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Subject Index

R. v. Lamb, 2016 SKPC 100

Hinds, July 27, 2016 (PC16169)

Criminal Law – Blood Alcohol Level Exceeding .08 - Approved Screening Device – Grounds for Demand
Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 10(a), Section 24(2)

The accused was charged with driving over .08, contrary to ss. 253(1)(b) of the Criminal Code. The accused's vehicle was stopped when two officers in an unmarked police car recorded it travelling at 139 km per hour. The accused was driving, and there was a total of six people in the vehicle. Constable D. attended at the driver's side of the vehicle and smelled alcohol coming from it. The accused indicated that he had not been drinking, but Constable D. did not believe him. Constable B. advised Constable D. that the accused was a suspended driver. The accused was asked to come back to the police vehicle at 21:47. He was told that the officers wanted to use an ASD on him less than a minute later. At 21:50, after two unsuccessful attempts, the accused properly blew into the ASD with a fail result. A breath test demand was read to the accused at 21:53 and he was arrested for impaired driving and given his rights to counsel at 21:54. The accused declined to contact counsel. The officers called a taxi for the passengers and a tow truck for the company vehicle the accused had been driving. The officers made three attempts to have someone else assist them by coming to the scene to wait for the taxi and tow truck. They departed for

the detachment at 22:30 and arrived there shortly after. The first breath sample was taken at 23:01 and the second at 23:22. The accused was arrested for driving over .08 at 23:23. The issues were as follows: 1) was the accused arbitrarily detained by the police, contrary to s. 9 of the Charter; 2) were the accused's s. 10(a) Charter rights breached when he was asked to get into the police vehicle; and 3) did the police have the necessary reasonable suspicion to make the ASD demand of the accused pursuant to s. 254(2) of the Criminal Code. If not, did the accused establish a breach of his s. 8 Charter rights; and 4) if a Charter breach was established, should the evidence obtained be excluded from admission into evidence, pursuant to s. 24(2) of the Charter.

HELD: The issues on voir dire were determined as follows: 1) the police were initially authorized to stop the accused respecting the speeding infraction pursuant to ss. 199 and 209.1 of The Traffic Safety Act. When the accused was taken to the police vehicle, he was not told why. The accused felt compelled to comply with the police. The court was satisfied that the accused was arbitrarily detained, contrary to his s. 9 Charter rights, from the time he was instructed to get out of his truck until he was asked to provide a breath sample in the ASD approximately a minute later; 2) the court found that the accused's s. 10(a) right to be informed promptly of the reason for his second detention was violated for approximately one minute; 3) the court was satisfied that Constable D. honestly suspected the accused had alcohol in his body and the officer's suspicion was reasonable on an objective basis. The officer had the statutory authority to make the ASD demand and there was no breach of s. 8 of the Charter; 4) the court conducted a Grant analysis: the breaches were not serious; the impact of the breaches was minor; and society has an obvious interest in litigating drinking and driving offences on their merits. The court held that the ASD result and the Certificate of Qualified Technician could be admitted into evidence at trial.

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Senko v LeRoy (Rural Municipality No. 339), 2017 SKCA 9

Caldwell, February 3, 2017 (CA17009)

Civil Procedure – Appeal – Leave to Appeal

The applicant applied for leave to appeal the decision of the Planning Appeals Committee of the Saskatchewan Municipal Board (SMB). Under s. 33.1 of The Municipal Board Act, such

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appeals must be founded on a question of law or jurisdiction of the SMB with leave. In addition, leave would be given if the applicant could satisfy the Rothmans requirements for leave to be granted. The applicant initially appealed to the Development Appeals Board (board) of the Rural Municipality of LeRoy (RM) objecting to the RM's issuance of a discretionary use development permit to the Regional Authority of Carlton Trail Waste Management District (REACT). The permit authorized REACT to build a regional landfill near to the applicant's farmland and the neighbouring RM of Wolverine. The board declined to hear the appeal because it concluded that it lacked jurisdiction. The committee ruled that the board erred in this finding, but with the consent of the parties, it undertook to hear the applicant's appeal. It heard evidence and arguments, made findings of fact and drew inferences, and then issued a written decision dismissing the applicant's appeal. The applicant represented himself, and his proposed grounds of appeal were paraphrased by the court and separated into those that involved questions of fact and questions of law. As the Act prohibited appeal on the ground of the former, the court considered the issues of law to be as follows: 1) whether the RM was in a conflict of interest when it issued the development permit because it was a member of REACT; and 2) whether the committee erred by concluding that the RM of LeRoy had no obligation to consult the RM of Wolverine.
HELD: The application for leave was denied. The court found the following with respect to the issues: 1) the RM of LeRoy was not in conflict of interest because it had approved the development in the normal course of its role as a municipal government and as a member of a regional association of municipal governments. The applicant had not raised this argument at the committee's hearing and was not entitled to raise it on appeal; and 2) the committee's finding that the RM of LeRoy had no obligation to consult the RM of Wolverine might have raised a question, but it had also found that, in fact, it had. The matter may raise a question of law but it was not of sufficient importance to warrant determination by the court.

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Bell Mobility Inc. v Chatfield, 2017 SKCA 10

Richards, February 2, 2017 (CA17010)

Civil Procedure – Class Action
Civil Procedure – Appeal – Leave to Appeal

The plaintiff Chatfield and the defendant Bell Mobility both applied for leave to appeal regarding different decisions in the class action commenced by the plaintiff against Bell and other wireless service providers seeking recovery from them of their "system access fees" charges. Bell's proposed grounds of appeal were the following: that the Queen's Bench judge improperly made knowledge of the law of the class members as opposed to their knowledge of the material facts the foundation of his analysis; that he failed to use the "reasonable person" approach to discoverability and based his decision on what the members actually knew; and that he failed to require the plaintiff to provide a basis for explaining why class members did not discover the material facts at the time they paid the system access fee. Chatfield's application related to a ruling on his entitlement to put discoverability in issue by way of reply dependent upon him filing a second revision of it (see: 2016 SKQB 364). Chatfield's application for leave was accompanied by a proposal that the court adjourn it sine die because he intended to file a reply, and if accepted, it would render the leave application moot. Bell's application related to a decision that denied its application to amend the class definition (see: 2013 SKQB 317).
HELD: The defendant Bell's application for leave was denied. The court found that its first two proposed grounds did not possess sufficient merit or importance to warrant granting leave. The third ground was affected by the fact that Chatfield had been permitted to plead discoverability in his reply. The court ordered Chatfield to serve and file a memorandum specifying his grounds for seeking leave and to serve and file appropriate material to support his application for adjournment.

