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Subject Index

R. v. Welsh, 2015 SKPC 150

Morgan, October 27, 2015 (PC15169)

Criminal Law – Aggravated Assault
Criminal Law – Bail
Criminal Law – Hearsay Evidence – Principle Exception

The accused was charged with assault contrary to s. 268(1) of the Criminal Code against his partner. His partner died before the bail hearing so the Crown had to rely on the principled exception to the hearsay rule. The hearsay evidence was tendered under the second ground of a bail hearing, for the protection and safety of the public. A third party called the police respecting an incident involving the accused and victim. When police attended, it was obvious to the officer that the victim was in considerable pain. She indicated that she was thrown off the couch. The victim was taken to hospital but she almost immediately checked herself out. She initially refused to give a statement, but later did so using a cell phone. She indicated that there had been previous violence and the police had significant concerns about the level of violence over a number of years. The victim's daughters, mother and sister also gave information to the police about violence against the victim at the hands of the accused. Only the daughters actually witnessed any violence, the others were just told about it from the victim. The Crown argued that the accused was violating his non-contact order by contacting the victim by phone and email before her death. The accused argued that all of the evidence of historical assaults

Assault with a Weapon – Sentencing – Appeal

Criminal Law – Assault – Assaulting a Peace Officer – Sentencing

Criminal Law – Assault – Sexual Assault

Criminal Law – Break and Entry and Commit Assault with a Weapon – Sentencing – Appeal

Criminal Law – Child Pornography – Possession – Sentencing – Appeal

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

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

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

Debtor and Creditor – Assignment of Wages

Environmental Law – Environmental Management and Protection Act – Environmental Protection Order

Family Law – Child Support - Adult Student

Family Law – Custody and Access – Hague Convention

Family Law – Division of Family Property – Judgment – Interpretation

Landlord and Tenant – Appeal – Damages

Landlord and Tenant – Appeal – Residential Tenancies Act

would be inadmissible at trial and, therefore, no weight should be attached to it at the bail hearing. The accused entered a letter from previous legal counsel that indicated the victim had told him that she broke her arm when she fell and that the accused had nothing to do with the broken arm.
HELD: The Crown did not meet its onus to justify detention on the primary ground, to ensure attendance at court. With respect to the second ground, the court indicated that it was clear evidence that would be inadmissible at trial should not be used at a bail hearing. The court indicated that the previous allegations of abuse would not be of benefit to the Crown in proving the offence. The Crown did not meet the onus of justifying detention on the secondary ground. The court said that the hearsay evidence of the victim indicated that she was pulled of the couch and somehow got a broken arm. It was not clear what the actual act that broke her arm was. The victim was self-medicating with alcohol at all times that she gave statements. The court did not agree with the Crown that the strength of their case was overwhelming. An aggravated assault is a serious offence. The history of past alleged violence did not have any bearing on the accused's guilt or innocence and had no role in assessing the circumstances of the offence. The court determined that the accused's detention was not necessary to maintain confidence in the administration of justice. The accused was released on an undertaking that included the following conditions: live at an approved residence; abide by a curfew; don't possess or consume alcohol or drugs; non-contact with a number of people; etc.

 Back to top

Maurice Law, Barristers & Solicitors v. Sakimay First Nation, 2016 SKCA 92

Richards Caldwell Whitmore, July 22, 2016 (CA16092)

Civil Procedure – Appeal – Dismissal
Civil Procedure – Court of Appeal Rule 46(2)

The issue was whether the appeal undertaken by an out of province law firm from a Court of Queen's Bench decision should be dismissed as abandoned pursuant to rule 46(2) of The Court of Appeal Rules. The law firm and their clients had a dispute regarding the effect of their retainer agreement. The law firm applied for an assessment of legal fees pursuant to ss. 64 and 67 of The Legal Profession Act, 1990 in 2011. The chambers judge held that the retainer agreement was not fair and

reasonable. The law firm filed a notice of appeal in October 2014. There was an agreement as to the contents of the appeal book in February 2015. In February 2016, the registrar of the Court of Appeal served a notice on the law firm pursuant to rule 46(2) allowing them 15 days to apply to the court to show cause why the appeal should not be dismissed.
HELD: There is no established framework to use when considering rule 46(2) issues. The bottom line inquiry was whether it was in the interests of justice to strike the appeal for lack of moving it forward. The court concluded that it was not in the interests of justice that the appeal be dismissed. The law firm indicated that they did not pursue the action further because the respondent was having an election in the fall 2015 that they thought may lead to a settlement. The court found that to be reasonable. The respondent also did not express any concern about the lack of progress. There was no meaningful prejudice to the respondent. The law firm indicated that they can file the appeal book and factum within two weeks and the court found no reason not to believe that. The court imposed a time for the law firm to have to file the appeal book and factum.

 Back to top

R. v. McLean, 2016 SKCA 93

Ottenbreit Caldwell Ryan-Froslie, July 27, 2016 (CA16093)

Criminal Law – Appeal – Sentence
Criminal Law – Extortion
Criminal Law – Luring
Criminal Law – Making Child Pornography
Criminal Law – Possession of Child Pornography
Criminal Law – Sentencing – Sentencing Principles
Criminal Law – Sexual Interference

The Crown appealed the sentence of two years less a day followed by three years' probation received by the respondent after he pled guilty to 11 Criminal Code offences with respect to four female victims: one count of possession of child pornography, contrary to s. 163.1(4); four counts of luring, contrary to s. 172.1(a); one count of extortion, contrary to s. 346(1); four counts of making child pornography, contrary to s. 163.1(2); and one count of sexual interference, contrary to s. 151. The respondent began online relationships with the victims when he was 18 years old. The victims were between 12 and 14. He was arrested just before his 19th birthday. The respondent had the victims send him sexual photographs and videos and he became angry when the victims refused to send additional

R. v. Morrison

R. v. Nahnybida

R. v. Natomagen

R. v. P. (J.M.)

R. v. Sikora

R. v. Welsh

Saskatchewan (Ministry of Environment)

Yorkton Mental Health Centre (Officer in Charge) v. K. (M.)

photos. The respondent admitted that he knew the victims' ages. He did not have a criminal record. The doctor that prepared a psychological assessment of the respondent characterized him as naive and immature with a low probability of reoffending generally and a moderate-high risk to reoffend sexually. The respondent showed remorse and took responsibility for the offences. He had strong community and family support. The issues were whether the sentencing judge erred by: 1) failing to impose sentences that were proportionate to the gravity of the offences and the respondent's moral culpability; and 2) failing to impose consecutive sentences and was the global sentence unfit on the basis of the principle of totality.

HELD: Leave was granted and the appeal was allowed in part. The issues were determined as follows: 1) the sentencing judge correctly acknowledged that the offences were of high gravity and the two years less a day sentence for eight of the eleven offences was evidence of the pre-eminence of denunciation and deterrence. The sentencing judge exceeded the mandatory minimum for all offences where there was one except for the sexual interference offence for which he imposed less than the mandatory one-year minimum. The court was not satisfied that the sentencing judge made any error in determining the respondent's moral culpability. Any error on focusing on certain factors over others would only lead to a reweighing of factors, but the sentencing judge must be given deference; and 2) the sentencing judge conflated the consecutive/concurrent sentence analysis and the totality analysis and committed an error. The totality principle has no application unless consecutive sentences are imposed yet the sentencing judge determined that anything more than the global concurrent sentences of two years less a day would be crushing on the respondent. The appropriate two-step analysis was not done. The sexual interference charge was found to attract a consecutive sentence to the making and possessing child pornography charge because the legally protected interest of the victim was different than the others. The making of child pornography offences must be concurrent because there were for four victims over the same time period and the offences were therefore considered part of one course of conduct. The convictions for luring justified a sentence of at least two years consecutive. The luring sentences were concurrent to one another for the same reasons as the making of child pornography charges. The one-year extortion sentence should be consecutive because the substance of the offence was different than the pornography related offences. After applying the consecutive sentences the total sentence would be six years less a day, which was found to be unduly long considering the respondent's favourable personal factors. The court concluded that a total sentence of three years' incarceration was fit in the

circumstances. To obtain the result, all of the sentences remained concurrent to one another except for the sentence to the sexual interference charge that was varied to the one-year mandatory minimum sentence and was to be served consecutive to the other sentences.

