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Subject Index

Dickinson v. Joyes, 2015 SKCA 133

Lane, December 2, 2015 (CA15133)

Family Law – Custody and Access –Interim – Leave to Appeal

The applicant father sought leave to appeal an interim order changing the school that his children are to attend. The children are ten and eight years of age. The parties had agreed the children would attend the school because it was convenient for both parties and it would enable the applicant's access and participation in their activities. The respondent, the children's primary caregiver, then indicated that the selected school would be difficult for her because of issues of transportation. She wanted to transfer them from the selected school in Corman Park to the school in Outlook where they resided. A pre-trial conference had been scheduled.
HELD: The application was dismissed. The court would not normally interfere with interim custody and access orders, and in this case an appeal would unduly delay proceedings. The applicant could raise his concerns at the scheduled conference, which should be held as soon as possible.

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R. v. Bird, 2015 SKCA 134

Ottenbreit Herauf Whitmore, December 8, 2015 (CA15134)

Criminal Law – Sentencing – Dangerous Offender – Determinate Sentence – Appeal

The respondent pled guilty to a charge of sexual assault contrary to s. 271 of the Criminal Code. Upon his conviction the Crown applied to have him designated as a dangerous offender pursuant to the provisions of Part XXIV of the Code and sought an indeterminate sentence. The sentencing judge declared the respondent to be a dangerous offender and determined that a determinate sentence of incarceration followed by a long-term supervision order would adequately protect the public, and therefore, an indeterminate sentence was not required under s. 754(4.1) of the Code. The judge then imposed a five-year sentence of imprisonment and long-term supervision order of three years (see: 2014 SKQB 75). The Crown appealed the sentence, arguing that the sentencing judge erred: 1) in misapplying the sentencing principles in s. 718 to s. 718.2 of the Code. In this case, the predicate offence committed by the respondent was touching the penis of a 14-year-old boy overtop of his clothing. The judge found that an indeterminate sentence was disproportionate to the gravity of the offence and contrary to s. 718.2(b) and (d) of the Code. The Crown submitted that the principle of proportionality was already incorporated in Part XXIV of the Code, and thus, there was no need for the judge to consider the gravity of the offence. In addition, the respondent had a lengthy history of sexual offences committed against young boys who were the children of his friends or relatives; and 2) in his consideration of whether there was a reasonable expectation that a lesser sentence than an indeterminate sentence would protect the public. The Crown maintained that the judge substituted hope and conjecture instead of the "reasonable expectation" required so that a lesser sentence would adequately protect the public. The judge ignored the negative evidence that had been admitted, namely that the respondent was at high risk to reoffend sexually and he had shown an inability to internalize treatment that he had received or make appropriate lifestyle changes, as shown by his violation of the condition in an earlier probation order not to have contact with children.

HELD: The appeal was allowed. The court set aside the determinate sentence and long-term supervision order and imposed an indeterminate sentence. The court held with respect to the issues that the sentencing judge erred: 1) in finding that an indeterminate sentence was disproportionate in the circumstances. The offence committed was within s. 271 of the Code and defined in s. 752 of the code as a serious personal injury offence. The judge was wrong in finding that the respondent's criminal record consisted of minor sexual assaults; and 2) by overemphasizing the positive factors and underemphasizing the negative ones in coming to his conclusion that a lesser sentence than an indeterminate sentence would adequately protect the public.

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Hang v. Dorchester Institution (Warden of), 2015 SKCA 135

Herauf, December 8, 2015 (CA15135)

Criminal Law – Prisons & Prisoners – Regulation of Prisons – Prisoner's Rights
Constitutional Law – Charter of Rights, Section 7, Section 15

The appellant applied for various forms of relief from the warden of Dorchester Institution in New Brunswick where the appellant was serving an indeterminate sentence. The appellant brought this application in the context of a civil appeal in Saskatchewan involving his mother's estate. The Warden was not a party to that action. The appellant alleged that the warden had violated his ss. 7 and 15 Charter rights and sought an order that the warden provide him with, among other things, access to his computer, direct access to CanLII and a photocopier, interlibrary loans and an FTR reader program. The appellant admitted that he could pursue this type of relief through the Inmate Grievance Procedure but that the process was too time-consuming.

HELD: The application was dismissed. The court could not adjudicate the dispute because the applicant had not alleged any specific legislation, regulation or policy to be non-compliant with the Charter so that the warden could not defend or justify his actions.

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R. v. Ahpay, 2015 SKCA 136

Jackson Ottenbreit Ryan-Froslie, December 9, 2015 (CA15136)

Criminal Law – Motor Vehicle Offences – Driving While Disqualified – Sentencing – Appeal

The respondent was convicted in Provincial Court of driving while disqualified contrary to s. 259(4) of the Criminal Code and received a six-month jail sentence and a one-year driving prohibition. The Crown sought leave to appeal the sentence. It had asked for a two-year sentence based upon the respondent's 11 previous offences for driving while disqualified. The sentencing judge found that the respondent had not committed any such offences since 2007. The respondent was a 47-year-old Aboriginal man who had been gainfully employed since 2001 and was supporting his family and his reserve community. The sentencing judge noted that many Aboriginal people do not avail themselves of services offered by Saskatchewan Government Insurance

that would assist them in regaining their driving privileges.
HELD: The appeal was dismissed. The sentencing judge took into account the Gladue factors mentioned in the respondent's pre-sentence report and those factors were appropriate. The sentence was not demonstrably unfit.

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R. v. Hunter, 2015 SKCA 137

Lane Caldwell Whitmore, December 9, 2015 (CA15137)

Criminal Law – Motor Vehicle Offences – Dangerous Driving – Acquittal – Appeal

The respondent was acquitted of the charge of dangerous driving and the Crown appealed the acquittal. The respondent had been driving from Regina to her home with two passengers. She fell asleep at the wheel and the vehicle rolled, ejecting one passenger and causing his death. The respondent testified that she had not stopped driving despite knowing that her eyes had closed at one point because she was so close to her destination. The trial judge found that a reasonable person in the circumstances would not have foreseen the risk of falling asleep. The Crown alleged that the finding that the respondent lacked the necessary objective mens rea constituted a reversible error since the judge had already found that the actus reus of the offence had been committed when the respondent subjectively knew that there was a risk of falling asleep.
HELD: The appeal was dismissed. The court found that the offence of dangerous driving would only be made out if the care exhibited by an accused constituted a marked departure from the norm. The trial judge had not erred. She acquitted the respondent because she found that the respondent had not exhibited a marked departure from the norm.

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Borowski v. Stefanson, 2015 SKCA 140

Richards Jackson Ryan-Froslie, December 15, 2015 (CA15140)

Civil Procedure – Court of Appeal Rule 47

The applicant had lost an election to the council for the respondent rural municipality. He unsuccessfully challenged the validity of the election pursuant to s. 19 of The Controverted Municipal Elections Act (see: 2013 SKQB 133). He appealed the Queen's Bench judge's decision.

R. v. Nayneecassum

R. v. Nguyen

R. v. Parada

R. v. Pristupa

S. (C.J.), Re

Saskatchewan (Attorney General) v. Ballantyne

Sauer v. Benko

Schulz v. Schulz

Stirrett v. Hyas (Village)

The Court of Appeal allowed the appeal subject to the applicant taking some procedural steps to get the question of the validity of the election before a Queen's Bench judge for consideration. The court set out in an appendix the form of recognizance that the applicant was required to provide pursuant to s. 19 of the Act if he wished to continue with his challenge (see: 2015 SKCA 70). The applicant then filed a notice of motion that sought relief from the decision, including a judicial review or reconsideration of the contents of the appendix.
HELD: The application was dismissed. The court held that in order to hear the matter, it would consider it as an application of rehearing pursuant to Court of Appeal rule 47. There were no special or unusual circumstances warranting such a rehearing, and an allegation that a decision was wrong was insufficient to trigger it.

