the respondent of exercising access from Nova Scotia. No child support was provided for the daughter. When the parties were divorced, the terms of it and the corollary relief order dated January 2013 repeated the descriptions of the income from the separation agreement and the explanation for the child support amount. In October 2012, the petitioner and her son moved to Warman, where her mother lived, because raising her son in Fort McMurray was difficult. She commuted to her job from Warman until April 2013 when she quit and stayed in Warman. She argued that there had been a change in circumstances since the order. She alleged that the respondent had not been exercising his access and her income had dropped substantially (she had been earning $150,000 in Fort McMurray) and claimed as well the increase in child support retroactive to February 2013. The respondent denied the allegation and the petitioner responded by claiming that his expenses to do so were much less than she expected at the time she signed the agreement. The petitioner also requested that the respondent be ordered to pay his share of s. 7 expenses for their daughter who was attending university in Calgary, which was costing more than had been anticipated at the time of separation agreement.
HELD: The court dismissed the application. Varying a corollary relief order required the petitioner to show a change of circumstance under s. 17(4) of the Divorce Act. The court found that the petitioner was in fact seeking a reconsideration of the previous order and the agreement. She would have known her circumstances when she signed the agreement and when the order was issued. The petitioner's reduction in income was due to intentional underemployment without any persuasive explanation for it. If there had been a material change in circumstances, there was no evidence provided to support a

retroactive award.

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R. v. Bear, 2014 SKQB 338

Zuk, October 21, 2014 (QB14331)

Criminal Law – Application for Court-appointed Counsel

The accused made an application seeking court-appointed legal counsel pursuant to s. 7 and s. 11(d) of the Charter. There were five charges against the accused, including conspiracy to traffic cocaine and possession of cocaine. The accused had originally been represented by counsel and entered a guilty plea to two of the charges and the Crown undertook to file a stay on the other counts. A pre-sentence report was ordered and the time of the hearing, counsel was granted leave to withdraw and the accused indicated his intention to seek an expungement of his guilty pleas. The accused stated that as the matter was complex and could involve a lengthy jail sentence, he could not represent himself but had no money to hire a lawyer. The accused received $300 per month in welfare and earned $6,000 per year working on his father's farm for six weeks. Although he had training in welding and had worked as a heavy equipment operator in a mine where he earned $1,600 per bimonthly, he had had to quit his position because his bail provision contained a curfew from 10:00 pm to 7:00 am, which prevented him from working at that job. There were few jobs available near his residence and he had to look after his teenage step-children. After he had been charged with the offences, he had received a residential school settlement in the amount of $98,000 in 2013. He used the funds to purchase four vehicles, two of which were forfeited. He retained ownership of a truck worth $15,000 and a $10,000 SUV, both of which he claimed to need in order to help with the farming operation and to transport his children. The accused did not have a driver's licence.

HELD: The court denied the application. The accused had failed to demonstrate that he was indigent and was unable to raise funds quickly to retain counsel. The accused chose to spend the settlement on vehicles when he knew he was facing serious criminal charges. The evidence he provided regarding his need for the vehicles was not substantiated and they should be sold. The accused had not established that he had made any reasonable attempts to obtain funds to retain counsel and had failed to show that he was unable to earn income. He had not spoken to his probation officer to change the terms of his curfew and had not made any effort to obtain employment. Regarding the second stage of the Rowbotham test, the accused was found to need legal representation. He had only a grade

10 education and would need a lawyer to conduct a complex expungement hearing and trial. The court was satisfied that the accused had the ability to raise sufficient funds in a short time in order to hire a lawyer.

