The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
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The appellant appealed his conviction (see: 2014 SKPC 120). He had been charged with driving while his ability to do so was impaired, contrary to s. 255(2) of the Criminal Code, and with driving while his blood alcohol content exceeded .08 thereby causing an accident that resulted in bodily harm to another person, contrary to s. 255(2.1) of the Code. The defence brought a Charter application, alleging that the appellant's ss. 7, 9 and 10(b) rights had been violated and a voir dire was held at trial. The appellant did not testify or call evidence. His defence was that when the two vehicles collided they did so because of the icy road conditions. The officer who attended at the scene of the accident found the appellant in his vehicle and noticed his pupils were enlarged and his speech was strange. She asked the appellant if he had had anything to drink and he said that he had two drinks earlier in the day. Although she could not smell alcohol, there was an odour of cologne. The officer testified that she wanted to investigate further to see if she could obtain more grounds, so she asked the accused to leave his vehicle and go to the police cruiser. She did not advise the

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appellant of the reason for the request and she testified that she did not believe that she was required to do so. In the cruiser, the officer could smell alcohol and asked the appellant what he had had to drink. He replied that he had had two drinks, the last about an hour before the accident. The officer then believed that she had grounds to believe that the appellant was impaired and made the ASD demand. The accused provided a sample and failed. The Crown admitted to the breach of s. 10(a). The appellant successfully persuaded the judge that there had been a violation of his s. 9 Charter rights because the appellant had been arbitrarily detained and of his s. 10(a) rights because he had not been informed of the reasons for his detention. The judge rejected the appellant's argument that his s. 7 Charter right had been breached. The trial judge considered the s. 10(a) breach to have been very serious because the officer should have known of the appellant's right to be advised of the reason for his detention. Regarding the s. 9 breach, the judge found it to be less serious because although the officer had a reasonable suspicion sufficient to permit an investigative detention, she lacked an objective basis. These two findings favoured excluding the evidence. However, the arbitrary detention was very brief and had little impact on the appellant. The information obtained from the appellant were his answers that were compelled by The Traffic Safety Act, therefore the impact of the Charter breach was marginal. Based upon the last factor in the Grant analysis, the trial judge admitted the ASD test results and the Certificate of Analysis. Before reserving her judgment, the judge raised with the Crown and the defence that the wording of the charge under s. 255(2.1) in the Information had used the same wording as the charge under s. 255(2), indicating that the former offence required a causal link. There was no objection raised by counsel. Later, at the time the judge rendered her decision, she amended the information to read that the appellant, while operating a vehicle having consumed alcohol in such quantity that he was over .08, caused an accident resulting in bodily harm to the victim. The trial judge convicted the appellant of the charge under s. 255(2.1) but acquitted him of the impaired driving charge. The appellant appealed his conviction on the grounds that the trial judge erred in amending the second count of the information because she did not have the power to do so, and if she did, she should not have exercised it in the circumstances in that his defence had been based on the Crown having to prove a causal link between his blood alcohol concentration and the injuries caused to the person in the other vehicle. By relieving the Crown of that requirement, the judge improperly prejudiced him in his defence. She also erred in her analysis under s. 24(2) of the Charter by failing to appreciate the impact of the two breaches on his rights and erroneously admitting the evidence. The Crown also argued on appeal that the appellant's ss. 9 and 10(a) rights had not been infringed. It asserted that the detention of the appellant was not an investigative detention within the meaning of R. v. Mann. The officer had the lawful authority to detain the appellant because she was investigating an

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accident pursuant to The Traffic Safety Act. The trial judge had mistakenly viewed the detention solely as one of an investigative nature as in R. v. Mann. The court set out the issues as: 1) was the judge authorized to amend the second count of the charge in the way that she did; 2) were ss. 9 and 10(a) of the Charter breached; and 3) if so, should the ASD and Breathalyzer test results be excluded from evidence under s. 24(2) of the Charter.
HELD: The appeal was dismissed. With respect to the issues, the court found that: 1) the judge had the authority to amend the second count under either ss. 601(3)(b)(ii) or 601(3)(c) of the Criminal Code. The judge had exercised this authority appropriately. The appellant was able to properly defend himself and was not misled by the Crown's error. The appellant had not explained how he would have conducted his defence differently. The amendment rendered the issue of the causation of the accident irrelevant to the determination of the appellant's guilt on the second count; 2) there was no statutory or common law authority that empowered the officer to detain the appellant and therefore s. 9 of the Charter was infringed. The officer failed to inform the appellant why he was being detained. The judge correctly concluded that the appellant's s. 10(a) rights were infringed; and 3) the court could conduct its own s. 24(2) analysis because the trial judge had made a fundamental error in her approach. The judge should have first considered the s. 9 breach before undertaking the analysis of the s. 10(a) breach because it resulted in her misapprehending the true nature and seriousness of the latter. The trial judge also misplaced the bulk of her reasoning under the second leg of the Grant analysis because she addressed the issue of statutorily compelled statements relevant to s. 7 of the Charter after finding that there had been no violation of it in this case. The court found that under s. 24(2) that the officer had demonstrated a negligent disregard for the appellant's s. 9 rights, which was a serious breach. However, she detained him in good faith to carry out her duty under The Traffic Safety Act. The officer's violation of s. 10(a) was very serious because she ought to have known that she was required to advise the appellant of the reasons for his detention and there could be no claim of good faith. Regarding the impact of the breaches, the court found that the period of arbitrary detention was relatively short and that because the appellant had not testified, there was no evidence that he felt he had to cooperate with the police by reason of his arbitrary detention and he had acknowledged at trial that he knew he had a legal duty to cooperate under The Traffic Safety Act. Society's interest in having these offences adjudicated on the merits were served by the admission of the evidence and the admission would not bring the administration of justice into disrepute.

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McNamara-Tysick v. Troy Transportation Moving and Storage Service Inc.

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S.(C.W.) v. J.(M.D.), 2015 SKCA 94

Jackson, August 31, 2015 (CA15094)

Civil Procedure – Application to Lift Stay – Court of Appeal Rule 15
Family Law – Appeal – Stay Pending Appeal – Custody and Access
Family Law – Costs – Affidavit Evidence – Hearsay
Family Law – Custody and Access – Appeal

The parties met in 2009 and had a child in 2010 before separating in 2012. The best interests of the child were found to be met by primarily residing with the mother and awarding her sole custody. The trial judge reduced the overnight visits with the father from five to two. The father appealed the decision and the mother applied pursuant to rule 15 of the Court of Appeal Rules to have the stay lifted with respect to the number of overnights the child would spend with the father. The father applied for costs regarding portions of the mother's affidavit. HELD: The trial judge was so concerned with the father's approach to parenting that he was almost to the point of considering the possibility of ordering supervised access. The appeal court was concerned that the trial decision did not provide for telephone or other communication in the ten days that the father did not have access. The parties were given leave to apply on three days notice if the issue of telephone access could not be agreed upon. The appeal was ordered to be treated as an expedited appeal pursuant to rule 43(1)(d). The application to lift the stay was allowed. The court noted that they did not take into account any of the hearsay statements in the mother's affidavit and costs were awarded to the father in the amount of $200.

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Palmier v. Kiel, 2015 SKCA 103

Richards Whitmore Ryan-Froslie, September 10, 2015 (CA15103)

Statutes – Interpretation – Landlord and Tenant Act, Section 50

The appellants appealed the decision of a Queen's Bench judge in chambers granting the respondents a writ of possession with respect to three quarters of land registered in their name but farmed by the appellants. The appellants had not appeared in court on the date set for the hearing of the application because they explained that they had not received notice of the application because proper service was not effected upon them. The respondent had hired a process server to serve the appellants. Under The Landlord and Tenant Act the server took the form B demand for possession and notice to tenant of intention to apply for a writ of possession, dated April 17, 2013. The server knew the appellants personally and had served them before. He went to their

Seier v. Scott

Sitter v. Saretzky Holdings Ltd.

Slim Contracting Inc. v. Saskcon Repair Services Ltd.

Sparvier v. ICR Property Management

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farm house on two separate occasions, but the appellants were not present, nor was any other adult there with whom the papers could be left. The server then went to the land described in the demand for possession and stapled envelopes addressed to the appellant on two abandoned houses believing that the envelopes would be noticeable to anyone driving into the yards.
HELD: The appeal was allowed. The decision and the writ of possession were set aside and the matter remitted to Queen's Bench chambers. The court found that s. 50(4) of the Act was not complied with in that the date of application (May 6, 2013) was not 16 days after the date form B was purportedly served on the appellants (April 22, 2013). Second, pursuant to s. 50(5), the notice of motion (i.e., application for the writ of possession) is to be personally served on the tenant or left with an adult person at the tenant's place of abode. The purpose of serving documents, such as the writ of possession in this case, is to ensure individuals receive notice of court proceedings so they have a reasonable opportunity to respond. Section 50(6) of the Act, which provides a form of substitutional service, can only be utilized in accordance with the terms of that subsection, if "notice cannot be effected in the manner described in subsection (5)". In this case, the affidavit of the process server fell far short of establishing that pre-requisite. The process server knew the appellants; he knew where they lived and he had previously served documents on them. There was no evidence he left a card or a note at the appellant's residence advising them of his attempt to serve documents or that he otherwise tried to contact them, nor was there any evidence that the appellants were evading service. In the circumstances, attending the appellants' residence twice, just two days apart at undisclosed times, is not sufficient to establish that the appellants or an adult person at their place of abode could not be personally served with notice of the application. Mere difficulty in serving documents does not equate to an inability to serve such documents. Before s. 50(6) can be utilized, it must be clearly shown that service in accordance with s. 50(5) cannot reasonably be effected. Third, even if service of the application for the writ of possession could have been effected pursuant to s. 50(6), that is, by posting the notice on two conspicuous places on the land, the process server's affidavit is deficient for the purpose of establishing compliance with that subsection. It is not sufficient to merely attest the notice was posted in "the most conspicuous places" the individual affecting service could locate. Evidence substantiating that the place is in fact conspicuous is required.

