The Law Society of Saskatchewan Library's online newsletter
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R. v. Peyachew, 2016 SKCA 21

Ottenbreit Caldwell Ryan-Froslie, February 16, 2016 (CA16021)

Criminal Law – Robbery with Violence – Sentencing
Criminal Law – Unlawful Confinement – Sentencing

The appellant pled guilty to unlawful confinement, contrary to s. 279(2) of the Criminal Code, and robbery with violence, contrary to s. 344(1)(b) of the Code. He appealed his sentence of five years imprisonment less 151 days credit for time served in remand on the grounds that the sentence was excessive. The sentencing judge had erred: 1) in determining the gravity of the offences; 2) in failing to give adequate consideration to the appellant's Aboriginal heritage; and 3) in failing to take into account the appellant's mental health. The appellant had grabbed the assistant manager by the throat and forced her, nine other bank employees and a customer into an office. The appellant revealed to the hostages that the only weapon that he had was his fists. He forced an employee to give him $1,700 from a till. As the appellant left the bank, he saw RCMP officers waiting outside. He grabbed the manager, put her in a chokehold and used her body to shield him from the police, and then pushed her to the ground when the officers entered the bank. In a warned statement, the appellant advised that he had smoked marijuana before the robbery and had robbed the bank so that he could pay some outstanding fines. The appellant, a 32-year-old Aboriginal man from the Red Pheasant First Nation, had a criminal record of 15 convictions for minor property offences. He claimed that he had not been affected by racism or poverty, but he acknowledged the difficulty his mother had in supporting her six children after her

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husband committed suicide. The appellant suffered from mental illness apparently caused by his use of marijuana. The pre-sentence report indicated that the appellant had shown no insight into his offending behaviour and rated him as a high risk to re-offend but noted he would profit from programming available in a penitentiary. The psychological profile of the appellant showed that he was cognitively impaired and this condition was exacerbated by substance abuse. The psychologist's opinion was that if the appellant did suffer from hallucinations, they were likely tied to his substance abuse. The psychiatrist's report confirmed the psychologist's and found no evidence of psychosis or formal thought disorder.
HELD: The appeal was dismissed. With respect to the grounds of the appeal, the court found that the sentencing judge had not erred in: 1) his assessment of the gravity of the offences. The judge found as aggravating factors that the appellant had planned the offences to some degree and that the unlawful confinement offences had had a significant negative psychological impact on the bank employees and customers. Further, the appellant physically assaulted two women in the course of the robbery; 2) the way in which he considered the Gladue factors as mitigating in crafting the sentence. The pre-sentence, psychological and psychiatric reports gave no indication that the appellant's moral dysfunction was tied to his Aboriginal background; and 3) finding that the appellant was fully responsible for his actions or that his ability to appreciate or understand his actions was in any way compromised by his use of marijuana.

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Beer v. Saskatchewan (Ministry of Highways and Infrastructure), 2016 SKCA 24

Richards Jackson Ryan-Froslie, February 22, 2016 (CA16024)

Civil Procedure – Appeal
Landlord and Tenant – Appeal – Court of Appeal Act, Section 7(3), Section 20(3)
Landlord and Tenant – Appeal – Landlord and Tenant Act, Section 55

The appellants appealed a decision of the Court of Queen's Bench pursuant to s. 55 of The Landlord and Tenant Act (LTA). The appeal was dismissed by the Court of Appeal. The appellants then filed a notice of appeal seeking the chambers decision be reviewed by a panel of three judges. The appellants relied on s. 55 of the LTA and s. 20(3) of The Court of Appeal Act, 2000 (CAA).
HELD: The appeal was dismissed. The court had no jurisdiction to conduct the review sought. Section 55 of the LTA provides for appeals to a judge in chambers but not then to a panel of judges. Also, s. 20(3) of

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the CAA only provides for appeals incidental to an appeal or a matter pending in the court, it does not create a free-standing right of appeal. Further, the court determined that s. 7(3) of the CAA limits the applicability of s. 20(3) because the right of an appeal is established in s. 55 of the LTA.