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Brandt Engineered Products Ltd. v. Rockford Engineering Works Ltd., 2014 SKQB 339

Zarzeczny, October 21, 2014 Corrigendum November 5, 2014 (QB14324)

Civil Procedure – Interlocutory Injunction
Contract Law – Employment Contract – Restrictive Covenant – Non-competition Clause – Non-solicitation Clause
Employment Law – Fiduciary Duty

The court held a full hearing of an interim injunction application of the plaintiff. The plaintiff was a very successful business in Saskatchewan, North America and internationally. The defendants were: 1) a corporation (Rockford); 2) four former long-term employees of the plaintiff and principles and shareholders of Rockford (Burt, Bitz, Doka and Konecsni); and 3) two individual employees of Rockford who were previously employed by the plaintiff (Wiens and Fogarty). The plaintiff's claim alleged that Rockford was a direct competitor to the plaintiff and that the individual defendants breached their fiduciary duties to the plaintiff individually and collectively through Rockford. The individual defendants had all been employed with the plaintiff for varying lengths of time and in various capacities. Burt, Bitz, and Konecsni all signed employment contracts with a clause prohibiting the use of trade secrets or confidential information in a manner adverse to the plaintiff. None of the other individual defendants signed employment contracts. Burt acknowledged that he had some confidential information of the plaintiffs but deposed that none was used by Rockford in obtaining or delivering upon any consultation agreements. Wiens had the most confidential information because he downloaded four discs of information (9,713 documents) from the plaintiff before he left their employment. Wiens admitted to placing some of the confidential information on Rockford's server. The plaintiff was given an interim injunction and preservation order on July 23, 2014. The interim injunction prohibited the defendants from soliciting previous or current customers or suppliers of the plaintiff. The preservation order required them to preserve and retain documents relating to the plaintiff. The plaintiff handled matters for clients from conception up to and including full manufacturing of equipment whereas the defendant did not offer any manufacturing. Further, the plaintiff's accounts were often in the millions while the

defendants' were often less than $10,000.
HELD: The court found that Rockford was a small scale competitor to the plaintiff. It was held that there was no compelling evidence that the defendants solicited work from the plaintiff's clients. The court was also of the view that all of the individual employees would have been aware of the confidential and proprietary nature of the information they were dealing with while working for the plaintiff. The court concluded that the plaintiff had presented a strong prima facie case that the individual defendants were in a fiduciary relationship with the plaintiff. Further, it was found that the fiduciary duty was breached. Also, the plaintiff did not show how Rockford and its owners solicited Wiens and Fogarty to be employees. The defendants were found to breach their fiduciary duties to the plaintiff by improperly taking confidential and proprietary information from the plaintiff for their own purpose and the benefit of Rockford. Most, if not all, of the information had since been destroyed. It was found that the plaintiff was at risk of losing clients' confidence if it became known that other businesses had the plaintiff's confidential information. The plaintiff therefore met the onus to establish that it may suffer irreparable harm because of the defendants' actions. The balance of convenience was found in favour of the plaintiff. Therefore, the plaintiff was found to be entitled to injunctive relief. The court found that a lot of what the plaintiff sought to achieve had already been done by the divulging and destroying of confidential information possessed by the defendants. The defendants urged the court to consider that the injunction application was not even heard for 21 months after Rockford started business. The plaintiff was no longer impaired in its ability to compete with Rockford for past, present or future clients. In the two interim years the plaintiff should have replaced the employees and mitigated the effect of their departure. An injunction was granted with the following terms: 1) the defendants were prohibited from using confidential information in any way; 2) the defendants were prohibited from soliciting or inducing for employment anyone employed by the plaintiff for six months; and 3) the defendants were ordered to locate and return any confidential information to the plaintiff and sign an oath within 30 days with respect to the confidential information.
CORRIGENDUM dated November 5, 2014: [83] This will confirm the date set out on the first page of the judgment is amended to October 21, 2014.

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R. v. Farden, 2014 SKQB 340

Layh, October 23, 2014 (QB14325)

Regulatory Offence – Traffic Safety Act, Section 241.1 – Cell Phone

The accused appealed his conviction of improper use of a cell phone contrary to s. 241.1 of The Traffic Safety Act. An officer observed the accused driving with a cell phone to his right ear. The accused testified that he was just checking his "to-do list" that he had previously dictated into the phone. The court accepted the accused's evidence. The Act lists making a phone call as a prohibited action. The appeal was concerned with the meaning of the word communication. The accused argued that there had to be two people involved for there to be communication. The trial judge concluded that the accused was communicating and that listening to one's own message would be as likely to cause him to be a distracted driver as listening to a message from someone else.
HELD: The appeal was denied. The standard of review on a question of law was correctness. If someone is retrieving useful data from the phone, what could it be called other than communication, even if the data was the voice of oneself? The court found that the intentions of the Saskatchewan Legislature would be thwarted if a person could avoid conviction by indicating they were just receiving their own voice message. A broad interpretation of the legislation was accepted by the court. To accept the accused's interpretation would be to permit an unreasonable interpretation of the legislation.

