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R. v. Clarke, 2016 SKCA 80

Jackson Caldwell Whitmore, June 30, 2016 (CA16080)

Criminal Law – Assault – Sexual Assault – Conviction – Appeal

The appellant appealed his convictions and the sentences imposed on him for sexual assault under s. 271 and sexual invitation to touching under s. 152 of the Criminal Code. He was given a global sentence of 35 months, composed of imprisonment for three years for the first offence, six months consecutive for the second and credit for seven months pre-sentence custody. The appellant also brought an application to adduce fresh evidence with respect to the first offence. The appellant had met the complainant at the house of A.H., the complainant's cousin, with whom she was living. The complainant told the appellant that she was 18 and then told him she was 17. When A.H. discovered them having sex, she told the appellant that the complainant was 15. The appellant testified that he felt ashamed, but within a day he texted the complainant to ask her to have sex with him again. He stated that the complainant mentioned the disparity in their ages, noting that she was 15 and he was 35. Sometime later the complainant sent the appellant provocative pictures of herself on Facebook. The trial judge found that the appellant, A.H. and the complainant all provided conflicting testimony about what happened. He did believe the appellant's evidence that he thought the complainant was 17 and had a reasonable doubt whether the appellant had forced sexual intercourse with her.

Under s. 150.1(4) of the Code, the trial judge convicted the appellant of the offence under s. 271 because he found that the appellant had not taken all reasonable steps to ascertain the complainant's age. With respect to the charge under s. 152, the trial judge convicted the appellant because the appellant knew that that complainant was 15 when he sent her the text message. In sentencing the appellant, the trial judge held that he would not vary from the three-year starting point set out in R. v. Revet and gave the appellant credit for the seven months of remand. Regarding the sentence imposed for the s. 152 offence, the trial judge found that the appellant's conduct was worse in this case than in R. v. G.R.K. but taking into account the totality principle, a six-month consecutive term was appropriate. The issues on appeal were whether the trial judge erred: 1) in fact in his findings relating to credibility; 2) in misapprehending material aspects of the evidence leading to an unreasonable verdict, such as the trial judge had mistakenly referred to A.H. as the complainant's aunt; 3) in interpreting and applying s. 150.1(4). In this ground there were numerous issues, among which was whether the trial judge had put the onus on the appellant to prove that he had taken all reasonable steps; 4) by not accepting that the appellant's text messages were not intended for the complainant for a sexual purpose. He said that he sent them to ascertain the nature of the deception practiced on him by the complainant. The appellant applied to adduce fresh evidence, requesting that information be admitted that the complainant gave her age as 18 on a Facebook page that was not available to the defence at trial; and 5) in imposing the sentence because it did not acknowledge proportionality, the Gladue factors and the principle of totality.

HELD: The conviction appeals were dismissed. The application to adduce fresh evidence was denied. The sentence appeal was allowed and the court varied the sentence from 35 months to 27 months. With respect to the issues, the court found with respect to the first four grounds that the trial judge had not erred in his findings of credibility or fact, or the manner in which he applied the evidence to the issue of whether the appellant had taken all reasonable steps. The fresh evidence sought to be adduced of the complainant's Facebook page had nothing to do with the s. 152 charge because the appellant already knew that she was 15. The court did not deal with the appellant's various arguments relating to his sentence since he had already served 18 months and would be eligible for parole soon. In light of all the circumstances, though, it reduced the sentence.

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Richards Lane Ryan-Froslie, July 15, 2016 (CA16090)

Corporations – Directors and Officers – Indemnification
Statutes – Interpretation – Business Corporations Act, Section 119(4)

The appellants appealed from a Queen's Bench decision concerning an application for indemnification pursuant to s. 119(4) of The Business Corporations Act (BCA). The appellants had been the directors and officers of the respondent corporation and both had been fired from their senior positions with it after disagreements arose between them and the other shareholders regarding the management of the respondent. The appellant Adams had loaned funds to finance the respondent through his company, Eagle Eye, and it commenced an action in debt against the respondent. The respondent counterclaimed and alleged that the appellants had breached their fiduciary duties, eventually adding them as third parties. The appellants made their chambers application following the dismissal of third party claims. Adams sought indemnification: for amounts he paid three different law firms, which included work performed by the appellant Ayers in his capacity as a lawyer; for interest costs on loans taken out to pay his legal bills; and for opportunity costs relating to his defence. Ayers applied for indemnification for the value of his own work representing himself. In his decision, the Chambers judge allowed some of Adams' expenses but dismissed his claim regarding Ayers' legal bill, interest on his loans and opportunity costs. The enforcement of the indemnification award was stayed on the basis that other shareholders of the respondent might make indemnification applications. The judge dismissed Ayers' claim entirely (see: 2015 SKQB 75). The issues on Adams' appeal were whether the trial judge had erred in: 1) disallowing those claims under s. 119(4) of the BCA; 2) staying the enforcement of the indemnification; and 3) not awarding costs on an indemnity basis. Ayers appealed on the question of whether the value of his legal work performed to defend himself was recoverable under s. 119(4).
HELD: The court allowed Adams's appeal in part and dismissed Ayers's. The court reviewed the purpose of s. 119(4) of the BCA and interpreted that provision. With respect to each of the issues raised by Adams, the court found that the chambers judge erred: 1) by disallowing Adams's claim for Ayers's legal bill and had erred in refusing to indemnify him for the interest costs. They were a type of cost that can fall within the scope of s. 119(4). He had not erred in finding there was no entitlement to the value of Adams's opportunity costs, regardless of whether the term

Saskatoon Co-operative Association Ltd. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union

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referred to the value of work foregone in order to respond to the respondent's claim or the value of the work done by Adams in his own defence; 2) in staying the enforcement of the order because it was done on a purely hypothetical basis as there was no evidence that other shareholders could or would bring applications for indemnification; and 3) by awarding fixed costs. Under s. 119(4), an officer or director should be indemnified for the legal fees reasonably incurred for bringing the application. Regarding Ayers's appeal, the court found that s. 119(4) does not cover indemnification for matters that do not involve an exchange of consideration by an officer or director and therefore there was no basis for indemnification for Ayers's work to defend himself.

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Saskatoon Co-operative Association Ltd. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, 2016 SKCA 94

Jackson Ottenbreit Ryan-Froslie, July 28, 2016 (CA16094)

Administrative Law – Appeal
Administrative Law – Judicial Review – Labour Relations Board – Procedural Fairness
Administrative Law – Procedural Fairness – Audi Alter Am Partem

The Court of Queen's Bench dismissed two applications to quash a decision of the Saskatchewan Labour Relations Board. The two appellants argued that the board's decision breached procedural fairness falling into two categories: the board conducted ex parte research following its oral decision; and the board improperly heard the parties because one member was not physically present when the board adjourned to deliberate and was without materials that had been filed during oral argument. The reasonableness of the board's decision was also questioned by the appellants. A grocery store changed operation with the former and latter being covered by different certification orders. The unions applied to the see who would represent the employees of the store. The oral hearing was adjourned to hear a final witness. The board found that s. 37 of The Trade Union Act applied such that the new operator of the store was the successor. The Queen's Bench concluded that the board's review of one of the union's websites did not result in any change to its approach although it was a breach.
HELD: The chambers judge erred by not quashing the board's decision because the board breached the principle of audi

alteram partem by consulting a website to support its conclusion without asking the parties for further submissions. The board functions at or near the judicial end of the spectrum and therefore a high level of procedural fairness was required. The parties did not have an opportunity to address the board with respect to the website and the reliability of the information on the website was not tested.