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R. v. Schraefel, 2015 SKPC 54

Jackson, April 2, 2015 (PC15117)

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

The accused was charged with failing to comply with the demand for a sample of his breath into an ASD. The defence brought a Charter application on the ground that the accused's s. 10(b) rights had been breached and that the evidence of the refusal should be excluded, pursuant to s. 24(2), and whether the police officer had the requisite grounds for reasonable suspicion of alcohol in the accused's body in order to make the s. 254(2)(b) ASD demand. The accused had been stopped for speeding. The officer noted an open beer carton, a canister for grinding cannabis marijuana and a pipe in the vehicle. The accused displayed no signs of impairment but lit a cigarette when the officer spoke to him. He was terse in conversation and appeared to avert his face when answering. The officer arrested the accused for possession of a controlled substance and placed him in the rear of the police cruiser. After a search of the vehicle revealed nothing other than the beer carton, the officer decided not to charge the accused with possession due to the trifling amounts involved. The officer had to wait for a while to process the speeding ticket and, during that time, noticed the smell of alcohol coming from the backseat. He then made an ASD demand and the accused declined to provide a breath sample. The accused was then arrested for that offence and given the standard rights and warnings. The officer testified that his grounds for making the demand included the open carton of beer, the manner in which the accused conversed with him, the fact that he was smoking and the odour of alcohol. He acknowledged that he had insufficient grounds for a roadside demand prior to detecting the smell of alcohol. The accused argued that his s. 10(b) rights were breached when the officer failed to provide him with his right to counsel once the accused had been initially detained for possession.
HELD: The accused was found guilty of refusal to provide a breath sample. The officer's failure to provide a right to counsel would apply only to the potential charge of possession that he was facing at the time – it could not apply to the subsequent detention arising as a result of the ASD investigation. The officer's suspicion only crystallized when he detected the odour of alcohol in the cruiser and the court found that the suspicion was reasonable in accordance with the decision in Yates and met the threshold for making the demand.

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Mikhelidze v. Bogomazov, 2015 SKPC 72

Metivier, May 4, 2015 (PC15118)

Contracts – Formation

The plaintiff entered into an agency agreement with the defendant. In it, the defendant would refer clients in Saskatchewan to the plaintiff, a certified immigration consultant, based in Edmonton. The parties agreed that the plaintiff would pay 50 percent of the fees she collected to him from the clients referred to her by the defendant. When the defendant advised the plaintiff that he knew of a Saskatchewan employer who could hire ten more foreign workers, the plaintiff entered into retainer agreements with some of her clients in Georgia and Armenia who wished to apply for residence in Saskatchewan under its Saskatchewan Immigrant Nominee Program (SINP). The retainer agreement was drafted by the defendant and amended by the plaintiff to include a refund policy indicating that the plaintiff would refund the money in full to the clients if documents were rejected by the SINP. The SINP denied the applications because the Saskatchewan business did not have sufficient sales to bring foreign workers into the province. The plaintiff returned the full amount of the fees paid to her by the clients and then demanded that the defendant reimburse her for his share of the fees in the amount of $24,300.The plaintiff testified that she discussed the refund policy with the defendant and he agreed to it. After she contacted him about the rejection, the defendant replied by email that he was waiting for some money and that he would pay to her the amount of the debt. At trial, the defendant denied that he had agreed to the refund policy and argued that any obligations arising from the retainer agreement were between the plaintiff and her clients. HELD: The court granted judgment to the plaintiff in the amount of $20,000 as the monetary limit for The Small Claims Act. The court found that there was a collateral agreement between the parties that the defendant would be bound by the refund policy in the retainer agreement because the terms of the contract were clear, there was a clear intention to contract and the collateral contract was not inconsistent with the main contract. The evidence indicated that the defendant was aware of and bound by the terms of the refund policy.

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Christian v. Manzuc, 2015 SKPC 74

Jackson, May 4, 2015 (PC15119)

Statutes – Interpretation – Limitations Act, Section 19

The plaintiffs brought a claim in 2014 alleging negligent workmanship provided by the defendants. The stucco and parging work done by the defendants to the exterior of the plaintiffs' residence in 2008 began to crack and fall off in 2009. The defendants filed a defence denying the allegations and further pleading ss. 5, 6 and 19 of The Limitations Act.

HELD: The claim was dismissed. The plaintiffs admitted that they became aware of the problem in 2008 and thus their claim was statute-barred by s. 19 of the Act.

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R. v. Alexander, 2015 SKPC 98

Wright, July 3, 2015 (PC15120)

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

The accused was charged with refusal to comply with a breath demand without reasonable excuse, contrary to s. 254(3) of the Criminal Code, to provide samples of his breath for analysis contrary to s. 254(5) of the Code. The defence brought a Charter application alleging violations of the accused's ss. 8, 9 and 10 rights. A voir dire was held and all evidence heard was applied to the trial proper. The defence called no evidence at either the hearing or the trial. The charge arose as a result of an RCMP officer stopping a vehicle that was speeding, driven by the accused. The officer ran a CPIC inquiry revealing that the vehicle's registration had expired. When she spoke to the accused to tell him of the reason for the stop, he advised her that his wife, who was a passenger in the vehicle, was going into diabetic shock. The officer inquired whether an ambulance was necessary because she could not allow the accused to drive because of the expired registration. She noted an odour of alcohol while she was at the driver's window and asked the accused if he had been drinking. A passenger in the backseat said that he had been. The officer asked the accused to exit his vehicle and get into the rear seat of the police vehicle so that she could determine whether the accused smelled of alcohol. When she did confirm it by isolating him, the officer informed him of that observation and the accused denied that he had been drinking. Although she had decided to make an ASD demand, she delayed because she had to call for medical assistance and to go back and forth from her vehicle to the accused's to check on his wife. About ten minutes after the stop, the officer told the accused that she had stopped him for speeding and said that because she believed that he had been drinking recently, she would wait 15 minutes to eliminate mouth alcohol. The officer testified that it was not her practice to wait 15 minutes in every case before administering the ASD but only when she thought there had been recent consumption. She asked the accused if there was alcohol in his vehicle and he said no. The officer was then interrupted by phone calls from ambulance personnel. The officer read

the ASD demand and administered the test approximately 20 minutes after the stop but the accused's sample was unsuitable. Another test a minute later registered a fail. The accused argued that the reading was incorrect. The officer was interrupted again when a first responder arrived at the scene. She went to the accused's vehicle with the responder and noted then that there was open liquor in the vehicle. Returning to her cruiser, the officer was persuaded to administer the ASD test again and the accused failed. She then advised him that he was under arrest for driving while over .08 and that he had a right to counsel. The accused said he did not want to consult with a lawyer. The Breathalyzer demand was made and the police warning given and the accused acknowledged that he understood. They stayed at the scene until the ambulance arrived. The accused eventually arrived at the detachment at 5:19 pm. The accused demanded that he see the Breathalyzer technician's qualifications. When the technician said that he was not required to do so, the accused said that he would not give a sample until he talked to his lawyer. The officer took the accused to the interview room and telephoned the after-hours number listed for that lawyer at 5:55. She called the lawyer's home number and left a message there at 5:57 and then waited until 6:20 before calling the number again and leaving another message. The officer asked the accused if he wanted to call any other lawyer and told him that Legal Aid was available. The accused declined but never asked to leave a message himself or provide any other numbers for his chosen lawyer. After five attempts, the accused gave his first breath sample with a reading of 120 milligrams in 100 millilitres of blood. Nine further unsuccessful attempts were made. The accused was warned during the process that he would be charged with refusal and he indicated that he understood. The breath technician testified that he could tell that the accused was not trying. The issues were whether: 1) there was a violation of the accused's rights not to be arbitrarily detained and to be secure against unreasonable search and seizure and that the ASD test was not administered forthwith as required by s. 254(2) of the Code; 2) there was a violation of the accused's right to counsel at the roadside; 3) there was a violation of the accused's right to counsel at the detachment; and 4) the offence of s. 254(5) was proven.
HELD: The application was dismissed and the accused found guilty of the charge. The court held with respect to each issue that: 1) the ASD test was administered forthwith in the circumstances of the case because of the medical emergency coupled with the officer's reasonable suspicion, based on the fact that the accused had lied about drinking and having alcohol in the car, that the screening device would yield an inaccurate result if the officer had not waited; 2) the accused's right to counsel at the roadside was not breached. The constitutional right to consult with counsel is suspended upon demand to provide a sample pursuant to s. 254(2) and the constitutional validity of s. 254(2) depends upon the forthwith requirement. Here the demand was made forthwith; 3) there was no breach of the accused's right to counsel at

the detachment. The accused was given a reasonable opportunity to contact his counsel of choice and given a reasonable period of time for that counsel to respond. He was then given an opportunity to contact another lawyer and was not diligent in doing so; and 4) the accused intentionally refused to comply with the demand to provide breath samples for analysis and had no reasonable excuse for doing so.

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McNamara-Tysick v. Troy Transportation Moving and Storage Service Inc., 2015 SKPC 114

Jackson, July 27, 2015 (PC15121)

Contracts – Interpretation

The plaintiff sued the defendant for $46,200 in damages caused by the defendant, a moving company, who had contracted with her to transport her possessions from Ontario to Saskatchewan. The plaintiff reduced her claim to $20,000 to meet the limit of monetary jurisdiction of The Small Claims Act, 1997. The plaintiff alleged that: 1) the defendant overcharged her with respect to the weight of the property. The defendant charged her $8,200 and the original quote was $2,300; 2) many of her belongings were missing; and 3) others were damaged. HELD: The plaintiff was awarded judgment in the amount of $1,800. The court found that with respect to her claims that: 1) the defendant's contract stated that weight would be established at a certified public scales or by constructive weight based on 112 kilograms per cubic meter of property loaded. The defendant had not used a public scale. Other goods belonging to another party were in the truck when the plaintiff's property was added. Due to the absence of proper weighing, the court calculated that the defendant had overcharged the plaintiff and should refund her the amount of $1,800; 2) the plaintiff's evidence was not sufficient to prove that she had lost any property; and 3) except for one item of property that the defendant had acknowledged damaging, the plaintiff had not presented evidence to support her claim.