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Chepil v. Chepil, 2014 SKQB 341

Megaw, October 21, 2014 (QB14326)

Family Law – Child Support
Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Joint Custody
Family Law – Custody and Access – Mobility Rights
Family Law – Custody and Access – Primary Residence
Family Law – Spousal Support – Duration of Spousal Support
Family Law – Spousal Support – Non-compensatory

The petitioner mother lived in Wynyard and the respondent father lived in Regina. Both parties sought to be the primary residence parent, and the respondent sought spousal support. The parties had two children, one in school and one soon to start. The petitioner was a registered nurse working full-time. The respondent was just recently unemployed but expected to find employment in Regina quickly. He indicated that the new employment would be Monday to Friday during regular business hours. The petitioner's extended family lived 45 minutes from Wynyard. The respondent's extended family did not live in Saskatchewan. The parties were married in 2006 and their

daughters were born in 2007 and 2010. The relationship ended early in 2013. The parties lived in Regina throughout their marriage. After the sale of the family home in July 2013 the petitioner and children moved in with her new partner in Wynyard. The respondent opposed the move and commenced proceedings. On September 4, 2013, the court ordered that the children be returned to Regina and if the petitioner also returned the parties would have shared custody and if she didn't the respondent would be the primary residence parent. The petitioner remained in Wynyard. The child care provided for the children while the respondent was working was the petitioner's aunt and she was prepared to continue to do so. The petitioner's new partner had a four-year-old child, of whom he shared parenting with his former partner. The respondent's home was not located in the area of the school they attended.

HELD: Both parties were found to be capable and loving parents, but they were both also found to be inflexible in dealing with the other. The inflexibilities were not such that the court moved away from joint custody. The court enumerated 23 factors to take into account on the facts of the case with respect to mobility of parents. The children would not suffer long-term disruption if they were moved from Regina. The children would live closer to the school and school friends in Wynyard than they did in Regina. The children's social network was more developed in Wynyard. The court was unable to conclude that the children had a closer bond with one parent over the other. The court concluded that the best interests of the children were to primarily reside with the petitioner based on her representation that she was able to arrange her work schedule to work more on the weekends she did not have the children and less when the children were in Wynyard with her. The respondent was given access three weekends of his choice per month, which were extended on statutory or school holidays. The respondent was also given the first choice for summer holidays and would have the children for spring break, Easter break and Christmas break. The parties would alternate Christmas and Easter days. The petitioner would be responsible for drop-off and pick-up in Regina. The parties were given leave to return the matter for child support determinations. The respondent sought non-compensatory spousal support. The respondent's former income was $60,000. The petitioner earned approximately $110,000. Neither party was disadvantaged as a result of childcare or other responsibilities of the marriage. The court did not find that any of the factors in ss. 15.2(6)(a) and (b) of the Divorce Act were present. The respondent suffered economic hardship when the relationship ended. The court indicated that the hardship could be compensated by a brief period of spousal support from the petitioner. The petitioner was ordered to pay $583 per month in spousal support for two years. Further, the petitioner should have been paying child support while the children were primarily residing with the respondent and the parties were left to make the calculation.