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R. v. Williams, 2016 SKPC 69

Gordon, June 7, 2016 (PC16080)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Refusal to Provide Breath Sample
Constitutional Law – Charter of Rights, Section 10(b), Section 24(2)

The accused was charged with impaired driving, contrary to ss. 253(1)(a) and 255(1) of the Criminal Code, and with failing to comply with a demand to provide a breath sample, contrary s. 254(5) of the Code. The defence brought a Charter application, alleging that the accused's s. 10(b) Charter right had been violated and that the evidence of her refusal should be excluded pursuant to s. 24(2). A voir dire was held. A videotape of the conversation between the accused and the police during the time in question was admitted as an exhibit. After the accused had been arrested for impaired driving, the police officer informed her of her rights to counsel. The accused said that she did not know a lawyer but wanted to call Scott. The parties repeated themselves, with the accused reiterating that she wanted to speak to that person without the officer responding specifically to her request. The officer advised the accused that if she didn't have a lawyer she could call Legal Aid. The accused informed the officer that Scott was the registered owner of the vehicle she was driving and that he was the mayor of a nearby village. The officer did not call Scott as requested by the accused. At the police station, the accused said that she had a lawyer in Saskatoon. The officer could not find a Saskatoon phone book but gave the Moose Jaw book to the accused and she randomly picked a lawyer's name. The officer called the office number but there was no answer. The officer instructed the accused to provide a breath sample and she tried unsuccessfully a number of times. She was warned that if she didn't provide one she would be charged but she was unable to blow sufficiently hard or long enough. The accused stated then that she wanted a

lawyer, and was informed again that she would be charged and again given her right to counsel. The accused told the officer that he would not let her call the person that she wanted to talk to and said that she was not refusing and that she wanted to call Scott. The officer then placed the accused in the cells.
HELD: The court found that there had been a breach of the accused's right to counsel at the end of the voir dire hearing. The officer had failed to ask the accused why she wanted to call Scott or conclude that she wanted to speak to him specifically to get the name of a lawyer. Under the Grant analysis, the court found that the breach was serious and so was the impact upon the accused because if the evidence of refusal was admitted, the accused would likely be convicted. In considering society's interest in adjudicating the case, the court was prepared to exclude the evidence of refusal. However, the defence argued as well that as there does not have to be a connection between the Charter breach and the evidence to be excluded, then in addition to excluding the evidence of the refusal, the court should exclude all the evidence of the officer's observations of the accused's driving and her demeanor after arrest. Because the Crown had not dealt with this argument in his brief or at the hearing, the court asked it to make submissions on the defence argument.

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Schiefner, June 17, 2016 (PC16075)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Refusal to Provide a Breath Sample
Constitutional Law – Charter of Rights, Section 10(b)

The accused was charged with refusing to comply with an ASD demand contrary to s. 254(5) of the Criminal Code. The defence argued that the officer who made the demand did not have proper grounds and had not made it forthwith and thus there was no obligation on the accused to comply with an unlawful demand. In addition, the defence argued that the accused had a reasonable excuse for failing to comply with the demand because he had not understood it. The defence also filed a Charter notice alleging that because the accused's detention was unlawful, his s. 10(b) Charter rights were not suspended. As he was not informed of his right to counsel at the time of detention, the evidence of his failure to comply with the demand should be excluded pursuant to s. 24(2) of the Charter. At the voir dire, the

RCMP officer testified that he decided to stop the accused because he had seen him spin his tires and drive at a high rate of speed from a stoplight. He asked the accused if he had had anything to drink and he replied no. The officer smelled alcohol on the accused's breath. The officer asked the accused to accompany him to the police cruiser, told him that he wanted to administer a roadside test and put him in the back seat. For a few moments, the officer made notes regarding the traffic stop and then read the standard demand from a card. The accused said that he did not understand. The officer read the same demand more slowly another time and the accused repeated that he did not understand. The officer informed the accused of the consequences of non-compliance, showed him the device and read the demand two more times and received the same response. The officer then arrested the accused. The accused testified that the officer had not told him why he was being asked to leave his vehicle and go to the police cruiser. He said that he did not understand why he had been stopped and why he had been detained. He admitted that he had not explained to the officer that this was what he meant when he repeatedly replied that he did not understand.

HELD: The Charter application was dismissed at the voir dire but the accused was acquitted at trial of the offence. The court accepted the evidence of the officer. It found that the officer had stopped the accused pursuant to s. 209.1 of The Traffic Act and that the officer had lawful grounds to make the ASD demand based on the accused's manner of driving and because of the smell of alcohol on his breath. The delay between asking the accused to leave his vehicle and the making of the breath demand was explained by the officer – that it was his practice to make the demand in the police cruiser and to make field notes. The time taken was short and was justified. The evidence of the accused's non-compliance was admitted to the trial proper. The court held that a lack of understanding provided a lawful excuse to the ASD demand. In this case, the intention of the accused had to be inferred from his conduct which was a "constructive refusal". Although the accused had not provided any evidence as to why he did not understand the demand, the court was left with a reasonable doubt.

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R. v. Islow, 2016 SKPC 81

Morgan, June 16, 2016 (PC16071)

Criminal Law – Assault – Assault with a Weapon

Criminal Law – Evidence – Beyond a Reasonable Doubt
Criminal Law – Evidence – Circumstantial Evidence
Criminal Law – Evidence – Identification
Criminal Law – Evidence – Police Dog Tracking

The two accused were jointly charged with the following: using a handgun in committing an assault; being the occupant of a motor vehicle where each party knew there was a firearm; committing mischief by damaging the complainant's motor vehicle; being in possession of a stolen vehicle; careless use of a firearm; and intentionally discharging a firearm while being reckless as to the life or safety of the victim. Two African-American individuals exited a white truck late at night and opened the doors of a car in a mall parking lot. When the complainant, the occupant of the car, reversed to get away, one of the individuals pulled out a hand gun and shot at the car twice before getting back into the truck. The complainant followed the truck and got a licence plate number for it. A surveillance video from the mall confirmed many of the facts. The police went to a location where the truck was reported to be parked. Trained police dogs located a loaded handgun in a hedge and the two accused in a restaurant. One of the accused had wet pant legs sitting in the restaurant. The officers that followed the track to the restaurant also had wet pant legs because the track from the truck to the restaurant went through a pathway with shin-deep water. The complainant identified the accused at trial, although he admitted he would have only had three to four seconds to see them during the incident and he had not seen them before. The accused did not have any identification or money on them at the restaurant though they had ordered food.
HELD: The evidence of the dogs was a matter of weight; there was nothing special about the evidence such that it needed to be treated differently from other evidence. The court did not place any weight on the complainant's identification of the accused in the courtroom because he may not have recognized them as much as he knew they were the ones charged in the trial. The court also gave no weight to his identification from a photo lineup done shortly after the events because none of the identifications were found to be particularly strong and one of the accused was not identified at all. The court found that it was quite likely that the track through the golf course was from one of the accused, the one with wet pants. The restaurant manager did not notice that he was exhausted or anxious when he entered the restaurant. There was no evidence to connect him with the gun, its concealment, or the truck other than the dog track. The dog track ended at the door to the restaurant, not at the accused inside. The court did not find an automatic connection existed between the track, the site of the shooting,

and the restaurant. Based on all the evidence, the court was unable to conclude beyond a reasonable doubt that the accused being tracked was guilty. The other individual was tentatively identified in the photo lineup, but so was another individual with no connection to the case. The court could not conclude beyond a reasonable doubt that the second individual was guilty.