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R. v. Atchison, 2016 SKCA 27

Jackson, February 24, 2016 (CA16027)

Criminal Law – Judicial Interim Release Pending Appeal
Criminal Law – Sexual Offences – Inviting Touching – Person Under 14
Criminal Law – Sexual Offences – Touching – Person Under 14

The accused sought an order that he be released from custody pending the resolution of his appeal pursuant to s. 679 of the Criminal Code. The accused was convicted of two charges of touching the same person under the age of 14, contrary to s. 151 of the Criminal Code, and with inviting the same person to touch his body for a sexual purpose, contrary to s. 152 of the Criminal Code. He was sentenced to five years incarceration and filed a notice of appeal and his application for judicial release on the day of sentencing. The accused had no prior criminal record and was employed as an aircraft maintenance engineer and as a pilot. The accused did not breach his conditions on judicial interim release or between conviction and sentence. The accused filed an undertaking with his affidavit indicating that he had moved out of the family home to a different city where he would remain until the appeal was heard. He did not have any contact with the complainant and he surrendered his passport. The accused argued that his detention was not necessary in the public interest. The charges were dated and he, therefore, argued that there was no compelling reason requiring him to start serving such a significant sentence before the reasons for the judgment were tested.
HELD: The court ordered the accused's release after finding he established the requirements of s. 679(3): 1) the Crown conceded that the appeal was not frivolous; 2) the Crown also conceded that the accused would surrender himself into custody as required; and 3) crimes like those the accused was convicted of committing raise special public interest concerns. The court considered the factors in the accused's favour: his good behaviour while on release and on strict conditions; his lack of record; no concerns regarding the accused being a present danger to the public or that he would not present himself as required; the dated nature of the charges; the terms the accused suggested he abide by; and the strength of the grounds of appeal. The court concluded, after balancing and weighing all of the relevant

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factors, that a review of the conviction should take place before enforcing the accused's sentence.

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Crombie Property Holdings Ltd. v. Saskatoon (City), 2016 SKCA 47

Richards, March 31, 2016 (CA16047)

Municipal Law – Tax Assessment – Leave to Appeal

The appellant applied for leave to appeal from a decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board (committee). The appellant had originally appealed the City of Saskatoon's assessment of its property, a shopping centre, to the Board of Revision. The assessor used the Retail Non-CBD Model for the 2013 and 2014 taxation years to make the assessment. The model was developed using 865 rental agreements signed in 2008, 2009 and 2010. The assessor determined a base rent of $15.68 per square foot and adjusted for the effect of various factors related to rental rates. The capitalization rate for the property was determined to be 7.26 percent based on 31 sales. The appellant argued before the board that the capitalization rate was too low, the rental rate was excessive for retail areas between 5,000 and 10,000 square feet in size, and that equity had not been achieved by use of the model. The board rejected the arguments and sustained the valuation. The appellant then appealed to the committee and it confirmed the valuation. The leave to appeal was based on a number of questions, among which was that the committee erred in its interpretation or application of The Cities Act when it held that the market valuation standard required pursuant to s. 163(f.1) of the Act had been met after the evidence that the assessment model resulted in an over-assessment of properties similar to the subject property.
HELD: Leave to appeal was denied. The court found that the proposed grounds of appeal contained no arguable errors of law. Although the court found that the questions were legitimate, the decision of the committee and the record of the evidence before it did not support the appellant's contention that the former had erred in law.

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Harvard Property Management Inc. v. Saskatoon (City), 2016 SKCA 48

Richards, March 31, 2016 (CA16048)

Municipal Law – Appeal – Property Taxes – Assessment

Municipal Law – Judicial Review

The appellant sought leave to appeal a decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board (the committee) for errors of law in determining the assessed value of a retail property in Saskatoon. The property was assessed as receiving a market rent of $15.91 per square foot using an assessment model and a capitalization rate. The appellant argued that: 1) the capitalization rate was too low because two of the six sales used to determine the capitalization rate for the property were not similar to it; 2) the $15.91 per square foot rental rate was too high for properties over 26,500 square feet. The Board of Revision (the board) erred by failing to find that the onus shifted to the assessor once the appellant demonstrated that the application of the model to properties similar to the subject property was not supported by any market rents in evidence; and 3) the board applied the incorrect equity test under s. 165(5) of The Cities Act as it held equity had been realized because the model was equitably applied to all retail properties. The committee confirmed the board's decision not to accept the appellant's submissions. The appellant appealed pursuant to s. 33.1 of The Municipal Board Act.
HELD: The court granted leave with respect to the capitalization issue. The appellant's arguments were examined as follows: 1) it was found to raise a basic issue of general significance to the property assessment regime. The argument also seemed to come with an evidentiary record that could allow a proper investigation of it. Leave was granted with respect to the capitalization argument; 2) the appellant did not adequately explain how an arguable error of law or an arguable misinterpretation of The Cities Act emerged. The assessor did appear to give some evidence of the rents used in the model, though not particulars of all 865 rents. The issues regarding onus were not addressed in any direct way by the committee; and 3) the application was for leave to appeal a decision of the committee not of the board. The committee's decision did not reference the issue of equity and it was not clear whether the appellant even gave much mention to the issue before the committee.