 Back to top

R. v. McCallum, 2016 SKCA 96

CAldwell Whitmore Ryan-Froslie, August 3, 2016 (CA16096)

Criminal Law – Assault – Assault with a Weapon – Sentencing – Appeal
Criminal Law – Sentencing – Dangerous Offender – Indeterminate Sentence – Appeal

The accused was convicted after trial in Provincial Court of the charge of assault with a weapon contrary to s. 267(a) of the Criminal Code (see: 2012 SKPC 192). After declaring him a dangerous offender, the trial judge sentenced the accused to an indeterminate sentence of imprisonment. The accused had stabbed another inmate with a pencil within minutes of being released from segregation. He denied the attack but the judge accepted the evidence of the complainant. The accused had been abused during his childhood and started offending at the age of 16. At the time of this offence, the accused was 38 years old and had been imprisoned for 23 years of his life. He had 87 convictions for violent offences committed while in prison. The accused had been diagnosed with paranoid schizophrenia but refused medication. After his trial and conviction, the Crown requested a psychological assessment for a dangerous offender application. One psychiatrist testified that the accused could not restrain his violent behaviour, was at high risk to reoffend and could not be released into the community. Another psychologist agreed with the assessment but opined that the accused should be treated for his mental health problems in a psychiatric facility. The accused appealed his conviction on the grounds that the trial judge had erred because: 1) he adopted a number of legal errors made by Crown counsel in her final submission and that resulted in the trial judge's reasons being insufficient as they pertained to the key issue of credibility; 2) he wrongly designated him a dangerous offender because the predicate offence did not warrant a sentence of 10 years and it had not been part of a pattern of repetitive behaviour as required by s. 753(1)(a)(i) of the Code nor part of a pattern of persistent aggressive behaviour required by s. 753(1)(a)(ii); and 3) he failed

to acknowledge the expert's opinion that he should not be imprisoned but sent to a mental health facility.
HELD: The appeal was dismissed. The court found with respect to each ground that: 1) the trial judge had explained his reasons for convicting the accused and he had not demonstrated any error in them; 2) the dangerous offender sentencing requirement that the accused be found to have committed a serious personal injury offence had been met. The appellant's argument that such an offence itself must warrant a minimum sentence of 10 years was rejected. Nonetheless, s. 267(a) of the Code permitted a sentence of 10 years and the offence did fall within the s. 752 definition of serious personal injury offence. The trial judge had not erred in finding that the accused had demonstrated a pattern of behaviour that fit into both ss. 753(1)(a)(i) and (ii). The accused was unable to restrain himself from acting violently and there was a likelihood that he would injure others in the future as a result. The behaviour was persistent and had shown itself over a long period; and 3) the trial judge's decision to impose the sentence was not unreasonable because the accused's schizophrenia was not under control and he was at high risk to reoffend. The court agreed that the accused should be treated in a mental health facility but it did not have the power to make such an order.

 Back to top

R. v. Sikora, 2016 SKCA 99

Jackson Caldwell Whitmore, August 4, 2016 (CA16099)

Criminal Law – Break and Entry and Commit Assault with a Weapon – Sentencing – Appeal

The appellant appealed from his conviction for breaking and entering and committing an assault with a weapon contrary to s. 348(1)(b) of the Criminal Code (see: 2016 SKQB 89).
HELD: The appeal was dismissed. The court found that the appellant's guilty plea must be taken as an admission of the facts as presented by the Crown at the time of sentencing. The court could not intervene in this sentencing decision in the absence of palpable and overriding error by the judge. The court agreed with the judge's conclusion that only a custodial sentence was appropriate in the circumstances of this case because the accused invaded his estranged spouse's home and threatened violence.

 Back to top

R. v. Burke, 2016 SKCA 100

Jackson Caldwell Whitmore, August 4, 2016 (CA16100)

Criminal Law – Child Pornography – Possession – Sentencing – Appeal

The accused appealed from his sentence. He had pled guilty to possession of child pornography contrary to s. 163.1 of the Criminal Code. The sentencing judge sentenced him to three years in prison (see: 2015 SKPC 173). The appellant argued that the sentence departed from the range put forward by counsel without seeking submissions from him. He also appealed to the court to review the order made pursuant to s. 161 of the Code. HELD: Leave to appeal was granted and the appeal from the sentence was allowed only with respect to the order under s. 161. The Crown had not established the evidentiary basis to impose the order that was made and the order was varied by the court. Regarding the length of the sentence, the court expressed concern regarding the judge's departure from the sentencing range put forward by counsel but the sentence was not demonstrably unfit.

 Back to top

Prairie Valley School Division No. 208 v. Pilot Butte (Town), 2016 SKCA 103

Richards Caldwell Whitmore, August 17, 2016 (CA16103)

Municipal Law – Appeal – Special Assessments – Improvements Act

The appellant appealed the decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board. The appellant owned land in the respondent town and argued that the committee erred in holding that the land was subject to a special assessment imposed by the respondent in relation to a water infrastructure project. The respondent enacted a bylaw pursuant to The Improvements Act to levy the cost of a water distribution system as a special assessment on land benefited by the project. The appellant was a school division. The committee rejected the appellant's arguments that it was immune from special assessment, finding the land was not Crown land, land held in trust for Crown, or public square, park or dedicated lands. It was also found not to be inequitable to apply the special assessment. Leave to appeal was granted by the Court of Appeal. The issues

were whether: 1) the land was owned by the Crown; 2) the land was held in trust; 3) the committee misinterpreted the concept of "equity"; and 4) the special assessment was an indirect tax. HELD: The appeal was dismissed. The land was subject to the special assessment. The issues were discussed as follows: 1) the appeal court held, for several reasons, that the land was not owned by the Crown but was owned by the school division. The appellant argued that it was so tightly controlled by the Minister of Education that it should be considered to be an agent of the Crown. There is no statutory provision that declares that boards of education are agents of the Crown. The appeal court found it unnecessary to determine the level of control pursuant to the common law because it was entirely clear that the statutory scheme did not contemplate boards of education being exempt from special assessments levied under The Improvements Act. The Municipalities Act, unlike The Improvements Act, specifically exempts the interests of the Crown and property owned by a school division from taxation; 2) the trust argument also failed because The Education Act says that all buildings and land are vested in the board of education; 3) the appellant's argument failed because the special assessments were not imposed on taxpayers, but rather on land. The appellant also argued that the assessment was inequitable because it applied to all four of its lots when only one of the lots was connected to the water system. The assessment was based on the length of frontage owned not on the number of connections etc.; and 4) the appeal court did not see any merit in the appellant's argument that the special assessment was an indirect tax. A tax levied on land is typically seen as a direct tax. The appellant acknowledged that local improvement assessments are direct taxes, but went further to suggest the assessment in this case was indirect as far as it applied to the school division. The appeal court did not accept the appellant's arguments in that regard.

 Back to top

101211532 Saskatchewan Ltd. v. Cronan, 2016 SKPC 91

Kovatch, June 30, 2016 (PC16089)

Debtor and Creditor – Assignment of Wages
Employment Law – Wage Assessment

The plaintiff brought an action in debt against the defendant. The defendant had worked for the plaintiff for a short period of time and then quit. The plaintiff's principal believed that during this period, the defendant had damaged equipment owned by

the plaintiff. The plaintiff agreed to rehire the defendant if he would pay for the damages and had an assignment of wages document prepared. The defendant executed the assignment. At the end of this employment period, the defendant complained to the Ministry of Labour Relations because of a shortfall in his wages in the amount of $2,000. The Ministry found that the amount had been deducted by the plaintiff pursuant to the agreement and that s. 9-2 of The Saskatchewan Employment Act deemed it an unlawful deduction from the employee's wages. The plaintiff did not pay the assessed wages but brought this action. The defendant denied that he had caused any damages to the plaintiff's equipment and claimed that he was coerced into signing the assignment.
HELD: The plaintiff's claim was granted in the amount of $200 in debt because an invoice confirmed that amount. The plaintiff failed to provide evidence to support the rest of its claim for damages. The court found that s. 2-65 and s. 9-2 of the Act prevented the plaintiff from relying upon the assignment of wages form as establishing civil liability to give it a legitimate action in debt.

 Back to top

R. v. P. (J.M.), 2016 SKPC 97

Whelan, August 3, 2016 (PC16084)

Criminal Law – Assault – Sexual Assault

The accused was charged with the sexual assault of his six-year-old daughter contrary to s. 271 of the Criminal Code. The accused represented himself. The accused and his former wife had divorced when their daughter was two and half years old. Since that time, the former wife had reported that the accused had sexually abused their daughter twice before this allegation. The complainant's video-taped statement to a police officer regarding the circumstances of the alleged assault was admitted and the child also testified during the trial from a soft room. The other Crown witnesses included the complainant's mother, the family's physician and a child protection officer who testified as to what the complainant had told them about the alleged assault. The accused testified in his defence and called his girlfriend, his mother and a friend as witnesses to testify as to their remembrance of events that took place at the time at which the alleged assault occurred.
HELD: The accused was found not guilty. The court accepted the evidence of the accused and was satisfied that his version of

events was corroborated by the evidence of family and friends. It found that the evidence of the child contained inconsistencies and confusion between what she knew to have happened and what she might have been told. The court suspected that the child had been coached by her mother to make the allegation.