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R. v. Fehr, 2016 SKPC 87

Daunt, June 30, 2016 (PC16076)

Criminal Law – Theft with Violence – Sentencing

The accused pled guilty to a charge of theft using violence contrary to s. 344(1)(b) of the Criminal Code. She had tried to rob a cab driver and had threatened him with a knife, but he had escaped unharmed. The accused was intoxicated at the time of the offence. The Crown sought a 30-month sentence to be served in a federal penitentiary. The defence argued that in the circumstances of the accused, the court should impose either a lengthy probation or a shorter sentence followed by probation. Both the accused and the victim were Aboriginal. The accused was 18 at the time of the offence. She had had a troubled childhood and was apprehended by Social Services at the age of three. Although she had been adopted by a Caucasian family and raised in a stable home, she ran away at age 15 and became transient and addicted to alcohol. The accused had formed relationships with abusive partners and had two children who had been apprehended. After the offence the accused returned to the home of her adoptive parents and was working toward regaining custody of her children. She had pled guilty and expressed remorse. She had complied with her court conditions for one year.
HELD: The accused was sentenced to a two-year sentence to be served in a penitentiary. The sentence took into account that the offence had been committed against a vulnerable person.

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Lunn v. Phillips, 2016 SKPC 96

Demong, March 31, 2016 (PC16082)

Civil Procedure – Evidence – Credibility
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Small Claims

The plaintiff claimed monies due and owing for goods and services that he supplied to the defendant while constructing his house. The defendant argued that the goods and services were defective resulting in negligent performance of the contract. The defendant appeared to argue that the plaintiff should have given him a friend or family discount. The plaintiff's daughter was married to a relative of the defendant's sister-in-law. He further argued that some of the work was agreed to, but other work done or goods supplied were not expressly requested by the defendant, or if they were, there was no agreement as to the price. The defendant argued that because the parties were not ad idem regarding the essential term, the price, the plaintiff was only entitled to a reasonable price on a restitutionary quantum meruit basis. Further, he asserted that because the Provincial Court cannot provide equitable relief the plaintiff was barred from claiming a substantial portion of his debt. The defendant did not include these claims in his pleadings. The plaintiff had been in the business of excavating land and drilling support piles for 38 years. He indicated that he advised the defendant to hire a surveyor to lay out the location that the piles would be drilled. The defendant and his uncle placed the pins. The defendant argued that some of the piles were drilled at a location different than what was called for in the engineering specs. He indicated that the plaintiff's crew must have run over or moved the pins and drilled the piles in the wrong locations. The plaintiff indicated that he gave the defendant a price per vertical foot drilled per pile and $2,500 to excavate the basement, which did not include removal of the excavated dirt. Significant rain shortly after caused the sides of the excavation to fall in. The plaintiff attended and repaired the sides. The defendant asked the plaintiff to obtain materials on short notice. The plaintiff also provided other goods and services during construction. The plaintiff gave the defendant three pages of invoices when his work was completed. The bottom of each invoice had a clause under the heading "special instructions" that indicated two percent interest per month on overdue accounts. The total account was $16,881.19 and when it went unpaid the plaintiff

filed a lien on the defendant's property.
HELD: There was no express written agreement between the parties. The matter turned to a great deal on credibility. The court preferred the plaintiff's evidence where it differed from the defendant's with respect to a suggestion of lack of good workmanship, the number of hours required to do the work, and the manner of the work done by the plaintiff. The court found that more than likely the pins were laid out wrong by the defendant. There was no evidence that the parties had an agreement in relation to the payment of interest so the plaintiff's claim for interest as stated on the invoices was denied by the court. The court held that the plaintiff provided each of the goods and services listed in the invoices, and expended the number of hours set out (except for the one-hour reduction to repair the sides). The goods and services were provided in a good and workmanlike manner. There was no evidence that the defendant ever communicated his expectation of a discount to the plaintiff. There is no presumption of a gift except in relation to a parent and minor child. The court held that the defendant did not meet this burden of proving a gift. The court had to determine whether or not payment should be made on the basis of contractual quantum meruit. The court concluded the trial must be reopened to allow the parties to present evidence as to what constituted a fair and reasonable price for the goods and services provided. The court found support for the conclusion from The Small Claims Act and from case law. The plaintiff in this case had a substantial loss and the loss outweighed the failure to adduce evidence. The plaintiff was not awarded costs for the lien placement, but the defendant was awarded costs for lapsing the lien because the plaintiff did nothing further to enforce it.

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R. v. W. (E.), 2016 SKQB 132

Barrington-Foote, April 21, 2016 (QB16228)

Criminal Law – Disclosure – Third Party Records

The accused applied for disclosure of the complete files of the Regina Police Service (RPS) in respect of complaints by S.T. against T.T., including police reports, investigative notes, interviews and witness statements. S.T. was called at the voir dire as a witness by the accused. She did not object to the proposed disclosure based on privacy concerns. The accused submitted that the requested disclosure was relevant because of

the past common-law relationship between S.T. and T.T. and the effect of the breakdown of their relationship. S.T. and T.T. had provided different testimony regarding their relationship at the preliminary inquiry. The disclosure would enable the accused's counsel to cross-examine T.T. with regard the post-breakdown relationship that might undermine T.T.'s credibility by tending to prove that he had a motive to implicate the accused.
HELD: The application was granted. The court ordered disclosure of the files subject to a number of conditions. It found that the accused had met the requirements for disclosure established in R. v. O'Connor.

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R. v. W. (E.), 2016 SKQB 197

Barrington-Foote, June 2, 2016 (QB16229)

Criminal Law – Evidence – Admissibility – Out of Court Statements – Hearsay

The accused was charged with the aggravated assault of M.M. pursuant to s. 268(1) of the Criminal Code. The Crown applied for a ruling that two out-of-court statements by M.M., the accused's wife, and two out-of-court statements by W.W. (the accused's sister) should be admitted for the truth of their contents pursuant to the principled exception to the hearsay rule. The Crown established the requirement of necessity in relation to both declarants because in the case of S.T., she denied that she remembered anything about the alleged crime or giving statements to the police as she was intoxicated. In the case of W.W., the police had been unable to locate her. The issue was whether to admit the statements of the two declarants.
HELD: The application was dismissed. The court found that neither of the statements was inherently trustworthy after it had assessed all the evidence related to the declarants and their relationship to the accused as well as the circumstances under which the police officers took the statements.

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R. v. Kvale, 2016 SKQB 208

Schwann, June 16, 2016 (QB16234)

Constitutional Law – Charter of Rights, Section 7 – Appeal

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

The appellant appealed from his conviction under s. 253(1)(b) of the Criminal Code of driving while over .08. He appealed on the grounds that the trial judge erred in: 1) not ordering disclosure of documents related to the qualifications of the breath technician, which violated the appellant's s. 7 Charter rights; and 2) finding that the appellant's right to counsel under s. 10(b) of the Charter was not breached. At trial, the appellant had raised the violation of his s. 10(b) rights and a voir dire was held. Counsel for both parties agreed that the evidence admitted at the hearing would form part of the trial proper. The Charter application was based on the allegation that when the police officer placed the appellant under arrest, he provided him with his right to counsel and asked him if he wanted to contact a lawyer. The appellant responded that he understood and said that he didn't want a lawyer because he wasn't rich. The officer explained that he could give the appellant a list of lawyers and that Legal Aid was free. The officer reiterated the question of whether he wanted counsel but the accused said no and that he needed to go to the bathroom. The officer drove the appellant to the station and breath samples were taken, which showed the appellant's blood alcohol content was .90. The officer who administered the Intoxilyzer test prepared a Certificate of Analysis. The judge found that no breach of the appellant's ss. 10(a) or (b) rights and the certificate was admitted into evidence in the trial. The trial was adjourned repeatedly at the request of the appellant and when the proceedings commenced, the court was asked to deal with a defence application pursuant to s. 7 of the Charter for disclosure of the designation of the officer as qualified technician, his certification for the operation of the Intoxilyzer and his annual proficiency examination. No evidence was filed in support of the application. The trial judge dismissed the application because it was brought very late in the proceedings.