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Dundee Realty Management Corp. v. Saskatoon (City), 2016 SKCA 49

Richards, March 31, 2016 (CA16049)

Municipal Law – Appeal – Property Taxes – Assessment
Municipal Law – Judicial Review

The appellant appealed the decision of the Appeal Committee of the Saskatchewan Municipal Board (the committee) arguing that it erred in determining the assessed value of an office building. The value was

assessed using a model that was developed using 306 rental agreements. The property received a positive adjustment to the base rent per square feet because it had restaurant and retail space. The appellant appealed to the Board of Revision (the board) arguing that the capitalization rate used was too low because it was based on non-comparable sales and because the net operating income used by the assessor was excessive due to the adjustment for restaurant areas being too high. The board found largely in favour of the appellant on the capitalization rate issue, but was not persuaded by its submissions on the rental rate question. The committee dismissed the appellant's application, noting that the retail/restaurant adjustment was only one component of the model and that the model worked as whole. The appellant asked for leave on whether the committee erred: 1) in its interpretation of ss. 163(f.1)(ii) and (iii) and s. 165(5) of The Cities Act when it failed to find that the rent applied to the restaurant/retail did not reflect the typical market conditions; 2) by failing to find that evidence of rents from main floor tenants with rent significantly lower was sufficient to prove the provisions in 1) were not met; 3) in finding that the model reflected typical market conditions for restaurant/retail when the assessor did not provide any evidence of the rents used in the analysis; and 4) in failing to find that the assessor's explanation and evidence that the assessment met the market valuation standard should be given no weight because there was no evidence of the rents used in the analysis.
HELD: Leave to appeal was denied. The arguments were examined as follows: 1) the evidence of rents provided by the appellant was of "historical" rents, not current rents. The court determined that there was no evidence to warrant the conclusion that the rent did not reflect the typical market conditions; 2), 3), and 4) the board did not accept the evidence on the rent being significantly less. The third and fourth arguments were found to be premised on dubious assumptions, at best.

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R. v. Hain, 2016 SKPC 15

Green, February 18, 2016 (PC16019)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Refusal to Provide Breath Sample

The accused was charged with refusing to comply with a demand for a breath sample made under s. 254(3) of the Criminal Code and with having care or control of a vehicle while impaired by alcohol. The defence argued that the police officer who made the demand did not have the lawful grounds to make the demand and that as a result, his rights under ss. 8 and 9 of the Charter were violated and any evidence

of refusal should be excluded under s. 24(2) of the Charter. The charges arose as a result of the accused losing control of his vehicle which ended up in the ditch. Another motorist stopped at the scene and observed that the accused was behaving hysterically, his speech was slurred and he staggered when he walked. Another vehicle stopped and the accused said that he was leaving to go to the hospital. The first motorist called the RCMP to report the accident and advised that he believed that the driver was impaired. Officers arrived and interviewed the motorist. One officer remained at the site and found a number of beer cans in the vicinity of the vehicle. The other officer drove to the nearest hospital and located the accused. At first the accused lied and said that he had not been driving but then admitted he had. The officer noted that the accused's speech was slurred and that his eyes were really bloodshot and glassy. She asked the accused if he had been drinking and he said that he had a few. The officer then arrested the accused for impaired driving, read him his Charter rights and made the breath demand. The accused told the officer that he would provide samples and continued to refuse when he was taken to the detachment. The issues were whether the Crown had proven beyond a reasonable doubt that the officer made a lawful demand and whether the accused was in care and control of his vehicle while impaired by alcohol.
HELD: The accused was found guilty of the charges of refusal to provide a breath demand and not guilty of impaired driving. The court found that there had been no breaches of ss. 8 or 9 of the Charter as the officer had made a lawful demand under s. 254(3) based upon reasonable grounds. Although the court found that there was evidence in support of impairment, there was a reasonable doubt that his ability to operate a motor vehicle was impaired by alcohol.