 Back to top

R. v. Natomagen, 2016 SKPC 108

Lane, June 15, 2016 (PC16085)

Criminal Law – Assault – Assaulting a Peace Officer – Sentencing

The accused pled guilty to one count of committing an assault, contrary to s. 266 of the Criminal Code, and one count of committing an assault on a peace officer, contrary to s. 270(1)(a). The first assault occurred when the accused was intoxicated. He claimed that a group of school children attacked him and he punched one of them in the face. The second assault occurred after the accused had been arrested. He threw his blood-soaked shirt into the face of one of the police officers.
HELD: The accused was sentenced to 60 days imprisonment for each charge to be served concurrently and one year of probation. The court found that the cases with respect to prisoners spitting in the faces of police officers were similar to the act of the accused. The court considered the mitigating factors such as that the accused, a 26-year-old Metis man, had no criminal record, suffered from alcoholism and lived in poverty. The accused had not attended residential school and had not experienced racism. The court decided that a custodial sentence was appropriate because the intention of s. 718.02 of the Code was to focus on deterrence and denunciation in offences under s. 270.

 Back to top

Gallernault v. Lavoie, 2016 SKQB 241

Danyliuk, July 19, 2016 (QB16249)

Landlord and Tenant – Appeal – Damages
Landlord and Tenant – Appeal – Landlord and Tenant Act
Landlord and Tenant – Appeal – Possession Order
Landlord and Tenant – Appeal – Rent Abatement
Landlord and Tenant – Appeal – Residential Tenancies Act
Residential Tenancies Act – Jurisdiction

The landlords applied for a writ of possession pursuant to The Landlord and Tenant Act (LTA). The landlords also appealed an order of a hearing officer under The Residential Tenancies Act, 2006 (RTA). The landlords entered into an agreement with the respondent whereby he would live in a house they owned, and in return, he would pay the utilities, do some construction work and manage the renovation of the house. There were eventually disputes between the parties, and the respondent stopped paying the utilities. The landlords applied for a writ of possession under the LTA, and the respondent brought an application before a hearing officer under the RTA. The hearing officer found he had jurisdiction because there was a tenancy agreement and rent payable. The hearing officer concluded that the landlords owed the respondent $700 as damages and rent abatement because the house was in such a state of disrepair that no rent should have been paid for part of the time. The hearing officer also found that the landlords wrongfully took $5,000 cash that belonged to the respondent, so he awarded that amount to the respondent. The landlords argued that the hearing officer did not have jurisdiction because: 1) there was no tenancy agreement as no rent was payable; 2) the rent must include profit or some expectation or hope of profit; and 3) the house was in such a state of disrepair due to ongoing renovations that it was dangerous and not fit for rental.

HELD: The court reviewed each of the landlords' arguments regarding the lack of jurisdiction of the hearing officer: 1) the court did not agree with the landlords that there was no tenancy agreement. Pursuant to the RTA, rent does not have to be real money. Either paying the utilities or supervising the construction were found to be sufficient to constitute rent. Even if it was found that the RTA did not include that type of rent, the court found that the common law did; 2) the argument was unsupported by law; and 3) the landlords had a duty to ensure the premises were in proper condition to rent to a tenant. Section 49 of the RTA requires a landlord to maintain the residential property in a good state of repair. The RTA and not the LTA is the proper legislation governing residential premises. The rent abatement order was reasonable and within the jurisdiction of the hearing officer. The court also found that it was within the hearing officer's authority to award the $5,000 order to the respondent for money found to have been taken from him by the landlords. The respondent could claim for loss of personal property pursuant to s. 70(6) of The Residential Tenancies Act, 2006. The evidence did not establish, however, on the civil burden of proof that the landlords took the cash. The hearing officer committed an error of law. The hearing officer first had to find that it was more than likely that the landlord did the wrongful act and only then could damages be assessed. The

landlords' application for a writ of possession under the LTA was dismissed because the LTA did not apply to the rental situation.

 Back to top

R. v. Hanson, 2016 SKQB 243

Schwann, July 21, 2016 (QB16238)

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

The Crown appealed from the decision of the Provincial Court judge. In it, she found that the police failed to satisfy the implementational duty owed to the accused and thereby breached her s. 10(b) Charter right to counsel and excluded the Certificate of Analysis from evidence pursuant to s. 24(2). The accused was acquitted of the charges of driving while her blood alcohol content exceeded .08, contrary to ss. 253(1)(b) and 255(1) of the Criminal Code, and impaired driving, contrary to ss. 253(1)(a) and 255(1) of the Code (see: 2015 SKPC 133). The Crown appealed on the grounds that the trial judge erred: 1) in finding a breach of the accused's s. 10(b) Charter rights because the accused had not waived her rights after arrest at the roadside and that the officers should have known that the accused's request to speak to her father-in-law while she was at the police station constituted an implicit request for legal advice; and 2) in excluding the Certificate of Analysis by failing to undertake a proper Grant analysis.
HELD: The appeal was dismissed. With respect to each issue, the court found that the trial judge had not erred: 1) in finding that the accused had not waived her right to counsel at the roadside because the officer had told her that she should let him know if she changed her mind. She had not declined the offer and it could be logically inferred that she thought that she would have the chance to contact counsel at the police station. While at the station, there was no evidence that the accused waived her right and the officers were aware that she had not done so. The trial judge was correct in finding in the unique circumstances of this case that the accused's repeated requests to call her father-in-law without explaining the purpose of the call constituted special circumstances. The accused clearly showed her confusion regarding what she should do and the officer failed to permit her to contact a family member for the purpose of facilitating her right to obtain legal advice before providing breath samples; and

2) in her application of the Grant analysis and decision to exclude the Certificate of Analysis.

 Back to top

R. v. Nahnybida, 2016 SKQB 245

Krogan, July 22, 2016 (QB16240)

Criminal Law – Motor Vehicle Offences – Dangerous Driving Causing Death – Sentencing
Criminal Law – Motor Vehicle Offences – Impaired Driving Causing Death – Refusal to Provide Breath Sample – Sentencing

The accused was charged with: dangerous driving causing death; driving while impaired thereby causing death; refusing to provide a breath sample without reasonable excuse when he knew that he had caused an accident resulting in harm to another person who later died; driving while disqualified; and breaching a probation order prohibiting him from driving. The accused was convicted of dangerous driving and acquitted of impaired driving after trial by judge and jury. He was convicted of refusing to provide a breath sample after trial by judge alone. He pled guilty to driving while disqualified and breaching the terms of his probation. The accused was 19 at the time of the offence. On the evening in question he was fatigued, and witnesses had seen him drinking at a party. He left it, driving a vehicle in breach of his probation, to buy liquor and then return to the party. He drove at approximately 130 km/h per hour in a 100 km/h zone, fell asleep and lost control of the vehicle. When it rolled, one of the passengers was injured and later died. The accused was taken to the hospital and interviewed by a police officer. After receiving legal advice, the accused declined to provide a breath sample. The Crown submitted that the accused should receive a global sentence of eight years' imprisonment, composed of seven and a half years for the refusal to provide a breath sample where death ensued and two years concurrent for dangerous driving, six months consecutive for driving while disqualified and six months concurrent for breach of probation. The defence argued that the proposed sentence was too harsh. The court considered the mitigating factors to be that the accused was a youthful offender, he was assessed at low risk to re-offend and he had offered an apology. Regarding the aggravating factors, the court noted that the accused had amassed 10 driving offence convictions under the Criminal Code and provincial traffic legislation between the time he obtained his licence and these offences. He demonstrated a persistent disregard for

driving prohibitions and sanctions placed on him. The court found that the accused's argument that the passenger contributed to his own injuries because he wasn't wearing a seatbelt indicated that he wasn't taking responsibility for his conduct. The court could not consider alcohol as an aggravating factor because the jury had acquitted the accused of the impaired driving charge.
HELD: The accused was sentenced to 40 months' imprisonment for the offence of dangerous driving causing death and 40 months' imprisonment for the offence of failing to provide a breath sample following an accident, to be served concurrently with the first sentence. For the offences of driving while disqualified the accused was sentenced to six months' imprisonment to be served consecutively and for the offence of breach of probation, the accused received a six-month concurrent sentence. The accused was prohibited from driving for five years following release.