HELD: The appeal was dismissed. The court held with respect to each ground that the trial judge had not erred: 1) in dismissing the application on procedural grounds in the circumstances of this case; and 2) in finding that there had been no breach of s. 10(b). The evidence supported her conclusion. The judge found that the officer had asked the appellant twice whether he wanted to consult a lawyer and his answers were not equivocal nor had his understanding of his rights been affected by his physical discomfort. The officer was not required to give the appellant his rights a second time at the police station because the judge had determined that the appellant had not expressed a desire to exercise his right to counsel.

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Longley v. McFadden, 2016 SKQB 210

Megaw, June 17, 2016 (QB16198)

Family Law – Child Support – Interim – Variation
Family Law – Family Property – Division
Family Law – Child Support – Arrears

The parties had separated in 2014. At that time, the court made orders regarding custody and access and dealt with some of the family property. The sale proceeds from the property was paid into the petitioner's lawyer's trust account. The petitioner then applied for child and spousal support based upon the respondent's income. The court determined that his income was $312,000. By consent, the court ordered him to pay approximately $10,000 per month in spousal and child support. The respondent's income was based in large part upon income generated by a hotel and bar owned by his family by means of family trust. After the order was made, the petitioner, who had been the manager of the hotel, was terminated by the respondent. A month later the respondent broke into the petitioner's home. He assaulted her and attempted to murder her friend. He pled guilty and was sentenced to eight years' imprisonment. Both parties brought this application for direction on the distribution of the family property proceeds held in trust. The respondent brought this application to reduce the child and spousal support to a nominal amount while he is in prison and to extinguish his arrears, which he estimated were in the amount of $25,000. He argued that because of the downturn in oil prices, the hotel and bar business was doing poorly. There was some evidence that the business would have to be sold because financing loans were not being paid. The petitioner argued that the business had been mismanaged and suggested that it would improve if she was returned to her position. She opposed any variation of support and the reduction of the outstanding arrears, which she estimated at $250,000. She took that position because of the uncertainty of the facts surrounding the business operation. The petitioner sought payment out of the funds in trust in satisfaction of some of the arrears and payment of her family property entitlement.
HELD: The respondent's application to vary support was dismissed. The court declined to find a material change in the circumstances because it was unable to make determination of the hotel's business situation on the evidence. For similar

reasons, the court declined to expunge the respondent's arrears. The decisions should await the trial of the matter. Regarding the funds in trust, the court found that a debt owed by the respondent to the CRA should be paid first and then ordered that the petitioner should receive her half share of the remaining amount.

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R. v. Smyth, 2016 SKQB 214

Kalmakoff, June 21, 2016 June 27 (corrigendum) (QB16207)

Criminal Law – Appeal – Conviction
Criminal Law – Driving over .08
Criminal Law – Evidence – Credibility
Criminal Law – Impaired Driving

The appellant appealed his conviction for driving while his ability to do so was impaired by alcohol, contrary to s. 253(1)(a) of the Criminal Code. The appellant spent the evening drinking beer at a bar and then drove into the ditch on his way home. A passerby called 911 when the appellant appeared to be unconscious or sleeping. The passerby waited in her vehicle for the police, and while she was doing so observed the appellant walk to her car three times, each time with difficulty walking through the snow. He fell a number of times. The appellant's son arrived before the police did. He took the appellant to his home. The appellant had several drinks of rye after he arrived at his son's home. The appellant was arrested and a breath test demand was made. Experts at trial testified that the appellant's blood-alcohol concentration could have been below the legal limit at the time of driving, if his post-driving alcohol consumption was accepted. The appellant was found not guilty of the driving over .08 charge. The grounds of appeal were: 1) the trial judge failed to conduct a proper analysis of the evidence in accordance with R. v. W.(D.) when considering whether the defence evidence raised a reasonable doubt on the offence of impaired driving; 2) the trial judge erred in law by failing to properly consider the conflicting evidence on the issue of impairment; 3) the trial judge erred in law by holding that the evidence tendered by the Crown was sufficient to prove impaired driving beyond a reasonable doubt; and 4) the trial judge erred in law by convicting the appellant of impaired driving after determining there was a reasonable doubt that the appellant's blood alcohol concentration exceeded the legal limit at the time of driving.

HELD: The appeal was dismissed. The grounds of appeal were dealt with by the appeal court as follows: 1) the trial judge did not specifically recite the instruction from W.(D.) but he clearly stated the correct burden at the outset and indicated that if he was left with a reasonable doubt on any element of the offence the appellant would be acquitted. The trial judge was also clear that he accepted the passerby's evidence as credible and reliable. He rejected the portion of the appellant's evidence that conflicted with the passerby's. The son's evidence was also rejected. The trial judge did apply the key principles from W.(D.) even if he did not specifically articulate his findings in the language of that case. The trial judge did not err in his approach to the credibility analysis or his application of the burden of proof; 2) the appeal court held that the trial judge considered all of the evidence, as he was required to do, before making any conclusions regarding impairment. The trial judge did not ignore the conflicts in the evidence regarding the impairment of the appellant's ability to drive; 3) the appeal court was not convinced that the trial judge's verdict was unreasonable. The trial judge's reasons demonstrated that he was aware of, and applied, the correct legal principles in reaching his verdict. The trial judge's conclusions were entitled to deference; and 4) there was no case law to support the appellant's argument that the trial judge rendered an inconsistent verdict by convicting him of impaired driving after having acquitting him of driving over .08. The offences are separate offences with different elements. CORRIGENDUM dated June 27 , 2016: [48] The second sentence in para. 40 shall be amended to read as follows: >>>>…The factual conclusions he reached, and the inferences he drew from them in concluding that Mr. Smyth's ability to drive was impaired at the relevant time are well supported by the evidence.

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McKay Career Training Inc. v. Baker, 2016 SKQB 215

Allbright, June 21, 2016 (QB16214)

Torts – Negligent Misrepresentation – Damages
Professions and Occupations – Realtor
Real Estate – Sale of Building – Negligent Misrepresentation

The plaintiff brought an action for damages against the defendant Baker, a commercial realtor who worked as an independent contractor of Royal LePage (LePage), operating as a real estate brokerage firm. The defendants joined the City of

Saskatoon as a third party. The plaintiff wanted to lease new premises for its business college. The plaintiff's manager asked Baker to find a suitable property. Baker recommended a building. Since renovations were required, Baker arranged for a contractor to meet with the manager. The contractor asked if sprinklers would be needed and the manager indicated to Baker that he should find out and Baker said that he would. No further instructions were given by the plaintiff. Baker went to the city's building department and asked a clerk whether the property could be used as a school and what would have to be done to the structure for such use. The clerk said that it looked like sprinklers would not be required. Baker reported this information to the manager. The lease was signed in September 2010. With the consent of the plaintiff, the contractor began renovations before a building permit was obtained. After the contractor had submitted the application, the city wrote to the contractor advising that it would not approve it for various reasons and requested that a design professional address the issue of sprinklers and fire alarms. The plaintiff was not informed by the contractor of this letter. In December 2010, the city sent the contractor a letter advising that sprinklers were required. As renovations had largely been completed by then, the plaintiff had to incur extra costs of $111,000 to install sprinklers. The issues were: 1) whether Baker was liable to the plaintiff for either a negligent misrepresentation made by him or for a breach of contract based upon misrepresentation; 2) whether LePage was liable to the plaintiff for either Baker's negligent misrepresentation or for breach of contract based upon the misrepresentation; and 3) if either or both of the defendants were found liable to the plaintiff, was the city liable to either or both of them.