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R. v. Bentley, 2015 SKPC 116

Gray, August 31, 2015 (PC15100)

Criminal Law – Defences – Charter of Rights, Section 10(b)
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08 –

Approved Screening Device – Demand
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08 – Breathalyzer – Demand

The accused was charged with driving while his blood alcohol content exceeded the legal limit and with driving while his ability to do so was impaired by alcohol. When the accused's vehicle was stopped, he acknowledged that he had had two drinks. He was asked to attend at the police vehicle to provide a sample of his breath into an ASD. The officer read the accused the demand and explained to him that he was not under arrest but that he was being investigated for impaired driving. The accused failed the ASD and the officer read him the breath test demand and was advised it was a different test from the ASD. He was also given his rights to counsel. Because the Crown did not tender the actual words used for the demands, the accused argued that there was nothing to prove a valid demand and therefore the requirements of s. 258(1)(c) had not been met. The accused indicated that he wanted to speak to a lawyer. He was placed in a telephone room upon arrival at the detachment and the accused asserted that he believed the only option he had was to call duty counsel. The officer testified that he told the accused, he could use the telephone book and yellow pages to find a lawyer and also told him that the phone number for Legal Aid was on the wall. The accused was left alone and at one point told the officer he had left a message for a lawyer but would keep trying. The accused said he wanted to call a certain lawyer and the officer told him that unless a lawyer had a 24-hour line he would not be able to reach them. The accused then indicated he would call Legal Aid. The number on the wall was pointed out and the officer left the room. The officer eventually dialed the number and gave the accused his cell phone because the accused said Legal Aid hung up on him. The issues were as follows: 1) were there valid demands made pursuant to ss. 254(2) and 254(3) of the Criminal Code; 2) was there a violation of s. 10(b) of the Charter; 3) if so, what was the appropriate remedy; 4) were the offences proved beyond a reasonable doubt; and 5) were valid demands made pursuant to ss. 254(2) and 254(3) of the Criminal Code. HELD: The issues were dealt with as follows: 1) it was clear that an ASD demand was made and that the officer explained to the accused that he was simply being asked to provide a breath sample in the safety of the police vehicle. There was nothing in the evidence that supported the accused was not aware of what was required of him. The court was satisfied that the only inference that it could draw was that valid demands were made pursuant to both ss. 254(2) and 254(3) of the Criminal Code. The Certificate of Qualified Technician was admissible; 2) there was no violation of s. 10(b) of the Charter. The accused was not restricted in his efforts to call his counsel of choice nor was he told that Legal Aid was his only choice. If the suggestion of duty counsel was not acceptable to the accused he had a duty to tell the officer and to take whatever further steps he wished. The officers fulfilled their obligations to the accused; 3) the court undertook a s. 24

analysis in any event and concluded that the breath test results would not have been excluded even if there was a Charter breach. If there had been a breach, it would have been prevented if the accused had communicated his concerns to the officers. The second factor would favour admission because the breath test was non-invasive and the accused did speak to a lawyer prior to the test. The third factor also favoured inclusion because of the seriousness of drinking and driving. After considering all factors, the court indicated that the exclusion of evidence would bring the administration of justice into disrepute; 4) the court was not satisfied beyond a reasonable doubt that the offence of impaired driving had been proven. The court was satisfied beyond a reasonable doubt that the offence of driving over .08 had been proven.

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R. v. Loewen, 2015 SKPC 124

Agnew, August 25, 2015 (PC15101)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purposes of Trafficking – Cocaine
Constitutional Law – Charter of Rights, Section 8, Section 9

The accused was charged with two counts of possession of cocaine for the purposes of trafficking, cocaine and MDMA respectively, contrary to s. 5(2) of the Controlled Drugs and Substances Act, and one count of having a sum of money not exceeding $5,000 knowing that the proceeds were obtained from the result of the commission of an indictable offence, contrary to ss. 354(1) and 355(B) of the Criminal Code. Police officers had stopped a vehicle for speeding and knew the driver had prior criminal involvement. The accused was a passenger in the vehicle. The officer asked the accused for his name and identification because he intended to check the name on CPIC. After searching it while detaining the parties, the officer discovered that the accused was a serving prisoner on parole subject to certain conditions. The officer called the National Monitoring Centre (NMC) to confirm the information and learned that the accused was to have no contact with known criminals. The officer was advised that the NMC would issue a warrant for the accused's arrest and to take the accused into custody. The officer knew of the NMC's procedures and believed that the warrant would be faxed to the station within the hour. The officer then arrested the accused for breach of his parole conditions, searched him for weapons and put him in the police cruiser. He also searched the accused's wallet where he found over $1,000 in cash. At the police station, the accused was searched again before being put in detention and bags of cocaine and MDMA were found in his underpants. At some point the warrant was received but it was not examined until

after this search, whereupon it was discovered that it was invalid on its face and the accused had been arrested for possession beforehand. The accused raised numerous allegations of Charter breaches, specifically ss. 8 and 9, and sought to have the evidence excluded.
HELD: The court dismissed the application and declined to exclude any of the Crown's evidence. The court found that there had been no breach of s. 9 of the Charter when the officer asked the accused his name because the accused gave the information voluntarily and there had been no breach of s. 8 of the Charter when the police checked the accused's name on CPIC. However, the court found that the accused's s. 9 right had been violated because the officer had arrested him before the warrant was in existence. The court held that the officer violated the accused's s. 8 right when he searched the accused's wallet at the time of the arrest, as the search was not incidental to it. Pursuant to the Grant analysis, the court found with respect to each breach that the officer acted in good faith when he took the accused into custody and that the accused would not have had a high expectation of privacy regarding the contents of his wallet and was only unlawful as a result of the unlawful arrest. The actual impact on the accused in both instances was minor.

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R. v. Young, 2015 SKPC 127

Morgan, August 25, 2015 (PC15104)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Refusal to Provide Breath Sample
Constitutional Law – Charter of Rights, Section 7

The accused was charged with impaired driving and failing to comply with an ASD demand contrary to s. 254(2) of the Criminal Code. The accused had been seen at 1:00 am driving down the wrong side of the street by a police officer who then stopped the vehicle. The accused indicated that he had consumed some alcohol the night before and the officer testified that the accused's eyes were slightly bloodshot and she thought that she could smell a little bit of alcohol. Relying on the admission and these factors, the officer made an ASD demand. The accused complied but after ten unsuccessful attempts to provide a breath sample, was charged. The officer had instructed the accused numerous times and had demonstrated with a new mouthpiece after the accused's sixth attempt. She then inserted another new mouthpiece. The accused did not advise the officer of any reason why he could not blow into the device. The attempts were videotaped within the police cruiser. Immediately after the accused was charged, the officer discarded all of the mouthpieces. The defence brought a Charter

application alleging that the destruction of the evidence had violated the accused's s. 7 Charter rights and a blended voir dire and trial was held. A physician who had treated the accused for asthma when he was a child and young man was called by the defence to explain the effect that asthma had on the accused, although it had been eight years since they had been in contact. The accused testified that he had not mentioned his medical condition to the officer because he was nervous and had not connected it with his inability to provide a proper sample. He also testified that he had driven the wrong way on the street on the night in question because there was a new intersection and he was confused by it.

HELD: The court dismissed the Charter application on the basis that the officer had not acted maliciously by throwing the mouthpieces away. They were not critical evidence as they were all operable. The accused was found guilty on the charge of failing to provide a breath sample. The court accepted the evidence of the officer that the accused intentionally refused to provide a breath sample pursuant to a lawful demand and that the accused had not satisfied the court that he had a reasonable excuse. The court acquitted the accused of the charge of impaired driving as there was insufficient evidence of impairment.

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R. v. Maxwell, 2015 SKPC 146

Wright, March 18, 2015 (PC15123)

Statutes – Interpretation – Sex Offender Information Registration Act, Section 490.027

The applicant applied pursuant to s. 490.027 of the Criminal Code for an order terminating his obligation to comply with The Sex Offender Information Registration Act. The applicant had been convicted in 2003 of 11 counts of sexual assault against employees of the village of Elbow while he served as mayor. He was sentenced to a nine-month conditional sentence and probation for 27 months. At the time of the application, he deposed that he had completed all counselling and programming required of him and had not committed any other offence. The applicant had worked for the past 10 years in Fort McMurray on the basis of 14 days working at camp and seven days at home. Under the order, the applicant had to report to the RCMP once every year in person and contact them by telephone every time he had to leave home for seven days or more. As he is unable to report to the Elbow RCMP detachment due to his work hours, he has to travel to Outlook, a distance of 50 miles. The obligation has not affected his ability to work nor has he suffered any personal stigma from the reporting.

HELD: The application was dismissed. The applicant had not met the burden of establishing that the impact on him of continuing his obligations under the Act would be grossly disproportionate to the public interest in his continued registration. The evidence showed that the impact on him was negligible.