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R. v. Pristupa, 2015 SKPC 139

Gordon, November 24, 2015 (PC15148)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08
Criminal Law – Defences – Non-insane Automatism

The accused was charged with operating a vehicle when his blood alcohol content exceeded .08 contrary to s. 255(1) and s. 253(1)(b) of the Criminal Code and with operating a vehicle while his ability to do so was impaired by alcohol contrary to s. 255(1) and s. 253(1)(a) of the Code. The evidence established that the accused's blood alcohol content was very high at the time that he had operated his vehicle. The issue was whether the accused had established on a balance of probabilities that he was in a state of non-insane automatism. The charges arose after four witnesses saw the accused drive into the parking lot of a liquor store and hit another vehicle. The accused pushed the other vehicle forward before he stopped his vehicle and got out of it. The witnesses testified that the accused seemed unaware that he had hit the other vehicle and when questioned by them, denied it. He appeared confused and dazed. He staggered when he walked into the liquor store, his eyes were bloodshot and he smelled of alcohol. The accused went into the liquor store but left without purchasing anything. A police officer summoned to the scene testified that he noted the same signs of impairment and had trouble getting the accused into the back of the police cruiser. The accused said that he had drunk a couple of bottles of champagne. He responded affirmatively to the officer's request for a Breathalyzer demand and to whether he wanted to contact counsel. The accused testified that he suffered from PTSD due to his military service in Africa in 2006. His

condition had not been officially diagnosed but he showed the symptoms of the condition. The physician at the accused's air force base prescribed the antidepressant Ativan in February 2015. He was told that the drug would take effect within a couple of weeks and to take them on an as-needed basis and the effect would last about eight hours. There was no discussion as to the consumption of alcohol with either the physician or the pharmacist when the prescription was filled. The pill bottle's label did warn that alcohol might intensify the sleepiness that the drug caused. During the evening before the episode in the parking lot, the accused had taken two pills over a couple of hours and believed that he had had only a couple of sips of wine but could not remember anything until he was being asked questions at the liquor store the next day. He said that he had not put his socks on or dressed properly or taken his wallet when he drove to the liquor store, which all indicated that he wasn't acting voluntarily. When he returned to his home afterward, he discovered that of the five bottles of wine that he knew were in the house, three of them were empty. The defence called a pharmacist who qualified as an expert in the area of medications and their effect. She testified that individuals taking Ativan in combination with consuming alcohol could suffer from blackouts.

HELD: The accused was found guilty of the first charge and the second charge was stayed. The court found that the accused had not established on a balance of probabilities that his impairment was due to automatism. The accused had voluntarily consumed alcohol and the drug being fully aware of the warnings against doing so. The court found that the accused did not have an adverse reaction to the combination of alcohol and the drug which caused him to black out after a few sips of wine and then obviously drank much more than he intended. The fact that he drank too much was not a defence.

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R. v. Keller, 2015 SKPC 157

Toth, December 1, 2015 (PC15154)

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

The accused was charged with indecent exposure contrary to s. 173(1)(1) of the Criminal Code. The Information was sworn on August 30, 2013, and the accused's first court appearance was on September 26, 2013, when the Crown elected to proceed summarily. The accused pled not guilty and the trial was set for April 2014. On that date, the Crown asked for an adjournment because the complainant had left Canada for three months. The defence opposed the adjournment but it was granted. In August 2014 the trial commenced, but the Crown informed

the court that only four of its five witnesses were available to testify. The Crown asked the court to allow the four witnesses to testify and then to adjourn the case until the fifth witness was heard. The judge granted the request but during it decided to step down because she knew the accused's wife. The judge who replaced her adjourned the matter for written submissions on how to proceed. In September 2014, the defence applied for a stay of proceedings on the basis that the accused's right to be tried within a reasonable time pursuant to s. 11(b) of the Charter, and the Crown requested a further adjournment to prepare for the Charter argument. In November 2014, the judge ruled that he was not bound by the previous judge's ruling to grant the Crown's request for an adjournment in August. A stay of proceedings was entered because the new trial judge decided that he would not have granted the Crown its requested adjournment and thus the matter would have been dismissed in August because the Crown was not in a position to proceed. The judge did not rule on the Charter application. The Crown successfully appealed the order. The Queen's Bench judge held that a stay was only available in the clearest of cases and returned the matter to the Provincial Court to deal with Charter application (see: 2015 SKQB 174).

HELD: The Charter application was granted and the proceeding stayed based upon ss. 11(b) and 24(1) of the Charter. The judge found pursuant to a Morin analysis that: 1) the length of delay was 18.5 months, which was sufficient to trigger the inquiry because the case was an uncomplicated summary conviction matter; 2) the accused had not waived any time periods; 3) as the matter was not complicated and the Crown had not explained why it did not have the disclosure package ready at the time of the accused's first court appearance in September 2013, he would attribute one month to inherent delay; 3) the actions of the accused had not contributed to the delay; 4) the Crown was responsible for three months of delay based on the second adjournment as it should have sought a warrant for the arrest of the witness who had gone on holidays and for the delay caused when the Crown asked for adjournment when the Charter application was made as it should have known that defence counsel would oppose further delay; 5) eight months of delay could be attributed to institutional delay; and 6) the accused had suffered severe stress and anxiety caused by the charge. The prejudice caused to the accused by the delayed trial outweighed the public interest in the adjudication of the case.

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Stirrett v. Hyas (Village), 2015 SKPC 163

Reis, December 3, 2015 (PC15155)

Statute – Interpretation – Municipalities Act, Section 340

The plaintiff claimed damages in the amount of $2,600 against the defendant village because of the effect of the defendant's sewer backing up in her basement. The defendant investigated the matter but because the ground was frozen, the problem could not be fixed. Eventually it discovered that the pipe was not broken but that a rock had caused a stoppage.
HELD: The action was dismissed. The court found that the defendant was not liable pursuant to ss. 340(1) and (2) of The Municipalities Act and the plaintiff could not show an intentional tort or negligence or breach of statutory duty on the part of the defendant.

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R. v. Nayneecassum, 2015 SKPC 172

Daunt, December 7, 2015 (PC15157)

Criminal Law – Robbery – Armed Robbery – Sentencing
Criminal Law – Aboriginal Offender – Sentencing

The accused pled guilty to four offences of robbery wherein she used violence or threats of violence, contrary to s. 344(1)(b) of the Criminal Code. These offences were committed during a four-month period. The accused carried a syringe or syringes containing blood and threatened the clerks of various stores that she would stab them with the syringe and inject them with AIDS-infected blood. After her arrest the accused was released on a recognizance and breached the conditions of it three times contrary to ss. 145(2) and (3) of the Code. She also willfully obstructed a police officer by providing a false name, contrary to s. 129(a) of the Code. The accused, a 33-year-old Aboriginal woman, was raised by her parents on the Ahtahkakoop Cree Nation. Her mother had attended residential school. Both of her parents were alcoholics but managed to become sober by the time the accused was ten years of age. The accused had a six-year-old daughter and they lived together on the reserve until the accused's drug addiction problem grew so severe that she left the child with her parents and went to live on the streets. Her brother died in 2014 of an overdose. The Crown asked for a penitentiary sentence and the defence sought a six-month jail sentence followed by a lengthy probationary period.
HELD: The accused was sentenced to a three-year penitentiary sentence to reflect the seriousness of the four robberies. As they had been committed in a short period, the court applied the totality principle and ordered the sentences to be served concurrently. The accused was given 101 days credit for 67 days remand time, leaving 994 days to be served. The court considered the aggravating factors to be: vulnerable victims; multiple robberies; a nasty threat; and the failure of the accused to take any steps toward restitution or

rehabilitation. The mitigating factors were that the accused had pled guilty early and expressed remorse, that she did not have a criminal record and that the victims had not suffered any injuries. The Gladue factors were taken into account. However, to meet the goal of denunciation and considering the fact that the accused failed to follow through on her bail plan indicated that she was not ready for a rehabilitative sentence.

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5 Point Contracting Ltd. v. J & S Hospitality, 2015 SKPC 174

Matsalla, December 8, 2015 (PC15164)

Civil Procedure – Small Claims Court
Contract Law – Consensus Ad Idem
Small Claims – Breach of Contract

The defendant company retained the plaintiff company to do renovations to its hotel. The plaintiff claimed $20,000 as the amount left owing for the renovations. The defendant argued that the plaintiff did not complete its obligations under the contract and there was no money owing. The plaintiff provided an estimate of $78,036 for the work but noted that it was only an estimate and the work would be billed on an hourly basis plus materials used. The second invoice provided to the defendant indicated $23,880.34 was owing. The plaintiff did not return to the job site when the defendant's shareholder advised the amount owing would not be paid. A few days later the defendant paid $10,000 but the parties could not resolve their issues. The plaintiff argued that some of the work left to be done was as a result of the defendant not wanting it completed. The defendant argued that the agreement was to do the work at a set price, not to exceed $70,000.
HELD: The court considered all of the surrounding circumstances determined that a reasonable, objective person observing the communication between the parties and their conduct throughout would conclude that the defendant had agreed to pay for labour at the rate set out by the plaintiff and for materials as billed to do whatever renovation work as requested. The defendant therefore owed the plaintiff for the cost of unpaid labour and materials. An implied term of the contract was that work be "done in a good and workman like manner". The court concluded that the cost to repair a carpet seam would be $400.00. Some of the other work not done was determined to be as a result of the defendant requesting that it be left "as is". There was not an agreement between the parties that the defendant would pay for the time spent to give the estimate. The amount owing exceeded the monetary jurisdiction of the court and therefore the

judgment was reduced to $20,000 less $400 for the carpet repair and $660 for additional labour costs. Pre-judgment interest and costs of $100 were also ordered. The plaintiff received judgment in the amount $19,240.35