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HELD: The court dismissed the plaintiff's claim. It found with respect to each issue that: 1) there was a special relationship between the plaintiff and Baker, and that Baker conveyed inaccurate information to the plaintiff. It found that he acted negligently in making the representation because he had not made notes of the conversation in question, had not ascertained the identity of the person at the building department or obtained the information in writing. The plaintiff had suffered detriment as a result of that reliance. However, it was not reasonable in the circumstances for the plaintiff to rely upon Baker's representation. It should not have assumed that a brief verbal comment was sufficient, particularly when it knew that Baker did not have personal expertise in the area. It employed an experienced contractor and if he had informed it earlier of the city's response to his application for the building permit, the plaintiff could have reacted; 2) the court dismissed the plaintiff's claim against Baker for breach of contract. There was an oral

contract that he would represent the plaintiff's interest and there was an implied term of the contract to find out from the city regarding the sprinklers. He performed the task requested of him, but not as a guarantor. LePage was therefore not liable to the plaintiff either. In any case, there was no vicarious liability anyway, because Baker was an independent contractor not an employee of LePage; and 3) the claim against the city was dismissed. It was not liable to either of the defendants even if the plaintiff's claims against them had been successful. There was no special relationship between the city and Baker and it was unreasonable of Baker to rely on the city's employee's statement. Further, the city could rely upon legislative immunity under s. 26 of The Uniform Building and Accessibility Standards Act.

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McCorriston v. McCorriston, 2016 SKQB 216

Goebel, June 21, 2016 (QB16215)

Family Law – Spousal Support – Interim
Family Law – Family Property – Division – Interim Distribution

The petitioner wife applied for interim spousal support in the amount of $2,000 per month and an order providing her with an interim distribution of property in the amount of $25,000. The parties were in a spousal relationship for 10 years. Due to health problems suffered during the marriage, the petitioner was disabled and had to live on disability benefits in the amount of $20,000 annually. Since the separation in July 2015, the petitioner had been residing with family members. She submitted that although this kept her costs low, it was not a sustainable situation. The respondent earned $74,000 per annum. He argued that because he had one minor child in his care and paid child support of $1,100 each month to his former spouse, he had no monies remaining after his basic expenses were paid. The respondent agreed that the petitioner was entitled to interim support but that she had failed to demonstrate a need for support at this time as her financial statement showed a modest surplus. Regarding the interim distribution of family property, the evidence was not clear regarding the ownership of the family home. The petitioner acknowledged that there were no liquid funds available and suggested that the respondent obtain a loan. The only assets of the parties consisted of their pensions. HELD: The application for interim spousal support was granted and the respondent ordered to pay $500 per month. The order was made to diminish the disparity between the income and

lifestyles of the parties. The application for interim distribution of property was dismissed. The court found that this was not a situation where the net assets exceeded the amount of the distribution claimed. As the respondent had no liquid assets, the distribution of family property might eventually involve a spousal rollover from the pension funds to the petitioner.

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Saunders v. Saskatoon Funeral Home Co., 2016 SKQB 217

Meschishnick, June 22, 2016 (QB16216)

Statutes – Interpretation – Funeral and Cremation Services Act

After the death of his infant child, the applicant arranged for the cremation of the child's remains and instructed that they be returned to the respondent funeral home. The applicant and his wife, the respondent, separated after the funeral and were unable to agree on how to deal with the cremated remains. The applicant applied pursuant to The Funeral and Cremation Services Act and The Funeral and Cremation Services Regulations that he had the authority to direct the disposition of the cremated remains of his child and for an order directing the funeral home to deliver the remains to him. The applicant argued that under the Act, he was the authorized decision-maker as defined by ss. 2(b), 91(d) and 91(2)(b). These provisions allowed him to control the disposition of human remains. Under ss. 29(1)(b) and 30(1) of the Regulations, he was further authorized to direct the disposal of the cremated remains. The issue was whether the legislative scheme empowered the authorized decision-maker to control the disposition of cremated human remains.
HELD: The application was dismissed. The court held that the applicant did not have authority to dispose of the cremated remains. Unless the parties could come to an agreement, the matter would be left to the person appointed to administer the deceased child's estate. The funeral home should retain the remains until the 30-day appeal period expired. If the matter was not appealed, the court directed that the funeral home deliver the remains to the applicant. He was ordered to keep them until the administrator was appointed and then deliver them to him.

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R. v. Neary, 2016 SKQB 218

Smith, June 23, 2016 (QB16208)

Criminal Law – Controlled Drugs and Substances Act – Possession and Trafficking of Narcotics – Sentencing
Criminal Law – Sentencing – Conditional Sentencing
Criminal Law – Sentencing – Safe Streets and Communities Act
Criminal Law – Sentencing – Suspended Sentence

The applicant argued that removing the option of a conditional sentence from the available sentences due to the enactment of the Safe Streets and Communities Act from offences contrary to ss. 742.1(c) and (e) of the Criminal Code violated his ss. 7 and 12 Charter rights. The accused was convicted of four offences: possessing over three kilograms of cannabis marihuana, contrary to s. 5(2) of the Controlled Drugs and Substances Act (CDSA); trafficking in cannabis marihuana in an amount exceeding three kilograms, contrary to s. 5(1) of the CDSA; unlawfully possessing psilocybin, contrary to s. 4(1) of the CDSA; and possessing the proceeds of crime in an amount exceeding $1,000, contrary to s. 354(1) and 355(b) of the Criminal Code. The applicant gave notice of his intention to apply for a remedy under the Charter prior to sentencing. The applicant argued that his s. 7 rights were violated because he was deprived of liberty by the removal of a conditional sentence as an option in his sentencing. The applicant did agree that because his argument fell within s. 12 of the Charter the court should focus on that analysis. The applicant argued that the absence of a conditional sentence order was cruel and unusual punishment, violating s. 12 of the Charter. The Crown argued that the removal of the conditional sentence was not cruel and unusual punishment because a jail sentence was only one of the options remaining for sentencing. The applicant was a first-time offender. He volunteered in his community and was a good athlete, accepting a four-year scholarship to a university. He received awards for his athletic achievements in university. The applicant's invitations to try out for CFL teams were revoked due the criminal charges. The applicant excelled in academics in high school and university. The applicant also had a good employment history and strong support from family, friends, and others. The applicant observed the strict conditions of his release for over two years. The Crown conceded that if the applicant was being sentenced before the removal of a conditional sentence as an option, he would have been a good candidate for a conditional sentence.
HELD: The court must not limit the analysis to the circumstances of the particular offender when undertaking a s. 12 analysis. The court had to determine if the sentencing regime

resulted in a grossly disproportionate punishment. There was no minimum jail sentence required with these offences; a conditional sentence was just not available. The applicant was accused of possessing and trafficking over 20 pounds of marihuana. The court concluded that no reasonable legal observer would conclude that having the set of options available was somehow grossly disproportional to the applicant's crimes. The applicant's Charter application was dismissed, no violation of s. 12 was found. The sentencing range was 15 to 18 months, but the court noted that the range may not be applicable given the inevitable legalization of marihuana in Canada. The court concluded that the applicant posed no danger to the community. The court imposed a suspended sentence of two years. The conditions of the sentence included: reporting; refraining from possession, etc., of alcohol or other intoxicants; maintaining a residence in Saskatchewan; and a curfew.