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R. v. Mildenberger, 2015 SKQB 27

Dawson, January 29, 2015 (QB15281)

Criminal Law – Defences – Charter of Rights, Section 10(b)
Criminal Law – Evidence – Admissibility – Derived Confessions
Criminal Law – Evidence – Admissibility – Statement Against Interest – Mr. Big Operation
Criminal Law – Evidence – Admissibility – Warned Statement
Criminal Law – Murder – First Degree

The accused was charged with first degree murder and the Crown argued that the accused made two statements to police admitting that he killed the victim. The court had to determine the admissibility of the two statements. The first statement was made during an undercover Mr. Big operation. The second statement was a warned statement made at the police station after the accused's arrest. The accused argued that neither statement should be admitted and further that the warned statement should be excluded on the basis that his s. 10(b) Charter rights were infringed. The Mr. Big operation lasted six and one-half months. The accused was paid a total of $13,340. The accused maintained his full-time employment throughout and he did not sever any personal relationships as a result of the Mr. Big involvement. The accused was told he could leave the organization at any time and the operation did not involve criminality, threats or violence. The accused indicated that he would like the organization's assistance to help the murder investigation against him go away. The officer that was posing as the person who could make the problem go away told the accused that he had to tell the truth if he wanted help. The accused offered, without prompting, the details of killing the victim. The accused showed the undercover officers where he burned the evidence and where he threw the knife blade. The accused was given his rights to counsel as soon as he was arrested. He was given an opportunity to speak to his lawyer twice and each time he indicated that he was satisfied with the advice he had received. An officer later advised the accused that his wife had arranged for another lawyer for him and asked him if he would like to speak to that lawyer. The accused told the officers 11 times during the warned statement that he did not wish to say anything and he did not disclose anything about the murder for the first four and one-half hours of the six-hour interview.

HELD: The Supreme Court of Canada case, Hart, established the test for whether a Mr. Big statement should be admitted. The court found that the accused voluntarily offered the confession. The evidence available to the court did not support the accused's assertions that he was pressured to make the admissions. There were also markers of reliability in the confession itself. For example, the details given by the accused matched the injuries found on the victim. The confession was found to be reliable with probative value. The court found that the moral prejudice in this case was far less than in most Mr. Big cases. There was also a risk of reasoning prejudice but the court concluded that the probative value of the evidence outweighed the prejudicial effect of admitting the evidence. There was also no abuse of process. The court held that the Mr. Big statements were admissible evidence at trial. The court then dealt with the admissibility of the warned statement given by the accused. The court adopted the two-stage approach from Oickle. The court determined that the withholding of the information regarding the undercover operation was not an implied threat. The court was satisfied from all the evidence that there was no promise made to the accused and there was no threat or implied threat made to the accused. Next, the court reviewed the operating mind of the accused and determined that it was clear he was aware of the consequences and what was at stake in making a statement to the police. The accused argued that the warned statement resulted from the police creating an atmosphere of oppression that overbore the accused's will and caused him to make a statement. The police used tactics to suggest it would be better if he confessed but those were not implied promises or threats. The court also determined that the derived confessions rule did not apply. Next, the court concluded that the police did not use any police trickery that would shock the community. The accused argued that his s. 10(b) Charter rights were breached because the implementation duties of the police were not met. The officers complied with the accused's s. 10(b) Charter rights. Both statements were admitted into evidence.

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Seier v. Scott, 2015 SKQB 244

Laing, August 13, 2015 (QB15242)

Family Law – Division of Family Property – Family Property Act – Common Law Relationship
Family Law – Spousal Support
Wills and Estates – Dependent's Relief Act – Family Property Act
Wills and Estates – Estate Administration – Executor – Removal

The deceased's will appointed his sister and his common law spouse as

co-executors. The residue of his estate, $495,605.27, was left to his sister, but his common law spouse (wife) refused to agree to pay the sister the sum. There were two applications: 1) the sister applied to remove the wife as co-executor and for an order of payment of the residue to her; and 2) an application by the wife to extend the time to bring a dependent relief application pursuant to s. 4(2) of The Dependants' Relief Act and for an order pursuant to s. 6 of the Act for her reasonable maintenance. The deceased and wife independently managed their own assets during the relationship. The deceased specifically bequested all his residential property at the time of his death plus $250,000 to his wife. The house the deceased and wife lived in at the time of his death was in joint names with right of survivorship so it did not become part of the estate.
HELD: The court found that it was appropriate to grant the extension of time to make a dependent relief application by the wife. She was the only dependent as defined by the Act and she made it known early on that she intended to pursue her claim. The sister was not prejudiced by the wife's application for an extension of time. The court did not find any evidence that the wife was personally responsible for the delay. The court reviewed the wife's entitlement according to The Family Property Act and determined that her matrimonial property entitlement as of the date of death was $125,000 from the sale of property plus one-half of the matrimonial home valued at $175,000 for a total of $300,000. She actually received the full value of the home and cash for a total of $600,000. The deceased's will satisfied his obligation pursuant to The Family Property Act. The court did not find any basis for compensatory spousal support. Further, the court did not find any evidence that the wife's lifestyle was different after the deceased's death than before it. She indicated an annual shortfall of $1,500 in living expenses. The court found that the shortfall could more than be made up from investment income. The court determined that non-compensatory support would not have been ordered because the wife did not need it and the deceased had a limited ability to pay it because he was living off the capital of his assets for the two years prior to his death. The wife received 40 percent of the deceased's assets and the court found that amount was not below the norm the community would consider reasonable when the balance of the estate went to a close family member. The application of the wife was dismissed because the court concluded that the deceased made reasonable provision for her. The court did not dismiss the wife as co-executor but did order the executors to distribute the residue of the estate to the sister. Each party was to receive their solicitor-client costs from the estate, up to a maximum of $10,000.

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Sather v. Sather, 2015 SKQB 247

McIntyre, August 18, 2015 (QB15239)

Family Law – Custody and Access – Mobility Rights

The petitioner and respondent were the parents of a five-year-old daughter. The parties separated in 2012 and according to the petitioner, they met and reached an interspousal agreement regarding custody, access and child support. The petitioner sent an email to the respondent, reflecting her understanding of what had been agreed to such as the petitioner would be the primary caregiver of the child and the respondent to have reasonable access. The respondent would pay child support in the amount of $400 per month, recognizing that the sum was less than prescribed by the Federal Guidelines. The respondent asserted that he had not received the agreement. No further steps were taken. The respondent did not pay child support and the child lived with the petitioner in Moose Jaw. The respondent picked up the child from her daycare and returned her there after weekends. In 2013 the petitioner moved with her daughter to Govan to live with her new partner who had three children from his first marriage. The respondent was unaware of the move because he exercised access at the daycare in Moose Jaw. In January 2014 the respondent failed to return the child to the daycare and the petitioner issued a petition for custody and child support. The petitioner described her residence as being in Moose Jaw. The respondent then applied for additional parenting time. An order was made that designated the petitioner as primary caregiver and gave specific weekly access to the respondent. The court determined the income of the respondent and ordered him to pay $626 in support and 60 percent of net child care costs. The respondent learned sometime in late spring 2014 that the petitioner and their daughter were living in Govan. He brought an application to vary seeking the child's return to Moose Jaw and the court ordered that she should remain resident in Moose Jaw on an interim basis. The petitioner moved back to Moose Jaw. At the hearing of the matter, the respondent requested that the child remain in Moose Jaw in a shared parenting arrangement. If the petitioner chose to remain in Govan, the respondent would become the primary caregiver. The petitioner requested that she be able to relocate to Govan and remain the primary caregiver with the respondent having parenting time three weekends out of four. She argued that she was the child's psychological parent and that her new relationship offered the child stability and the benefits of an extended family. The petitioner explained that she had deceived the court because she and the child were happy in Govan and she did not want to risk losing the situation. The court heard evidence regarding the kind of relationships that the child had with each parent, the role that extended family played in her life, the nature of her relationships with the respondent's partner and his children as well as her relationship with the petitioner's new

partner and children. One witness from daycare spoke of the petitioner crying and the child trying to comfort her.
HELD: The court ordered that the child was to reside in Moose Jaw in a shared parenting arrangement. The parties were joint legal custodians and they would parent their daughter on a week-on, week-off basis. Because of the deception practiced by the petitioner on the respondent and the court and because the child was seen comforting the petitioner, the court concluded that it was in the child's best interest for the respondent to have a substantial role in parenting so as to balance or mitigate issues that might arise from the petitioner's parenting. The court found that the child had lived most of her life in Moose Jaw and that it wasn't an option that the respondent could move to Govan. The court also ordered child support and s. 7 expenses based upon the parties' respective annual incomes. The petitioner's application for retrospective child support was granted and the respondent ordered to pay $400 per month and one half of net child care costs from July 2012 until the April 2014 interim order.

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Daniels Investments Saskatoon Ltd. v. Houk, 2015 SKQB 251

Zuk, August 21, 2015 (QB15267)

Civil Procedure – Pleadings – Statement of Claim – Striking Out – Want of Prosecution
Civil Procedure – Queen's Bench Rule 4-44
Real Property – Certificate of Pending Litigation

The defendant sought an order, pursuant to Queen's Bench rule 4-44, to dismiss the plaintiff's claim for want of prosecution and an order vacating the certificate of pending litigation registered by the plaintiff against the defendant's property. The plaintiff issued a statement of claim in 2008 alleging that the defendant, an employee, had a fiduciary duty to it and breached it when she fraudulently converted funds belonging to it in the amount of approximately $300,000. It alleged as well that the defendant had used the funds to purchase properties against which the plaintiff placed the certificates. After a pre-trial conference was held in October 2012, no proceedings were taken until this application was made. The plaintiff explained that there had been an active police investigation commenced in 2012. The employee who was responsible for reviewing the corporate records for the purposes of compiling the evidence said that meetings with the police had taken most of her time, particularly because the defendant had altered thousands of computer records.
HELD: The court dismissed both applications. The court found that it took the parties approximately four years and eight months to reach

the pre-trial stage. Part of the delay was attributed to the defendant's unsuccessful application to have the civil action stayed pending the criminal investigation. The second time period was 33 months between the pre-trial conference and this application. The court found that this constituted inordinate delay on the part of the plaintiff. The delay was found to be excusable because the court found that the first period of delay was largely caused by the defendant and accepted the plaintiff's explanation regarding the second period of delay on the basis that the alleged fraud consisted of thousands of transactions made over two years, which had to be reconstructed due to the alteration of computer records. The court determined that the plaintiff had pled the facts necessary to sustain a certificate of pending litigation.