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Reisinger v J.C. Akin Architect Ltd., 2017 SKCA 11

Ottenbreit Caldwell Herauf, February 8, 2017 (CA17011)

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

The appellant appealed the decision of a Queen's Bench judge in chambers dismissing their application to strike out the various claims of the plaintiffs against them pursuant to Queen's Bench rule 7-9. The statement consisted of many factual allegations with a multiplicity of headings referring to specific torts. The appellant had argued that all the claims should be struck except for a claim in breach of contract against Riverbend

Developments. The chambers judge found that the conspiracy claim as pleaded disclosed a reasonable cause of action. The lack of a specific allegation that the predominant purpose of the conspiracy was to injure the plaintiffs was not a fundamental flaw. The appellant submitted that the judge erred in the following ways: 1) failing to strike the claim of conspiracy; 2) failing to determine whether the statement of claim disclosed a reasonable cause of action with respect to alleged specific torts and the claim for breach of contract, and failing to strike those claims; 3) failing to provide reasons for his conclusions that the causes of action had been sufficiently pleaded; and 4) in his interpretation of rule 1-3.
HELD: The appeal was allowed in part. The court found with respect to the first ground that the chambers judge had not erred regarding the claim of conspiracy. The pleadings were sufficient to establish a reasonable cause of action and its viability was not dependent on whether torts were alleged. The court dealt with the remaining grounds together. It found that the judge had erred by failing to consider pursuant to rule 7-9 whether a number of other causes of action were properly pleaded, because he only stated that the essential elements of each specific tort could be found somewhere in the copious allegations of fact rather than actually analyzing the pleadings. The statement of claim was poorly drafted and offended Queen's Bench rule 1-3 and 13-8. The judge had not erred by failing to strike the claim in contract against the individual appellants. A review of the claim as a whole showed that the contract was allegedly with each of the individual appellants as parties although acting through RDL Management, a non-existent company. As such, the claim was properly pleaded against all appellants.

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Winnitowy v Winnitowy, 2017 SKCA 12

Jackson Herauf Ryan-Froslie, February 6, 2017 (CA17012)

Civil Procedure – Appeal – Standard of Review
Civil Procedure – Queen's Bench Rules, Rule 7-2
Civil Procedure – Summary Judgment

The Court of Queen's Bench dismissed the appellants' claim by way of summary judgment, rule 7-2 of the Queen's Bench Rules. The issues raised by the appellants were as follows: 1) did the chambers judge make a palpable and overriding error of fact by valuing the house at $100,000 as of 2008 but not mentioning the current value of $175,000; 2) was there a palpable and overriding

error because the issue of summary judgment was decided in the absence of oral evidence; 3) was the decision that the appellants provided no evidence to support the conclusion that the respondent exerted control over B.'s ability to make his own decision unreasonable; and 4) was the conclusion that the respondent's and A.D.'s affidavits be given preferential weight unreasonable.
HELD: The appeal was dismissed. The appeal court concluded that the summary judgment rule required deference. The appeal court dealt with the issues as follows: 1) the chambers judge pointed out that an increase in value to $175,000 would only be about $30,000 to each interested party, an amount that would soon diminish if the judge ordered the matter go to trial. The chambers judge also indicated that the matters were not complex and that there was very little conflict in the evidence; 2) the issue could not be considered as raising an error of law; 3) the court of appeal found that the chambers judge understood all of the possible evidence that could go to the question of undue influence, but none of the evidence was related to 2008, when the transfer into joint names occurred. There was no evidence in relation to the deceased's state of mind or circumstances as of 2008 from the appellants. There was, however, evidence to support the respondent's argument that there was no undue influence; and 4) the issue could not be considered as raising an error of law.

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Students' Association Saskatchewan Polytechnic Regina Inc. v Saskatchewan Polytechnic, 2017 SKCA 13

Whitmore, February 13, 2017 (CA17013)

Contracts – Interpretation
Civil Procedure – Queen's Bench Rules, Rule 3-54, Rule 3-55

The appellant Students' Association of Saskatchewan Polytechnic Regina appealed the decision of a Queen's Bench judge granting the respondent, Saskatchewan Polytechnic, a writ of possession pursuant to s. 50(1) of The Landlord and Tenant Act. The Students' Associations for Regina, Saskatoon and Moose Jaw and the respondent had entered into a Master Agreement in 2010. In 2012, the appellant and the respondent entered into the Wascana Campus Agreement, which was intended to augment the Master Agreement and which provided that the respondent would act as a landlord and provide space to the Students' Association. In October 2015 the respondent

advised all of the Students' Associations that it was ending the agreements effective July 1, 2016, so that it could create new contractual arrangements that met appropriate standards. The appellant took the position that the Master Agreement was not terminated and it was willing to negotiate revisions to it for the benefit of all parties. The respondent argued that it had given proper termination notice pursuant to s. V(iv) of the Master Agreement. The appellant refused to accept a short-term services agreement that the respondent offered when the latter realized that the matter could not be concluded by June 30. The respondent made a demand for possession of the appellant's premises pursuant to the Act. When the appellant refused to comply, the respondent made its successful application for the writ of possession. The appellant's grounds of appeal were that the chambers judge had erred in the following ways: 1) failing to set a viva voce hearing to deal with contradictory affidavit evidence; 2) finding that the respondent could unilaterally terminate the Master Agreement upon appropriate prior notice and, if not, he had erred in finding that appropriate notice was given and the Master agreement terminated; and 3) finding that the termination of the Master Agreement necessarily terminated the Campus Agreement.

HELD: The appeal was dismissed. The court found that the chambers judge had not erred in the following ways with respect to each ground: 1) when he had not held a viva voce hearing. The court noted that it was a discretionary decision under Queen's Bench rules 3-54 and 3-55 and that the evidence was sufficient to sustain the judge's findings of fact. Further, the findings were not relevant to the interpretation of the Master Agreement which was the central issue to be determined; 2) in his interpretation of the provision in the Master Agreement that a single party could withdraw from the Agreement and unilaterally terminate it. The court agreed with the judge's conclusion that the eight months' notice was appropriate and reasonable based upon the circumstances surrounding the parties and the Master Agreement; and 3) in finding that the Campus Agreement was corollary to and established under the Master Agreement and that the former terminated upon the termination of the latter.

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R v Felix, 2017 SKCA 16

Richards Jackson Ryan-Froslie, February 9, 2017 (CA17016)

Criminal Law – Controlled Drugs and Substances Act –

Possession for the Purpose of Trafficking – Cocaine – Sentencing – Appeal
Criminal Law – Sentencing – Aboriginal Offender – Appeal