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Crowe v. Thomas, 2015 SKPC 176

Demong, December 9, 2015 (PC15159)

Real Property – Lease – Termination – Damages
Tort – Negligent Misrepresentation – Damages

The plaintiff entered into a five-year lease agreement with the defendant whereby he was to pay rent in the amount of $3,400 per year by two equal payments to be made the first day of April and October. In 2011 the plaintiff alleged that she tried on numerous occasions to make contact with the defendant about the April 1 payment because the defendant had made late payments in the past. When the date passed without receiving payment, the plaintiff left a notice at the defendant's house advising him that because of default the lease was terminated and that she intended to re-enter and repossess the land. The lease provided that if default of payment occurred, the full amount of the rental became due and payable. The plaintiff brought an action for the full amount of the rental. The defendant claimed that he had made diligent efforts to make payment by going to the plaintiff's residence twice without finding her at home. He argued that he was willing and able to make the payment but the plaintiff prevented him, and therefore the lease should not have been terminated and he was entitled to the possession and use of the land. The plaintiff further claimed the sum of $9,600, which arose from her alleged loss of opportunity to obtain monetary benefits from a federal-provincial government program relevant to the leased land. The defendant applied for and received these monies after the lease had been terminated. The plaintiff argued that the defendant had made a negligent misrepresentation and that she claimed damages arising from that tort.
HELD: The plaintiff received judgment in the amount of $13,000, which included $3,400 for her claim to the full amount of the lease rental for a year and for the sum of $9,600 that the defendant obtained from the government program. The court did not accept the defendant's testimony. Under the terms of the lease he knew when payment should be made and the lease provided that it could be mailed to the plaintiff. He could not rely on the allegation that he tried to pay her at her house but she wasn't home. The plaintiff was entitled to the full rental sum as stipulated in the lease as liquidated damages.

The defendant knew or should have known the plaintiff had terminated the lease and had taken possession of the land when he applied for benefits under the government program. The court found that he had made a negligent misrepresentation to the program, which worked to the plaintiff's detriment.

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R. v. Barber, 2015 SKPC 178

Bazin, December 15, 2015 (PC15168)

Municipal Law – Dangerous Dog – Destruction Order

The accused owned a pit bull dog that had attacked and injured a calf. The dog had been adopted by the accused from an animal shelter and had not shown any aggressive tendencies before this episode. The accused had pled guilty to the charge of owning an animal that, without provocation, attacks a domestic animal under s. 376(4) of The Municipalities Act. The issue was whether the public could be protected from the dog, either through conditions of care or whether the dog should be destroyed.
HELD: The dog was ordered to be destroyed because of the seriousness and unprovoked nature of the attack and the injuries caused to the calf and the potential that he had to inflict harm.

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Cheon v. Altern Properties Inc., 2015 SKQB 23

Schwann, January 26, 2015 (QB15021)

Landlord and Tenant – Residential Tenancies Act – Hearing – Appeal

The tenant appealed the decision of a hearing officer of the Office of Residential Tenancies wherein he granted the respondent landlord's order for possession. The respondent had first served the appellant with a notice to vacate because he had been in arrears of rent for more than 15 days. The notice was served by ordinary mail at the appellant's rental address and by posting a copy of the notice to vacate on the entrance door. When the appellant failed to vacate, the respondent applied for an order for possession. Service of it was effected in the same manner as the notice to vacate. At the hearing, the appellant and a friend appeared as well as a representative of the respondent. The appellant argued that he had called the respondent's office and spoken to one of his staff. He told this person that he would be able to pay the

rent by the end of the month and the person said that was acceptable. The respondent's agent said that none of the respondent's staff had authority to make such an arrangement. The appellant advised the hearing officer that he was disabled and that he would receive funds for the rent from his father by the end of the month. The hearing officer found that the respondent had proven its claim and an order for possession was granted. The appellant appealed on the grounds that: 1) the notice to vacate was not properly served. He should have been personally served, and further, he had found the notice on the ground instead of posted on his door; 2) his proposal had been accepted by the respondent's staff; 3) the hearing officer lacked impartiality and had failed to conduct a fair hearing because the officer had only asked him a few questions and had not permitted him to explain.
HELD: The appeal was dismissed. The court found with respect to each ground that: 1) the respondent had complied with the requirements for service under s. 82 of The Residential Tenancies Act, 2006 – it did not require personal service. There was no evidence that the notice had not been posted. The appellant admitted that he had received the notice; 2) the appellant had not suffered actual prejudice as a result of relying upon the staff person's assurance and, therefore, his estoppel argument could not succeed; and 3) the court was satisfied that the hearing officer heard evidence from the appellant. The number of questions he asked did not constitute a legal error nor was he required to mediate the dispute. Although s. 70(11) of the Act allows relief from an order of possession, the factors did not include a consideration of the appellant's circumstances in this case.

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R. v. Gryba, 2015 SKQB 372

Popescul, November 20, 2015 (QB15373)

Criminal Law – Defences – Autrefois Acquit, Autrefois Conviction

The accused brought an application for autrefois acquit and autrefois conviction. He was originally charged with four counts of child pornography–related offences. Pursuant to a search warrant, the police seized a tower computer, a laptop and two encrypted DataLocker external hard drives. The police examined the two computers and discovered 25 child pornography files and 2,126 screen-captured pornography files stored on them. The police were unable to access the encrypted hard drives. The Crown stayed two of the charges after the accused pled guilty to the other two charges of making child pornography available contrary to s. 161.1(3) of the Criminal Code and possession of child pornography contrary to s. 163.1(4) of the Code. At the time of sentencing, the Crown made it clear that the sentencing

process before the court did not include any information that might be found on the accused's encrypted hard drives. After the Crown deciphered the code and examined the hard drives, the accused was charged with seven counts of child pornography–related offences at varying dates pertinent to the specific charges which included: 1) two counts of possession, contrary to s. 163.1(4); 2) two counts of making, contrary to s. 163.1(2); two counts of committing voyeurism, contrary to s. 162(1)(a); and 4) one count of accessing, contrary to s. 163.1(4.1). The counts of possession, making and voyeurism related to a folder on the hard drive that contained a series of videos of nude boys surreptitiously recorded by the accused. As four of the images found within the folder were the same images referred to in the original sentence hearing, the defence argued that the new charges were substantially identical to the offences for which the accused was previously brought before the court. The accused submitted that the stay of two of the counts from the previous proceedings were tantamount to acquittal and thus the plea of autrefois acquit applied to them.

HELD: The court denied the application. It held that the accused failed to establish the basis for the special pleas. The court found that the plea of autrefois acquit did not apply to the five counts arising from the contents of the hard drive as they related in fact to the videos and not the images that had been the subject of the previous proceeding. Thus, they were substantially different charges than those for which the accused had been found guilty. Similarly, the court held that the final two charges of possession and accessing, arising from 12,775 unique child pornography images discovered on the hard driver, were from a different time frame than those images covered by the two counts of the original indictment. The Crown's stay of the two charges from the original proceeding against the accused was not an acquittal, and therefore the plea of autrefois acquit was denied with respect to those charges.

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R. v. Parada, 2015 SKQB 380

Gabrielson, November 27, 2015 (QB15375)

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

The appellant appealed her conviction by a Provincial Court judge of driving while her blood alcohol level exceeded .08 contrary to ss. 255(1) and 253(1)(b) of the Criminal Code (see: 2014 SKPC 116). The grounds of appeal were that the trial judge erred: 1) in ruling that the testimony related to the Standard Field Sobriety Tests (SFST) was not expert

opinion testimony triggering the provisions of s. 657 of the Criminal Code; and 2) in ruling that the Breathalzyer tests were administered as soon as practicable. The appellant argued that the RCMP officer's testimony constituted expert opinion due to the fact that he had received 40 hours of classroom training, had had to write an exam in order to obtain his SFST certification, and that there was a subjective element in that he formed opinions based upon the results of the tests. He had given very detailed opinions in this case, including estimated blood alcohol concentrations based upon the results of the tests given to the appellant. Since s. 657.3 required that specific notice be given at least 30 days before the commencement of a trial when a party intends to call an expert witness, the officer's testimony should not have been admitted. The officer based the Breathalyzer demand upon the results of the SFST, and therefore without the evidence, the demand could not have been made. Accordingly, the appellant should have been found not guilty of the charge. The appellant argued with respect to the second ground that there had been no evidence to explain the 30-minute delay between the arrival of the officer and the appellant at the RCMP detachment. Defence counsel argued that the norm dictated the first sample should be taken within 18 minutes.