 Back to top

Beacon Roofing Supply Canada Co. v. Industrial Properties Regina Ltd., 2016 SKQB 248

Barrington-Foote, July 26, 2016 (QB16243)

Civil Procedure – Evidence - Credibility
Civil Procedure – Queen's Bench Rule 7-1
Contracts – Interpretation – Unjust Enrichment – Restitution
Landlord and Tenant – Commercial Lease
Landlord and Tenant – Lease – Breach
Landlord and Tenant – Lease – Repair

The plaintiff alleged that the defendant failed to maintain, repair, and replace an outside storage area on the property pursuant to the lease of commercial space. The plaintiff claimed pavement costs, other costs as a result of the breach, interest at 10 percent per annum, and solicitor-client costs. Alternatively, the plaintiff argued that the defendant was unjustly enriched and therefore it was entitled to restitution. A consent order was granted pursuant to rule 7-1 of The Queen's Bench Rules for certain questions to be heard before the trial. The plaintiff indicated that some of the unusable yard area was paved when the lease was signed but was torn up when the defendant removed some racking. The defendant disagreed that the racking was on asphalt, and indicated that it was on plywood. Over a year after possession, the plaintiff wrote to the defendant and demanded that the yard site be paved immediately indicating that the defendant had breached the lease. When the defendant refused

to make the repairs the plaintiff wrote to the defendant and indicated that the situation was an emergency entitling them to proceed without waiting 30 days for the defendant to do the repairs. The issues were: 1) did the plaintiff or the defendant breach the lease by failing to repair, replace or maintain the yard site as and when it was obliged to do so, and specifically: a) was there an implied term that the yard site was fit for the purpose for which it was to be used; b) did the defendant breach article 7.1 by failing to repave the yard site on notice from the plaintiff; c) was the condition of the yard site a latent defect pursuant to article 2.2 of the lease, and as such, a breach of the defendant's warranty that the premises were in good condition and repair; and d) did the plaintiff breach the warranty in article 5.2(iv) that the premises did not require material expenditures for repair or replacement; and 2) was the defendant unjustly enriched.
HELD: The issues were determined as follows: 1) a) there was no implied term that the yard site was fit for the plaintiff's purpose and, therefore, there was no implied term that the defendant must repair or replace all or any portion of the yard site to enable the plaintiff to carry on operations; b) the court interpreted article 7.1 to mean that the defendant was obliged to maintain, repair, and replace structural elements and structural components of parking areas. The court used the plain meaning of parking area to conclude that it meant only those areas used for parking and not the areas used for storage; c) the court found that the fact that a substantial portion of the paved area in the yard site was a light structure was not a latent defect. If the portions of the yard with broken pavement were found not to be in good condition and repair the plaintiff was still not entitled to repave the whole yard with a heavy pavement; d) the term "improvements" in article 5.2 was interpreted to include the south parking area but not the remainder of the outside storage areas. The plaintiff accordingly did not have a claim pursuant to article 5.2. If the warranty extended to the remainder of the yard site the court said that it would still not have found a breach because there was insufficient evidence to support the conclusion that the west lot needed any repairs when the plaintiff leased and took possession of the property. The defendant did do the necessary repairs to the north lot where the racking had been removed; and 2) the court found that the plaintiff failed to prove that the defendant was enriched and that it suffered deprivation. Further, the plaintiff did not seek the consent of the defendant to undertake the work, as required by the lease. Article 8.1 also said that the plaintiff shall pay the entire cost of each alteration and article 8.2 said that all alterations were to remain upon the premises at the expiration or termination of the lease without compensation to the plaintiff. The court indicated there was a juristic reason why the

defendant was entitled to retain any benefit it may have received. The court also noted the common rule is that in the absence of an express covenant in a lease, leasehold improvements become the property of the landlord without compensation. The court concluded that there was no basis for an order for restitution based on unjust enrichment.

 Back to top

R. v. Cote, 2016 SKQB 249

Allbright, July 28, 2016 (QB16250)

Constitutional Law – Validity of Legislation – Charter or Rights, Section 1
Criminal Law – Sentencing – Manslaughter
Criminal Law – Sentencing – Remand Time

The accused was jointly charged with another person with manslaughter, contrary to s. 236(b) of the Criminal Code. The co-accused pled guilty and was sentenced to a term of imprisonment of 7.5 years minus a one-year credit for time on remand. His remand duration was 249 days, but he was given remand credit of 1.5:1. The accused later also entered a guilty plea. The Crown and accused proposed a 7.5-year sentence of imprisonment by way of a joint submission. The Crown and accused did not agree on the calculation of remand time to be credited to the accused. The accused spent 47 days in remand and was then released on judicial interim release until he committed a theft of a motor vehicle. He was sentenced to one-year imprisonment on that charge and was then denied further judicial interim release. The accused's bail was revoked pursuant to s. 514(8), so he was limited to 1:1 remand credit by operation of s. 719(3.1). The accused served a total of 606 days on remand. The accused brought a notice of constitutional questions application where he sought orders that: 1) s. 719(3.1) of the Criminal Code was unconstitutional and contrary to s. 7 of the Charter, and not saved by s. 1 of the Charter; and 2) the words referring to s. 514(8) in s. 719(3.1) of the Criminal Code are of no force and effect, pursuant to s. 52 of the Constitution Act, 1982. The accused argued that the principles of fundamental justice were offended by s. 719(3.1) of the Criminal Code. He further asserted that the application of s. 719(3.1) prohibited the sentencing judge from applying the principles of parity and proportionality to a person being sentenced.
HELD: The Supreme Court of Canada held that s. 719(3.1) of the Criminal Code violated s. 7 of the Charter with respect to

remand time being limited if the detention was pursuant to s. 515(9.1). The violation was not saved by s. 1. The court had not dealt with the question as it related to s. 524(8). The Supreme Court of Canada found it clear that s. 719(3.1) limits liberty. The court applied the Supreme Court's conclusions regarding the purpose of s. 719(3.1) as being directly applicable. The challenged law was found to be unconstitutionally overbroad because it deprived some people of liberty for reasons unrelated to its purpose. Further, it was held that the Crown did not justify the infringement under s. 1. The court declared the challenged portion of s. 719(3.1) to be of no force and effect under s. 52 of the Constitution Act, 1982. The accused was denied further bail because he committed a serious offence while released. The court concluded that it was not appropriate to consider remand credit of 1.5:1 for the accused. The accused was given credit of 1.25:1 for a total of 757.5 days or 2.07 years. The accused was given remand credit of two years. The court accepted the joint submission of 7.5 years. Ancillary orders were made.

 Back to top

Saskatchewan (Ministry of Environment), 2016 SKQB 250

Brown, July 28, 2016 (QB16244)

Civil Procedure – Queen's Bench Rules, Rule 2-12
Civil Procedure – Parties – Intervenor
Civil Procedure – Court of Appeal Rules, Rule 17

The Government of Saskatchewan applied for judicial review of an arbitrator's decision. The decision was rendered after the respondent union grieved the government's replacement of a firefighter fitness test with the WFX-fit test. The arbitrator found that the test was discriminatory. The Canadian Interagency Forest Fire Centre Inc. (CIFFC) had supported the development of the WFX fit-test. The CIFFC, an international not-for-profit organization comprised of firefighting agencies from across Canada and the United States, operates forest fire management services between the provinces, territories and the states with the goal of providing and sharing properly trained firefighters at time of need. The CIFFC applied for intervenor status pursuant to Queen's Bench rule 2-12 in the judicial review initiated by the government.
HELD: The application was granted. The court found that Queen's Bench rule 2-12 was a consolidation of former Queen's Bench rules 39, 39A and 672. As Court of Appeal rule 17 was similarly worded, the court reviewed the application in

accordance with the Court of Appeal's interpretation of that rule. The CIFFC had sufficient interest in the outcome of the review and its submissions would aid the court. The parties had not objected to the CIFFC being involved in the application. The court stipulated that the CIFCC was not to expand the issues identified by the parties and was restricted to filing a 15-page brief and to 15 minutes of oral argument.

 Back to top

Campbell v. Campbell Estate, 2016 SKQB 251

Keene, July 27, 2016 (QB16245)

Civil Procedure – Limitation Period
Civil Procedure – Pleadings – Statement of Claim – Application to Strike

The plaintiffs brought a claim against the defendant, the executor of their father's estate. Their father died in 1990 and the defendant applied for and received letters probate in July 1990. Under the terms of their father's will, the plaintiffs were to receive title to his farmland in equal shares. The plaintiffs claimed that the defendant was tardy in transferring the land to them, which resulted in them suffering losses and damages. The defendant defended on the basis that the suit was statute-barred by The Limitations Act. He filed an application for summary judgment requesting that the claim be struck.
HELD: The application for summary judgment was granted. The plaintiffs clearly identified that the cause of action commenced in January 1991 and yet they did not commence their action until 14 years later. The action was statute-barred under s. 3(1)(f) of the former legislation (The Limitation of Actions Act). The claim was struck as an abuse of process pursuant to Queen's Bench rule 7-9(2)(e).