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R. v. Venne, 2015 SKQB 252

Laing, August 24, 2015 (QB15253)

Criminal Law – Application to Expunge Guilty Plea

The accused was charged with defrauding the Ministry of Social Services of $86,000, contrary to s. 380(1)(A) of the Criminal Code. She initially pled guilty but then applied to expunge her plea. The Crown alleged that from 1998 to 2010 the accused had not reported her true living circumstances as she was living with her common law spouse and their two children. Social Services had believed that the accused was a single parent supporting the children. In addition, the Crown alleged that the accused had not reported money she was receiving from her mother. The amount of the fraud was determined by Social Services as an overpayment of benefits. When she was charged with the offence in 2013, the accused met with a senior defence lawyer, before Crown disclosure had occurred. She paid a retainer of $5,000 and the lawyer told her not to worry about it. After that meeting, the lawyer entered an election on her behalf before the Provincial Court and later consented to a committal at the preliminary inquiry, followed by three management pre-trial appearances, resulting in the trial date being set. The lawyer did not inform the accused of any of these proceedings. Eventually she was called by a junior lawyer in the same office to tell her that he had received Crown disclosure. He advised her that she had no chance of winning the case and that she should plead guilty, which would avoid a jail sentence. The lawyer referred to the Crown's disclosure of her living arrangement and the funds from her mother. The lawyer did not pay any attention to her denial that she was living with the man alleged, that she was helping her 87-year-old mother by visiting her twice a day to enable her to remain in her home and that she was the sole caregiver for her daughter. Just before the

trial, the accused met with the junior lawyer and displayed her unhappiness with pleading guilty. The lawyer assured her that she would not receive a jail sentence and therefore she would be able to continue to support her children and her mother. One week after pleading guilty, the lawyer advised her that the Crown was going to seek a jail term. After asking for advice from a friend, the accused fired her lawyer and obtained a new one. At the hearing, a friend of the accused who had accompanied her at the meetings with the junior lawyer at his office and at the courthouse, confirmed the accused's version. The former junior lawyer testified that he told her that she would not receive a sentence including jail time but learned subsequent to the guilty plea that he had misunderstood the law.
HELD: The court expunged the guilty plea. The court found that it was neither voluntary nor informed because she had been misinformed. The accused was treated badly by the senior lawyer in his failure to communicate with or consult with her and she was never interviewed to obtain her version of events once she denied the Crown's main allegations. The representation that she received was incompetent.

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Casa Grande Framers Ltd. v. Pagnotta Industries Inc., 2015 SKQB 253

Danyliuk, August 25, 2015 (QB15245)

Civil Procedure – Originating Notice
Civil Procedure – Queen's Bench Rule 1-6, Rule 3-49(1), Rule 13-28
Civil Procedure – Settlement
Contracts – Interpretation

The respondent made an offer to settle the commercial construction project dispute to the applicant and the offer was accepted. The respondent subsequently realized that there was an error made when calculating the offer so they refused to honour the terms of the settlement claiming mistake. The applicant applied by originating notice to enforce the settlement agreement. The respondent was the contractor on the project and the applicant was a subcontractor that registered a claim of lien for $368,455. The issues were: 1) did the court have jurisdiction. The respondent argued that the applicant should have commenced the action with a statement of claim; 2) if so, should the matter proceed to a trial or hearing or be adjudicated on the merits based on the present material; 3) if no trial is directed, what was the proper adjudication; and 4) what was the proper cost award.
HELD: The issues were analyzed as follows: 1) the court did have jurisdiction to hear the application. Rule 3-49(1)(f) of The Queen's Bench Rules is broad enough to include this situation. The court also found that rule 3-49(1)(i) could also be used because there was little

dispute as to the formation of the settlement. The court dismissed the respondent's argument that the matter had to be commenced with a statement of claim because it dealt with a lien. The lien had already been discharged so the dispute was no longer regarding a claim of lien. The court also indicated that rules 1-6 and 13-28 could be used to cure a defect where a party commences proceedings with the wrong documents; 2) the court rejected the applicant's argument that the dispute should be decided without a trial because the respondent was just offering a number to end the matter without any principled negotiations or calculations. The respondent provided evidence of exactly how they miscalculated the figures; there was a reason for the number they meant to offer. Case law cautions against effectively creating a new contract through over-application of the evidence of surrounding circumstances. For the matter to be determined at chambers there can be no dispute as to the facts. The court found that the determination of whether an enforceable settlement agreement existed was a question of mixed fact and law. The respondent conveyed to the applicant the basis of calculating their offer figure. The court found that the evidence was insufficient on points that case law directed must be considered to interpret the contract. The respondent was correct in asserting that they should be allowed to fully explore the issues and advance their argument of mistake. The court held that the matter needed to proceed to a vive voce hearing. The court set out the terms upon which the hearing should proceed; 3) the issue did not need to be determined; and 4) the assessment of costs was found to be premature because the matter was to proceed to trial.

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Hillsdon v. Hillsdon, 2015 SKQB 255

Chow, August 26, 2015 (QB15246)

Family Law – Division of Family Property – Costs
Family Law – Division of Family Property – Division of Pension
Family Law – Division of Family Property – Occupational Rent
Family Law – Division of Family Property – Spousal Support
Family Law – Spousal Support – Compensatory and Non-compensatory
Family Law – Spousal Support – Retroactive

The parties were married in 1980 and separated in 2009. The petitioner was employed throughout the marriage in various civil service positions. From 2010 to 2015 her annual income varied from $64,302 to $72,708. The petitioner argued that she was the two adult children's primary caregiver while they were young. The petitioner remained in the family home. She suffered from anxiety and depression. The respondent worked at a refinery throughout the marriage, rising to a supervisory position by the time of separation. He paid for the

expenses of the family home for the first six months after separation. The balance of the line of credit secured by the family home was $38,019 at separation and was $159,466 at trial. The respondent indicated that he had not borrowed against the line of credit since separation. The respondent's base income was $171,828 with an additional amount from a workplace savings plan bringing his T4 income up to $192,000. He argued that his pension should be valued at the date of application because it was based on his salary in the years of contribution. The parties had a cabin and a trailer. The issues were as follows: 1) family home and real property; 2) pensions; 3) other registered investments; 4) other family property and debts; 5) spousal support. The petitioner sought ongoing spousal support of $4,000 per month and retroactive support of $3,000 per month; 6) occupational rent; and 7) costs.

HELD: The issues were resolved as follows: 1) the court reviewed the applicable provisions of The Family Property Act and case law to determine the value of the family home and real property. Where an increase or decrease in the value of real property is primarily the result of market forces, such property is generally valued at the date of adjudication as opposed to application. The value of the family home at trial was $490,000 and the value of the cabin was $46,500. The court ordered that the family home was the sole possession of the petitioner and the cabin was in the sole possession of the respondent; 2) the court determined that the appropriate date to value the parties' pensions was the date of application. The respondent's pension was valued at $433,853 and the petitioner's was valued at $105,221.22. The respondent was ordered to transfer $164,316 of his pension to the petitioner; 3) the court declined to decrease the parties' registered assets by any amount for potential tax liability and ordered that the respondent roll over or transfer $21,112 to the petitioner; 4) the personal property of the parties was already divided. The bank accounts of the parties at separation totaled $47,090 so each party was entitled to $23,380. The parties also had debts at separation: the petitioner was entitled to an equalization of debts of $2,442.50 and she was responsible for the line of credit with the respondent owing her $16,822 for the portion of the debt at the date of application; 5) the evidence was found to clearly establish entitlement to spousal support, on both a compensatory and non-compensatory basis. The court found that an appropriate quantum of ongoing support would be $3,000 per month. The court discussed the factors for retroactive support and concluded that the petitioner was entitled to a retroactive award of $2,700 per month. The respondent's support obligations were reviewable upon the retirement of either party; 6) the respondent never moved towards a sale of the family home or for occupational rent prior to the trial. He also never experienced financial difficulties as a result of not being able to live in the family home. The court held that the evidence failed to demonstrate that an award of occupational rent would be equitable and just in all of the circumstances; and 7) neither

party was entirely successful so there was no order for costs. The court determined that after all of the individual calculations the petitioner owed the respondent the sum of $89,748, which was to be paid within 30 days of the decision.

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Latham v. Canada (Attorney General), 2015 SKQB 256

Goebel, August 27, 2015 (QB15247)

Criminal Law – Day Parole Suspension
Criminal Law – Habeas Corpus Application – Corrections and Conditional Release Act
Criminal Law – Jurisdiction
Criminal Law – Parole

The applicant was a prisoner serving an indeterminate sentence as a dangerous offender in the federal penitentiary in Prince Albert. A warrant was issued suspending the applicant's day parole pursuant to s. 135 of the Corrections and Conditional Release Act (CCRA). The applicant brought an application for a writ of habeas corpus with certiorari claiming that: the suspension was an unlawful deprivation of his residual liberty because it was unreasonable; the parole supervisor was biased; and his procedural rights were breached due to the delay between the date of suspension and the date when he received an explanation and disclosure. The Crown argued that the court should decline jurisdiction in this case even though it has concurrent jurisdiction with the Federal Court. The court analyzed the following issues: 1) the impact of the Supreme Court of Canada decision in Khela; 2) did the decision involve a parole decision; 3) did the procedural fairness issues raised by the applicant fall outside of the scope of the complete, comprehensive, and expert review process provided for under the CCRA such that the court is bound to exercise its jurisdiction; and 4) did the delay resulting from the review process impact the court's analysis respecting jurisdiction.
HELD: The issues were determined as follows: 1) in Khela, the Supreme Court of Canada re-affirmed the limited instances that a provincial superior court should decline to hear habeas corpus applications to ones where the legislature has put in place a complete, comprehensive, and expert procedure to review the administrative decision. The court emphasized the superior court's concurrent jurisdiction with the Federal Court and the right of a prisoner to choose the forum he wishes; 2) the matter has been referred to the Parole Board for review and the board is vested with exclusive decision-making authority in relation to decisions relating to the applicant's parole, including whether or not to suspend his day parole privileges;

3) the applicant did not convince the court that the issues he raised would not be addressed within the CCRA process. The board would conduct a hearing, with unbiased decision-makers, from which there is a right of appeal. The court did not accept the applicant's argument that the court must exercise jurisdiction for every alleged breach of natural justice; and 4) the applicant argued that the court had to exercise jurisdiction because otherwise he may have to spend 120 days in detention before the board hearing. The court held that the delay in itself did not compel the court to exercise its jurisdiction where the matter could otherwise proceed through a complete, comprehensive, and expert review process. The court declined to exercise jurisdiction and the matter was dismissed.