HELD: The appeal was dismissed. The court held with respect to each issue that: 1) the trial judge was correct in his determination that the officer did not have to be qualified as an expert or notice given pursuant to s. 657.3 of the Code before he could testify as to the results of the physical coordination tests that he carried out on the appellant; and 2) the trial judge's decision that the breath sample was taken as soon as practicable was correct. There is appellate authority that as long as the Breathalyzer tests are done within the two-hour limit and there is a reasonable explanation regarding delay, an appellate court will not overturn a trial judge's findings in this regard. The trial judge found that there was an explanation for the delay in this case: the officer testified that the machine's standard solution needed to be changed because it was older than two weeks, that he had to run a validating test after the change and that he waited to do a proper 15-minute observation period of the appellant prior to the testing.

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R. v. B. (A.M.), 2015 SKQB 383

Kalmakoff, December 2, 2015 (QB15377)

Criminal Law – Sexual Touching – Child Victim – Appeal

The appellant was convicted after trial in Provincial Court of the charge that she did, with a sexual purpose, invite a person under the age of 16 years to touch a part of her body contrary to s. 152 of the Criminal

Code (see: 2014 SKPC 78). She appealed her conviction and sentence. The appellant had been represented by counsel at trial, but represented herself on the summary conviction appeal. She raised numerous grounds of appeal, which included that the trial judge had erred in failing to apply the correct legal standard regarding the mens rea component of the offence. The trial judge had found, based upon the testimony of the appellant's eight-year-old son and a tenant who lived in her house that the appellant had first requested her son to massage her while she was naked and then asked the tenant to take pictures of the episode. The trial judge relied upon the Supreme Court's decision in R. v. Chase as establishing that the test to determine whether an accused had committed the offence of sexual assault was an objective one. He then went on to find that a reasonable person would conclude that there was a sexual aspect in the circumstances.
HELD: The appeal was allowed on this ground only. The conviction was set aside and a new trial ordered. The trial judge had erred in applying the objective test associated with sexual assault, an offence of general intent. The offence of invitation to sexual touching is one of specific intent. The words "for a sexual purpose" in s. 152 of the Code requires that the Crown must prove that the invitation by the accused to have the complainant touch the accused or someone else was done for a sexual purpose.

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Alignvest Private Debt Ltd. v. Naber Specialty Grains Ltd., 2015 SKQB 384

Rothery, December 3, 2015 (QB15378)

Debtor and Creditor – Receiver – Approval of Sale

The plaintiff, a secured creditor of the defendant Naber and Melfort Grain (Naber), applied for a receivership order appointing Ernst & Young as the receiver of Naber because it had committed some defaults under the plaintiff's security agreements. After the order was granted, the receiver implemented a tendering process to sell Naber's operation. The highest offer was very low and the plaintiff objected to the receiver accepting it. The plaintiff applied to the court for an order determining whether or not the offer should be accepted. Counsel for the offeror submitted that although the offer might be low, it reflected the fair market value of the property and that the integrity of the sales process must be upheld. The receiver did not recommend the proposed sale.
HELD: The application was granted. The court found that the receiver's notice of sale clearly stated that the highest or any tender would not necessarily be accepted. The offeror would be reimbursed

for its entire deposit, so the integrity of the process would not be undermined. The court also found that the offer was so low in comparison to the appraised value of the property that it would be unfair to the interests of the creditors to approve it at this stage.

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R. v. Louie, 2015 SKQB 385

Barrington-Foote, December 3, 2015 (QB15379)

Criminal Law – Assault – Sexual Assault – Application for Appointment of Counsel to Cross-examine Complainant
Criminal Law – Application for Court-appointed Counsel

The accused was charged with sexual assault pursuant to s. 271 of the Criminal Code. He applied for court-appointed counsel and the Crown applied for the appointment of counsel to cross-examine the complainant pursuant to s. 486.3. The accused submitted that if his application was granted, it would make the s. 486.3 application irrelevant.
HELD: The application for court-appointed counsel was denied and the Crown's application was granted. In the case of the accused, he had not proven that he was indigent. His net family income was just over $4,000 per month. Although this amount was barely sufficient to meet the needs of the family, the court found that the accused's expenses demonstrated that he had not made an effort to be financially prudent and to prioritize legal fees. As a result of amendments to s. 486.3, effective July 22, 2015, it was mandatory for the court to order the appointment of counsel to cross-examine the complainant. In this case, the lawyer who had made the application on behalf of the accused for court-appointed counsel advised that she would accept the appointment to cross-examine the complainant and would be willing to assist the accused regardless of whether his application was granted. Thus the accused would be represented throughout the trial as long as the lawyer was appointed on the s. 486.3 application.

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R. v. Dunford, 2015 SKQB 386

Krogan, December 4, 2015 (QB15381)

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

The accused was found guilty of dangerous operation of a motor vehicle causing death contrary to s. 294(4) of the Criminal Code (see: 2015 SKQB 386). The accused, a 47-year-old man, had driven along 13 kilometres of highway with signs posted advising motorists to be prepared to stop and to reduce their speed because of road construction and the presence of construction crews ahead. The accused was aware of this construction zone as he had earlier travelled the same stretch of highway but was not paying attention to his whereabouts or the road conditions at the time of the offence. The accused maintained normal highway speed of 90 to 100 km/hr and had passed two trucks that were slowing down when he struck and killed a woman who was employed as a flag person. The accused stopped immediately and called 911. He cooperated with the police when they arrived, and they established that alcohol was not a factor. The accused did not have a criminal record but had committed driving infractions within the last four years such as failing to stop his vehicle and speeding. He had been employed all his life and had been trained as a truck driver. Many letters testifying to his good character were filed with the court. The accused had expressed his remorse to the victim's family. Four victim impact statements were also filed that indicated the grief suffered by the victim's family and partner. The accused submitted that a period of incarceration would not be appropriate because it was not necessary to separate him from society as he had no previous criminal record and there was no risk that he would reoffend. He had accepted responsibility for the incident and stated that there was no need for rehabilitation. The goals of deterrence and denunciation could be achieved through a period of probation with strict conditions and a two-year driving prohibition. The Crown argued that the accused's degree of responsibility was high and sentencing for the purpose of deterrence was important. It suggested a three-year period of imprisonment together with a five-year driving prohibition.

HELD: The accused was sentenced to imprisonment for two years less a day and prohibited from driving for three years following his release. The court found that although specific deterrence was not an issue in this case because the accused felt remorse and was at a very low risk to reoffend, there was a requirement that the goal of general deterrence from driving dangerously in construction zones should be met by the sentence. The accused's unlawful conduct had to be denounced as it was not momentary or of short duration. He was distracted and inattentive for a prolonged period and the gravity of the offence and his degree of responsibility was high. A probation order would not satisfy the principles of deterrence and denunciation. The court regarding the accused's previous traffic infractions to be an aggravating factor and considered the mitigating factors to be that the accused had no criminal record, had not been drinking, stopped and assisted the victim, cooperated with the police, expressed remorse and had not exceeded the speed limit. The court reviewed the sentencing

range imposed in similar cases and applied the Court of Appeal's comment in R. v. Bear that the starting point for dangerous driving causing death is two years less a day when there was no record for driving offences.

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R. v. Nguyen, 2015 SKQB 387

Tholl, December 10, 2015 (QB15382)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine

The accused was charged with possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. The charge arose as a result of a surveillance operation conducted by members of the Saskatoon Integrated Drug Unit (SIDU) in which officers were tipped off that trafficking was occurring in the parking lot of a restaurant. During the course of the surveillance, an officer testified that he saw the accused leave the restaurant and get into a vehicle that had just arrived in the parking lot. While in the vehicle, the officer testified that he saw the accused appear to hand something to the driver. After 30 seconds, the accused returned to the restaurant. The officer testified that this behaviour was consistent with drug trafficking transactions he had witnessed in over 50 operations. Shortly after this incident, the accused left with other men. The police followed the men to a motel. The accused returned to the restaurant, and when he was exiting the vehicle, the officers identified themselves as police and said that he was under arrest. The accused then started running and was chased by the police. One officer fell on the accused and tried to wrest the accused's cell phone from him. Other officers, acting on the premise that dealers discard items during a chase, retraced the route taken by the accused. A bag was found behind the tire of a vehicle that was parked very near where the officer and the accused had fallen. The bag contained three bags in which were baggies containing various amounts of cocaine, the total weight of which was 14.7 grams. After the accused's arrest, the officers returned to the motel and searched the room and found numerous computers and cell phones. One officer took calls on the cell phone and purported to be the intended recipient of the call. The caller advised him to pick up another man at a certain location. The officers followed the instructions and arrested the caller at the location specified. Two bags containing numerous baggies of cocaine, weighing in total 29 grams, were found on his person. At trial, a police officer testified as an expert witness regarding dial-a-dope operations. In his opinion, the accused was part of such a trafficking operation. The accused argued that the Crown had

failed to prove that he was in possession of the cocaine. He admitted that if he was in possession of the cocaine found, the Crown had proven it was possessed for the purpose of trafficking.
HELD: The accused was found guilty of possession for the purpose of trafficking. The court found that the evidence strongly supported a finding of fact that the accused was a participant in a dial-a-dope operation at the time of the incident. The court accepted the evidence of the expert that the amount of cocaine found in the parking lot indicated that it was to be used in trafficking and not personal use. The court determined that there were no other rational inferences to be drawn from the circumstantial evidence and that the accused dropped or threw the bag as he was apprehended.