The respondent pled guilty to one count of trafficking in cocaine, contrary to s. 5(1) of the Controlled Drugs and Substances Act. He received a 30-day intermittent sentence plus 12 months of probation. The terms of the probation were that the respondent had to abide by a curfew, could not possess or consume alcohol, could not possess a cell phone and had to perform 100 hours of community service. At the time of the appeal, the respondent had complied with all of the terms. The Crown appealed the sentence almost two and a half years after the date of the offence and date of sentencing. The circumstances of the offence were that the respondent had met a woman in a bar and because he wanted to impress her, he helped her when she said that she wanted to buy some cocaine. The respondent did not use drugs but obtained the name of a dealer and went with the woman to meet him. The woman purchased 1.6 grams for $200. The woman contacted the respondent again seeking more drugs. Although he refused to be involved, he did give her the dealer's phone number. The woman was an undercover police officer and as a result of the cocaine purchase, the respondent was arrested and charged with trafficking. The pre-sentence report regarding the respondent described the respondent's difficult childhood growing up on the Sturgeon Lake First Nation, primarily because his mother, who had attended a residential school, was an alcoholic. She had been sober for the past 10 years and was now a very positive influence on the respondent. At the time of sentencing, the respondent had only obtained a grade 10 education and been employed sporadically. He was 31 years of age and had no prior criminal record. He accepted responsibility for his offence by pleading guilty and expressing remorse. He was assessed as having a very low risk to reoffend, and the author of the report recommended a community sentence. Since receiving his sentence, the respondent had upgraded his education and would complete high school in 2017; contributed time and labour in excess of his probation order to the elders in this community; attended AA meetings regularly; and had participated in and completed the extensive rehabilitation programming required by his probation. The Crown argued that the sentencing judge 1) overemphasized the respondent's personal circumstances, including that he was an Aboriginal offender; 2) failed to take account that the respondent had paid the cocaine trafficker and obtained the number of the dealer for the police officer; 3) failed to assess the respondent's motivation correctly; and 4) failed to craft a sentence that gave effect to denunciation, deterrence and punishment.
HELD: The appeal was dismissed. The court found that when

the Crown's arguments were considered against the circumstances of the case, including the respondent's post-offence rehabilitation, they did not meet the test for intervention set out in R v Lacasse and R v L.V. The sentencing judge based his sentence on a combination of factors, such as the uncommon nature of the offence, in that it was an isolated incident; the respondent's personal circumstances; and his post-offence actions.

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M.D.M.S., Re, 2017 SKPC 6

Tomkins, January 12, 2017 (PC17005)

Family Law – Child in Need of Protection – Permanent Order – Evidence

The Ministry applied for a permanent order pursuant to s. 37(2) of The Child and Family Services Act regarding children M. and D. Shortly after M.'s birth, the Ministry was contacted by the birth hospital due to concerns regarding the mother's ability to provide adequate care for M. The father was a registered sex offender. M. was apprehended four days after her birth. M. was returned to her mother's full-time care before her first birthday. D. was born when M. was a few days short of turning one. In September 2014, when D. was a few months old, both children were apprehended and remained in the care of the Ministry at the same foster home. The parents did not agree that the children were in need of protection originally, but they did by April 2015, when the last temporary order was made. At the permanent order hearing the Ministry's concerns were as follows: 1) the condition of the parents' home; 2) domestic violence between the parents; 3) concern with the parents' willingness to provide the children the care they required; 4) the father's criminal history and risk of re-offending; 5) the parents allowing unsafe and inappropriate people to supervise the children; 6) the mother's ability to parent the children; 7) the father's health challenges; and 8) the emotional harm to the children if they were removed from their current placement. HELD: The court considered each of the Ministry's concerns: 1) the court found it had no basis to conclude that the home was not continuing to be maintained as presented in pictures submitted by the father. The court concluded that there were bed bugs in the home previously and the Ministry should not have committed to eradicate the bed bugs if it had no means to do so. The evidence did not satisfy the court that the condition of the

home prevented the parents from adequately providing care for their children; 2) the mother attended counselling after slapping the father, and the court was not satisfied that there was evidence of ongoing domestic violence between the parents; 3) the court was concerned with the number of visitations cancelled by the parents, but did not conclude that this meant the parents were not interested in providing for their care; 4) the Ministry was concerned with the father's convictions for sexual assaults in 1991 and 1993. An expert for the Ministry prepared a report and concluded that the risk of the father re-offending sexually was less than one percent and he was a very low risk to his children. The expert also said that the risk of re-offending would be further reduced as the father aged and there was no indication that the father was attracted to pre-pubescent children. The court concluded that the father did not, on the basis of his criminal past, pose a risk to the children; 5) some of the people that the parents suggested to provide short-term care for the children had their own children under the care of the Ministry, some permanently. The court was not provided with details regarding those matters, but noted that it would not always mean that they were not able to provide short-term care to a child. The court was unable to reach conclusions as to whether the parents have or might engage inappropriate or inadequate child care for their children; 6) the court concluded that the mother was not capable of providing for the care of her children without significant, ongoing assistance; 7) the father was 53 and had many health challenges that limited his opportunity and availability to advise and help the mother. The parents' ability to care for their children was therefore limited; and 8) the potential emotional harm to the children if there was a change in residence was more appropriately considered when determining an appropriate order. The court was not satisfied that the parents could provide care for their children that met the minimal standard. The children were in need of protection pursuant to s. 11(b) of the Act. The court recommended the following: the Ministry ensures the children maintain regular contact with their biological parents; the Ministry assists the parents in ensuring the children are aware of and participate in their Aboriginal heritage; and the Ministry provides assistance to allow the parents to include their children in cultural activities.

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R v Hayes, 2017 SKPC 8

Green, February 13, 2017 (PC17010)

Criminal Law – Assault – Uttering Threats

The accused was charged with knowingly conveying a threat to cause death to the Prime Minister, contrary to s. 264.1 of the Criminal Code. The charges arose out of Facebook posts made by the accused in March and July 2016. An RCMP officer had spoken with the accused after the first post and explained to him that he was violating the offence of uttering threats. The accused gave a voluntary statement to the officer regarding his post, explaining that he was frustrated because he had lost his job in the oil fields and with the Prime Minister's failure to help the oil industry. The officer testified that he believed that the accused would not do it again and decided not to charge him. The accused posted another message to Facebook in July 2016, and the accused was arrested for the offence. The accused provided another voluntary statement at that time saying that he did not intend to kill the Prime Minister but was expressing his frustration, although he agreed that he had crossed a line in writing what he had. The defence argued that considering the context in which the words were written and posted by the accused, a reasonable person would not find them to be a threat to cause the death of the Prime Minister and that it was clear from the context that the accused had not intended to utter a threat but only to express an opinion.
HELD: The accused was found guilty. The court found that that a reasonable person would have believed both posts to constitute a threat conveyed on the Internet to or towards the Prime Minister to cause his death and that the accused intended the threatening words to intimidate and be taken seriously.