 Back to top

Back to top

Agri Resource Mgt. 2001 Ltd. v. Saskatchewan Crop Insurance Corp., 2016 SKQB 254

Allbright, August 3, 2016 (QB16257)

Civil Procedure – Queen's Bench Rules, Rule 4-44
Civil Procedure – Application to Dismiss Action – Want of Prosecution

The plaintiff commenced an action against the Saskatchewan Crop Insurance Corporation (SCIC) in 1993. The plaintiff alleged that its farm operation was wrongfully denied crop indemnities from the defendant for its 1991 and 1992 crop year and that by cancelling the plaintiff's crop insurance for 1994, the plaintiff suffered consequential losses arising from that cancellation. The defendant brought an application pursuant to Queen's Bench rule 4-44(a) for an order dismissing the plaintiff's claim for a want of prosecution. There had been two periods of activity on the file between 1993 and 1998 and again between 2004 and 2006. During the latter period, the defendant had brought a motion to dismiss the claim for want of prosecution but it was adjourned by consent. The plaintiff argued that the delay had not been inordinate due to the complexity of the case. Delay had occurred because of lengthy and contentious examinations for discovery and ensuing undertakings. The plaintiff had had trouble obtaining experts' damage reports. The plaintiff's counsel had been unable to work for a period of time. It argued that there would be no prejudice to the defendant if the matter proceeded and it was in the public's interest to allow the action to proceed as the outcome would affect all Saskatchewan farmers due to the nature of the action and the subject of the claim. The defendant's position was that the delay was inordinate and inexcusable. It filed an affidavit deposing that many of its witnesses had died or could not be located. The memories of those who could testify would be detrimentally affected after 24 years had elapsed. HELD: The application was granted and the plaintiff's claim struck in its entirety. The court applied the test established in International Capital Corp. v. Robinson Twigg and Ketilson and found that there had been inordinate delay in light of the fact that there were only two parties to the litigation. The court found the delay to be inexcusable because it was not satisfied that the plaintiff had been diligent in pressing its claim. Although the court found that the defendant had not acted diligently either, it had tried earlier to dismiss the claim for want of prosecution. It was not in the interests of justice to proceed as it would cause significant prejudice to the defendant because of the effect of the lapse of time on its witnesses. The public interest would be best served in having disputes involving crop insurance like this one be resolved in a timely fashion.

 Back to top

Yorkton Mental Health Centre (Officer in Charge) v. K. (M.), 2016 SKQB 255

Schwann, August 3, 2016 (QB16251)

Mental Health Services Act – Certification – In-Patient Detention

The applicant sought an order pursuant to s. 24(1) of The Mental Health Services Act directing that the respondent be detained at the Saskatchewan Hospital for a period not to exceed one year for the purpose of obtaining treatment and/or care and supervision. The application was served on the respondent, his sister and personal guardian, his official representative, and his son. The respondent was long diagnosed with schizo-affective disorder and the criteria for granting a long-term order set out in ss. 25.1(1)(b), (d), and (e) were met in these circumstances. The respondent's son and sister argued that he was not likely to cause bodily harm to himself or others within the meaning of s. 24.1(1)(c). They also questioned whether the treatment, care, and supervision can only be provided in a mental health centre. The respondent was 60 years old and had been detained in a health centre since April 23, 2016. The centre was not a long-term treatment centre. He was admitted to hospital when the operators of his approved home gave notice for termination of his placement after an incident where the respondent allegedly assaulted the home operator and left the home. The respondent's psychiatrist indicated that the respondent's first admission was in 1985 and that all admissions since May 2012 had been on an involuntary basis. In 1985, the respondent was diagnosed with schizo-affective disorder and alcohol-use disorder. The alcohol problem was no longer an issue. The psychiatrist indicated that, without appropriate and adequate treatment, the respondent's condition would continue to deteriorate to his detriment. The respondent often failed to comply with his medication regime when not at the centre and this led to significant mental disorder. The psychiatrist believed that the respondent posed a risk to his own safety and the safety of those around him and that only the treatment, care and supervision he needed could be provided at the Saskatchewan Hospital. She also noticed a marked increase in his aggression and verbal outbursts. The sister and son indicated that they believed a partial cause of the respondent's recent outbursts were a result of his opposition to going to the Saskatchewan Hospital.

HELD: The court was satisfied that the respondent was suffering from a mental disorder and as a result was in need of treatment, care and supervision from a mental health centre. The respondent had not engaged in self-harm or presented with suicidal ideation, but he had been found to place cigarette butts in drawers and garbage cans. He had also left community homes and been found wandering on the highway. The court did not find that either of those examples satisfied the likelihood of bodily harm to the respondent that necessitated a long-term detention order. The court concluded that the evidence

established an increasing tendency toward physical aggression. The court was satisfied that the nature of the respondent's illness combined with its progression over the past few months presented a likelihood of harm to others. The s. 24.1(1)(c) was met. The only facility available to offer the necessary treatment was the Saskatchewan Hospital. The court made the order requested by the applicant.

 Back to top

Hooper v. Pelletier, 2016 SKQB 256

Megaw, August 3, 2016 (QB16267)

Family Law – Division of Family Property – Judgment – Interpretation
Family Law – Division of Family Property – Interest
Family Law – Division of Family Property – Minutes of Settlement – Judgment
Statues – Interpretation – Interest Act, Section 4

A judgment was granted pursuant to the pre-trial settlement minutes the parties reached. The judgment included a term whereby the respondent was ordered to pay the petitioner $1.1 million within 90 days from the date of the pre-trial conference and to pay interest at 2.2 percent accruing monthly if the respondent was unable to pay the sum within 90 days. The respondent forwarded $1,008,000 to the petitioner's counsel on trust conditions that it not be released until there was an agreement on the remaining terms of the minutes of settlement. The respondent wanted to make up the $92,000 left owing by a transfer of an equivalent RRSP amount. The petitioner wanted the rollover of RRSPs to be grossed up for income tax consequences. The parties eventually agreed on an amount to be rolled over. The respondent argued that he should not have to pay interest because he was in substantial compliance with the judgment within 90 days when he paid the large amount in trust, the Interest Act limits interest to five percent, and he could not afford the interest. The 90 days expired on May 18 and the funds were transferred to the petitioner's lawyer on June 10, but not released to her until July 22.
HELD: The parties' intention was irrelevant: the interpretation had to be based on an objective observer reading the words in their usual manner and taking into account the context in which they were made. The court determined that the consequence to the respondent was the obligation to pay interest on any late paid funds. When the funds were held in trust they were not paid to the petitioner for her use so interest was payable during

that time. The petitioner's solicitor was not found to have an obligation to put the trust funds in an interest-bearing account. There was no evidence of what interest could have been earned in any event. The Interest Act did not apply because the parties made an agreement regarding interest. The court held that it was not able to fundamentally alter the specific terms of the judgment entered into, based on the evidence. The respondent was obligated to pay $51,522.58 to the petitioner. The petitioner was awarded costs fixed at $1,000.

 Back to top

R. v. Fiddler, 2016 SKQB 257

Elson, August 8, 2016 (QB16252)

Criminal Law – Assault
Criminal Law – Appeal – Sentencing
Criminal Law – Domestic Violence Court
Criminal Law – Sentencing – Conditional Discharge

The Crown appealed the sentence imposed by the trial judge on the respondent after finding him guilty of assaulting his common law partner contrary to s. 266 of the Criminal Code. The respondent received a conditional discharge. The Crown argued on appeal that the sentence was demonstrably unfit, particularly because it did not fit the gravity of the offence or moral culpability of the respondent's behavior. The Crown argued that the trial judge could not treat the respondent in the same way as someone who had pled guilty and received treatment in the context of the Domestic Violence Court. The respondent did not have a criminal record. The respondent and complainant had separated, and on one occasion when he returned to the shared home to retrieve belongings, the respondent threw a cup of coffee at the complainant and grabbed her and hit her on her side. On another occasion that he was retrieving his belongings, the complainant indicated that the respondent pushed her into the bedroom and slapped her on the left side of her neck. Unknown to the respondent, the complainant had recorded the incidents and the recordings were admitted into evidence. The trial judge accepted the complainant's testimony and found the respondent guilty of the offence. At sentencing the trial judge invited the respondent to take the domestic violence programming before sentence was pronounced because he indicated that if the matter had been dealt with in the Domestic Violence Court (DVC) he could have qualified for a lesser sentence. The respondent agreed and the sentencing was

adjourned. The domestic violence programming was not available to the respondent. A condition of the conditional discharge was that the respondent participate in an assessment and complete programming for addictions, anger management, and domestic violence. The Crown argued that the sentencing judge wrongly focused on the respondent's willingness to attend the Domestic Violence Treatment Court option when that treatment option was unavailable to him. The Crown asserted that the respondent's lack of a guilty plea or admission of responsibility precluded the trial judge from even considering any form of discharge.
HELD: The appeal was dismissed. A guilty plea, especially early on, can be considered as a mitigating factor. The court concluded, however, that the lack of a guilty plea must not, in all instances, lead to a greater sentence than if there had been a guilty plea. The Crown's position was too rigid. Also, the Crown's position ignored the principle concern that an offender who was found guilty at trial ought not to be penalized for having exercised his right to a trial. The appeal court could not conclude that the sentence was demonstrably unfit. The authorities indicated that a conditional discharge was not out of the range of possible outcomes, although it was at the low end.