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R. v. Hudec, 2016 SKPC 16

Kalmakoff, February 16, 2016 (PC16015)

Criminal Law – Long-term Offender – Sentencing
Criminal Law – Child Pornography – Possessing – Sentencing
Criminal Law – Sentencing – Remand Time

The accused pled guilty to the following Criminal Code offences: accessing child pornography contrary to s. 163.1(4.1); possession of child pornography contrary to s. 163.1(4); breach of probation by having contact with children under 16 years of age contrary to s. 733.1; and breach of probation by possessing computer equipment capable of accessing the Internet contrary to s. 733.1. The Crown applied under s. 733.1 of the Code for an order remanding him for the purpose of having an assessment conducted for use in a proceeding under Part XXIV of

the Code. The application was granted and the assessment prepared. The Crown then applied to have the accused declared a long-term offender pursuant to s. 753.1 of the Code. The accused was 46 years of age at the time of sentencing. Over the previous 15 years, he had been convicted of six offences relating to child pornography, one conviction of sexual assault of a 12-year-old girl and numerous convictions for breaching conditions of his probation orders relating to either prohibiting contact with children or his use of computers. He had taken the High Intensity Sex Offender Program while in prison. In the opinion of the psychiatrist who assessed him, the accused suffers from Pedophilic Disorder and was at high risk to reoffend. The accused admitted that the requirements of s. 753.1(1) were met. The Crown sought a sentence of six years and six months, comprised of five years for the child pornography charge and 18 months consecutive for breach of probation. The accused argued for a shorter sentence. He had been in custody for 992 days and nothing the circumstances of his case precluded consideration of enhanced credit for that custody under s. 719(3) of the Code. At the rate of 1.5 to 1 for the 992 days, the credit would equal 1,488 days or four years.
HELD: The accused was declared a long-term offender. The court found that due to his history and the circumstances related to the current offences, he should receive a sentence at the top end of the applicable range and held that an appropriate sentence for the charges of possessing and accessing child pornography was four years and six months. With a consecutive term of imprisonment of one year for the charges of breach of probation, the result was a total sentence of five years and six months' imprisonment. Pursuant to s. 719(3.1) of the Code, the court gave credit to the accused of three years and six months for the time spent in custody, leaving a sentence of two years' imprisonment in a federal penitentiary. The court calculated the credit for remand at the rate of 1.3:1 for remand credit. The accused would be subject to a long-term supervision period of 10 years after his release.

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R. v. Pratchett, 2016 SKPC 19

Baniak, February 24, 2016 (PC16021)

Criminal Law – Child Pornography – Accessing
Criminal Law – Child Pornography – Possessing
Criminal Law – Evidence – Beyond a Reasonable Doubt
Criminal Law – Evidence – Credibility

The accused, an RCMP officer, was charged with the Criminal Code charges of possessing child pornography and accessing child pornography contrary to ss. 163.1(4) and 163.1(4.1), respectively. The

accused came to the attention of police when they were investigating into file sharing of known child pornography files. The IP address of the accused was discovered and, pursuant to a production order, the internet provider gave the name of the person, the accused, assigned to that IP address on that time and date. A search warrant was obtained to search a duplex within the RCMP campground. A document was tendered that showed every time there was activity on the Child Protection System log with respect to the offence the accused was not on duty. A witness for the Crown testified that the data packets would have had to be downloaded by the accused's red tower hard drive because the internal IP was tied to the VIN number for that computer. The red computer tower was not accessible to police because it was completely encrypted. An expert in peer-to-peer file sharing testified that the port number for the file sharing program on the accused's system had been manually changed. Another witness testified that he attempted a brute-force attack on the accused's computer to attempt to force into the program to get it to open. The attack was not successful over a period of six days. The witness indicated that an attack on a password of less than eight characters could be successful in minutes. The attack in this case would have made billions of attempts to get into the program. The accused did not cross-examine any of the Crown witnesses. The accused testified that he had never downloaded or possessed child pornography. The accused indicated that he did not provide his personal password for the red tower on the advice of his legal counsel. He said that he encrypted the red tower in case it was stolen. He also admitted that he regularly checked his bandwidth usage. The accused argued that a negative inference should not be made against him for not giving up or surrendering his password because he was following legal advice and exercising his right to remain silent.

HELD: The court found that the material viewed met the definition of child pornography as defined by the Criminal Code. Only the accused had access to his computer and knew his password. There was no evidence that the accused's spouse was in any way involved. The evidence established that all of the file-sharing traffic came into the accused's residence through a router that directed everything to the red computer only. The encryption on the red computer was so formidable that the best forensic technicians from the RCMP were not able to get past it. The court found that it would be unlikely for the accused not to detect a hacker given the encryption and his monitoring of bandwidth usage. A witness also testified that the accused's operating system could not be accessed remotely. The court rejected the accused's testimony given all of the Crown's evidence. The Crown witnesses were all forthright and credible, whereas the accused was less forthcoming. The court found that the Crown met their burden of proving the offences beyond a reasonable doubt.