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Acton v. Britannia (Rural Municipality No. 502), 2016 SKQB 220

Scherman, June 23, 2016 (QB16209)

Civil Procedure – Queen's Bench Rules, Rule 9-28
Civil Procedure – View by Jury – Accident Site

The defendant rural municipality applied to have the jury view the site of the accident as allowed under rule 9-28 of The Queen's Bench Rules. The accident occurred 12 years prior to the application. The road was in the process of being resurfaced at the time of the accident. The accident happened after a rainfall when the road was wet and slippery. The road surface had been changed from "chinese pavement" to conventional pavement since the accident. The road bed had not changed. The defendants argued that a view by the jury would allow them to understand and fully appreciate the evidence both as to the conditions on the day and the evidence in relation to speed. The defendant's defence was that the plaintiff was driving too fast. HELD: The judge had discretion as to whether to order a view. A specific purpose, demonstrable for good reasons was required. The court was unable to see how a view would serve the purpose of helping the jury to understand the evidence already heard or that to come. A view would not help the jury to understand the condition of the road at the time of the accident 12 years ago. There were numerous photographs and vive voce evidence available. The view would also not assist in determining how fast the plaintiff was driving. There were

experts on both sides to assist with the accident reconstruction. A view may distract the jury from a proper assessment of the evidence they would hear from the experts. The primary reason that the court did not order a view was because it would not assist the jury in assessing the essential evidence on the issue of speed.

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Knuth v. Best Western International Inc., 2016 SKQB 224

Elson, June 24, 2016 (QB16212)

Civil Procedure – Class Action – Jurisdiction of the Court – Territorial Competence
Class Action – Jurisdiction

A number of defendants in the class action brought an application challenging the territorial competence of the court to deal with and try the class action to the extent the claim pertained to those defendants. Only one defendant had been heard to date so the decision pertained to that defendant. The defendant argued that it had never operated a hotel in Saskatchewan and was not registered to carry on business in Saskatchewan. Further, the defendant indicated that the plaintiff had not stayed at any of their hotels in other provinces. The claim alleged that the defendant hotels had been improperly collecting destination marketing fees from their customers. HELD: The action was just a proposed class action and therefore, there would be determinations that had to be made in a certification application that may impact the consideration of territorial competence. The application was adjourned to be considered at the same time as the certification application. The defendant's argument was largely focused on the principles applicable to an individual action. They had little regard for the fact that if the action was certified it would become a national class action. There was no suggestion that the issues raised in the application were time sensitive. Also, there were other applications relating to territorial competence and it would be best for them all to be considered a once and at the same time as the certification hearing. The defendant could also pursue a claim for costs if they were eventually successful on their application.

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R. v. W. (E.), 2016 SKQB 226

Barrington-Foote, June 28, 2016 (QB16231)

Criminal Law – Aboriginal Offender – Sentencing
Criminal Law – Long-term Offender – Long-term Supervision Order – Breach – Sentencing

The accused pled guilty to breaching a condition of his 10-year long-term supervision order by consuming alcohol, contrary to s. 753.3 of the Criminal Code. The accused had assaulted someone and his wife called the police. When the police found the accused, he tried to drink a bottle of whiskey as they entered. The Crown submitted that he should be sentenced to a term between 18 months and two years because of the accused's lengthy and serious criminal record. He had shown a pattern of breaching release conditions and presented a serious risk to the public. The defence argued that an appropriate sentence would less than the 12 months imposed in R. v. Ipeelee because the accused was only drinking when the police found him under the assumption he had nothing to lose because he would be charged with assault. The accused had a lengthy criminal record of both violent and non-violent offences. Alcohol abuse was often behind the accused's criminal behaviour. The records from the Correctional Service of Canada and a National Parole Board assessment showed that the accused, a 52-year-old Aboriginal man, had performed well and participated in all required programming during his last period of incarceration for manslaughter. Whenever he was released, he tended to reoffend and was considered at high risk for violence because of the effect of alcohol on him. The defence argued that the accused had been making good progress since his release and that if he was imprisoned again his chance of rehabilitation would be adversely affected. The accused had experienced physical, emotional and mental abuse during childhood.
HELD: The accused was sentenced to 15 months. The court found that Gladue factors contributed to the accused's pattern of alcohol abuse and that reduced his blameworthiness for this offence. However, the protection of the public should be given the greatest weight in this case.

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Wendt v. Wendt, 2016 SKQB 227

Turcotte, June 30, 2016 (QB16219)

Family Law – Spousal Support – Interim

The petitioner wife applied for interim spousal support under The Family Maintenance Act, 1997. The respondent objected to the application only on the basis of how his income was determined and the amount of support he should pay because he was currently paying $3,600 per month to cover the family debts and all of the expenses associated with the family home, which the petitioner occupied. The petitioner had stayed at home during the course of the marriage although she had had part-time employment selling clothes. Her income was established as being $37,000. The respondent's base annual income was $122,000 in 2015. He had also received a discretionary bonus of $36,300 but he argued that the funds should not be included in his income at the time of the application. He did not know what bonus he would receive until December 2016. As far as the 2015 bonus was concerned, the parties agreed that those funds had already been spent on a family holiday. The respondent also argued that because the restricted share units (RSU's) issued by his employer in 2015 would not vest until 2018, the actual value to him was unknown and their value should not be included in his 2015 income. HELD: The application was granted. The respondent was ordered to continue to pay the monthly amounts of mortgage, property taxes, insurance and house loan. Of these amounts, the monthly sum of $2,200 should be considered as being interim spousal support. Under ss. 56.1 of and 60.1 of the Income Tax Act, these amounts were to be taxed as income to the petitioner and deductible to the respondent. In addition the respondent was ordered to pay $1,000 per month in interim support. Upon receipt of any bonus in 2016, the respondent would pay a percentage of it to the petitioner. The court agreed with the respondent's position that his annual income should not include the amount of his 2015 bonus because the parties had both received benefit and the value of RSU's as the value was not yet determined.

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Lemare Lake Logging Ltd. v. 3L Cattle Co. Ltd., 2016 SKQB 230

Danyliuk, June 30, 2016 (QB16221)

Statutes – Interpretation – The Saskatchewan Farm Security Act, Section 18

The applicant applied pursuant to s. 11 of The Saskatchewan Farm Security Act (SFSA) for an order that s. 9(1)(d) did not apply to four mortgages granted by the respondents in favour of

the applicant. The parties had been involved in a lengthy dispute and eventually an agreement was reached in August 2014, whereby the respondents acknowledged that they owed the applicant a total of $1.3 million and agreed to repay the debt by June 1, 2015. The respondents granted several mortgages in favour of the applicant, dated October 2014. The mortgages were on various pieces of agricultural land and were intended to secure the debt. The respondents paid nothing against the debt by June 2015 and the individual respondent in the action advised the applicant that he had no intention of paying. A demand was made and this proceeding instituted. As required, the Farm Land Security Board became involved. A report was prepared for the board that was to include the disclosure of financial information by the respondents. However, the individual respondent would not provide the information. Although he pledged to sell some assets to eliminate the debt, nothing had been sold.
HELD: The application was granted with conditions. The court ordered that the SFSA did not apply to the mortgages but gave the respondents a period of six weeks from the time of the decision in which to sell its assets to satisfy the debt. The court found that under s. 18 of the SFSA, the applicant had met the onus of proving that there was no reasonable possibility of the respondents meeting their obligations under the mortgage or that they had made sincere and reasonable efforts to do so. This finding was based upon its failure to provide sufficient information to the board to allow it to complete its report as satisfying the requirement to show a lack of viability. The court found that there were no equitable considerations under s. 19 of the SFSA to prevent it from granting the application.