 Back to top

R. v. Envirogun Ltd., 2016 SKQB 258

Schwann, August 8, 2016 (QB16253)

Environmental Law – Environmental Management and Protection Act – Environmental Protection Order

The appellants were the operator and sole shareholder and director of a hazardous waste transfer station. The appellants had a tax dispute with the municipality, and the municipality took title to the business location of the appellants in 2009 through tax enforcement processes. The appellants did not advise the minister that it no longer owned or had access to the property, nor did it request approval to close the hazardous waste storage facility as required by law. The minister served the appellants with a Notice of Intent (NOI) and gave the appellants 30 days to respond. The appellants responded outside of the 30 days that the site had been left in good condition when the municipality took over and that it was impossible to enter the property in order to comply with the proposed order. In 2011 the Minister of Environment issued an environmental protection order (EPO) pursuant to s. 47 of The Environmental

Management and Protection Act, 2002 (EMPA) to both appellants. After not complying with the EPO, the appellants were charged with failing to comply with a ministerial order contrary to ss. 74(1)(c) and 74(2) of the EMPA. The appellants were convicted after trial. The core issue on appeal was whether the trial judge erred in refusing to allow the appellants to challenge the validity of the underlying EPO in the criminal proceedings. The trial judge concluded that a collateral challenge to the lawfulness of the EPO was contrary to the intent of EMPA and was therefore unavailable to the appellants.
HELD: The appeal was allowed and the appeal court directed a new trial. The trial judge erred in refusing to hear evidence or consider arguments tailored to an attack on the validity of the EPO. The court found that the appellants' concern regarding how they could achieve the restoration measures when they didn't own the property were legitimate. The legislation fails to provide a means to balance the right of citizens to meaningfully assert their rights and advance their positions in a substantive way against the broader public interest. There is no mandated disclosure under the EMPA and therefore, this was a problem because the NOI simply identified the legal triggers without further explanation as to how the minister arrived at his conclusion. This is different from the legislation in cases considered by the Supreme Court. The trial judge found the legislative purpose and scheme of the EMPA to be consistent with the acts considered by the Supreme Court even though they weren't. The EMPA has a more limited form of appeal on questions of law and jurisdiction. The EMPA does not have any mandated disclosure. Also, the appeal court could see why, based on the language in s. 49(3), the appellants did not push for an oral hearing. The legislation did not specifically prohibit an oral hearing, but it was not inviting or promising that one would be undertaken. The appellants were found to be at an obvious disadvantage in responding to the NOI because no disclosure accompanied it. The court concluded that given the severity of the penal consequences under the EMPA, coupled with the potential for criminal liability accruing to a director, officer or agent of the corporate entity, the appellants should have been given an opportunity to challenge the validity of the underlying order in defence of the charge. Because there was no forum for independent substantive review of the EPO, the appellants should be permitted to attack its legal validity in subsequent proceedings. The appeal was allowed and a new trial was directed.

 Back to top

R. v. Morrison, 2016 SKQB 259

Dovell, August 8, 2016 (QB16254)

Constitutional Law – Validity of Legislation – Charter or Rights, Section 1
Criminal Law – Fitness to Stand Trial
Criminal Law – Sentencing – Dangerous Offender
Criminal Law – Sentencing – Fitness Assessment – Criminal Code Section 2, Section 672.23(1)

The applicant argued that ss. 2 and 672.23(1) of the Criminal Code were unconstitutional because they violated his s. 7 Charter rights. The applicant was convicted of a break and enter and committing a sexual assault causing bodily harm. The Crown proceeded with a dangerous offender application. Post-verdict and prior to sentencing, the applicant requested and was granted an order for a fitness assessment. The Crown never opposed the request at the time. The fitness assessment concluded that the applicant was suffering from a mental disorder that made him unfit to understand the nature and object of the dangerous offender sentencing proceeding and unfit to communicate with and instruct his counsel. The Crown then argued that the court could not order a fitness assessment pursuant to s. 672.23(1) of the Criminal Code. The applicant argued that it was unnecessary for the court to consider whether a fitness assessment could be ordered because one had already been ordered by the court and the Crown took no position at that time.
HELD: The court was not prepared to dispose of the matter on the basis that the Crown had not opposed the original order so could not oppose anything now. There was no doubt that the applicant's liberty interest was engaged with the Crown's dangerous offender application. The wording in ss. 2 and 672.23(1) of the Criminal Code indicate that the issue of fitness can be tried at any time before a verdict is rendered. The applicant became unfit post-verdict; he had no idea what was going on around him or the jeopardy he was facing. The court was not prepared to continue with the dangerous offender hearing while the applicant was not really present at all. One of the basic criminal principles is that an accused must be present, not just physically, at all times during his or her criminal proceedings except for some specific situations. The applicant had to be capable of instructing his new defence counsel regarding the many issues that would be considered during the dangerous offender sentencing hearing. The court concluded that the language of ss. 2 and 672.23(1) of the Criminal Code was an infringement of the applicant's s. 7 Charter rights that were not justified under s. 1 of the Charter. The appropriate remedy,

pursuant to s. 52(1) of the Constitution Act, 1982, was to read in provisions for fitness to be tried post-verdict in the circumstances of the case.

 Back to top

R. v. Kusch, 2016 SKQB 260

Goebel, August 9, 2016 (QB16258)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Conviction – Appeal
Constitutional Law – Charter of Rights, Section 8 – Appeal
Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Breath Demand – Reasonable and Probable Grounds – Appeal

The appellant appealed from the decision of a Provincial Court trial judge convicting him of the charge of driving while his blood alcohol content exceeded the legal limit contrary to s. 253(1)(b) of the Criminal Code. The charges were laid after the appellant's vehicle had collided with another vehicle. The officer who arrived at the scene was told by the other driver that the appellant was intoxicated. The officer could smell alcohol on the appellant's breath but he displayed no other signs of impairment. The appellant acknowledged having consumed two drinks, the last one being 20 minutes before. The officer made an ASD demand pursuant to s. 254(2) of the Code. After failing it, the officer demanded that the appellant provide a breath sample. The first sample showed 140 milligrams of alcohol and the second sample showed 110 milligrams of alcohol per 100 milliliters of blood. A third sample was taken because the first two were greater than 20 milligrams apart. The last sample showed 110 milligrams. A Certificate of Analysis was not issued because more than two samples were taken. At trial, the appellant alleged that his s. 10 Charter rights had been breached and the trial judge then excluded the appellant's admission that he was driving the vehicle involved in the accident as well as information about his weight. The appellant also alleged that his ss. 8 and 9 Charter rights were breached when the officer obtained a breath sample without having first determined that there were reasonable and probable grounds to do so. The trial judge found that there had been no breach of the appellant's s. 8 rights. During the trial, an expert witness testified on behalf of the Crown to provide a "read back" analysis of the breath samples provided by the appellant. She testified that based upon the readings the appellant would have had a blood alcohol level between 142 and 175 milligrams percent at the time when it was

believed that the appellant had last been driving. The appellant's grounds of appeal were that the trial judge erred in: 1) finding that his s. 8 Charter rights had not been breached. The trial judge had mistakenly used the "reasonable suspicion" standard required in s. 254(2) of the Code instead of the "reasonable grounds to believe" standard required by s. 254(3); and 2) admitting and giving weight to the evidence of the Crown's expert to determine that the appellant was guilty of the charge. The facts relied upon by the expert were not proven beyond a reasonable doubt and therefore the trial judge erred in admitting the evidence, following R. v. Skorlatowski. Further, the appellant argued that the evidence should not have been given any weight because the Crown had not proven that there was no "bolus drinking". Given that the evidence of the appellant's body weight was excluded at trial, the expert's evidence respecting bolus drinking could not have been relied upon by the trial judge and an acquittal must follow.
HELD: The appeal was dismissed. The court found with respect to each ground that: 1) the trial judge's oral judgment contained a possibly inadvertent misstatement of the applicable legal test. However, upon review of the evidence, the court found that in the circumstances and the facts as understood by the officer when his belief was formed and the demand made, it was satisfied that the officer held an honest and reasonable belief that the appellant had been driving a vehicle while impaired within the preceding three hours. Therefore there had been no substantial wrong or miscarriage of justice; and 2) the trial judge had not erred in admitting the toxicology report and the oral evidence of the expert. The decision in Skorlatowski had been overturned by the Court of Appeal. Regarding the weight given to the expert's evidence, the transcript showed the defence had not raised the issue at trial. The judge weighed the evidence before him relevant to the arguments advanced by both the appellant and the Crown. The evidence was reasonably capable of supporting his conclusion.