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R. v. S. (D.J.H.), 2016 SKPC 21

Henning, February 17, 2016 (PC16016)

Criminal Law – Young Offender – Sentencing
Criminal Law – Assault – Aggravated Assault – Sentencing

The accused pled guilty to the offence of endangering the life of the victim, thereby committing aggravated assault contrary to s. 268(1) of the Criminal Code and the Youth Criminal Justice Act (YCJA). He was also charged with failing to comply with a Youth Court sentence by failing to keep the peace contrary to s. 137 of the YCJA. Another accused, C.S., was charged with the same offence, as both young men had attacked the same victim with machetes. Both accused pled guilty and C.S. received a sentence of 24 months in closed custody. The Crown argued that this accused should receive a sentence of 18 months closed custody. The accused and C.S. had both been heavily intoxicated when they attacked the victim. They were members of a gang and were with four other members when they made the apparently unwarranted attack upon the victim. In his victim impact statement, the victim described the extensive surgeries and lengthy hospitalization caused by the injuries inflicted by the accused with the machete. He spoke of the long-term physical effects of the injury to his arm and the psychological trauma he had suffered. After the offence, the accused had spent only nine days in custody and was released subject to extensive conditions for over one year. He had observed the conditions, which included electronic monitoring, complete abstention from alcohol and drugs and a requirement of full-time school attendance. The accused had become involved in sports and other activities and disassociated himself from gang activities. He maintained a stable relationship with his girlfriend with whom he had two children. They were taking parenting classes and receiving counselling. By contrast, the accused C.S. had been found to have been involved in a gang plan to attack guards and escape from the detention centre where he was held. He refused to attend high school, remained a member of the Native Syndicate and was associating with peers who were involved in the criminal justice system.
HELD: The accused was sentenced to probation for a period of two years – the least restrictive sentence that would achieve the rehabilitation of the accused. Conditions were to be drafted to address accountability. The court found that in the circumstances of this case, consistency with the co-offender's sentence was not the governing principle. A custodial sentence would be harmful to the rehabilitation and development of this accused.

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Lohse v. Lake Alma (Rural Municipality No. 8), 2016 SKPC 25

Wiegers, February 22, 2016 (PC16023)

Civil Procedure – Limitation Period – Discoverability Principle
Municipal Law – Liability – Flooding
Municipal Law – Limitation Period – Discoverability Principle
Statutes – Municipalities Act, Section 344(1)

The plaintiff claimed compensatory and punitive damages against the defendant, a rural municipality, based on statutory non-compliance, negligence, and trespass. The defendant argued that the plaintiff's claim was statute-barred. In 2013 water collected on land adjacent to the plaintiff's. The land was separated by a road. To remedy the water problem and protect the road the defendant installed a culvert under the road that caused a large amount of water to rush towards the plaintiff's land. The culvert was installed on August 12, 2013, and the plaintiff was not notified of the situation. The plaintiff argued that the situation could have been remedied by trenching 200 feet and draining the water into a nearby existing slough. The plaintiff said that nine acres of his land were immediately flooded when the culvert was installed. He estimated the cost of his crop loss in 2014 on the affected acres to be $6,289 less input costs. The affected acres had been too wet to seed in 2013. The plaintiff's claim was issued on September 23, 2014, and was served on the defendants November 20, 2014. The main issue for the court was how much detail regarding the damages does a plaintiff have to possess before the damage has been discovered and thus the limitation period begins.
HELD: The action was statute-barred and was dismissed. The limitation period for actions against a municipality is one year from the time the damages were sustained (s. 344(1) of The Municipalities Act). The plaintiff bore the burden of proving when the cause of action was discoverable, and, therefore, when the limitation period commenced. The plaintiff argued that the damage sustained was the inability to grow crops on the acres in 2014 and therefore the cause of action was not discoverable before the spring of 2014. The defendant argued that the period began the date the culvert was installed because the plaintiff was aware on that date that the culvert had caused flooding. The defendant asserted that the claim arose no later than October 23, 2013, when the plaintiff filed a claim against the defendant with the Saskatchewan Association of Rural Municipalities. The court found that on August 12, 2013, the plaintiff was cognizant that he had sustained some damage. The damage had been discovered, and the limitation period began, on August 12, 2013.