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Belak v. Joint Medical Professional Review Committee, 2015 SKQB 388

Krogan, December 4, 2015 (QB15383)

Occupations and Professions – Physicians and Surgeons – Fees
Statutes – Interpretation – Saskatchewan Medical Care Insurance Act
Administrative Law – Judicial Review – Standard of Review

The appellant physician appealed from the reassessment and order for repayment of $360,500 and a further $50,000 to the Minister of Health relating to patient services provided pursuant to The Saskatchewan Medical Care Insurance Act. The reassessment resulted from a review conducted by the Joint Medical Professional Review Committee pursuant to the Act. The committee received a referral with respect to the appellant's billing pattern. It served a notice in writing upon him in November 2010 of its review for the period June 2009 to September 2010. The committee informed the appellant that it would like additional information from him regarding the frequency of visits and a description of his practice, including geographic, demographic and special interests, that might affect his pattern. It also sought records for 135 patients. After obtaining an extension of time and failing to submit by the deadline, the appellant's counsel submitted the materials requested in June 2011. Counsel specified that the appellant's patient care statistics could not be compared to the norm because he generally provided services, specifically home visits, to people who came from the lower end of the socio-economic scale, suffered from drug or alcohol abuse and were non-compliant, resided in crowded homes and did not have access to transportation. The committee advised counsel that they would be inquiring into the issue of the frequency of billed visits. Counsel responded with a request for further particulars and the committee specifically listed the questions that it would be asking of the appellant. At his hearing in November 2011, the appellant

explained that in his practice he took the initiative to follow up on these patients himself by visiting them as he thought was necessary. He explained his telephone calls, office appointments and home visits recording procedure. The committee asked questions about specific files such as one where the appellant had made 57 home visits in the 15-month review period when the patient was being treated by a nephrologist three times each week, and raised its concerns that the appellant's notes had not explained the reasons for the home visits. The appellant provided further information and comments to the committee after the first hearing was adjourned and again after the committee had provided him with a copy of their proposed decision. The committee decided that there was no new evidence and held to their original decision that the appellant had charged for services that were not medically required, and reassessed home visits charges to be reduced by 90 percent and over 25 visits to be reduced by 95 percent in the amount noted above. As the appellant had been advised in 2009 by the committee to reduce his home visit frequency by 50 percent, but had then increased the number of his house calls instead, the committee ordered, pursuant to s. 49.2(9) of the Act, that the appellant pay the Minister an additional amount of $50,000 because he had not acted upon the directions given to him. The appellant appealed on 11 grounds that could be classified generally that: 1) the committee's process was contrary to the rules of natural justice; and 2) the committee lost sight of its mandate in making its decision.
HELD: The appeal was dismissed. The court found that the standard of review was reasonableness and that the committee's expertise in making its decisions was to be accorded deference. In this case, the committee's decision was reasonable. The appellant's complaints that he had not been properly informed and notified by the committee was not supported by the evidence. With respect to his ground that the committee failed to consider his response to their proposed decision, the court found it had accurately stated that the appellant had not provided any new evidence. The committee had not lost sight of its mandate in that the percentage reassessments were not punitive and it was authorized by the Act to impose the $50,000 payment.

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Sauer v. Benko, 2015 SKQB 389

Barrington-Foote, December 7, 2015 January 19, 2016 (corrigendum) (QB15391)

Barristers and Solicitors – Compensation – Taxation – Limitation Period
Professions and Occupations – Lawyers – Fees – Assessment

The applicant applied for an order pursuant to s. 67 of The Legal

Professions Act, 1990 that the respondents' bill for legal services be referred to the registrar for assessment. The issue was whether the court should extend the time for assessment since the application was made more than 30 days after the date of the last bill. The applicant was the client of the respondent from June 2012 to August 2015, during which time the respondent issued seven bills totaling $17,500. The applicant paid all the bills promptly and did not raise any concerns with the respondents. In her affidavit, the applicant stated that she did not know that she had a right to have the bills assessed until she was informed in August 2015 when she acquired new counsel. The applicant said that she had retained the respondents primarily with respect to the division of the family home and had relatively no legal issues to confront regarding child custody and support. She deposed that the respondents had not moved the file quickly and accomplished little during the three-year retainer period, contending that the charges were excessive. The applicant's lawyer in the respondent firm filed an affidavit to the effect that she dealt with both parenting and child support issues during the retainer and although the property issues were not complex, they did not relate solely to the family home, and the dispute was complicated by the applicant's former spouse, who contested the length of their cohabitation. The documents provided by the lawyer confirmed these facts. The lawyer deposed that the applicant was often slow to provide information required to move the file forward and this was not disputed by the applicant.

HELD: The application was allowed only with respect to the last bill dated August 2015. The court ordered that it be referred to the registrar for assessment. It was not in the interests of justice to extend the time for assessment of the six earlier bills. The applicant was aware of how she was being charged by the respondent because the bills detailed the time spent on an item by item basis with the specific hourly rate identified. The charges were not subject to adjustment based upon results or other considerations and the accounts rendered were periodic final accounts. The applicant did not complain about the bills. The court also considered the lengthy period of time that had passed since the applicant received the bills. The charges were perhaps high in the circumstances but there was no evidence that the lawyer was guilty of dereliction of duty or any other misconduct.

CORRIGENDUM dated January 19, 2016: [26] Paragraph 19 of the judgment is amended by deleting "in the client receives and" thereafter replacing them with "the client has received when he or she". Accordingly, para. 19 will now read as follows:

>>> [19] This reasoning reflects the fact that the 30 day period may run in relation to a bill that is an "interim" account in this sense, and is accordingly not the final bill in relation to the matter as a whole. It is a question of fact as to whether a bill is "final", or a "periodic final account": see De Cotiis v Owen Bird (1998), 1998 CanLII 3821 (BC SC), 51 BCLR (3d) 272, at paras 16–18. That is not to suggest that such a bill must be considered in isolation. The fact the matter is ongoing will, for

example, often be relevant to the client's ability to assess what the lawyer has done, and the value of the services the client has received when he or she pays an "interim" account. That, in turn, may affect the weight be accorded to matters such as the payment of the accounts without complaint, or the fact that the client has waited a good deal of time before applying to assess that periodic final account.
[27] All other aspects of the judgment will remain the same as set out therein.

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Nowoselsky v. Saskatchewan Association of Social Workers, 2015 SKQB 390

Mills, December 9, 2015 (QB15384)

Statutes – Interpretation – Social Workers Act, Section 22
Civil Procedure – Queen's Bench Rule 1-3
Professions and Occupations – Social Workers – Registration – Appeal

The appellant applied to the Registrar of the Saskatchewan Association of Social Workers under the provisions of The Social Workers Act to be registered as a social worker under the Act. His initial application was heard by an ad hoc committee due to a belief that there would be a conflict of interest for the registrar to do so. The appellant disclosed to the committee that he had been registered with the Alberta College of Social Work until his registration was cancelled following his suspension in 2013. The committee requested further information from him and he provided a written explanation. The committee denied the application pursuant to s. 21(1)(b) of the Act on the basis that they were concerned that he had not met the requirement for good character. The committee stated that the appellant had failed to take responsibility for the actions for which he had been disciplined in Alberta in that he had not completed the two-year supervision requirement imposed by the college as a rehabilitative measure. The background to the committee's finding was that while in Alberta, the appellant had appealed the decision of the college's discipline committee to a tribunal and it had set aside some of the findings of the committee. The appellant then appealed to the Alberta Court of Appeal and it was allowed in part. The court upheld two of the penalties imposed: the suspension of the appellant's registration for six months; and that any future practice as a social worker was to be under the supervision of a registered social worker outside of his employment context for period of two years. The appellant appealed the decision to the council of the association, permitted under s. 22(4) of the Act. At that point, the appellant had been working for the Mamawetan Churchill River Health Region as social worker for 20 months. The appellant appeared before the council

and submitted a report from that employer as to his professional qualities. The appellant considered this report to have satisfied the penalty imposed in Alberta that his work be supervised. He also filed many letters testifying as to his good character in his work, his volunteer activities and participation in the community, although the comments referred to a period before his suspension. The council upheld the decision of the committee. In his appeal the appellant, who was self-represented, requested relief that included the association issuing his professional social work licence. The appellant argued that he had met the requirement for supervision of his work imposed upon him in Alberta through his employment in Saskatchewan. Further, the council could not make the decision it had if it had had regard to all the evidence he had submitted as to his good character.
HELD: The appellant had no right of appeal from the decision of the council under the Act and the remedies requested could not be provided. Relying upon the new Queen's Bench Rules, specifically the foundational subrules 1-3(1), (2)(a)(b) and (3), the court decided to treat the notice of appeal as an application for judicial review under rule 1-6. The court found that the standard of review to be one of reasonableness. In this case, the court found that the council's decision was reasonable and supportable based upon the material before it. The application to quash the decision was dismissed.