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R v Burles, 2017 SKPC 10

Harradence, January 31, 2017 (PC17009)

Statutes – Interpretation – Traffic Safety Act, Section 276(1)
Statutes – Interpretation – Criminal Code, Section 495
Criminal Law – Assault
Criminal Law – Arrest – Reasonable and Probable Grounds

The accused was charged with committing an assault, contrary to s. 266 of the Criminal Code. The alleged assault occurred during the course of an arrest of the victim by the accused, an RCMP officer. If the arrest was lawful, the defence argued that the use of force was justified by circumstances, relying upon s. 495 of the Code as authorizing the arrest. Under s. 276(1) of The Traffic Safety Act, a peace officer is authorized to arrest a person

if they are contravening s. 32 (driving while suspended) and the officer has reasonable grounds to believe that the person will not appear in court to answer a summons. The evidence presented at trial was contradictory. The accused testified that while working on the Muskoday First Nation he had checked the plate number of a vehicle and determined that the owner of it was suspended. He followed the vehicle and stopped it pursuant to s. 32 of The Traffic Safety Act. He informed the complainant that he needed to check her license and registration. The complainant told the accused that she owned the car, but she would not provide I.D. and became belligerent. The accused testified that he knew from experience that many drivers will assert that they own the vehicle but that is often not the case. He maintained that if he could not confirm the driver's identity, then it would be impossible to serve the summons on her or have any confidence she would attend court. The complainant testified that the accused threatened her with a spray can and that she told the accused she was not a suspended driver, but would not produce any identification. The accused testified that when he informed her she was under arrest, the complainant drove the vehicle a short distance away and stopped, at which point he acted according to the use-of-force model by putting both his hands on her left wrist and telling her to let go of the steering wheel. Two witnesses testified that they saw the commotion and heard the accused tell the complainant she was under arrest. After the complainant drove a short distance and then stopped, they saw the complainant resisting the accused's efforts to get her out of the vehicle, and he put her on the ground and handcuffed her. The complainant testified that when she refused to get out of the vehicle, the accused hit her forcefully on her shoulder and pulled on her ear and her hair. The complainant said that the officer never informed her that she was under arrest.

HELD; The accused was found not guilty. The court did not believe the complainant's version of events. Based on the accused's experiences in attending traffic stops where individuals had provided false names in the past and the complainant's belligerence and refusal to identify herself, the accused had reasonable grounds to believe that the complainant would not attend court to answer a summons. The Crown had failed to prove an absence of lawful authority to arrest under s. 276 of the Act and that provision applied to the arrest of the complainant.

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Bashutski v Peters, 2017 SKPC 17

Demong, February 8, 2017 (PC17011)

Torts – Motor Vehicle Accident – Liability
Torts – Negligence
Statutes – Interpretation – Traffic Safety Act, Section 213, Section 227

The plaintiff brought this action to recover the cost of his insurance deductible in the amount of $700 against the defendant. The plaintiff was driving through a pedestrian crosswalk when his vehicle was struck broadside by the defendant bicyclist, causing some damage to the vehicle. The plaintiff reported the accident to SGI and was advised that he would be found entirely at fault for the accident because he failed to yield the right of way for a pedestrian. At the time of the accident the plaintiff was proceeding in the northbound curb lane of the road and slowed his speed to stop his vehicle because he observed a cyclist on his side of the road activate stoplights over the crosswalk. He watched the cyclist cross six lanes of traffic and since he saw no one else in the intersection, he proceeded to accelerate and as he entered the crosswalk, although the lights were still flashing, the defendant cyclist hit his vehicle. The defendant testified that she was from a small town and was unfamiliar with the rules of the road as they related to bicycles. She thought that she cycled through the crosswalk at 10 km/h. Although the defendant saw the plaintiff's vehicle, she felt that he had an obligation to stop for her.
HELD: The defendant was found to be negligent and 75 percent of the cause of the accident was attributable to her. The court found that cyclists were governed by the City of Regina's Bylaw 9900, which stated that they were governed by the applicable rules of the road as set out in The Traffic Safety Act and in this case by s. 227, which obligated the defendant to stop, dismount and walk her bicycle across the highway. She was also obligated to comply with s. 213 and drive with due care and attention. In this case, the defendant's actions fell below the standard of a careful and prudent driver. The court attributed negligence to the plaintiff to the extent of 25 percent because he should not have entered the crosswalk against a red light when the lights were still flashing. He was awarded the sum of $525 in damages.

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Babich v Babich, 2017 SKQB 32

Megaw, January 31, 2017 (QB17027)

Family Law – Custody and Access – Interim – Application to Vary

The petitioner applied to vary the interim order regarding parenting of the parties' three children. The original order made in 2015 specified shared parenting of the children but that they should have their primary residence with the respondent mother with the petitioner having access. In this application the petitioner requested that the children's primary residence be with him and that the respondent's access be supervised. Beginning in July 2015, the petitioner brought his first application on the grounds that the respondent's alcoholism and mental health issues were sufficient reason to vary the interim order but the court had not varied the order. In June 2016, the petitioner applied again and provided affidavit evidence regarding a number of incidents wherein the respondent had been intoxicated. At the hearing the court received a custody and access assessment report commissioned by it. The author indicated that both parties denied any issues with alcohol consumption and the respondent indicated that she did not drink. Therefore the author did not assess the impact of any alcohol consumption on the respondent's ability to parent the children. The author prepared an updated evaluation of his report in January 2017, in which he expressed concerns about the respondent's mental health and alcohol addiction issues. He had also become aware that when personnel from the Ministry of Social Services attended at the respondent's residence, she would not answer the door. They returned later with the police and were forced to obtain a warrant to gain entry to the house. The author now recommended that the respondent seek addiction and mental health counselling, psychiatric assistance and medication if necessary. The respondent deposed that since she received the updated assessment, she had enrolled in a parenting program, stopped consuming alcohol for ten days, attended a couple of AA meetings, re-engaged with her psychologist and been referred to a psychiatrist. Since the July decision, the court learned that there were further incidents of alcohol consumption. The respondent had been seen intoxicated while on holiday with her boyfriend and had been charged after she allegedly drove while impaired and while her youngest child was in the vehicle. The respondent had been acquitted. HELD: The application was granted. The court varied the order to make the petitioner's home the primary residence for the children for four days each week. The children were to spend the other three days with the respondent. The court found that there was a compelling reason to change the existing parenting regime, relying upon the contents of the updated assessment and the incident involving the Ministry officials. The respondent had lied to the assessor at the time he prepared his first report and had not been able to explain satisfactorily why she refused to allow the officials into her home. As the assessment report had

not identified actual risks to the children, the court decided that the situation did not warrant supervised access, although it was concerned about the driving incident. Instead the court imposed a number of conditions on the respondent, including that she refrain from consuming alcohol while the children were in her care and to continue with counselling.

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R v Mosiuk, 2017 SKQB 33

Zarzeczny, February 2, 2017 (QB17028)

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

The appellant was convicted of two separate charges of driving while suspended. The charges were laid on September 29 and October 18, 2014. At trial, the Crown submitted an exhibit pursuant to s. 140(5) of The Traffic Safety Act, a Certificate of Disqualification or Prohibition, dated September 4, 2014. An employee of the Drivers Records program at SGI, who was responsible for preparing and providing the certificates, testified that she had mailed two separate letters to the appellant advising him that his driver's license, and therefore his right to drive, was suspended in August 2014 and sent a third letter in late September informing him of yet another suspension. None of the letters were returned as undelivered. The appellant testified at trial that he had not received the letters. The issues on appeal were whether the trial judge erred: 1) in law in admitting and accepting the certificate as proof that at the date the offences were alleged to have been committed, the appellant was suspended from driving. The appellant argued that he was charged with driving while suspended and there was no reference in the Certificate to suspension or that he was suspended from driving; and 2) in concluding that the Crown had proven that the accused knew or was deemed to know of his suspension from driving at the material times charged.
HELD: The appeal was dismissed. The court found that the trial judge had not erred: 1) in admitting the Certificate as satisfying the presumption contained in s. 140(7) of the Act. The Certificate certified that the appellant was disqualified from holding or securing a licence at the date the two instances of driving occurred; and 2) in finding that the appellant had not proven on the balance of probabilities that he was unaware of his suspension or that his explanation was reasonable. It was implicit in his judgment that the judge had rejected the

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appellant's evidence.