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Robin Hood Management Ltd. (c.o.b. Merriman & Co.) v. Gelmich, 2014 SKQB 347

Barrington-Foote, October 30, 2014 (QB14338)

Civil Procedure – Pleadings – Statement of Claim – Striking Out
Civil Procedure – Queen's Bench Rule 7-9(2)(a)

The plaintiffs brought an action against the defendants as a result of a sexual harassment complaint filed by one of the defendants (Gelmich) with the Saskatchewan Human Rights Commission (SHRC) pursuant to s. 27(1) of The Saskatchewan Human Rights Code (the Code). The plaintiffs alleged that the complaint contained false allegations and that the defendants, having accepted and pursued the complaint, committed numerous torts. The defendants then applied to strike the statement of claim and reply pursuant to Queen's Bench rules 7-9(1) and 7-9(2)(a). Gelmich did not file an application to strike but appeared at the hearing and asked that the action against her be dismissed. The plaintiffs argued that the court should not consider Gelmich's application as she had not given proper notice. The plaintiffs represented themselves, and their statement of claim was difficult to understand and had many shortcomings. At the hearing, one of the plaintiffs clarified that its claims against the applicants were based on negligence, abuse of office and intimidation. The plaintiffs were informed of the complaint by Gelmich by the SHRC and the investigator advised that the complaint would be mediated. They argued that if the investigator had made the necessary inquiries, she would have determined that the complaint was without merit and should be dismissed. They also argued that since the SHRC had written letters misdescribing them after they had notified the writer of their corporate name and sent them to the wrong addresses, again after the plaintiffs had corrected the writer, that the defendants had committed the torts of negligence, abuse of public office or intimidation.
HELD: The court granted the application to strike the claim in its entirety against all of the defendants under Queen's Bench rule 7-9(2)(a) except for Gemlich, because she had failed to provide notice to the defendants. The court noted that she was free to file a notice of application in the usual way. The court found that the plaintiffs' claims based on the actions of the SHRC had no chance of success based on the evidence and thus could be struck. The SHRC was obliged by s. 27 of the Code to review the complaint but not to determine whether it was made out. As part of its review, the SHRC requested information from the plaintiffs for investigative purposes and to attempt mediation, which it was entitled to do. There was no

basis for the plaintiff's claims in tort as the SHRC had followed its procedure properly. The plaintiffs' claim against the defendants based upon the letters written by the SHRC and sent to the wrong name and wrong address had no chance of success either. The plaintiffs had not pled that they suffered any loss or damages as a result of the SHRC's mistakes. They had not established that the mistake constituted an unlawful act or threat regarding the torts of intimidation and abuse of public office.

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Pippin v. Pippin, 2014 SKQB 348

Goebel, October 24, 2014 (QB14332)

Family Law – Costs
Family Law – Spousal Support – Variation – Change in Circumstances
Family Law – Spousal Support – Variation – Termination

The parties were married in 1966 and separated in 1995. In 1996 the husband was ordered to pay $800 per month in spousal support. The wife received a personal injury award in 2001 in the amount of $41,243 but it was found not to be a material change in circumstances given the discrepancy in each party's income. The husband retired in 2007 and the wife received an inheritance in 2011 of $330,000. The husband brought an application to vary. The wife indicated that she continued to work casually and that she had a number of health concerns. She said that she used the inheritance to purchase a condo and pay debts. She had $200,000 in retirement funds and the husband indicated he had $139,347 in retirement funds plus some income from a rental property. The wife argued that her support should be increased because she continued to live alone while the husband had a new partner. The wife also requested that the matter be set for trial arguing that there was not enough information for the court to make a decision. The husband argued that they had been exchanging information for over a year and a trial would just unduly delay the matter and increase the costs. The issues were: 1) did the court have sufficient information to make a final determination in chambers; 2) did the husband meet the onus upon him to demonstrate that a material change in the circumstance occurred; 3) if so, what variation order, if any, was appropriate having regard to the Divorce Act. HELD: The court determined the issues as follows: 1) the court found there was sufficiently clear and uncontroverted relevant evidence to make a final determination. The husband's spouse's business was wound up in 2013 and therefore there was no need to gather more information in that regard because there was no application for retroactive support; 2) each party retired for appropriate reasons and

the they were found to be a material change in circumstances, which was not taken into account when the original order was made. Also, the original order contemplated a variation order if the wife received a lump sum award. The inheritance was a material change in circumstances; and 3) the wife's living expenses were $34,000 per year and she had a deficit of $18,000 after taking into account her income. The husband's living costs are $50,000 per year with a deficit of $29,000 per year after taking into account his income. It was found to be reasonable for the wife to draw on her own savings to support her retirement. The spousal support order was terminated. The suspension was made effective June 30, 2014, when the matter was first argued in court. Given the modest means of each party, no order was made for costs.