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Mosaic Potash Esterhazy Ltd. Partnership v. Unifor Local 892, 2015 SKQB 391

Elson, December 10, 2015 December 23, 2015 (corrigendum) (QB15392)

Administrative Law – Judicial Review – Arbitration – Collective Agreement
Administrative Law – Judicial Review – Saskatchewan Human Rights Code
Administrative Law – Judicial Review – Standard of Review – Reasonableness
Labour Law – Arbitration – Judicial Review
Labour Law – Collective Agreement – Last Chance Agreement

The applicant employer applied for judicial review of a labour arbitration award that dealt with the extent that a settlement agreement, the Last Chance Agreement (LCA), formed part of the underlying collective agreement. The arbitrator allowed the grievance brought by the respondent, union, on behalf of the grievor, with respect to the termination of his employment with the applicant. The grievor was 53 years old and had been employed by the applicant since 1980 as a loadout operator. The position was safety sensitive, and

pursuant to protocol, employees in safety sensitive positions were required to undergo drug testing. The grievor was required to undergo an assessment by a company providing Employee Assistance Programs (EAP) because he tested positive for alcohol. The EAP assessor concluded that the grievor met the criteria for alcohol and drug dependence and six recommendations were made. The applicant respondent and grievor entered into a Return to Work Agreement (RWA) with 11 terms. The grievor returned to work and tested positive for cannabis during an unannounced substance test. The grievor underwent another EAP and he attended an inpatient treatment program. A second RWA was signed after the grievor's discharge from the inpatient treatment facility. The RWA was the LCA. Another unannounced substance test resulted in the grievor testing positive for alcohol, and he was terminated. The grievor grieved his dismissal asserting that he was terminated because of his disability. The arbitrator determined that: 1) the evidence of post-dismissal counselling and testing was relevant to the issue of deciding whether his disability had been properly accommodated to the point of undue hardship; 2) the LCA did not form part of the collective agreement because it did not meet the definitions contained within the relevant sections of The Saskatchewan Employment Act (SEA); and 3) if the LCA was a part of the collective agreement it either ignored or purported to override the statutory right of the grievor to accommodation of his disability pursuant to the Human Rights Code (HRC). The arbitrator found that having the grievor return to work would not result in undue hardship for the applicant. The applicant argued that the LCA imposed a legitimate and imperative limit on the arbitrator's jurisdiction. They also challenged the admission of post-discharge evidence and the finding that the grievor's substance dependency had not been accommodated to the point of undue hardship. The issues were: 1) the standard of review; 2) whether the arbitrator erred in concluding that the LCA did not form part of the collective agreement; 3) whether the arbitrator erred in concluding that the LCA did not limit her jurisdiction to deal with the grievance; 4) whether the arbitrator erred in finding that the applicant had not accommodated the grievor's disability to the point of undue hardship; 5) whether the arbitrator erred in the admission of post-discharge evidence; and 6) whether the arbitrator erred in imposing unreasonable conditions?

HELD: The application was dismissed. The arbitrator's findings and conclusions were reasonable. The issues were determined as follows: 1) the standard for the last three issues was agreed to be reasonableness. The reasonableness standard is the presumptive standard of review in respect of grievance awards and the court concluded that the applicant did not rebut this presumption with respect to the first two issues so the reasonableness standard applied to all issues. The court did not agree with the applicant that any limit the arbitrability of an issue necessarily impacted the true jurisdiction of the arbitrator; 2) the

arbitrator relied on ss. 6-1(1)(d) and 6-41(1)(a), (b), and (c) of the SEA to conclude that the LCA did not form part of the collective agreement. The court noted that a strong argument could be made that an agreement concluded through collective bargaining should be regarded as a collective agreement unless the definition in ss. 6-1(1)(d) specifically excludes it. The court also acknowledged that deference to the arbitrator guided the review. The court was satisfied that the arbitrator's reasons were arguable and could justify the conclusion she made; 3) the arbitrator correctly identified her obligation to address the issue of the grievor's rights under the HRC and she observed that the parties could not contract out of the substantive rights set out in the HRC. Based on case authorities, the court concluded that if a collective agreement cannot be interpreted to oust or conflict with an arbitrator's authority to determine the application of employment-related law, such as employment standards and human rights legislation, an ancillary agreement could not interfere with that authority either. The court found that the LCA attempted to diminish the grievor's protection under the HRC, which was not open to either party, or the grievor. The court held that the arbitrator was not bound to follow it; 4) the applicant argued that the reinstatement of the grievor imposed an unreasonable and undue obligation on it to accommodate all alcoholic employees, essentially forever. The applicant did not, however, provide reasons that the arbitrator's decision lacked transparency, justification, or intelligibility. The court deferred to the arbitrator's findings; 5) there was both case and legislative authority for the arbitrator to admit post discharge evidence; and 6) the arbitrator found that the grievor had to fully accept the reality of his illness and placed conditions on his reinstatement in that regard. The court was not prepared to interfere with the conditions.

CORRIGENDUM dated December 23, 2015: [95] Paragraph [59] of the judgment is amended by deleting the words "and that the decision" in line six thereof and accordingly shall read as follows:

>>>>>[59] Despite all of the foregoing, I must remember that deference is the principle that guides this review. The fact that I may have decided the question differently does not, standing alone, signify anything about the reasonableness of the Arbitrator's conclusion. Rather, the question relates to whether her reasons, which were transparently expressed, were intelligible and justified her decision, fell within the range of reasonable outcomes. Despite my disagreement with the Arbitrator's view, I am satisfied that her reasons are arguable and would justify the conclusion she drew. As such, deference obliges the court not to intervene.

[96] Except as amended by this correction, all other portions of the judgment dated December 10, 2015, remain as originally published.

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Elash v. Elash, 2015 SKQB 392

Zarzeczny, December 8, 2015 (QB15385)

Family Law – Division of Family Property – Settlement Agreement
Civil Procedure – Queen's Bench Rule 1-3, Rule 6-11
Civil Procedure – Settlement – Enforcement

The respondent filed a notice of application for judgment. The petitioner had petitioned for divorce, spousal support and equal division of family property. The case was submitted to a pre-trial settlement conference in May 2015, but the parties could not reach an agreement on the division of property and the matter was set down for trial. The respondent contacted the petitioner by text message about five weeks before the trial and suggested that they reconsider settling before going to court. The petitioner agreed to the proposal made by the respondent during the exchange and told him to send the settlement to her lawyer. A consent judgment was drafted by the respondent's counsel and sent to the petitioner's lawyer. He responded that the petitioner indicated that there was a mistake in the document and advised that for every required change to it, the equalization payment would increase by $2,000. The respondent's counsel corrected the mistake and returned it to the petitioner with the amount of settlement unchanged. The petitioner replied that she wanted the sum increased as earlier indicated. This situation prompted the respondent to contact the petitioner again by text message. The petitioner responded that she had agreed to the amount in their first exchange and would stick to it. Afterward the petitioner then told her lawyer that she would not accept the lower amount and sign the document. The respondent's lawyer then advised that an application would be made to the court for judgment to implement the terms of the settlement.

HELD: The application was granted. The court applied the test set out in Tether v. Tether to determine whether a settlement had been reached and found that a legally enforceable settlement was entered into between the parties and that it was binding upon the petitioner. When she reviewed the first draft of the consent judgment, the petitioner had the opportunity to repudiate the agreement but did not, and had unilaterally imposed a penalty. The petitioner then reconfirmed the settlement in the second exchange of text messages. The court rejected the petitioner's argument that the respondent had pressured her into the settlement based upon the content of the two text message exchanges. The court had regard to s. 29 of The Queen's Bench Act, rule 1-3 and rule 6-11 of the Queen's Bench Rules of Court and s. 40 of The Family Property Act to find the discretion and the authority to permit the application for judgment and to pronounce judgment.