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R v Carpenter, 2017 SKQB 34

Barrington-Foote, February 2, 2017 (QB17029)

Municipal Law – Dangerous Animals Bylaw – Appeal
Municipal Law – Offences – Sentencing Appeal

The appellant appealed the sentence he received after being convicted of two counts under s. 376(4) of The Municipalities Act, when his five dogs attacked three teenagers without provocation. The sentence included an order that the RCMP take possession of the five dogs and have them euthanized. The appellant argued that only one of the dogs should be euthanized because he was the only known biter. He also argued that the order violated s. 8 and 6(2) of the Charter. After a review of the facts and circumstances of the offences, the trial judge concluded that the appellant lacked insight and acceptance of responsibility, leaving him with little confidence that the appellant would take the steps required to mitigate the risk of future attacks. The central issue was found to be public safety. The issues examined by the appeal court were as follows: 1) did the trial judge err in law or principle; 2) was the sentence demonstrably unfit; and 3) Charter issues.
HELD: The standard of review was one of deference to the trial judge. The issues were determined as follows: 1) the appeal court agreed that public safety was the primary consideration in determining whether an order should be made pursuant to s. 375(5) of the Act. The appellant was a dog breeder and the court had no reason to conclude that he would not continue to breed dogs. The appellant indicated that four of the dogs were blameless and that the victims bore some responsibility because they ran. The appeal court concluded that specific and general deterrence were relevant. The list of considerations in the Ontario Act considered by the trial judge was found to be useful, but the appeal court said they need not be treated rigidly. The appeal court found that the trial judge applied the correct legal test. He did not commit an error of law or principle that had an impact on sentence. The appeal court also concluded that the trial judge did not have to consider the impact of the order on the appellant's livelihood. The fact that the appellant was a dog breeder would not have weighed in the appellant's favour if it had been taken into consideration; and 2) the trial judge found that all of the dogs attacked and bit one of the victims. The

sentence was not found to be demonstrably unfit. There was a reasonable basis for the trial judge's conclusion that the dogs presented a risk to the public, and that the risk could only be reasonably addressed by destroying the dogs. The fact that four of the dogs had never been known to bite before did not mean that the sentence was demonstrably unfit; and 3) the appellant's s. 8 Charter rights were not infringed by the seizure and impounding of his dogs. The Charter right does not protect property rights, only privacy rights. Further, s. 6(2)(b) requires a mobility element. The appellant had moved from Alberta to Saskatchewan, but the case did not in any way relate to that move.

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Chapin Estate v Bennett, 2017 SKQB 36

Currie, February 2, 2017 (QB17030)

Civil Procedure – Queen's Bench Rules, Rule 7-2
Equity – Wrongful Act
Wills and Estates – Constructive Trust

The defendant applied for summary judgment pursuant to Queen's Bench rule 7-2, dismissing the plaintiff's claim. The claim related to five quarter sections of farm land in Saskatchewan. The defendant's father had transferred the land into her name and her sister's as joint tenants in 1994. In 2010, the sister was killed in a motor vehicle accident while she was a passenger in the vehicle driven by the defendant. The land was transferred into the name of the defendant as surviving joint tenant. The plaintiff, the executor and husband of the deceased sister, took the position that the deceased had a one-half interest in the land that survived her death and passed to her estate. The issues presented by the plaintiff included the following: 1) whether the mutual conduct of the deceased and the defendant showed that the latter held the land in trust for the deceased's estate; 2) whether the land was registered in error as a joint tenancy; and 3) whether the defendant held a half interest in the land in a constructive trust for the deceased's estate because it would be inequitable for the defendant to benefit from the death of her sister because she had caused it.
HELD: The court granted the application and awarded summary judgment to the defendant. The plaintiff's claim was dismissed. The court reviewed each of the issues to determine whether there were genuine issues requiring a trial and held that there were none. The court found the following with respect to the

issues: 1) the plaintiff's evidence generally did not reflect any mutual understanding between the defendant and the deceased. Even if the evidence were to establish that there had been a trust agreement between the defendant and the deceased, it would not be enforceable by operation of s. 7 of the Statute of Frauds; and 2) the evidence provided by the lawyer who had prepared the transfer was conclusive that the intention of the deceased's father had been to transfer the land to the deceased and the defendant as joint tenants; and 3) this was not a situation where a constructive trust based upon public policy that a criminal should not be permitted to profit from crime was applicable. Although the defendant may have been negligent in causing the death of her sister, it was not the kind of objectionable conduct that the policy was designed to cover. The deceased's estate had released the defendant from such a claim in any case.

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S.U., Re, 2017 SKQB 37

Megaw, February 3, 2017 (QB17031)

Family Law – Child in Need of Protection – Permanent Order

The Ministry of Social Services sought a permanent order for a child, S.U., pursuant to s. 37(2) of The Child and Family Services Act. The parents had previously indicated that they would be participating, but they did not appear. S.U. was apprehended shortly after her birth due to concerns over domestic abuse of her mother from her father. There were also concerns with the mother's substance abuse and the father's mental health. The first short-term care order was made in November, 2014. Further orders were made, each of three months' duration. The parents were unable to carry through with the conditions and recommendations in the orders. The Ministry tried to find a family member to care for S.U., but they were unsuccessful. The parents had some visits with S.U. until August 2016, when the visits ended. The parents told the Ministry that they were busy working and had got a new dog. They said that they would contact the Ministry if they wanted to schedule visits. Indications to the court were that the parents were in Ontario and there were continued concerns regarding domestic violence. The long-term/permanent ward review indicted that S.U. was registered under the Nunavut Land Claims Agreement. S.U. lived with the same family since she was six months old. She had asthma and a skin condition. The foster parents dealt with the health issues and also accommodated visits with the parents.

HELD: The court had little difficulty determining that S.U. was a child in need of protection pursuant to s. 11(b) of the Act. None of the circumstances in s. 37(1) of the Act were appropriate. The only available order was to commit the child permanently to the Ministry pursuant to s. 37(2) of the Act. The court did not find s. 37(3) was available because there were no circumstances to warrant a long-term order being made. The court ordered that S.U. be permanently committed to the Ministry pursuant to s. 37(2). The court found that the Ministry was committed to ensuring that the child received assistance to allow her to connect in a real and substantive way with her birth culture and heritage. The court also found that the foster mother was committed to the child and to ensuring that S.U. was exposed to her heritage, culture, and language.