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R. v. Obey, 2016 SKPC 31

Tomkins, February 29, 2016 (PC16025)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Assault with a Weapon
Criminal Law – Sentencing – Dangerous Offender – Determinate Sentence – Long-term Supervision Order

The accused was convicted of assault with a weapon contrary to s. 267(a) of the Criminal Code. The Crown was successful in obtaining an order remanding the accused for assessment pursuant to s. 752.1 of the Criminal Code. The accused was born in 1978, the fifth of six children. All of the accused's grandparents attended residential school. Both of the accused's parents struggled with substance abuse and were both violent. His parents separated when he was ten and he lived with his father, who had quit drinking. The accused began drinking while visiting his mother, where there was no supervision. He was expelled from school at 16 due to abuse of substances and repeated conflict with one of the teachers. After his father's death in 2005, the accused had occasional jobs but depended primarily on social assistance benefits. The accused did not have any contact with two of his children that were in the care of Social Services. The accused was in a new relationship and they had one child together. That child was in foster care. The predicate offence occurred when the accused was intoxicated and he and his partner began arguing. His partner's brother heard the yelling and challenged the accused. The accused swung at the brother but intentionally stopped himself. The brother noted that the accused had a large butcher knife in his swinging hand. The accused then left the house. The accused had an extensive criminal history, including seven convictions as a young person and 40 as an adult. Fourteen of the offences, between 1998 and 2013, were for violence. He also had six convictions for threats. The psychologist that prepared the assessment report concluded that the accused had an antisocial personality disorder and impulse control disorder, with comorbid alcohol abuse or alcohol dependence disorder. The accused's risk to re-offend violently was found to be high. The psychologist concluded that the accused required a highly structured and long-term program and that could lead to eventual control of his risk in the community, and was found to be a high risk to re-offend sexually. The accused also had a psychological assessment prepared. The tests given resulted in the accused having a 61 percent or greater risk of reoffending one year after release. The accused was found to have Attention Deficit Hyperactivity Disorder. The court also received a detailed Gladue report. The issues were: 1) whether the accused should be declared a dangerous offender, a long-term offender or neither; and 2) what was the fit sentence for the offence.
HELD: The issues were determined as follows: 1) the predicate offence was a serious personal injury offence as defined in s. 752. The court

found that the accused was the aggressor in all of his violent offences. The level of violence was not grievous but it was consistent. The court was satisfied that the accused's history of offending established a pattern of repetitive behaviour for the purposes of s. 753(1)(a)(i). The court also found that in the offences considered for the repetitive behaviour the accused failed to restrain his behaviour. The court held that unless the accused was able in the future to restrain his behaviour through effective treatment or otherwise, there was a likelihood of his causing death or injury to others. The court also found that the accused's history showed a pattern of persistent aggressive behaviour. The court was satisfied that the circumstances of the offences showed an indifference to the consequences of his actions. The court was not satisfied beyond a reasonable doubt that the accused was indifferent to the consequences of his actions in the course of the predicate offence because he stopped the swing with the knife. Therefore it did not form part of the pattern of repetitive aggressive behaviour for the purposes of s. 753(1)(a)(ii). The accused was nonetheless found to be a dangerous offender because the court proved beyond a reasonable doubt that the accused met all of the criteria in s. 753(1)(a)(i); and 2) both experts testified that the accused was treatable. The court noted that the accused's age of 36 would likely result in a plateau and decrease in offending behaviour. The accused had completed some programming while on remand and showed that he was able to absorb and act on lessons from programming. The court was satisfied, on a totality of evidence, that there was a reasonable expectation that a sentence other than one of indeterminate duration would adequately protect the public against the commission by the accused of murder or a serious personal injury offence. The accused was remanded for almost three years. Programming available in the community or within the provincial system was not found to be adequate to address the accused's treatment needs. A penitentiary sentence was required. He was sentenced to a term of four years in a federal penitentiary, followed by a six-year long-term supervision order.

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R. v. R. (C.F.), 2016 SKPC 32

Hinds, February 29, 2016 (PC16026)

Criminal Law – Peace Bond

The Crown applied for a Peace Bond pursuant to s. 810 of the Criminal Code, against the accused, alleging that he harassed his estranged wife and their children. In 2011 the accused agreed to enter into a Peace Bond with respect to the wife for a period of one year. A family law trial in 2012 ordered the wife and accused to have joint custody of the