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Saskatchewan (Attorney General) v. Ballantyne, 2015 SKQB 393

Currie, December 9, 2015 (QB15393)

Statutes – Interpretation – Criminal Code, Section 2, Section 810.2

The Attorney General (AG) applied for an order quashing the decision of a Provincial Court judge (see: 2014 SKPC 179). In that case, a police officer had made applications for orders (peace bonds) under s. 810.2 of the Criminal Code in relation to two individuals. The applications were in the form of informations sworn by the officer and were accompanied by consents signed on behalf of the AG by the Director of the High Risk Offender Unit of the Ministry of Justice. The judge noted that s. 2 of the Code included delegation from the AG to a lawful deputy, and that in December 2011 the AG had delegated his authority to the Director of Prosecutors and the Director of the High Risk Offender Unit. The judge concluded though that the latter director was not the lawful deputy of the AG within the meaning of the Code, basing her decision on the Supreme Court's decision in Horne. After this ruling, the officer placed another consent signed by the Associate Deputy Minister of Justice, which was accepted, and the officer did not take further steps to pursue a peace bond for the other person. The AG argued that the judge made an error in jurisdiction in declining to receive the informations and that the judge decided a complex legal issue without notice to the AG, which was a breach of natural justice. HELD: The court granted application on the first ground and quashed the judge's decision. It was unnecessary to consider the second ground. It also found that although the matter was moot, the judge's decision was reported and stood as a statement of the law that would affect the administration of justice with respect to other applications for peace bonds and deciding the matter was a proper subject of adjudication. Regarding the issue of whether the judge had jurisdiction, the court could review it on the standard of correctness. The court held that the judge had erred in taking the approach that she did in relying upon the Supreme Court's decision in R. v. Horne that delegation assigned to the AG under a statute such as the Lord's Day Act could only be delegated by "specific legislation unmistakably applicable". The Supreme Court had decided in R. v. Harrison that the AG could delegate decisions relating to the administration and management of the justice system under s. 2 of the Code. The Horne decision dealt specifically with the power to delegate in political matters. The decision to consent to an application for a peace bond was the kind of decision that can be delegated by the AG without the need for "specific legislation unmistakably applicable".

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S. (C.J.), Re, 2015 SKQB 394

Turcotte, December 11, 2015 (QB15386)

Family – Child Protection – Permanent Order

In February 2013, a Queen's Bench judge had granted an order that two siblings, aged five and four years at that time, were in need of protection pursuant to s. 11(b) of The Child and Family Services Act and that they be permanently committed to the custody of the Minister of Social Services pursuant to s. 37(2) of the Act. In this application, the mother of the children, J.L., applied pursuant to s. 39 of the Act to vary or terminate the order on the ground that there had been a material change in circumstances since the order had been made and that it was in the best interests of her children that the order be set aside. At the close of the applicant's case, counsel for the ministry brought an application to dismiss it pursuant to Queen's Bench rule 9-26 because the applicant had not adduced uncontradicted nor sufficient evidence to meet the threshold required by s. 39(1). The children had been apprehended in 2011 because of the ministry's concerns, starting in 2008, that the applicant mother was living in an abusive relationship with the children's father, that they lacked appropriate supervision and suffered from emotional and physical neglect, and that their surroundings were filthy. The children lived with a friend of the applicant's since the apprehension and they were developing normally and thought of their caregiver as their mother. After the permanent order had been made, there was an intention that this person would adopt the children. At the hearing for the committal in 2013, the children's father received notice of it but did not attend. He and the applicant had since separated permanently and as he wished to re-establish a relationship with his daughters, he supported the applicant's application for variation. The applicant was in a new relationship and had had two children with her spouse. Both of these children were the subject of separate protection proceedings pending before the court. At the time of this application, the applicant acknowledged that her living conditions were the same as they had been when the order was granted. She had also been unable to adhere to the schedule of supervised access with the children, had been unable to maintain employment and had not participated in counselling or completed the parenting program that had been recommended at the time of the order.

HELD: The ministry's application was granted and the applicant mother's application for variation dismissed. The court found that there had been no material change in circumstances since the granting of the order that had altered the children's needs or the applicant's ability to meet them.

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R. v. Lynn, 2015 SKQB 398

Danyliuk, December 15, 2015 (QB15395)

Constitutional Law – Charter of Rights, Section 24(2) – Admissibility of Evidence – Appeal – Standard of Review

The appellant was convicted of driving while his blood alcohol content exceeded .08 contrary to s. 253(1)(b) of the Criminal Code. The defence made a Charter application that the appellant's rights under ss. 8 and 9 had been breached. The Provincial Court trial judge found that there had been a breach but held that the evidence of the breath tests should not be excluded pursuant to s. 24(2) of the Charter after conducting a Grant analysis. The issues on appeal were: 1) what the appropriate standard of review was; and 2) had the trial judge erred when he failed to exclude the Certificate of Analysis pursuant to s. 24(2). The defence argued that the final factor of the Grant analysis required the trial judge to assess whether the admission of the evidence "could" bring the administration of justice into disrepute, and in this case he had used the word "would".
HELD: The appeal was dismissed. The court held with respect to the issues that: 1) the standard of review on the appeal of a Charter application under s. 24(2) had been established in R. v. Grondin. It held that where the decision to exclude under s. 24(2) is an admissibility of evidence issue, it is a question of law and the standard is correctness. Because the determination requires the judge to exercise some discretion, considerable deference is owed to the trial judge's s. 24(2) assessment when the appropriate factors have been considered. Neither the Crown nor counsel for defence cited Grondin for the principle that an appellate court should accord deference to the findings of the trial judge in this case; and 2) the word "would" has been consistently used. It found that the trial judge had articulated the correct legal principles and applied them to the facts as he found them.

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Schulz v. Schulz, 2015 SKQB 399

Megaw, December 15, 2015 (QB15388)

Civil Procedure – Contempt

The petitioner applied for an order to have the respondent found in contempt of a judgment made regarding family property issues. The respondent was ordered, among other things, to vacate the family

home by a certain date and to leave within it the appliances. He was also ordered to provide the documents associated with an insurance claim on the property. The respondent requested an extension of the time for him to relocate, but it was dismissed by the judge who heard the application. He was given the opportunity to purge his contempt by vacating within two days of the order and was further directed to provide the insurance documentation. The respondent did in fact leave the property but it was found in a poor condition by the petitioner. In addition, the respondent removed the appliances. At another hearing within a month, the respondent was provided with an opportunity to purge his contempt with respect to the insurance documentation and directed to return and reconnect the appliances. He did provide the documents. The petitioner then filed an affidavit of costs incurred by her in relation to the respondent's actions in failing to act in accordance with the court order. The total costs sought were $17,000, which included the cost of purchasing used appliances, repairs, garbage disposal, cleaning and arrears of mortgage, tax and sewer payments. The petitioner also sought recovery of her solicitor-client costs estimated at $10,000.
HELD: The petitioner's application was granted in part. The respondent was found to have purged his contempt by complying with the judgment requirements although not perfectly and not in a timely fashion. The court assessed a fine in the amount of $500 as a penalty for his failure to purge his contempt in a complete manner. Regarding the claims of the petitioner as to the costs associated with the family home, the court decided to leave them to be considered upon distribution of the net sale proceeds from the sale of the house. The petitioner was awarded costs in the amount of $5,000 as partial compensation for the additional legal expense she incurred, but the court did not find this an exceptional case warranting an award of solicitor-client costs.

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Copper Sands Land Corp. v. Edwards, 2015 SKQB 402

Keene, December 16, 2015 (QB15390)

Landlord and Tenant – Residential Tenancies – Mobile Home Statutes – Interpretation – Residential Tenancies Act, Section 2, Section 84, Section 54(3)

The appellant appealed from the decision of a hearing officer of the Office of Residential Tenancies (ORT). The hearing had been held pursuant to an application by the respondent, who claimed that the appellant had breached his rights as a tenant by providing an improper notice of rent increase. The respondent owned a mobile home that was situated on property leased to him by the appellant. The parties were

notified of the hearing date and the appellant's representative and its lawyer appeared along with respondent. The appellant's representative informed the officer it took the position that the ORT did not have jurisdiction to hear the case because The Residential Tenancies Act, 2006 did not apply to mobile homes in this kind of situation. The representative filed a brief of law and departed. The officer then proceeded to hear the case in the absence of the appellant's representatives and found that the Act applied to mobile home sites regardless of whether the landlord owns the structure. The officer found in favour of the respondent. The appellant appealed on the grounds that the hearing officer had erred in: 1) holding that the land owned by the appellant and leased to the respondent was deemed to be a residential premise under the Act; 2) presuming she had jurisdiction with respect to this situation; and 3) not giving the appellant an opportunity to be heard and thereby breaching the rules of natural justice.
HELD: The appeal was allowed. The court quashed the decision of the hearing officer with respect to the third ground and directed the case to be re-submitted to the ORT for a re-hearing. The court found that the standard of review with respect to the first two issues (questions of law) was reasonableness and on the third (a question of law), correctness. With respect to the first and second issues, the court found that the hearing officer's decision was reasonable. It reviewed ss. 2(g) and (m)(v), s. 54(3) and s. 84 of the Act, as well as references to mobile homes in Hansard at the time the bill was debated, and held that it was clear that the Act applied to mobile homes when the structure is owned by the tenant. The hearing officer's decision with respect to the third ground was not correct. She erred in law when she decided to determine the jurisdictional issue and then proceeded to her decision without allowing the appellant an opportunity to be heard on the substantive application.