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R v Abramoff, 2017 SKQB 38

Smith, February 3, 2017 (QB17035)

Criminal Law – Appeal – Acquittal
Criminal Law – Dangerous Driving
Criminal Law – Mens Rea

The accused was acquitted of dangerous driving. The trial judge concluded that the accused had committed the actus reus of the offence because his driving conduct was a marked departure from the standard of care. However, the trial judge could not conclude beyond a reasonable doubt that the accused had the requisite mens rea. The Crown argued that the trial judge erred in the following ways: 1) by applying the criminal standard of proof to individual pieces of evidence; 2) by failing to consider the totality of the evidence; and 3) by finding that the respondent's conduct was not a marked departure from the standard of care expected of a reasonable driver. The three Crown witnesses were all in vehicles stuck in a lineup of traffic travelling northbound on the highway. Their evidence and the accused's differed in some respects so the trial judge noted that credibility was an issue. One Crown witness testified that there were two instances of the accused passing vehicles while there was oncoming traffic. The other two Crown witnesses testified to one instance of unsafe passing. The accused said that there was only one incident where there was an oncoming vehicle, but that he had assessed the situation and determined that it was safe for him to pass. The trial judge indicated a reasonable doubt about the accused's evidence that there was one incident and not two.

HELD: The acquittal was set aside and the matter was directed to be returned to the Provincial Court for retrial. The issues were analyzed as follows: 1) the Crown did not have to prove beyond a reasonable doubt that there were two incidents. Its only obligation was to prove, beyond a reasonable doubt, that the accused was guilty of dangerous driving; 2) the court did not find anything wrong with the trial judge referring to a pattern of driving as part of the factual matrix. However, the appeal court agreed with the Crown that it was not necessary for it to prove beyond a reasonable doubt that there was a "pattern of dangerous driving behaviour" in order to make out the charge; and 3) the appeal court agreed with the Crown that there were sufficient concerns that amounted to an error of law due to the focus of the analysis with regard to the mens rea of the offence as well as consideration of extraneous issues addressing that element of the offence.

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McAdam v Grimard, 2017 SKQB 39

Goebel, February 3, 2017 (QB17036)

Civil Procedure – Application to Set Aside Default Judgment
Civil Procedure – Queen's Bench Rules, Rule 10-13
Civil Procedure – Service – Personal

The plaintiff commenced an action against the three defendants. The first defendant, V., was served by registered mail on June 5, 2013, and was noted for default on July 24, 2013. He acknowledged receiving an envelope but said he did not open it or read it because he was illiterate. After amending her claim, the plaintiff then served the other two defendants, L. and D., on February 5, 2014. They were noted for default on February 26, 2014. In February 2015, the plaintiff obtained a default judgment against the defendants in the amount of $26,100 plus pre-judgment interest and costs. The plaintiff's spouse began to enforce the judgment shortly after she died in September 2015. V. claimed that he did not have sufficient notice because he was not personally served with the original claim nor ever served with the amended claim. L. and D. claimed that they were never served. The process server deposed that he went to L. and D.'s home where L. opened the door just wide enough for him to speak. The process server said that there was also a man in the house that he believed to be D. The process server left the documents on the deck. The court considered the following factors: 1) did the defendants provide a satisfactory explanation

for their failure to respond to the claim; 2) was the application made as soon as possible after the judgment came to the attention of the defendants and/or did they provide a satisfactory explanation for the delay; 3) did the defence disclosed by the defendants raise arguable issues; and 4) did the defendants satisfy the court that an order setting aside the judgment would not seriously prejudice the plaintiff.
HELD: The court had broad discretion and jurisdiction to grant the order sought by the defendants. The factors were considered as follows: 1) there was no evidence that V. understood the importance of the statement of claim and deliberately decided to let the matter go to default judgment. Also, V. was never served with a copy of the amended claim as required by rule 3-72(4) of the Queen's Bench Rules. The court found it arguable that the plaintiff's obligation to serve V. with the amended claim was militated by a reasonable assumption that she was not obligated to provide him with further notice of proceedings given his failure to file any response to the service of the original claim. The court found it difficult to conclude that L. and D. were properly served. The person being served must be made aware that a document is being served upon them and have the opportunity to determine what the document might be. The process server only advised L. that he had information for her. There was no evidence that the process server had any conversation with D. The court concluded that the determination respecting service on V. and L. required consideration as to whether they demonstrated an arguable defence to the claim and whether the delay caused the plaintiff irreparable harm; 2) L. and D. said they first became aware of the claim and default judgment on February 18, 2016, when L. went to the bank and was advised that funds had been seized from her account. The initial application to set aside the default judgment was made five weeks later. It was delayed for appointment of the plaintiff's spouse as administrator ad litem. V. said that L. advised him of the legal matter on February 19, 2016. He met with a lawyer on March 7, 2016, and filed his application on July 12, 2016, three weeks after the plaintiff's spouse was appointed as administrator ad litem; 3) the defendants deny the plaintiff's claims. L. and D. provided affidavits with some detail in support of their denials; and 4) there were some challenges in proceeding with the claim given the plaintiff was now deceased. However, there were also a number of supporting affidavits tendered by witnesses who remained available to provide viva voce evidence and could be subject to cross-examination at trial. The court exercised its discretion in favour of the order sought pursuant to rule 10-13. The default judgment was set aside and the defendants were given leave to serve and file their statement of defence within the next 14 days. The plaintiff was awarded costs

of $1,500.

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Giesbrecht v Storos, 2017 SKQB 40

Goebel, February 6, 2017 (QB17037)

Family Law – Disclosure
Family Law – Spousal Support – Imputing Income
Family Law – Spousal Support – Interim

The parties were in a spousal relationship for almost ten years and had no children. The petitioner applied for interim disclosure, interim spousal support of $3,000 per month, and costs. The respondent did not file income information despite being served with a notice to file it on December 1, 2016. He provided the court and petitioner with a copy of his income tax returns during the course of his arguments. The petitioner was 37 years old with a high school education and work experience in physical labour. She claimed that she was limited to working 20 hours per month due to ongoing medical issues. She indicated she earned $3,985 per year as a cleaner and was unable to earn additional income. The respondent earned more than $150,000 per year and did not dispute the petitioner's entitlement to interim support but argued that income should be imputed to her based on principles of self-sufficiency. The petitioner did not provide independent evidence of the alleged health concerns. HELD: The court was not prepared to impute income to the petitioner on the interim application. The petitioner did provide sworn testimony and many of the assertions were not denied by the respondent. The petitioner also had a low income over the last three years of the relationship. The court found that the petitioner earned $4,000 per annum and the husband earned $157,000 per annum. The range of spousal support according to the Spousal Support Advisory Guidelines was between $1,900 and $2,600. The respondent was ordered to pay the petitioner $2,500 per month commencing December 1, 2016. The respondent was ordered to serve and file income information by February 10, 2017. The petitioner was ordered to provide the respondent disclosure of medical information within the next 90 days. The respondent had de facto sole occupation of the family home, and he was expected to pay all of the costs associated with the home. The respondent was ordered to pay the petitioner costs of $1,200 within 30 days.