 Back to top

Ivakic v. Bacic, 2016 SKQB 261

Dufour, August 9, 2016 (QB16255)

Family Law – Custody and Access – Hague Convention

The petitioner brought an application under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention). The petitioner sought the return

of his five-year-old daughter to Croatia from Saskatchewan. The child was born and lived in Croatia until April 2014. The respondent moved to Canada and took the child with her. The Croatian court had made a temporary order in October 2012 that gave custody to the respondent and a right of access to the petitioner. After an application brought by both parties, the court confirmed the arrangement but stipulated that the petitioner would have direct contact at specific times because the respondent had been unjustifiably preventing him from seeing the child. Despite the order, the respondent continued to resist allowing the terms of access. A final judgment issued in March 2014 confirmed the requirement for the petitioner to have access. A few weeks later the respondent took the child and left for Canada after her application under Canada's Temporary Foreign Workers program was granted. The visa was operative until August 2016 and the respondent had applied for permanent residency status. The petitioner was informed by the respondent in September 2014 that she was in Saskatchewan, and in November 2014, the petitioner made his application under the Convention. There were numerous delays as the Central Authorities for Croatia and Saskatchewan dealt with the matter. The issues were whether: 1) the removal of the child from Croatia was wrongful within the meaning of Article 3 of the Convention; and 2) if so, had the respondent established a defence under Article 12 or Article 13 of the Convention that the child was "now settled" in Canada and should not be sent back to Croatia.

HELD: The application was granted and the court ordered that the child be returned to Croatia by mid-August 2016. The court found with respect to each issue that: 1) the child was wrongfully removed from Croatia based on finding that the child's place of habitual residence was Croatia and that the petitioner had rights of custody that were breached when the respondent took the child to Canada. It also found, as required, that he had been exercising rights of custody when she was removed; and 2) the respondent had not established the defence that the child was "now settled" and ought not to be repatriated because of the uncertainty regarding her ability to remain in Canada.

 Back to top

Dyck v. Dillman, 2016 SKQB 263

Zuk, August 16, 2016 (QB16261)

Landlord and Tenant – Appeal – Residential Tenancies Act

Landlord and Tenant – Lease – Repair
Landlord and Tenant – Notice of Termination
Residential Tenancies Act, Section 72 – Appeal

The appellant leased a room in the respondent's house for a one-year term pursuant to a written lease agreement. The ceramic/glass stovetop was damaged and the appellant argued that the stovetop damage occurred when a salt jar fell out of an overstuffed cupboard above the stove. She indicated that the overstuffed cupboard was the respondent's fault, resulting in her being entirely responsible for the accident or at least she was contributorily negligent. The respondent argued that the damage could not have happened as described by the appellant. The appellant originally agreed to pay $475 towards a new stove but later changed her mind and indicated she would only pay $275 towards a stove. The appellant no longer wished to rent the room, so she vacated on November 20 and asked for a notice of termination from the respondent. The respondent would not provide the termination notice until she had received the $475 for the stove and $475 for the next month's rent. The respondent was unable to rent the room until January 1. The hearing officer determined the following: the damage could not have been caused as suggested, and must have been caused by the appellant or her friend; the parties had a binding agreement whereby the appellant would pay the respondent $475 for a new stove; and the appellant owed the respondent for a month's rent but reduced it by ten days for the time the respondent erroneously advertised the room for rent in another province. The appellant argued that the hearing officer erred in law and/or jurisdiction in five ways: 1) in her treatment of evidence; 2) in her treatment of the issue of contributory negligence; 3) in her finding relating to when the tenancy ended whether in relation to ss. 56 and 63 of the Act, or otherwise; 4) in her treatment of the issues of causation and mitigation as they related to the respondent's claim for lost rent; and 5) in her determination of the quantum of damages.
HELD: The grounds of appeal were analyzed as follows: 1) the court agreed with the hearing officer that a binding contract of settlement was formed whereby the appellant offered to pay $475 towards the new stove; 2) the court was not prepared to overturn the hearing officer's finding of fact that an item could not have fallen from the cupboard above the stove and hit the back of the stove top as suggested by the appellant; 3) the hearing officer did not make an error in finding as fact that the appellant was not fearful of the respondent. The tenancy was not ended until the December rent and the $475 for the stove was received; 4) the appellant did not provide any evidence that the success rate for renting between September and December was affected by the dates that the advertisements were published;

and 5) the appellant abandoned the ground of appeal. The appeal was dismissed.

 Back to top

Fecke Holdings Ltd. v. Cojocar, 2016 SKQB 264

Currie, August 15, 2016 (QB16262)

Civil Procedure – Costs – Solicitor-and-Client
Civil Procedure – Evidence – Credibility
Contracts – Breach – Latent Defect
Contracts – Breach – Misrepresentation
Contracts – Breach – Non-payment
Torts – Fraud

The plaintiff sued the defendant regarding the purchase of the defendant's outfitting business. In spring 1995, the defendant provided the plaintiff with the following in contemplation of the purchase: the income and expense statements for the business for the year end March 31, 1993; expected revenue and expenses for the upcoming fishing season; a projection for 1996; and draft financial statements for the period ending March 31, 1995. A short form sale agreement was executed April 26, 1995, and the final conditional sales agreement was executed on May 17, 1995. A $25,000 payment that was due on September 1, 1995, was not paid, so the defendant took possession of the lodge pursuant to the agreement and his security. An agreement was made between the parties to return possession to the plaintiff. The plaintiff missed another required payment in 1998 and the defendant again took possession, this time permanently. The plaintiff claimed that: 1) the defendant misrepresented the outfitter licence that the plaintiff would be able to obtain by purchasing the lodge; 2) the defendant misrepresented the amount of guest deposits that he received for the 1995 fishing season; 3) the defendant misrepresented the revenue and expenses of his operation of the lodge; 4) the defendant concealed latent defects in the buildings that formed part of the lodge operation; and 5) the plaintiff was obliged to bear the cost of brochures that the defendant arranged for and that were of no use to the plaintiff. The defendant counterclaimed for $3,946 for taxes and lease payments that had not been paid by the plaintiff when the defendant took possession in 1998.
HELD: The court concluded that the defendant provided honest and accurate evidence and his evidence was accepted over that of the plaintiff's where there was conflict. The plaintiff's claims were determined as follows: 1) during negotiations the plaintiff learned the nature of the licences held by the defendant and also

that the licences could not be sold or transferred, but had to be applied for by the purchaser of an outfitting lodge or camp. The purchaser did obtain the same licences as the defendant in 1995; 2) the plaintiff indicated that the defendant had advised them that no guest deposits were greater than $200 when they were in fact so. The agreement allowed the defendant to retain any deposits he had received prior to possession. The court found that the plaintiff knew most deposits were in amounts greater than $200 prior to the agreement being signed; 3) the estimates and projected income provided by the defendant to the plaintiff could not be an actionable misrepresentation because an actionable representation had to be a fact, of something that had actually happened. None of the actual income and expense was proven to be untrue, inaccurate, or misleading; 4) the plaintiff asserted that the buildings were in such decay and disrepair that they were unsound and unfit for the business. According to the plaintiff, many of the logs comprising the buildings were rotted and rotting. He alleged that the defendant knew of the rot and intentionally covered it up with paint to conceal it. The defendant testified that he stained the logs as required and would work on a building at a time repairing and replacing logs that were in disrepair. The court held that the plaintiff was aware of the defects; the defendant did not intentionally try to conceal any defects; and 5) the parties settled the brochure matter in 1995 when they agreed to set-off money owed to the defendant by the plaintiff. The agreement required the plaintiff to pay the taxes and lease payments that the defendant incurred when he took possession in 1998. The defendant was awarded $3,946 by the court. The plaintiff unsuccessfully argued that the defendant had committed fraud, and therefore the court could consider extraordinary costs. The court held that the evidence did not reveal conduct even close to being fraudulent and therefore an award of solicitor-and-client costs against the plaintiff was awarded.