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Morsky Construction Ltd. v. Nickle Lake Regional Park Authority, 2015 SKQB 257

Scherman, August 31, 2015 (QB15248)

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

The defendant, a regional park, applied to dismiss the plaintiff's claim against it and the defendant by counterclaim applied to dismiss the defendant's claim against it. Both applications for dismissal were for want of prosecution due to delay pursuant to rule 4-44 of the Queen's Bench Rules. The plaintiff contracted with the defendant to repave a road and the work was completed September 2005 but the defendant refused to pay, alleging defective workmanship amounting to a total failure of consideration. The plaintiff commenced action on August 15, 2007. The defendant brought a counterclaim against the plaintiff and the defendant by counterclaim. The defendant by counterclaim was a subcontractor. The defendant cross-claimed against the plaintiff by counterclaim. The mandatory mediation was completed March 2008 and no party did anything until May 2015 when the defendant by counterclaim brought its application to dismiss the defendant's counterclaim.

HELD: A delay of seven years without action is an inordinate delay. The plaintiff argued that the delay was excusable because: the plaintiff and defendant by counterclaim were involved in parallel proceedings with another regional park during the seven years; the president of the plaintiff had a number of health and family issues; and the defendants didn't take any steps to require the matters to move forward. The plaintiff argued that it was not feasible to proceed with both actions at the same time but the court found that the delay of seven years was not excusable. There was an expectation that when the immediate need

with respect to health and family concerns had passed, efforts would be expended to make up for the delay. Some of the personal issues would have required some time, but the plaintiff's business continued to receive attention, as it should have. The court found that the legal action was part of the plaintiff's business that should have received attention. The health and family issues did not justify significant and ongoing delay in the action. The court then considered whether the interests of justice require that the claim proceed notwithstanding the delay. The prejudice involved was largely limited to the fading or loss of memories inherent in any long delay. The length of delay was significant and the stage of litigation was very early. None of the parties pressed the others to advance their claims. The reasons for delay were not satisfactory and none of the delay was attributed to lack of action by counsel. There were no public interests at stake in the issues of the claims. The court found the prejudice, the length of delay, the stage of proceedings and the public interest to be the most significant factors in determining whether it is not in the interests of justice for the matter to proceed. The court dismissed both claims for want of prosecution. Party and party costs were fixed for the successful parties.

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Slim Contracting Inc. v. Saskcon Repair Services Ltd., 2015 SKQB 258

Scherman, August 31, 2015 (QB15249)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike
Civil Procedure – Queen's Bench Rule 1-3, Rule 7-1, Rule 7-9
Statutes – Interpretation – Builders' Lien Act, Section 5

The applicant defendants applied to strike out the plaintiff's claim without leave to amend on the basis that the claim disclosed no reasonable cause of action. The plaintiff applied for leave to amend its statement of claim. The applicant defendants argued that the amended form of claim continued to disclose no reasonable cause of action against them. The plaintiff supplied rental equipment to the defendants, SaskConstruction Group Corporation, who were subcontractors to the defendant Saskcon, a general contractor on contracts to do work on portions of a municipal road and a provincial highway in Saskatchewan. When SaskConstruction Group Corporation failed to pay the plaintiff for the rental, it gave Saskcon notice pursuant to The Builders' Lien Act of a claim of lien on the holdback payable by Saskcon. When Saskcon disputed this claim, the plaintiff commenced its action. Saskcon argued that s. 5 of the Act expressly provides that the Act does not apply where services or materials are provided in connection with contracts entered into pursuant to The Highways and

Transportation Act, 1997. Thus there was no right to a claim of lien nor a claim on trust funds under the Act and the plaintiff had no reasonable cause of action. The plaintiff submitted that the section could be interpreted to apply only to the Crown and parties with whom it contracts. The Supreme Court's decision in Canadian Bank of Commerce v. McAvity stands for the proposition that liens against holdback and the trust obligations arising under the Act continue to operate. The defendant submitted that the Foundational Rules (Part I of the Queen's Bench Rules) relating to timely and efficient determinations should govern and take priority over rule 7-9, because the plaintiff's claim succeeded or failed on the basis of statutory interpretation not on the evidence.
HELD: The plaintiff's application to amend the statement of claim was granted. The court dismissed the defendants' application. They had relied upon the decision in 3972674 Canada Inc. v. 101114762 related to an application to strike pursuant to rule 7-1 in which the court had noted that rule 1-3 promoted the timely and cost effective resolution of claims. However, the court agreed with the decision in Venture Construction v. Saskatchewan that 397274 Canada should not be read as suggesting that the law in relation to applications to strike pursuant to rule 7-9 had changed. The defendants' application was pursuant to rule 7-9 as disclosing no reasonable cause of action and the court had to approach it as the Supreme Court directed in Imperial Tobacco. This was not a plain and obvious case on the facts that the action had no reasonable chance of success.

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Metis Nation - Saskatchewan v. Provincial Metis Council of the Metis Nation Legislative Assembly, 2015 SKQB 259

Scherman, August 31, 2015 (QB15250)

Civil Procedure – Contempt

The plaintiff applicant, the president of the Metis Nation Society (MNS), applied to find the defendant respondents in contempt of court for failure to implement the order issued on April 6, 2015 (see: 2015 SKQB 98). The court ordered the Provincial Metis Council (PMC) to instruct locals to ensure delegate selection was in place for a Metis Nation Legislative Assembly (MNLA) to be held immediately; appropriate notice of the MNLA was to issue by May 9 and the PMC should schedule the MNLA to take place on or before June 19, 2015. The MNLA was not held. Both parties submitted their evidence by affidavit and the contents of them were in conflict regarding what had transpired. The respondents submitted that the requirement for a clear and unambiguous order had not been proven as it was directed to the

PMC as a collective and the individual respondents could not be held to have failed to comply with it as it was not directed to them personally. They also argued that the requirement of proof of the required mens rea, the respondents deliberately or recklessly acted contrary to the order, had not been proven beyond a reasonable doubt. Furthermore, once they had learned funding was not available to finance the cost of an MNLA the applicant refused to participate in the PMC meetings to pursue funding efforts and to organize an MNLA. They argued that by failing to cooperate, the applicant frustrated their efforts to comply with the order and without funding, compliance was impossible. Based upon these arguments, the court stated that the issues in this case were: 1) whether the mandatory nature of the order, as opposed to prohibitory, addressed to the collective body PMC, call for the modification of the usual test for civil contempt; 2) whether the potential absence of "clean hands" on the part of the applicant is a relevant factor in deciding whether the respondents were in contempt; and 3) was contempt proven beyond a reasonable doubt.
HELD: The application was dismissed. The court held with respect to the issues that: 1) in cases of contempt applications with respect to mandatory orders or injunctions, it is necessary to consider whether efforts to comply were frustrated by the actions of others and whether intervening circumstances could be viewed as making compliance impossible. In Metaxas, the court held that inability to comply was a valid defence and a finding of contempt in that case would not enhance the administration of justice; 2) injunctive relief has its origins in equity. Wrongdoing on the part of the applicant should not deprive him of a remedy, unless it bears directly on the appropriateness of the remedy, and the refusal of relief should be justifiable on some more precise basis that the clean hands maxim. Here, the allegation that the applicant brought the application in a context where his hands were not clean should be assessed from the perspective of whether this is relevant to the objective of protecting the independent administration of justice and whether any alleged wrongdoing by the applicant is relevant to the respondents' position that his actions frustrated their attempts to comply with the order; and 3) evidence of frustration to comply is properly considered when deciding whether the alleged contemnors had intentionally or deliberately failed to do as ordered. The applicant bore the burden of proof. The court decided on the evidence that it disclosed the respondents' efforts to follow the order and implement it and when they learned that there were no funds available to finance the MNLA, the record shows significant but unsuccessful efforts by them to obtain government funding. The applicant failed to participate with the respondents in their efforts despite his position as the president. The applicant failed to prove beyond a reasonable doubt that the respondents deliberately or recklessly ignored the order.