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Winnitowy v. Winnitowy, 2016 SKQB 231

Tholl, June 30, 2016 (QB16236)

Civil Procedure – Summary Judgment
Civil Procedure – Queen's Bench Rules, Rule 7-5
Real Property – Joint Title – Undue Influence

The defendant applied for summary judgment dismissing the plaintiffs' claim. The plaintiffs brought an action for a declaration that the defendant held one half of the beneficial interest in a house as a trustee for them. The house in question had been owned at one time by the plaintiffs' father who died in 2014. At the time of his death, the title was registered in his

name and the defendants as joint tenants with right of survivorship. After obtaining letters probate, the defendant had the title to the property registered in her name. The defendant had been married to the plaintiffs' father in 2003. Prior to their marriage they had entered into an interspousal agreement that stipulated the defendant could continue to live in the house owned by the plaintiffs' father after his death. When she died or decided to move from the house, the residence was to be sold and the proceeds shared equally between the defendant and the plaintiffs' father's estate. In 2006, the plaintiffs' father made his will in which he confirmed the disposition of the house as stated in the agreement. In 2008, the plaintiffs' father transferred the title of the residence into a joint tenancy with the defendant. The lawyer who had prepared the agreement also handled the transfer of title. He deposed that he had informed the plaintiffs' father of the effect of the transfer and that he understood the consequences. The plaintiffs all deposed that they did not believe that their father understood the ramifications of the transfer and that his true intentions were reflected in the agreement and the will. They alleged that the defendant had induced their father to sign the transfer resulting in undue influence. None of the parties provided any evidence that the plaintiffs' father was suffering from a lack of capacity at the time of the transfer.

HELD: The defendant's application for summary judgment was granted and the plaintiffs' claim dismissed. The court found that although the plaintiffs had satisfied the burden for establishing that there were genuine issues for trial under Queen's Bench rule 7-5(1)(a), it would grant summary judgment pursuant to Queen's Bench rule 7-5(2)(b) because the matter was not complex, involved a relatively small amount of money and little conflict in the evidence. The court found that the plaintiffs' father understood the concept of joint title and the consequences to his children of transferring the title to his house. The court held that it could consider the issue of undue influence in a summary judgment application. The court found that there was no evidence regarding whether the defendant had exerted control over the plaintiffs' father nor was there any indicating that he lacked capacity. The court accepted the lawyer's evidence that the plaintiffs' father understood the transfer would defeat the provisions of the will. The court was satisfied that no presumption of undue influence arose and there was no actual undue influence and therefore a trial was not required. The court found that there was no resulting trust because the plaintiffs' father intended the defendant to have the full legal and beneficial title to the house upon his death.

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PS International Canada Corp. v. Palimar Farms Inc., 2016 SKQB 232

Kalmakoff, June 30, 2016 (QB16235)

Contracts – Interpretation
Civil Procedure – Summary Judgment
Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 7-5
Civil Procedure – Pleadings – Affidavits – Striking Out

The plaintiff sued the defendants for breach of contract because they had contracted in February 2014 to deliver a certain quantity of Canada grade #2 red lentils to the plaintiff between the months of September and December 2014. It claimed that the defendants' failure to make delivery of the lentils breached the contract and they suffered damages and sought $118,800 against Palimar and $81,400 against Marc. In their statement of defence the defendants described the contracts as production not delivery contracts. They contained an "Act of God" clause, which applied to the quality and quantity of lentils they were to produce. Due to unusual rainfall during the growing season, their lentil crops suffered and were graded as #3. Consequently, the quality did not meet the terms of the contract and they notified the plaintiff of the problem in a timely fashion. They argued that the Act of God clause became operative and relieved them of their obligations. The plaintiff and the defendants both applied for summary judgment pursuant to Queen's Bench rules 7-2 and 7-5 and also applied to strike affidavits filed on behalf of each of them.
HELD: The plaintiff's claim was dismissed and the defendants' application for summary judgment was granted. The court found that it was an appropriate case for summary judgment because it involved the interpretation of the contract, little was in dispute and the matter could be resolved on the evidence. Regarding the applications to strike affidavits, the court reviewed each of them pursuant to Queen's Bench rules 5-37, 5-39, 7-3, and 13-30 ascertained that portions of each affidavit should be struck for reasons relevant to the contents. It also dealt with other issues related to the affidavits and struck one because it did not conform to the requirements of reply affidavits under rules 6-6 and 6-14(2). With respect to the contract, the court interpreted the term "subject to sample acceptance" and found that it did not give the plaintiff the right to demand delivery of a lower quality of lentils. It also found that it was a production contract. The production of the specified grade of lentils was a true condition precedent to the contracts because there was no guarantee that the defendants could produce lentils of that

quality and until the event occurred, there was no right of performance on either side. If the condition precedent was not satisfied there was no contract. The court granted the defendants' application

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Humboldt Electric Ltd. v. Workers' Compensation Board, 2016 SKQB 234

Scherman, June 30, 2016 (QB16223)

Statutes – Interpretation – The Workers' Compensation Act, 2013, Section 18, Section 20, Section 23
Administrative Law – Judicial Review – Workers' Compensation Board

The applicant sought judicial review of a decision of the Appeal Tribunal of the Workers' Compensation Board that upheld the decision of employees of the Board that claims on behalf of four victims of an automobile accident were covered by The Workers' Compensation Act, 2013. The accident victims, three of whom were deceased, had been employees of the applicant. They had left their worksite and were travelling to their homes in Regina in a vehicle owned and driven by their supervisor, one of the victims. The applicant's business sign was on the vehicle. The applicant paid this supervisor $400 per month as a vehicle allowance in return for providing workers' transportation. The applicant advised that the employees were paid travel time based on a one-way trip from Regina to the work site but not paid for the return trip. The grounds for quashing the decision were: 1) that the tribunal made an error in jurisdiction because it ignored its own policy, which it was required to follow under s. 18(6) of the Act. The policy stated that the board would not provide coverage for injuries occurring during travel to or from work unless the travel was under the control of the employer; and 2) that the tribunal's decision was unreasonable.
HELD: The application was dismissed. The court held with respect to the issues: 1) that this was not a situation of true jurisdictional error, which would have required judicial review on the standard of correctness. The board had the jurisdiction under s. 20(2)(b) of the Act to decide the matter as it saw fit and was not bound to follow its own policy directives. Whether or not it failed to properly interpret its own policy was a matter to be decided in judicial review on the reasonableness test, not the correctness criteria; and 2) that it found the decision of the tribunal to be transparent and intelligible. Its interpretation that

the employees in this case were travelling in a vehicle paid for by the applicant was not unreasonable nor was its description of the applicant's position that it was not paying wages during the return trip of its employee was illogical. Its reasoned justification for its conclusion fell within a range of acceptable outcomes.