 Back to top

Lone Spruce Developments v. Jameson, Gilroy B & L Livestock Ltd., 2016 SKQB 268

McMurtry, August 17, 2016 (QB16260)

Civil Procedure – Queen's Bench Rules, Rule 7-2
Civil Procedure – Summary Judgment

The parties applied for summary judgment pursuant to Queen's Bench rule 7-2. The plaintiff claimed summary judgment in the

amount of $286,500 owed to it by the defendant for the sale of 1,000 heifers. The defendant sought summary judgment in its counter claim for $527,700. It alleged that the plaintiff failed to deliver on its agreement to deliver 2,000 heifers. The affidavit filed by the plaintiff indicated that the parties had made an oral agreement during a telephone conversation that the plaintiff would deliver 2,000 heifers. It was a forward-looking contract in that the agreement was made in February that the plaintiff would deliver that number of cattle in the fall of 2014 at a certain price per 100 pounds. Later the same day the plaintiff advised the defendant by telephone that it could not meet the number of cattle because its deal with a third party livestock dealer fell through. After discussions with the defendant, the plaintiff undertook to supply 1,500 head of cattle and then reduced the number again to 1,000 head, which the defendant agreed to in an amended agreement in May 2014. The defendant withheld the amount claimed by the plaintiff because it alleged in its counterclaim that it would not have amended the original agreement if it had known that the plaintiff had made a misrepresentation regarding the cattle sale.
HELD: The applications were dismissed and the court ordered that the trial of the claim and counter claim should proceed in the ordinary way. The validity of the amended agreement was at the centre of both the claim and the counter claim and its validity depended upon a determination of the defendant's allegation of deceit or misrepresentation. On the evidence before it, the court could not make the necessary findings of fact to come to any conclusion on misrepresentation.

 Back to top

R. (A.V.) v. A. (M.J.), 2016 SKQB 272

Barrington-Foote, August 22, 2016 (QB16263)

Family Law – Child Support - Adult Student
Family Law – Child Support – Determination of Income – Disability Payments
Family Law – Child Support – Determination of Income – Pension
Family Law – Child Support – Determination of Income – Veterans Affairs Canada
Family Law – Child Support – Family Maintenance Act
Family Law – Child Support – Retroactive
Family Law – Child Support – Section 7 Expenses
Family Law – Child Support – Variation

The petitioner and respondent cohabited from 1995 to 2001 and had two children. Both children lived with the respondent

mother after separation, and the petitioner father paid child support as ordered. The petitioner retired from the Canadian Armed Forces in 2009, after 25 years of service. He suffered from post-traumatic stress disorder (PTSD) as a result of his service. The oldest child was 18 and expected to graduate high school in June, and the youngest child was 16. The oldest child planned to attend university in British Columbia. The petitioner and the oldest child had little communication and no visits since Christmas 2010. There was some evidence of the respondent's limited communication with the petitioner regarding the costly extracurricular activities of the children. There were many orders for ss. 3 and 7 child support orders, the most recent being in 2009 requiring the petitioner to pay $390 per month based on his income of $27,867 and 36 percent of net after-tax childcare costs. The petitioner received a pension from Veterans Affairs Canada. Since 2009, he also received between $25,144.20 and $32,239.56 annually for an "earning loss" benefit, but he did not disclose the payments until 2014. He conceded at trial that retroactive child support should be awarded based on that income. The petitioner also did not disclose his s. 21 Pension Act disability pension for his wrist, and the $129,661 in s. 45 Veterans Charter awards for PTSD, hearing loss, and tinnitus. The issues were: 1) was the petitioner obligated to pay maintenance for the oldest child; 2) were the s. 21 Pension Act pensions and s. 45 Veterans Charter awards income for the purpose of calculating child support pursuant to s. 3 of the Guidelines; 3) retroactivity, incomes of the parties, and s. 3 Guideline calculations; and 4) section 7 expenses; HELD: The court determined the issues as follows: 1) the oldest child was still a person for whom the petitioner was required to pay maintenance. The court found that the evidence suggested that the petitioner did not make adequate attempts to reach out to the oldest child, particularly in the last few years; 2) the legislation is clear that the Guidelines govern so that child support must be calculated solely on the basis of income, and income must be calculated on the basis of ss. 15 to 20 of the Guidelines. The court therefore had to take a fair but generous approach in considering what may be included in income pursuant to the Guidelines. Section 19 is the only section that could justify a finding that the ss. 21 or 45 payments were income. The court determined that Manuge was authority, though not binding authority, for the proposition that s. 21 pensions are compensation for loss of amenities of life. The court held that the s. 21 disability pension and s. 45 awards, which were awarded as compensation for pain and suffering or loss of amenities of life, were not included in the petitioner's income. The court did not agree that the issue turned on how the s. 45 awards were used by the petitioner. The portion of the s. 21 payments that were because the petitioner had a spouse and

children were found to relate primarily to income support, rather than loss of amenities of life, and were included in income. The s. 45 awards were not income at all; 3) the court found that the petitioner should pay retroactive support on the portion of s. 21 disability pension included in income commencing January 1, 2009, and an additional $500 for the period before that time. The court determined the child support arrears to be $24,996. The parties were given 30 days to make submissions on any time the petitioner should be given to pay the arrears. The petitioner was also ordered to pay ongoing child support of $838 per month. The parties were to work to agree on an amount of support for the oldest child once more information on her income and expenses was available; 4) the petitioner agreed to pay his proportionate share of dental and medical expenses, which totaled $1,644. The court did not order the petitioner to pay s. 7 expenses prior to the application date because the respondent made virtually no effort to consult the petitioner as to extracurricular activities. The petitioner's pro rata share of s. 7 expenses since the application date was $14,366. The respondent was not awarded costs on a solicitor and client basis because the petitioner's conduct was not sufficiently reprehensible and the petitioner was partially successful. The respondent was awarded costs pursuant to the tariff.

 Back to top

Jans v. Jans Estate, 2016 SKQB 275

Barrington-Foote, August 24, 2016 (QB16264)

Contract Law – Formation – Oral Agreement
Real Property – Oral Contract – Part Performance
Contract Law – Breach of Contract – Damages

The plaintiff brought an action in contract and unjust enrichment against the defendants. One of the defendants was the plaintiff's brother, Jay, named in his personal capacity and as executor of the estate of their late father, Russell Jans. Russell owned the Jans Ranch, a large cattle ranch located in Saskatchewan. The plaintiff worked on the ranch since he was 18 years of age without proper compensation. He decided against attending school to become a mechanic at that time because Russell promised him that someday the ranch would be transferred to him and Jay. In 2010 Russell informed the plaintiff that he would receive nothing and the entire ranch would go to Jay, and the plaintiff brought this action. In 2011 the plaintiff was excluded from the home quarter and the other deeded land. In 2012, Russell transferred most of

the assets that made up the ranch to Jay and to his corporation. Russell died during the course of the trial. By his will, he left all the remaining property to Jay and his wife. The plaintiff sought a proprietary remedy by way of specific performance, constructive trust or resulting trust in relation to the ranch with damages only in the alternative. The defendants argued that Russell could dispose of the ranch as he wished and that the plaintiff had failed to prove the elements of the causes of action pled. The court heard testimony from the plaintiff regarding the work he had done on the ranch and the contributions he had made monetarily to purchase equipment. When he turned 18, his name was added to the Crown lease of pasture lands that was critical to the development of the ranch. The evidence showed that Russell described the addition of the plaintiff's name as indicating that he was a "shareholder". The plaintiff acknowledged that Russell and Jay contributed their labour as well. However, Jay had not been involved as heavily due to being in school and because he developed his own business off-site. Russell's former wife testified that Russell had promised the ranch to both sons. In 1992 Russell made a will that left the estate to be equally divided between them and stipulated that the plaintiff should receive a cash bequest because he had worked longer on the ranch than his brother. The plaintiff also submitted the transcripts of evidence given by Russell in other legal proceedings that confirmed that he wanted both sons to share the ranch and that neither was paid a salary. In 2007 when the plaintiff married, the family's relationship with each other deteriorated. The plaintiff's wife testified at trial that she knew of the agreement between Russell and his sons and confirmed it with him in discussions before she married the plaintiff. Expert evidence as to the value of the land, improvement, equipment and cattle was tendered.

HELD: The plaintiff's claim in contract and unjust enrichment was granted. The court found that the plaintiff and his witnesses provided credible and reliable evidence and disbelieved Jay and his wife's evidence that they did not remember that Russell had promised the ranch to both sons. It found that there was an oral agreement and that it was enforceable with respect to the land because of part performance. Russell's actions confirmed by post-contract conduct as to the agreement and its terms as described by the plaintiff. The plaintiff and Jay contributed their labour and made improvements without monetary reward as acts of part performance. The court declined to order specific performance because of the hostility between the brothers and awarded damages instead for breach of contract from the defendant estate in the amount of $3,124,422. In the alternative, the court found that if there was no binding agreement, then the plaintiff was entitled to recover based on unjust enrichment. As

with the claim in contract, the court held that the appropriate remedy was damages.

 Back to top