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Procyshyn v. Gabruch, 2014 SKQB 349

Schwann, October 28, 2014 Corrigendum November 5, 2014 (QB14329)

Civil Procedure – Application to Strike Statement of Claim
Civil Procedure – Class Action
Civil Procedure – Judgments and Orders
Civil Procedure – Pleadings – Particulars
Civil Procedure – Queen's Bench Rule10-3(4), Rule 10-5(1), Rule 10-10

The applicants applied to have the respondent's class action statement of claim struck or, in the alternative, requested an order that the proposed plaintiff, the respondent, prove further and better particulars. The application resulted when the respondent did not reply to a request for particulars within 45 days as ordered. There was a consent order of the parties, which the chambers judge directed be issued on June 27, 2014, in chambers but for some reason, unknown to the court, the order did not issue until July 25, 2014. The consent order required the respondent to reply to a request for particulars within 45 days. The respondent replied to the request for particulars on August 15, 2014, which was within 45 days of the orders issue, being July 25, 2014, but not within 45 days of the chambers date when the court indicated the consent order could issue. The issue for the court was when the 45-day period began to run.
HELD: Rule 10-5(1) of the Queen's Bench Rules makes it clear that a judgment takes effect from the date it is pronounced regardless of when it issues. The rule refers to judgments though and not orders. The court preferred the approach in rule 10-3(4) where orders are specifically referred to and the rule uses the words "on which it was made" instead of pronounced. The court concluded that both Queen's

Bench rules as well as case law directed that an order takes effect from the date it is pronounced regardless of when it issues. The order took effect June 27, 2014, and therefore the respondent was four days late in replying to the request for particulars. The respondent did not apply to vary the terms of the consent order. The respondent did not advance any argument that the order should be amended pursuant to the common law or rule 10-10 of the Rules. The statement of claim was struck.
CORRIGENDUM dated November 5, 2014: [1] This will confirm the date set out on the first page of the judgment is amended to October 28, 2014.

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R. v. Alsager, 2014 SKQB 350

Laing, October 30, 2014 (QB14339)

Regulatory Offence – Wildlife Regulations
Statutes – Interpretation – Wildlife Regulations, 1981, Section 47
Statutes – Interpretation – The Wildlife Act, Section 63
Criminal Law – Obstruction – Appeal

The appellants appealed their convictions and sentences after trial in Provincial Court for the offence of hunting wildlife from an aircraft without a licence, contrary to s. 47(1) of The Wildlife Regulations, 1981. Erik Alsager was convicted of obstruction of a peace officer acting in execution of his duties pursuant to The Wildlife Act, 1998 and The Wildlife Regulations, 1981, contrary to s. 129 of the Criminal Code. They were each fined $7,500 for their first offence. Erik Alsager was also prohibited from obtaining any big game, bird or fur licence issued pursuant to The Wildlife Act, 1998 for one year and Jan Alsager for a period of two years. They were both prohibited from carrying a firearm in a helicopter for one year. The appellants operated a deer game farm licenced pursuant to The Animal Products Act. On the day on which the charges arose, they went out in their helicopter to check their property, its fences and gates. During the course of their survey, they saw coyotes attacking one of their deer. Erik Alsager landed the helicopter nearby, and Jan Alsager jumped out and shot the coyotes and then they returned in the helicopter. The appellants testified that coyotes had killed a large number of their herd and that they always carried a firearm in the helicopter because of the frequency of the attacks. A man working on a seismic crew near the property saw the helicopter and heard three gunshots fired from it when it was in the air. As he thought that the people in the helicopter might be involved in a government cull of animals, he called a friend to ask him to notify the government to let the authorities know that the crew was in the