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S. (W.) v. S. (D.), 2015 SKQB 265

Tholl, September 3, 2015 (QB15256)

Family Law – Child Support – Determination of Income
Family Law – Child Support – Imputing Income
Family Law – Child Support – Section 7 Expenses
Family Law – Split Custody
Family Law – Custody and Access – Joint Custody
Family Law – Custody and Access – Primary Residence
Family Law – Division of Family Property
Family Law – Spousal Support – Compensatory and Non-compensatory
Family Law – Spousal Support – Indefinite Order

The parties were married in 1993 and at the time of the trial had six children ranging in ages from seven to 21. The two oldest children, B1 and B2, were independent and the third oldest, B3, was in grade 12. B4 was 15 and resided with the petitioner at the time of trial. B5 and B6 were 11 and seven, respectively, and both resided primarily with the petitioner. The parties agreed to joint custody but the respondent wanted sole decision making authority for B6's medical issues. The petitioner's income, pursuant to his tax returns, ranged from $45,760 to $58,100; however, the respondent argued it was actually much higher. The petitioner worked for a home building company owned by his parents and had done so since 1986. The respondent did not work outside the home during the marriage and requested spousal support. After separation the petitioner moved into a home owned and paid for by his sister. The issues were: 1) what parenting arrangements were in the best interests of children B4, B5, and B6; 2) what was the petitioner's income; 3) should the court impute income to the respondent; 4) was the respondent entitled to spousal support; and 5) what was the appropriate division of property.
HELD: The court decided the issues as follows: 1) the court found that during the marriage the respondent was: responsible for the children's care during the work hours; primarily responsible for the children's activities; and primarily responsible for the children's school, homework, and medical appointments. The parties were given joint custody of the four youngest children with the respondent having sole decision making authority regarding medical issues for B6. The court declined to make a parenting order with respect to B4. The court found that it was in the best interests of B5 and B6 to primarily reside with the respondent; 2) the court found the petitioner's income to be markedly higher than reported on his income tax return. It would be impossible for the parties to have lived the lifestyle they did without accumulating significant debt or receiving income from other sources. The petitioner had a luxury vehicle from his parents' company for his business and personal use and none of it was reported as income to him. The

company's accountant testified that an amount for personal use of a vehicle should have been included on the petitioner's income tax return and that amount could be $20,000 for a new vehicle. The court also included $800 for the petitioner's cell phone provided by his employer. The petitioner was also found to have received significant amounts of cash that were not reported as income and was used to pay for family expenses. The court imputed an annual base salary of $90,000 to the petitioner. An annual bonus of $9,500 was added, as were the amounts for cell phone and vehicle for a total of $120,300 in annual income; 3) the respondent worked for a home based selling business for a few years during the marriage but had very little net income, if any, from it. She recently became a representative to sell a line of skin care products but did not receive a salary. The court did not impute any income to the respondent because she had been out of the job market for over 20 years and had no formal training or experience to use in obtaining a job; 4) the parties had split custody of the children. The petitioner was ordered to pay child support of $2,117 per month, pursuant to s. 3 of the Guidelines, for B3, B5, and B6, whereas the respondent was ordered to pay zero to the petitioner for B4. There were no adjustments made for retroactive support. The court had concerns with some of the extracurricular expenses claimed by the respondent. The court ordered the petitioner to pay the respondent $2,951.44 for s. 7 expenses up to June 30, 2015. He was ordered to pay ongoing, consented to, s. 7 expenses within 10 days of being provided with a receipt. The respondent was ordered to provide the petitioner with all medical and dental costs of the children incurred in the last two years and the petitioner was ordered to pay the respondent any funds he received from his medical insurer; 5) the respondent was entitled to spousal support on the basis of compensatory and non-compensatory grounds. The petitioner was ordered to pay indefinite spousal support in the amount of $1,500 per month with either party being able to bring a review to the court after three years. The review would be for the purpose of determining if the respondent was self-sufficient and to examine her efforts to do so; 6) the parties' property included a home, a vehicle, recreational vehicles, etc. The respondent also had a bank account with $32,000 in it that she removed in cash and hid at her parents' house. The respondent was ordered to pay the petitioner $333,581.50 to equalize the parties' property. The court also ordered that $24,953 be transferred from the respondent's pension account to the petitioner to equalize the parties' taxable assets; and 7) a divorce was granted. The respondent was entitled to two thirds of her taxable costs except for the expert report that she was entitled to the full amount.

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Deliotte Restructuring Inc. v. Avramenko, 2015 SKQB 266

Kalmakoff, September 4, 2015 (QB15262)

Bankruptcy – Costs
Bankruptcy – Judicial Sale
Bankruptcy – Sale of Land – Vesting Order

The applicant trustee in bankruptcy applied for orders: confirming the sale of farmland; vesting the title to the land in the purchasers; for the distribution of sale proceeds; and for costs. An order for sale of the land by judicial listing was made in May 2015. The order gave the trustee board authority to conduct the sale. The land was co-owned by the bankrupt and his wife, the respondent. The respondent consented to the sale and transfer of one quarter but opposed the sale of the other two quarters arguing that the trustee acted improperly by rejecting her offers to purchase the land. The respondent's offers did not provide the required deposit. She also had outstanding unsatisfied judgments against her. At a previous court appearance, a judge of the court found that there was no fault on the part of the trustee with respect to refusing to accept the respondent's offer. The issues were: 1) should the sale be approved; 2) if the sale was approved, should the vesting order be made; and 3) how should proceeds be distributed, and what order, if any, should be made respecting costs.
HELD: The court dealt with the issues as follows: 1) the order of May 2015 required that the selling officer could sell the land subject to approval by the inspector of the estate and approval and confirmation by the court. The inspectors of the estate unanimously approved the offer. The test for whether the court should approve the sale was whether the trustee was acting with integrity and in a reasonable and competent manner. The court was satisfied that the trustee acted with integrity and in a reasonable and competent manner by accepting the offers it did, over the offers made by the respondent. The order of May 2015 gave the trustee discretion and the court found that the discretion was exercised in a reasonable manner; 2) all of the requirements for a vesting order were met; and 3) it was not appropriate to order that the respondent pay one half of the solicitor-client costs incurred by the trustee. The actions of the respondent may have been misguided but they were not reprehensible, scandalous or outrageous. The trustee was entitled to costs of the application on the usual party-and-party basis.

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Ecker v. Regina Housing Authority, 2015 SKQB 267

McMurtry, September 3, 2015 (QB15282)

Landlord and Tenant – Residential Tenancies – Order of Possession – Appeal

The tenant appealed the order of possession granted to the landlord by the Office of Residential Tenancies. The order was granted on the basis that he was repeatedly late in paying his rent. At a hearing the tenant was ordered to pay his rent in full by July 15, August 15, and September 15. When he had not paid his rent in full by July 15 the landlord reconvened the hearing pursuant to the earlier decision. The tenant requested an adjournment until he had received information pursuant to an Access to Information request of his files from the Regina Housing Authority and Office of Residential Tenancies. The hearing officer determined that the information would not assist the tenant and continued with the hearing. The tenant made the July 15 payment through online banking, and the hearing officer held that he knew it would not reach the landlord until three to five days later. The hearing officer also concluded that the tenant did not do this out of error but for his own agenda. The hearing officer found that the tenant violated s. 58 of The Residential Tenancies Act, 2006 and ordered that the landlord be put in possession of the rental premises. The tenant appealed on the grounds that the hearing officer erred by not accepting that the landlord had a mandate under The Saskatchewan Housing Corporation Act to assist low-income persons with their housing needs.
HELD: The appeal was dismissed. The tenant did not show that the hearing officer erred. The appeal court also agreed with the hearing officer that the documents the tenant sought in his Access to Information request would not have been of assistance to him.

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101133330 Saskatchewan Ltd. v. Hanis, 2015 SKQB 271

McMurtry, September 4, 2015 (QB15260)

Landlord and Tenant – Residential Tenancies – Appeal
Statutes – Interpretation – Residential Tenancies Act, Section 82.1

The appellant landlord appealed the decision of a hearing officer of the Office of Residential Tenancies on the grounds that it did not receive notice of the hearing. The tenant made a complaint against the appellant for return of her security deposit and duly served it with notice of the hearing by ordinary mail at the two addresses she had for the appellant, one in Regina and one in Saskatoon. The Saskatoon address was taken from an invoice given to the tenant by the landlord at the beginning of the tenancy. There was no written lease agreement. (Pursuant to s. 19(1)(e) of The Residential Tenancies Act, written leases must contain the landlord's addresses for service.) A hearing was held

in April 2015 at which the appellant appeared, represented by counsel, and sought an adjournment that was granted to May 28. On May 27, an employee of the law firm telephoned the office to request a second adjournment. A new date was set for June 25. The tenant served the appellant with notice of the third hearing date by ordinary mail to the same addresses as before. The appellant did not appear and the hearing proceeded in its absence. The appellant chose not to apply back to the hearing officer pursuant to s. 73(5) but appealed on the grounds that the hearing officer violated the principles of natural justice in proceeding with the hearing in its absence and made an error in law finding that service on an unknown address was valid service. At the appeal, the appellant filed affidavit evidence showing that its registered office was its lawyer's address and the manager of the Regina office testified that he did not receive the hearing notice. No evidence was presented to confirm or deny service at the Saskatoon office.

HELD: The appeal was dismissed. The Act permits a hearing officer to waive the usual service requirements if they conclude that the notice came to the attention of the person to be served pursuant to s. 82.1(1). The hearing officer in this case came to that conclusion. The appellant was represented by a lawyer who had adjourned the hearing twice. The appellant had been served at both addresses for the first hearing and responded to that notice. The hearing officer did not err in law or in the exercise of her jurisdiction

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Acto Structures & Logistics v. Unite Here, Local 47, 2015 SKQB 275

Zarzeczny, September 10, 2015 (QB15265)

Administrative Law – Judicial Review – Labour Relations Board
Labour Law – Labour Relations Board – Certification Application – Representational Vote

The applicant employer applied for judicial review of the decision rendered by the Saskatchewan Labour Relations Board regarding the applicant's application filed with it objecting to a certification vote conducted by the board and its appointed agent. The respondent union had applied for certification of an employee unit of the applicant, comprising of approximately 45 employees at the employer's work site, a potash mine. The employer filed its written reply to the union application, identifying 45 employees but raising an issue regarding the composition of the unit. The board issued its direction for vote by secret ballot by all employees who were employed in the unit. The board's registrar was appointed agent of the board for the purpose of conducting the vote and he determined that it would be by mail-in

vote. The only matter raised by the employer at that time was that the work schedule of the employees might make the mail-in ballot system problematic. The vote was held and when the ballots were counted, 16 employees voted for and 15 employees voted against the union of the 49 eligible voters. The employer then filed a letter notifying the board of the objections that it had to the conduct of the vote. The employer's objections related to the decision by the agent to conduct a mail-in ballot, the time frame for the conduct of the vote (21 days) and concerns of individual employees who either had not received a ballot or were omitted from the list of voters. The board held a hearing where witnesses, primarily representatives of the employer and certain employees called by it, testified. The latter testified to their individual and personal circumstances, which resulted in them not voting. After hearing the evidence and the submissions, the board rendered its decision dismissing the employer's objections to the conduct of the vote. It authorized an order to issue certifying the union. The issue was whether the board committed reviewable or reversible error respecting its decision.
HELD: The application was dismissed. The standard of review was reasonableness. The court found that the board reviewed each of the employer's objections and then correctly identified the provisions of The Saskatchewan Employment Act and The Saskatchewan Employment (Labour Relation Board) Regulations. The board's decision was within a range of reasonable outcomes available to it based upon the facts as found and on the application of the Act and Regulations to those facts. Costs were awarded to the union based upon column one of the new Tariff of Costs because the application was heard after they had been amended.