children with each party being allocated unfettered child-rearing responsibilities. The accused argued the evidence did not show that the wife feared he would cause physical injury to her and the children. In August 2015 the accused's application for non-suit with respect to the children was granted. The accused then called witnesses and testified with respect to the application regarding his wife. The accused and wife had not communicated verbally since 2012, but the wife testified to numerous encounters where she claimed to be emotionally traumatized and intimidated by the accused. The accused indicated that the wife at no time told him or warned him not to communicate with her by email or text. The issues were: 1) did the wife actually fear psychological injury to herself; and 2) if so, were there reasonable grounds for her fear.
HELD: The application for Peace Bond against the wife was dismissed. The issues were determined as follows: 1) the test is subjective. The court was satisfied, on a balance of probabilities, that the wife actually feared psychological injury to herself from the accused's actions; and 2) the test is objective, with the Crown having the onus on a balance of probabilities. The court found that the content of emails and texts was not threatening towards the wife, and was largely confined to issues relating to co-parenting the children. The court held that the ongoing exchange of emails and text messages was, on an objective basis, inconsistent with the wife fearing the accused. The court found the wife to be a more highly emotional person than the accused and, further, that the wife was prone to some exaggeration. The court was unable to conclude that reasonable grounds existed for the informant's fear.

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R. v. Bannerman, 2016 SKPC 33

Martinez, February 19, 2016 (PC16018)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 8, Section 9, Section 10(a)

The accused was charged with impaired driving contrary to s. 253(1)(a) of the Criminal Code and driving while his blood alcohol content exceeded the legal limit contrary to s. 253(1)(b) of the Code. The defence brought a Charter application alleging breaches of the accused's ss. 8, 9 and 10(b) rights, and as a result the Certificate of a Qualified Technician should be excluded from the evidence. The accused had been stopped by RCMP officers who saw him driving his vehicle down a secondary road just after midnight. Believing that impaired drivers often used back roads to avoid detection, they pulled the accused over to check his

sobriety pursuant to s. 209.1 of The Traffic Safety Act. The first officer spoke to the accused while he was still in his truck and testified that he observed that the accused: fumbled with his wallet when asked for his licence; had slightly glossy eyes; spoke with a slight slur; and admitted that he had drunk four beers the previous day. The officer had not smelled alcohol but had a hunch that the accused had alcohol in his body and wanted to continue with his investigation. He then asked the accused to get out of his truck and walk to the police cruiser. The accused complied but didn't display any balance problems while walking. At the police vehicle, both officers continued to converse with the accused. The second officer could not smell alcohol either but noticed that the accused's speech was slightly slurred. However, the first officer testified that by then he detected a slight smell of alcohol on the accused's breath. He asked the accused to sit in the back seat of the police vehicle and then read him the ASD demand. The accused failed the ASD and the officer then arrested him for impaired driving and made the demand for breath samples. The officer testified that he read the warning and right to counsel from the standard RCMP cards. The officer could not recall the words from his memory, but the Crown argued that the cards include information regarding the availability of Legal Aid counsel. The accused advised that he did not want to contact a lawyer. The defence argued that the officer had failed to: 1) inform the accused of the reasons for his detention, violating s. 10(a) of the Charter, and that he was arbitrarily detained contrary to ss. 8 and 9 of the Charter; and 2) inform the accused that he could obtain free legal advice from Legal Aid and thereby violated his s. 10(b) Charter right.
HELD: The court excluded the evidence of the Certificate and the smell of alcohol on the breath of the accused. Based on the remainder of the evidence, the accused was found not guilty of impaired driving. The court found that the officer: 1) had failed to inform the accused of the reasons for his detention as required by s. 10(a) of the Charter. In this case, the officer testified that he knew that he did not have grounds for an ASD demand when the accused was still in his vehicle and that he wanted to continue his investigation on the basis of his hunch that the accused was impaired. The detention of the accused outside of his own vehicle was arbitrary and violated s. 9 of the Charter; and 2) had not failed to inform the accused about Legal Aid, although he may have inadvertently not provided the toll-free telephone number. Pursuant to a Grant analysis, the court found that the officer's failure to tell the accused why he was being detained was a serious breach under s. 10(a) of the Charter because he did not have a lawful reason to detain him and his continuing detention was a serious infringement of the accused's s. 9 Charter right to liberty. The officer's conduct was found to be wilful or reckless of the accused's Charter rights under ss. 8, 9 and 10(a). The evidence could have been obtained through lawful means. The court concluded that it would bring the administration of justice into disrepute to admit the evidence.