vicinity. Eventually the notification was given to a conservation officer who worked in the area. Coincidentally, he had been observing the appellants at that time because of complaints received that they had been hunting out of their helicopter. He had observed the appellants arriving in their yard in their helicopter. Jan left the helicopter carrying what appeared to be a firearm and then reloaded it. He got back into the helicopter with the firearm and it left the yard. The officer called the RCMP to report what he had seen and would need backup from them if he entered the yard. Later when the helicopter returned, he contacted the RCMP and then entered the yard. He drove into the yard with his emergency lights flashing and yelled to Erik Alsager that he should put his gun on the ground. Erik ignored him and walked into a Quonset. The officer ran to the door and found it locked. Another conservation officer came to the yard and the two officers opened the door of the helicopter and found an open box of shotgun shells, with some missing. The officer again asked Erik for the firearm, but the appellant said that he would not speak to him and ignored his request. When an RCMP constable arrived, the appellant agreed to give him his shotgun. The appellant asked what the conservation officer's authority was to seize his gun and the officer informed him for the first time that he had reasonable and probable grounds to believe that unlawful hunting had taken place. The trial judge did not find the appellants' story credible – she believed that that they had shot the coyotes from the air and found them guilty.
The appellants' grounds of appeal were: 1) that the trial judge erred because there was no direct evidence that the appellants had shot from the helicopter; 2) the conservation officer had carried out an illegal search of the appellants' property by entering it without a search warrant, and the seizure of the shotgun and ammunition should have been excluded from evidence pursuant to s. 24(2) of the Charter; 3) that the conservation officer was not in the lawful execution of his duty, and if he was, the Crown had failed to prove that Erik Alsager knew that he was in the lawful execution of his duty; and 4) the appellants' sentences were not proportionate to the gravity of the offences.
HELD: The court dismissed the appeal with respect to the convictions regarding hunting but allowed Erik Alsager's appeal from his conviction for obstruction and allowed the appellants' sentence appeal. With respect to the grounds of appeal, the court held that: 1) s. 47 of the Regulations does not require that the purpose of hunting wildlife from an aircraft to be the only purpose, or the main purpose. It is sufficient if it is a purpose. On the evidence, the trial judge concluded that the appellants were operating from a helicopter and shooting at coyotes. The trial judge accepted the evidence of the witness and rejected the explanation of events offered by the appellants and did not err in law in making this finding; 2) as s. 61(3) of The Wildlife Act, 1998 authorizes a search without a warrant, the trial judge's conclusion that that the conservation officer was involved

in an investigation from the time he called the RCMP until he observed one of the appellants removing a firearm from the helicopter was valid and so was her conclusion that he had reasonable and probable grounds to believe that an offence pursuant to s. 47.1(1) of the Regulations was being committed was also valid. The judge accepted the officer's explanation that he would not have had time to obtain a warrant while he waited for the appellants to return in their helicopter and would have lost the opportunity to seize the evidence of hunting; 3) the trial judge erred in convicting Erik Alsager of obstruction as the appellant was not informed by the conservation officer of the reason for his demand that he turn over his firearm. The Crown had failed to prove that the appellant knew that the officer was acting in the lawful execution of his duty and that he willfully obstructed him in the execution of it; and 4) the sentences should be reduced to a fine of $3,500 for Erik Alsager and $2,500 for Jan Alsager as these were first offences and the sentences were not proportionate to the gravity of the offences and were outside the range of fines imposed for a first offence of unlawful hunting identified in R. v. Hoff.

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Ratt (Litigation Guardian) v. Tournier, 2014 SKQB 353

Acton, October 30, 2014 (QB14333)

Statutes – Interpretation – Education Act, Section 232(1)
Torts – Breach of Privacy
Torts – Negligence – Duty of Care