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R v Bookout, 2017 SKQB 41

Popescul, February 7, 2017 (QB17038)

Criminal Law – Appeal – Conviction
Criminal Law – Driving over .08
Criminal Law – Evidence – Expert Evidence

The appellant was found guilty of driving a motor vehicle while his blood alcohol level was over .08, contrary to s. 253(1)(b) of the Criminal Code. The appellant's breath samples were both .150 and were taken more than two hours after the alleged driving. The Crown was therefore not entitled to rely on the presumption of blood alcohol level at the time of driving and instead had to call expert evidence to provide extrapolation evidence. The issue on appeal was whether the trial judge erred in law by qualifying the witness as an expert entitled to give opinion evidence, in light of the recent Supreme Court of Canada case White Burgess. The witness was a forensic alcohol specialist employed by the RCMP. The appellant argued at trial that the Crown failed to establish that the witness was an "unbiased objective" witness. The White Burgess case required consideration of whether the expert's opinion would not change regardless of the party that retained him or her. The appellant argued that the trial judge erred by not considering White Burgess. He pointed out that the trial judge did not expressly conclude that the witness was independent and not biased. In a previous case, an Alberta judge made comments questioning the same witness's impartiality.
HELD: More than a simple appearance of bias is necessary and the threshold requirement is not particularly onerous. The trial judge was reasonably satisfied that the witness was "going to act as an expert in this situation". The expert evidence was relatively well-known mathematical calculations. The appeal court did not find it of any consequence that a previous Alberta court involving a completely different issue, made comments questioning the impartiality of the witness. There was no evidence of bias or a lack of impartiality or independence. The appellant's appeal was dismissed.

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Graham v Purdy, 2017 SKQB 42

Labach, February 7, 2017 (QB17039)

Torts – Defamation – Damages
Torts – Defamation – Malice
Civil Procedure – Queen's Bench Rules, Rule 3-84(2)

The plaintiff brought an action in libel against the six individual defendants and the one corporate defendant, Canwest Publishing (Canwest), alleging that they had published defamatory comments about him in a series of articles in the StarPhoenix newspaper and on websites owned and operated by the newspaper and Canwest. The defendant, Purdy, was a reporter for the Star Phoenix and the author of seven articles that had allegedly defamed the plaintiff. The other individual defendants held positions as city editor, publisher and general manager, managing editor and editor-in-chief of the Star-Phoenix. The plaintiff claimed he suffered loss and damage to his professional reputation, as a physician specializing in obstetrics and gynaecology, and to his civic reputation. The defendants denied that the words complained of in the various articles were defamatory and said that they formed part of the defendants' reporting of a civil trial held in the fall of 2007 in which the plaintiff was the defendant. In that case, a former patient of the plaintiff alleged that he had been negligent in performing her surgery. The defendants relied as well on the defence of privilege afforded newspapers under s. 11 of The Libel and Slander Act and the defence of responsible communication. The plaintiff was found not negligent for his former patient's injuries. Two articles were written during the trial by Purdy. She was the author of five more articles following the trial. In addition to reporting on the trial and verdict, Purdy reported that a number of other former patients of the plaintiff had alleged that they had suffered from negligence while they had been under his care. Purdy testified that she had discussed the information she had obtained and the articles themselves with her editors, the other individual defendants. After the plaintiff filed his claim, the defendant Canwest was purchased by Postmedia Network (Postmedia). The issues were as follows: 1) whether the statement of claim should be amended to add Postmedia as a defendant. The defendants opposed the request because the two-year period in The Limitations Act had expired and the plaintiff had not explained the delay in seeking the amendment; 2) whether the defendants, or any of them, were liable in defamation; and 3) if so, what was the quantum of damages.
HELD: The action was allowed. The defendants had defamed the plaintiff and he was entitled to damages in the amount of $100,000. The court found the following with respect to each issue: 1) it would substitute Postmedia as a defendant pursuant to Queen's Bench rule 3-84(2) as it was the successor to Canwest and was aware of the plaintiff's claim when it purchased the

StarPhoenix and it would not be prejudiced. It would not deprive Postmedia of a defence under s. 5 of The Limitations Act because the articles remained on Postmedia's websites and were republished whenever they were viewed or downloaded; 2) after reviewing each of the articles and assessing the words complained of, it found that the words constituted defamation; 3) all of the defendants were found to be joint tortfeasors with Purdy because they participated in the publication of a libel and were jointly and severally liable in defamation to the plaintiff; and 3) an appropriate award for general damages was $50,000. The court allowed the claim for aggravated damages as the defendants were found to be motivated by actual or express malice because Purdy did not simply report the jury's verdict in her articles but indicated that she believed that the jury had not reached the proper verdict in the trial. She deliberately chose to report the stories of people who had made complaints about the surgical care provided to them by the plaintiff without verifying it or seeking comment from the plaintiff. As she was acting in the course of her employment, Purdy's malice was attributed to all the defendants. The plaintiff was awarded $50,000 in aggravated damages.

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C.D. v K.A., 2017 SKQB 43

Tholl, February 8, 2017 (QB17040)

Family Law – Child Support – Imputing Income
Family Law – Child Support – Retroactive
Family Law – Custody and Access – Best Interest of Child
Family Law – Custody and Access – Children Born Outside Marriage
Family Law – Custody and Access – Mobility Rights
Family Law – Custody and Access – Primary Residence

The petitioner and respondent had been parenting their child on a shared parenting basis for the past three years, but the respondent was now moving to Alberta. At a pre-trial conference the parties entered into Minutes of Settlement and detailed steps the parties would take with regard to a possible move to Edmonton, and the petitioner agreed to have his income imputed as $81,000 and would pay $500 per month in child support to the respondent. The petitioner had paid all daycare costs, extracurricular and medical/dental costs prior to 2016. The petitioner could not obtain employment in the oil and gas industry, so he cancelled his plans to move to Edmonton and enrolled full-time in university beginning September 2015. He