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Moosomin First Nation v. Bird, 2016 SKQB 235

Currie, June 30, 2016 (QB16224)

Trusts and Trustees – Trust Agreement – Variation

The applicant First Nation applied for an order varying a trust agreement. The applicant received funds from the federal government in 2003. The funds were placed in a trust administered under terms of a trust agreement for the benefit of the applicant. The trustees came to believe that the agreement limited their ability to manage the funds most effectively and wanted to modify the trust to prevent dissipation. The chief and council of the applicant and the trustees developed proposed amendments to the agreement to decrease operating expenses and create more income and growth and they unanimously approved adoption of the amendments. However, under the agreement, amendments could be made only by written agreement between the applicant's council and the trustees, followed by a vote of voting members approving it. The agreement provided that a majority of voting members, defined as individuals whose name appeared on the band's membership list, must vote and a majority of them must vote to approve the written agreement. The applicant advised that it would be costly and probably futile to seek approval of the amendments to the trust agreement in accordance with the voting requirement. There were 997 eligible voting members and 449 of them would be required to participate in the vote. At a recent community meeting held to vote on a matter related to the agreement, only 54 band members attended. The meeting had been widely advertised to the voting members. The applicant argued that because it anticipated another low turnout and that it would cost $50,000 to conduct the vote as required by the agreement, the court should make the requested order.
HELD: The application was dismissed. The court found that it had jurisdiction. It was not persuaded that the amendment provisions of the trust agreement should not be followed. The trust agreement provided a procedure for amendment. The cost of voting could be lessened, for example, by using mail-out

ballots. It was not appropriate for the court to vary the trust agreement to order the proposed amendments.

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Saskatchewan v. STC Health & Family Services Inc., 2016 SKQB 236

Schwann, June 30, 2016 (QB16225)

Injunction – Interlocutory Injunction

The Government of Saskatchewan (Saskatchewan) brought an application for an order for interim injunctive relief. In 1996 it had entered into an agreement with the defendant, the Saskatoon Tribal Council Health and Family Services Agency, under s. 61 of The Child and Family Services Act (CFSA), whereby Saskatchewan purportedly delegated its authority under the CFSA to the agency with respect to children on the Saskatoon Tribal Council First Nations reserves (STC). The agency described the agreement as one where the parties vested their respective jurisdictions in a joint initiative to provide child and family services on the STC First Nations using Saskatchewan courts. The agency relied on an annual comprehensive funding agreement (CFA) with the federal government to enable it to deliver the services. In May 2016, the federal government and the provincial Minister of Social Services indicated their concern to the agency with its unwillingness to adopt standardized reporting and accountability criteria and that as a result, the federal government would not be offering a 2016-2017 CFA until the requirements were met. In June 2016, the provincial Minister of Social Services purported to terminate the agreement to delegate its authority under the CFSA because of the federal government's decision not to fund the agency. The Minister also advised that effective immediately, Saskatchewan would assume responsibility for providing child welfare services for children on STC First Nation reserves. The Minister then tried to access and obtain files and documents in the possession of the agency and it refused to provide the access or authorization for ministry officials to enter STC First Nations reserves. The agency's position was that it was in negotiations with the federal government and that Saskatchewan's purported termination of the agreement and this application for injunctive relief constituted disreputable conduct amounting to an abuse of process. Saskatchewan argued that it must have access to the materials because it was the only legal entity with authority to

exercise powers under the CFSA and in order to exercise its powers and duties in a manner that ensured the safety of children.
HELD: The application was granted. The court ordered that the terms of interim injunctive relief would expire on September 30, 2016. The terms were that the agency was restrained from interfering with the exercise of Saskatchewan's statutory mandate on the STC First Nations reserves and from purporting to exercise any of Saskatchewan's powers under the CFSA. The agency was ordered to provide Saskatchewan with access to the documents that it requested.

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Kreger, Re (Bankrupt), 2016 SKQB 247

Thompson, July 25, 2016 (QB16242)

Bankruptcy and Insolvency – Discharge – Condition
Bankruptcy and Insolvency – Income Tax Debt

The bankrupt assigned into bankruptcy for the first time in 2013. His discharge required a court application pursuant to s. 172.1 of the Bankruptcy and Insolvency Act because the Canada Revenue Agency (CRA) had a proven claim in bankruptcy for personal income tax that exceeded $200,000 and it made up at least 75 percent of the unsecured proven claims in the bankruptcy. The CRA opposed the discharge, arguing that the bankrupt should be required to make further payments to the bankruptcy estate to preserve the integrity of the bankruptcy system. The bankruptcy trustee opposed the discharge because there was a debt for outstanding surplus income. The issue was whether the unique circumstances of the bankrupt supported an order for discharge from bankruptcy. The court considered: 1) the circumstances of the bankrupt at the time the personal income tax debt was incurred; 2) what efforts, if any, did the bankrupt make to pay the personal income tax debt; 3) did the bankrupt make payment in respect of other debts while failing to make reasonable efforts to pay the personal income tax debt; and 4) what were the bankrupt's financial prospects.
HELD: The court considered the circumstance as follows: 1) the bankrupt had some employment between 2005 and 2011 and he also earned income from drug trafficking. Since incarceration for drug trafficking the bankrupt enrolled as a student at a university and intended to continue his education with the assistance of student loans. The bankrupt's income tax debt was the result of a CRA reassessment for the years 2005 through 2011

on a net worth basis; 2) the bankrupt made no effort to pay his income tax debt before or after his incarceration. When the CRA undertook the assessment the bankrupt's assets had been forfeited as proceeds of crime and he was incarcerated and not working; 3) there was no evidence that he bankrupt made payments to any other debts while failing to make reasonable efforts to pay the personal income tax debt; and 4) the bankrupt indicated that his prospects would be limited by his criminal record. The court concluded that a condition of the discharge was required to ensure the integrity of the bankruptcy system. The court was confident that the bankrupt had the potential to become a contributing and participating member of society. The court imposed a condition on the bankrupt's discharge that he pay $18,000 to the trustee for the benefit of the creditors. The court also gave a two-year suspension from the date of the decision.

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Gyorfi v. Folk, 2016 SKQB 252

Zarzeczny, July 28, 2016 (QB16246)

Landlord and Tenant – Residential Tenancies Act – Hearing – Appeal

The appellant landlords appealed from the decision of a hearing officer of the Office of Residential Tenancies. The respondent tenants applied for compensation from the appellants for alleged violations of their obligations under The Residential Tenancies Act, 2006. The officer awarded them compensation. The appellants appealed on the ground that they had not received full disclosure specifically regarding the respondents allegations that there was mould in the rental suite and were not able to respond at the hearing.
HELD: The appeal was dismissed. The officer's decision mentioned that all the issues upon which it was based had been raised and addressed at the hearing and that both the appellants and the respondents had declined an opportunity for an adjournment to present further or other evidence and agreed that the officer could proceed with her decision based upon the evidence as it was given.

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Karavadra v. Shridhar, 2016 SKQB 253

Zarzeczny, July 28, 2016 (QB16247)

Landlord and Tenant – Residential Tenancies Act – Hearing – Appeal

The appellant tenant appealed from a decision of a hearing officer of the Office of Residential Tenancies. The tenant had applied for an order for the return of his security deposit pursuant to ss. 33 and 70 of The Residential Tenancies Act, 2006. Although the landlords had acknowledged that the tenant had paid his rent and a damage deposit, the hearing officer found that the landlord had proven his claim for unpaid rent but was not entitled to further damages. The officer then denied the tenant the return of his deposit.
HELD: The appeal was granted. The decision of the hearing officer was quashed and the damage deposit held by the rentalsman's office was ordered to be paid to the appellant. The hearing officer's decision was not supported by the facts: the appellant had paid his rent and his damage deposit.

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