The plaintiff, litigation guardians for a minor, claimed a breach of privacy or negligence against the defendants, a vice principal and a school division. The particular school had a clearly communicated cell phone policy in place in 2009–2010 prohibiting their use during school hours. The minor acknowledged that he was aware that he could not use his cell phone during class. On March 10, 2010, the minor took his cell phone to class, and when he was caught texting, he reluctantly turned the phone over to his teacher. The phone was given to the vice-principal, who checked the phone and noticed the words "we stole a car". When the minor was asked about the text, he indicated that he was not personally involved in the theft. The vice-principal testified that he did not usually look at the content of the phones but that he was concerned in this instance because the minor had been suspended on two previous occasions for fighting and the teacher indicated that the minor was trying hard to conceal the message and did not want to turn in the phone. The vice-principal indicated that he was concerned for student safety. The police were notified. The police had the minor reply to the text and get the location of the stolen vehicle. The minor

was taken by the police to locate the vehicle. The minor's litigation guardian indicated that the minor had to be taken away on weekends after the incident to avoid being assaulted by the individuals who stole the vehicle. The issues were: 1) whether the defendants breached the minor's privacy rights; 2) whether the defendants breached the standard of care owed to the minor; and 3) whether the minor experienced harm from the alleged breaches.
HELD: The court did not believe that the minor was leaving on weekends to avoid assaults, but found that he was leaving to visit his mother and other grandparents. The issues were resolved as follows: 1) the court found that s. 232(1) of The Education Act, which absolves teachers of liability, did not apply in this instance. Students can expect some degree of privacy with respect to their cell phones; however, that expectation is reduced when they are violating a school policy they are aware of. The responsibilities of the school staff outweigh the student's right to privacy when there is a concern for violence or threats to personal safety of students as there was in this matter. The court also found that the minor's right to privacy pursuant to s. 34 of The Privacy Act was not breached; 2) the defendants were found to apply the cell phone policy in a prudent, appropriate and reasonable manner and as a prudent or careful parent would; and 3) there were no damages proven as a result of the defendants' actions.

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Lidguerre v. Mercredi, 2014 SKQB 357

Zuk, October 3, 2014 (QB14343)

Statutes – Interpretation – Federal Court Act, Section 18
Aboriginal Peoples – Jurisdiction of the Courts – Band Elections
Constitutional Law – Courts – Jurisdiction
Injunction – Interlocutory Injunction – Requirements

The plaintiff, the Chief of the Fond du Lac First Nation (FLFN), made an application without notice for an interlocutory injunction in relation to actions taken by the defendants in their capacity as members of the Executive Advisory Committee (EAC) for the Fond du Lac Densuline First Nation (FDLDFN). He also sought an interlocutory injunction against Mercredi and Lidguerre in their capacities as Chief Electoral and Deputy Electoral Officers, preventing them from initiating or continuing with a by-election to fill the position of Chief of the FLFN. The applicant was elected chief in 2011 and again in October 2013, pursuant to The Fond Du Lac Densuline First Nation Election Act, under which the band had codified its election procedure. The band also enacted The Fond Du Lac First Nation Executive Act, which established a code of conduct for the chief and

councillors and provided for the creation of the EAC. Under The Executive Act, a member was able to bring a motion of no confidence against the chief or councillors for breaches of their duties and any motion may be referred to the EAC, which then was to call a band meeting. In this case, the applicant alleged that he was advised by the EAC that he was no longer the chief, that another person had been appointed acting chief in the interim and by Mercredi that a new chief would elected immediately pursuant to the process described above. The applicant took the position that his removal from office was unlawful and that he remained the chief and requested an injunction preventing the by-election. The issues before the court were whether: 1) the Court of Queen's Bench had jurisdiction to grant an injunction regarding the band election and whether it had the right to grant an interim injunction to prevent the removal of the chief; and 2) the facts warranted the granting of the injunction.

HELD: The court held that it had jurisdiction to grant injunctive relief in the circumstances and that it would grant the interim injunctions requested by the applicant. It held with respect to the issues that: 1) the fundamental basis for the application arose from the removal of the applicant as chief pursuant to The Fond Du Lac Executive Act. As the Indian Act contains no powers relating to internal band governance, the EAC was not acting pursuant to that Act. Thus s. 18 of the Federal Court Act had not removed the jurisdiction of the Court of Queen's Bench in the present circumstances; and 2) that the facts warranted granting the injunctions. The applicant had met the requirements of establishing that there was a serious question to be tried and that irreparable harm would arise if the injunction was not granted because of the confusion created in the community and on the balance of convenience, there would potentially be two persons claiming to be the properly elected chief.

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