lived in a rented 1,000-square-foot, two-bedroom, two-bathroom apartment. The petitioner's parents lived on a lake 190 km from the petitioner and the petitioner's sister and child lived in the same city as him. The respondent married and had a son in 2016. The respondent was on maternity leave at trial. She planned to move 800 km away, regardless of the court's decision. The respondent's husband was born and raised where they were moving and they would move in with his mother in her large home on an acreage. The husband was being transferred for work and he would be away approximately two weeks per month for work. The respondent did not plan on returning to work. Her family was in Prince Edward Island. The child was six years old and in grade one. The parties' relationship had a high level of conflict and they had extreme difficulty communicating. HELD: The court first reviewed the factors in ss. 8(a) of The Children's Law Act, 1997. The child had a good quality relationship with both of his parents and the court could not make a decision regarding whether one parent had a better quality of relationship with the child. The child had a good relationship with the petitioner's extended family and he also had a good relationship with his step-father and baby brother. The court concluded that both parents could equally meet the child's needs, with each parent being equally weak in meeting the child's emotional and psychological needs because of their conflict. Both parties had appropriate homes with neither having an advantage over the other in that regard. The parties also both had realistic plans for the child's future. Additional mobility factors were then examined. The court found that the move was a bone fide transfer that was being undertaken in good faith. The court could not find anything to suggest that the new situation would not be permanent. The court determined that neither parent was the primary psychological parent of the child. The court concluded that it would be in the child's best interests to primarily live with the petitioner, thereby staying in the same city. The court ordered joint custody with a significant amount of parenting time for the respondent. Both parents were given reasonable contact with the child by telephone, Skype, Facetime or other electronic means when the child was in the care of the other. The court ordered the exchange point at approximately halfway. The respondent claimed $4,500 in retroactive child support, a figure arrived at after deducting $2,500 for payments already received. The petitioner's line 150 income for 2015 was $16,720 and the respondent's was $9,281. The court determined that the most appropriate manner to deal with arrears of child support was to provide the respondent with a credit of $2,500 against the payment of future child support. The court imputed minimum wage incomes of $25,376 to the respondent and $22,298 to the petitioner. The court ordered the respondent to

pay $212 per month pursuant to s. 3 of the Guidelines. Payment was not required until the $2,500 credit was depleted. No order was made with respect to s. 7 expenses because there was no evidence of any ongoing s. 7 expenses. The court order included details regarding each party's parenting times and included clauses that the parents could not travel more than 50 km from their home without informing the other, and that the parties' main form of communication was to be through email, etc.

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T.S.P. v D.A.K., 2017 SKQB 44

Chicoine, February 13, 2017 (QB17045)

Family Law – Custody and Access

The parties separated in 2013 and had settled most of the issues resulting from the breakdown of the marriage, including an agreement for shared parenting of their two children, aged nine and six respectively. Under an earlier court order, the parties had been successful in implementing a fairly complicated schedule allowing them to share custody but there were some aspects of it that they asked the court to settle. The respondent father's position involved shift work. In one eight-day period of the schedule when the children were with the respondent, he had to attend work from 6:45 am until 7 pm. During those days, the respondent's parents drove in from Yorkton and stayed with the respondent so that they could care for the children before and after school. The petitioner argued that it was in the best interests of the children if for those eight days, she was to parent them rather than rely upon their paternal grandparents. Her employment schedule was regular and allowed her to spend at least four to five hours of each day with the children as opposed to the one and a half hours that the respondent had with them before they went to bed during the eight-day period. The petitioner offered in exchange for this time that the respondent would have one extra weekend in the 14-week schedule.
HELD: The court approved the petitioner's proposal to revise the parenting schedule. It ordered various other changes to the parenting schedule and set the amounts owed by each party for s. 3 support and s. 7 extraordinary expenses.

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T.W. v S.L., 2017 SKQB 45

Kalmakoff, February 13, 2017 (QB17041)

Family Law – Child Support – In Loco Parentis
Statutes – Interpretation – Family Maintenance Act, 1997, Section 2(c), Section 3

The parties disputed whether the respondent had a legal obligation to pay child support for a child who was not the biological son of the respondent. The petitioner and the respondent began their relationship in 1999, and when the petitioner became pregnant, the respondent assumed that he was the father of the child. The petitioner had been having a relationship with another man at the same time but she testified that she believed that the respondent must have been aware of it and would have had some concern about the parentage of the child, but she never expressly discussed it with the respondent. The respondent testified that he never questioned the paternity of the child. The parties lived together with the child until 2002. After their separation, the child had his primary residence with the petitioner but the respondent made strong efforts to stay involved with the child and to parent him. In 2006 he began paying child support to the petitioner in the amount of $200 per month in accordance with an informal agreement between him and the petitioner. In 2015, the petitioner filed a petition and brought an application that sought support in an amount consistent with the Guidelines and for retroactive payment. She brought the application because her employment was uncertain and the costs relating to the child, now 15, were increasing. A friend who knew the petitioner at the time the respondent had met her suggested to him that he question whether he was actually the child's biological father. He arranged to take a DNA test and the results proved that he was not the father, whereupon he stopped paying child support and having any contact with the child. The respondent counter-petitioned for repayment of the support he had paid. The issues were as follows: 1) did the respondent ever had an obligation to pay child support, and if so, how much should he be required to pay in the future and retroactively; or 2) if not, how much of the child support should the petitioner repay.
HELD: The petitioner's application was dismissed. The court believed the respondent's assertion that he had always believed that he was the child's father. Regarding the issues, it found the following: 1) under s. 2(c) of The Family Maintenance Act, 1997, the respondent could not have formed "the settled intention", on the facts of this case, to be the child's parent and therefore there was no corresponding obligation under s. 3 to provide maintenance; and 2) the petitioner would not have to repay the

child support paid by the respondent. As it was not an overpayment, the court considered it to be a question of restitution and unjust enrichment. The petitioner had received an enrichment and the respondent a deprivation. However, because of the petitioner's financial circumstances, it would cause hardship for her to have to repay the child support. In light of the parties' divided success, the court exercised its discretion and made no order as to costs.

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Brittain v Petit, 2017 SKQB 46

Dufour, February 14, 2017 (QB17046)

Barristers and Solicitors – Confidentiality – Conflict of Interest – Application for Removal

The applicant, a petitioner in an action involving a dispute with the respondent regarding the custody of their only child, applied to have the respondent's law firm, PLG, disqualified from representing him because of a conflict of interest. This conflict became apparent to the applicant at the start of the trial of the custody matter when she recognized one of the lawyers with PLG, Jeremy Caissie. He had represented her in a 2006 custody dispute involving another child born of her relationship with her former husband. The respondent had employed a lawyer from PLG since 2014. In 2016, Caissie joined PLG and reviewed its client roster with the respondent's lawyer to ensure that there were no conflicts of interest. He did not recall the applicant's name as his former client in the roster. The lawyer who represented PLG at the hearing conceded that the applicant and Caissie were in a solicitor-client relationship and that the information relayed to him in the former action was relevant to the current action. The remaining question was whether Caissie received confidential information through the relationship and whether the applicant would be prejudiced if he was allowed to represent the respondent. The respondent argued that: 1) nothing that the applicant told Caissie was confidential because, as a result of their relationship, he knew the same things that Caissie would know and that there was very little chance that the information could be used to the applicant's detriment; and 2) the applicant had waived her ability to complain about the conflict because she waited too long before making the application.
HELD: The application was allowed. The court found that the applicant had divulged confidential information to Caissie. The

court found the following: 1) the respondent could not know what information the applicant had imparted to Caissie. The respondent's argument that the similarity of his knowledge and Caissie's concerning the applicant would eliminate the risk of prejudice had been rejected by the Supreme Court's decision in MacDonald Estate; and 3) on the evidence, the court accepted that the applicant was not aware that Caissie was part of PLG until the start of the trial.

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