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Morton v. Blacklaws, 2015 SKQB 403

Barrington-Foote, December 17, 2015 (QB15396)

Contracts – Breach
Contracts – Breach of Contract – Non-payment
Contracts – Formation – Verbal
Contracts – Interpretation

The plaintiff filed a statement claim pursuant to ss. 5 and 6 of The Woodmen's Lien Act claiming a $16,694.34 lien for logs supplied to the defendant. The defendant argued that the plaintiff had been paid in full and that there were various breaches of the contract to supply the

logs. The verbal agreement between the parties was for the supply of at least 500 cords of logs to the defendant. The defendant argued that the price was $100 per cord, whereas the plaintiff argued that he said he may give a volume discount from his usual price of $110 per cord, but only if he felt he could make enough money at a discounted price. The defendant forwarded a draft agreement to the plaintiff outlining the cost of $110 per cord and the defendant's responsibility to pick up the logs and transport them at his own expense. The agreement was silent as to forwarding the logs from the initial landing site. The defendant's written response questioned the lack of the volume discount. The defendant paid $55,000 upfront. The plaintiff invoiced the defendant for 544.66 cords at $110, 94.33 cords at $120 per cord, and $1,900 for forwarding fees.
HELD: The case turned on credibility. The court concluded that the plaintiff established that the price was $110 per cord, and an additional $10 per cord for wood cut at the remote site. A volume discount was discussed but not finally agreed upon and it was up to the plaintiff to decide it. The defendant's credibility was brought into question because of contradictory evidence. The court also found the payments made by the defendant to be helpful because the last cheque had a notation that it was the final payment for 500 cords. The payment equaled $110 per cord. The court also found that the plaintiff was entitled to charge a reasonable price for forwarding fees. The court ordered the claimed amount plus costs minus an amount for some rot in wood.

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All-Fab Building Components Inc. v. Montreal Lake No. 354 (Montreal Lake Cree Nation), 2015 SKQB 407

Smith, December 18, 2015 (QB15400)

Contracts – Bankruptcy
Contracts – Breach of Contract – Non-payment
Contracts – Termination – Novation
Statutes – Interpretation – Indian Act – Band Council Resolution

The plaintiff claimed for payment of invoices and interest relating to the provision of building materials to the defendant. The defendant was a band pursuant to the Indian Act. The claim was defended on three grounds: 1) the contract lacked Band Council Resolution (BCR) and was therefore not enforceable against the defendant; 2) if there was a contract it had been terminated by novation of a contract between the plaintiff and another corporation (the corporation). The other corporation was incorporated by the defendant; and 3) the plaintiff was pursuing the corporation under its bankruptcy proposal and therefore

the plaintiff could not then pursue the defendant. A clause of the contract said that the defendant confirmed that the agreement had the same force and effect as a BCR. The defendant incorporated the corporation to sell RTM homes to the defendant and other First Nations. The plaintiff sent product to the corporation's projects but there was no written contract between the plaintiff and the corporation. The corporation eventually made a proposal in bankruptcy owing creditors more than $1.5 million with zero assets. The plaintiff was included in the list of the corporation's creditors. The plaintiff filed a claim with the trustee in bankruptcy. The defendants felt bad for the failure of the corporation and therefore paid $20,000 for trustee fees and then a further $445,000 to be distributed to its creditors. The plaintiff received $81,903.75 from that payment. The balance claimed by the plaintiff was $1,172,557.34.
HELD: The court discussed the defendant's arguments as follows: 1) the absence of a BCR would be fatal to the plaintiff's claim. The agreement between the parties was signed by the chief of the band and six of the 12 band council members. The plaintiff therefore asserted that quorum was met. The court concluded that the plaintiff proved compliance by the defendant with s. 2(3) of the Indian Act, which required a BCR; 2) the defendant pointed to some invoices from the plaintiff that referenced the defendant operating as the corporation to support the novation argument. Also, the corporation wrote four cheques to the plaintiff to pay for portions of the building materials supplied and the plaintiff claimed the full amount owing with the bankruptcy trustee. There was no evidence that the plaintiff knew the corporation was a separate legal entity. The defendant did not meet the requirement of producing evidence of probative value inexorably leading to the conclusion of novation; and 3) the court found that the evidence was clear that the defendant was the obligant under the contract and there was never any change to that legal status. The plaintiff's claim in the corporation's bankruptcy in no way affected the efficacy of its claim against the defendant under the contract. The court awarded the amount owing under the contract.

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Aalbers v. Aalbers, 2016 SKCA 1

Caldwell Herauf Whitmore, December 9, 2015 (CA16001)

Family Law – Child Support – Application to Vary – Appeal
Civil Procedure – Appeal – Discretion to Hear
Civil Procedure – Appeal – Court of Appeal Rule 59

The appellant appealed the decision of a Queen's Bench judge in chambers dismissing his application to vary child and spousal support

obligations because the appellant had not satisfied it that there had been a material change in circumstances (see: 2014 SKQB 387). At the time of the original trial in 2010, the appellant had been ordered to pay $2,034 per month in child support and $1,500 per month in spousal support based upon income imputed to him of $115,000 (see: 2010 SKQB 172). The appellant had never made a payment, and the arrears currently stood at $160,000. At the first hearing, the Court of Appeal indicated that it was reluctant to hear the appeal because of the appellant's non-compliance with the support orders, and invited submissions as to whether the court should exercise its discretion to decline to hear the matter. On the return date the appellant sought to introduce fresh evidence showing that his three daughters (the children for whom the support order was made) had been living with him since November 2015.
HELD: The appeal was adjourned sine die. The court held that with respect to the appellant's application to admit fresh evidence that he had not met the second branch of the test established in R. v. Palmer that the evidence must be relevant. It was not relevant to the appeal of the issue whether the chamber's judge had erred in his decision that one of the appellant's daughters had moved from the respondent's residence. Regarding the issue whether the appeal should be heard, the court found that it had the authority to decline to hear the matter and in the circumstances of this case it would exercise its discretion to do so because of the appellant's continuing disobedience of a court order. If the arrears and costs awarded at this hearing ($2,500) were not paid by the appellant within one year, a panel of the court would determine whether the appeal should stand dismissed.

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R. v. Chukwu, 2016 SKCA 6

Ottenbreit Caldwell Ryan-Froslie, December 10, 2015 (CA16006)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine
Criminal Law – Application to Expunge Guilty Plea – Appeal

The accused pled guilty to possession of heroin for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, as well as unlawful possession of Canadian citizenship cards and unlawful possession of Canadian social insurance cards contrary to s. 122(1)(a) of the Immigration and Refugee Protection Act. Prior to sentencing, the accused applied to expunge his guilty pleas and the application was denied. The accused was then sentenced to ten years in prison regarding the possession conviction and to an 18-month term concurrent for the other convictions. He sought leave to appeal on: 1)

the expungement order, on the ground that he had not understood what was happening when the guilty pleas were entered and that his lawyer had not followed his instructions; and 2) the sentence, on the ground that it was demonstrably unfit. The possession charge arose as a result of custom officials in Germany seizing a package containing 591 grams of heroin with a value of $485,000 to $1,632,000. After being notified by the German officials, Canadian police officers conducted a controlled delivery of the package after removing all but 3.6 grams of heroin from it. The accused retrieved the package using a false identity. The officers followed the accused to his residence, where they found a number of false identification citizenship and social insurance cards. At the time of his expungement application, the accused was represented by experienced counsel and the judge heard evidence regarding the discussions between him and his lawyer and found that the latter advised the accused that the Crown had a fairly strong case and had ascertained that the accused understood the charges. The judge found that the accused was intelligent and knew that he was going to be imprisoned and that his counsel had not told him he would receive only an 18-month sentence if he pled guilty to the drug charge. Regarding the sentence imposed upon him, the accused argued that it was unfit because there were only 3.6 grams of heroin in the package and that his criminal record was not extensive and did not contain any prior drug offences. He submitted that the sentence was unduly harsh. HELD: Leave to appeal was granted but the appeal of the expungement order and the sentence was dismissed. With respect to the grounds of appeal, the court found that: 1) the trial judge had correctly identified the issue as to whether the guilty pleas were voluntary, unequivocal and informed, and based on his findings, they were; and 2) the accused was in constructive possession of the entire amount of the heroin sent. His criminal record was not a mitigating factor because his previous and current offences involved the possession and/or use of false identification. Although the range of sentences for heroin trafficking has not been developed in Saskatchewan, in Ontario first-time offenders found guilty of this offence receive sentences between 9 to 12 years. The sentence was not demonstrably unfit in any case because it achieved the predominant sentencing objectives of denunciation and deterrence.

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