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R. v. Grover, 2015 SKQB 278

Danyliuk, September 15, 2015 (QB15284)

Summary Offences Procedures Act – Appeal – Default Conviction

The appellant received a notice of violation of a red light camera fail to stop and he failed to appear at court so was convicted in absentia, pursuant to s. 2 of The Summary Offences Procedure Act. The appellant sought a remedy under s. 23 to examine the circumstances regarding the missed court date. At the s. 23 hearing the judge refused to direct a new trial date. The appellant appealed.
HELD: Section 4(4)(b) of the Act allows for appeals from convictions, acquittals, sentencing or other orders. The s. 23 order was an "other order" and therefore the court had jurisdiction to hear the appeal. The appeal was dismissed on its merits. The appellant did not have an

adequate answer for his non-attendance; the reason had to be something out of his control. The explanations were that the date slipped his mind; he did not know there was a red light camera in that location; and that the notice was served too late, even though it was before the six months allowed for a summary charge. The appellant did not show that: the verdict was unreasonable; that it could not be supported by the evidence; that there was an error of law; or that there was a miscarriage of justice.

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Moyer v. Corman Park (Rural Municipality No. 344), 2015 SKQB 281

Danyliuk, September 15, 2015 (QB15286)

Municipal Law – Appeal – Municipal Order – Judicial Review
Municipal Law – Bylaw – Nuisance – Appeal
Municipal Law – Judicial Review
Municipal Law – Statutory Appeal

The defendant, a rural municipality, issued an order to the plaintiffs with a deadline to complete cleanup work on their property. The plaintiffs waited almost a year before bringing the application for judicial review of the defendant's decision to issue the order. The plaintiffs did launch an appeal shortly after receiving the order, pursuant to s. 365(1) of The Municipalities Act, where they sought and were granted more time to comply with the order. The plaintiffs did not otherwise exercise the statutory appeal of the order. The issue for the court was whether the plaintiffs' failure to exercise the statutory right of appeal prevented them from then seeking judicial review. HELD: The application was dismissed because the court determined that the plaintiffs had an adequate alternate remedy, the statutory appeal, and the failure to pursue it was a bar to judicial review. It is widely held that judicial review should not be allowed if other remedies exist. The Act outlines other remedies available to the plaintiffs. No exceptional circumstances existed to justify the judicial review application.

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Sitter v. Saretzky Holdings Ltd., 2015 SKQB 282

Gunn, September 16, 2015 (QB15273)

Landlord and Tenant – Residential Tenancies – Rehearing

The tenant appealed the decision of a hearing officer of the Office of Residential Tenancies on the ground that she had not been given a fair trial. Because the tenant owed the landlord $67 for 15 days past when the rent was due, the landlord served a notice to end the tenancy. At the hearing the appellant raised a number of issues about the state of the rental unit. The appellant complained that there was no fan in the bathroom or the kitchen and she found black mould. The landlord referred to the "condition of premises checklist" completed and agreed to by the tenant at the time she moved in. The document was not submitted into evidence at the time of hearing. The appellant denied signing it and the landlord said that she had. The hearing officer permitted the landlord to email the document to him after the hearing concluded. Upon review of the document, the officer concluded that the agreement had not indicated that there were fans on the premises at the time of rental and was under no obligation to install them if they were not included in the tenancy agreement.
HELD: The appeal was granted. The court was not satisfied that the principles of natural justice were observed in the conduct of the hearing. The court returned the matter to the Office of Residential Tenancies for a rehearing.

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Sparvier v. ICR Property Management, 2015 SKQB 284

Gunn, September 17, 2015 (QB15275)

Landlord and Tenant – Residential Tenancies Act – Appeal

The tenant appealed the decision of hearing officer of the Office of Residential Tenancies to grant an order for a writ of possession on the basis of arrears of rent on the grounds that he was not present at the hearing. The respondent gave the tenant proper notice of the hearing and the appellant had an agent appear for him to have it adjourned. At the next hearing date, the appellant did not appear and the hearing officer rendered his decision. The appellant explained that he may have missed the hearing because family members had not drawn the notice to his attention.
HELD: The appeal was dismissed. The hearing officer had the jurisdiction to make the order she did, and the appellant had not raised a question of law.

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Kurtz, Re (Bankrupt), 2015 SKQB 290

Thompson, September 18, 2015 (QB15278)

Bankruptcy and Insolvency – Discharge – Suspension

The bankrupt applied to be discharged from bankruptcy. The trustee opposed an absolute discharge and recommended that the bankrupt pay $10,398 for surplus income owing to the bankruptcy estate and $16,000 for assets that the bankrupt failed to disclose to the trustee at the time of the assignment. The office of the Superintendent of Bankruptcy also opposed the discharge and requested that it should be adjourned until its special investigations unit and the RCMP completed their investigation. The office provided no further information and did not appear at the hearing. The bankrupt earned approximately $6,000 per month and was obligated to pay child and spousal support totaling $1,560 per month. The trustee confirmed that the bankrupt's required surplus income payment would have been $1,382. The bankrupt made two withdrawals from an RESP investment just before the bankruptcy and then later reported to the RCMP that his girlfriend had absconded with the funds.
HELD: The registrar denied the application to adjourn the discharge hearing until after the office's investigation was completed, because the Bankruptcy and Insolvency Act (BIA) and the Criminal Code provided sanctions if the bankrupt was found to have conducted himself improperly. The bankrupt was found not to have met the duties imposed upon him by ss. 158, 172(2), and 173 of the BIA and attempted to shelter at least $16,000 from his creditors. The registrar ordered the bankrupt to serve a one-year suspension and that he pay the trustee for the benefit of the creditors the sum of $26,398 by monthly payments of $1,000.

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R. v. Mildenberger, 2015 SKQB 298

Dawson, June 3, 2015 (QB15292)

Criminal Law – Admissibility of Statements – Voluntariness of Statements
Criminal Law – First Degree Murder

The accused was charged with first degree murder contrary to s. 235(1) of the Criminal Code. He elected to be tried by judge and jury. A voir dire was held prior to trial where the Crown sought to use three statements allegedly made by the accused to police officers. The first statement was described as a witness statement and was audio recorded. The second statement, which was videotaped, was allegedly given to an officer during an interview to complete a serious incident questionnaire when he was a person of interest. The third statement,

which was videotaped, was allegedly given by the accused to an officer when the accused was not in custody, but the statement was a warned statement. The Crown did not seek to introduce the statements as evidence at the trial, but wanted to use them, if necessary, for the purpose of cross-examining the accused, if he testified.
HELD: The court was satisfied that the statements were made by the accused. The court was also satisfied that each of the three statements were voluntary. Counsel were given leave to apply to the court to determine if any portion of any of the statements required editing prior to use.

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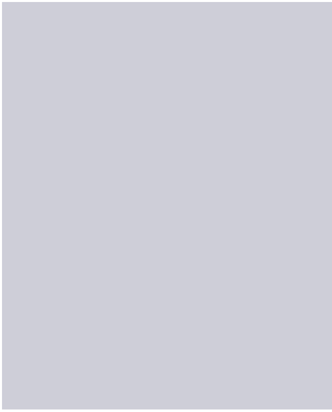
R. v. Mildenberger, 2015 SKQB 299

Dawson, June 3, 2015 (QB15293)

Criminal Law – Admissibility – Polygraph Refusal
Criminal Law – Defence – Inadequate Investigation
Criminal Law – Defence – Third Party Suspect
Criminal Law – Evidence – Polygraph Refusal
Criminal Law – First Degree Murder

The accused was charged with first degree murder contrary to s. 235(1) of the Criminal Code. The Crown brought an application to admit the following evidence: that the accused agreed to a polygraph test but later refused to take the test; that the accused did not take the test; that the accused told people that the police withdrew their request for a polygraph; and that the police never withdrew their request for a polygraph (collectively referred to as polygraph evidence). The Crown brought the application because they thought that the accused may raise a third party suspect defence or argue that the police investigation was inadequate. The Crown also sought to use the polygraph evidence in various ways during the trial, including: in the Crown's narrative; to lay a foundation to cross-examine the accused if he testified; and to attack the credibility of the accused. The accused confirmed that he was not raising a third party suspect defence nor going to argue that the police conducted an inadequate investigation unless the Crown witnesses alerted the accused to the argument during trial.
HELD: The court found that it was premature to decide the issue of whether to admit the evidence in anticipation of the accused's arguments. The court directed counsel to advise the court in the absence of the jury of their intention to tender the evidence if the issue arose during trial. The law is well established that the results of a polygraph examination are not admissible. The admission of a refusal to take a polygraph is a highly prejudicial piece of evidence that runs



contrary to the basic tenets of our justice system. The court was not satisfied that the polygraph evidence was admissible as a necessary part of the narrative. Also, to allow the Crown to lead the evidence in anticipation that the accused may testify would be highly prejudicial. The court concluded that the prejudicial effect outweighed the probative value. There was little probative value in the polygraph evidence in relation to the issue for the jury. The polygraph evidence was not admissible.

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