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622705 Saskatchewan Ltd. v. Smuda, 2016 SKPC 35

Monar Enweani, March 21, 2016 April 25, 2016 (corrigendum) (PC16033)

Landlord and Tenant – Farm Lease – Crop Share Agreement Contract – Breach – Damages

The plaintiff, a holding company incorporated by the plaintiff Taras (defendant by counterclaim), was the registered owner of farmland. The defendant Smuda farmed this land pursuant to an oral crop-share agreement made between him and Taras. For more than 20 years the crop was shared: one-third to Taras and two-thirds to Smuda. The latter would pay Taras his share by delivering a cheque to him after the crop had been harvested. In 2013, a number of incidents occurred between Taras and Smuda that led to a breach in their relationship as neighbours. Taras demanded payment of his share within two weeks instead of waiting until the harvest was completed. When it was not received, he denied Smuda and his hired man access to the fields. The plaintiff commenced an action for payment of a one-third share of the 2013 crop. Smuda counterclaimed against the plaintiff and Taras personally for his two-thirds share of the crop that Taras prevented him from harvesting, thereby breaching the oral crop-share agreement. Taras denied that he had breached the agreement and argued that Smuda failed to mitigate his damages as he could have harvested the crop if he had paid him the one-third share. Smuda had also stored oats in bins owned by Taras. Taras assumed that some portion of them belonged to him and used them. Smuda counterclaimed for the value of oats that remained in Taras's possession.

HELD: The action by the plaintiff Taras was allowed and Smuda's counterclaim was allowed. The court found that there was an oral agreement and that it had been between Taras and Smuda. The creation of the holding company occurred after the agreement had been reached and Smuda was unaware of its existence. Therefore, Taras was personally liable for any judgment. The court found that Smuda would have to pay Taras the value of the plaintiff's one-third share of the 2013 crop, which the court valued at $7,900. The value of the oats stored in Taras's bins was $7,100. The court found that Smuda was entitled to recover damages from Taras for breach of contract for preventing him from harvesting the crop and that Smuda had not failed to mitigate his damages. It was not clear on the evidence that even if Smuda had paid Taras his one-third share that he would have allowed Smuda onto the farmland. Smuda's damages for breach of contract were set at $3,600. By way of set-off, Smuda received judgment against Taras in the amount of $3,000.

CORRIGENDUM dated April 25, 2016: LXXVI. The judgment in this

matter was released on March 21, 2016. There are certain typographical and/or calculation errors in the figures listed in paragraphs 72, 73 and 74.
LXXVII. Paragraph 72 reads: "Taras has proven damages against Smuda in the amount of $7,9854.75." That paragraph should read: "Taras has proven damages against Smuda in the amount of $7,984.75."
LXXVIII. Paragraph 73 reads: "Correspondingly, Smuda is entitled to $11,032.25 against Taras." That paragraph should read: "Correspondingly, Smuda is entitled to $10,751.75 against Taras."
LXXIX. Paragraph 74 reads: "Accordingly, by way of set-off, Smuda shall have judgment against Taras in the amount of $3,048.00 plus pre-judgment interest from January 1, 2014 to date of judgment." That paragraph should read: "Accordingly, by way of set-off, Smuda shall have judgment against Taras in the amount of $2,767.00 plus pre-judgment interest from January 1, 2014 to date of judgment."

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Tochor v. Rudensky, 2016 SKQB 52

Megaw, February 17, 2016 (QB16055)

Civil Procedure – Costs
Civil Procedure – Jurisdiction of the Court – Application to Transfer
Civil Procedure – Queen's Bench Rules, Rule 4-23, Rule 4-24 – Security for Costs
Civil Procedure – Security for Costs

The plaintiff sought recovery of money from the defendants. The plaintiff applied to have the matter proceed to mediation, while the defendants applied to transfer the action to Ontario pursuant to the provisions of The Court Jurisdiction and Proceedings Transfer Act or, in the alternative, to have the plaintiff post security for costs if the action remained in Saskatchewan. The plaintiff alleged an oral agreement with the individual defendant whereby the plaintiff would be paid a fee in exchange for directing certain work to the other defendant, the accounting firm the individual defendant worked for. The work was referred but the defendants argued that the engagement was actually with another company not the corporate defendant. The company earned $850,000 and the plaintiff claimed $150,000. The plaintiff and the individual defendant lived in Ontario, but the work done was in Saskatchewan. The discussion between the plaintiff and individual defendant occurred in Ontario. The plaintiff argued that the only witnesses from Ontario would be the plaintiff and individual defendant. The plaintiff also suggested that the defendants were engaged in delay and obfuscation to obtain a procedural or tactical advantage.

HELD: The court held that there was no sufficient basis established to transfer the claim to Ontario. The defendants submitted to the court's jurisdiction pursuant to s. 4(b) of the Act. The factors set out in s. 10 were considered as follows: 1) on balance there was nothing in s. 10(1)(a) that obviously favoured a transfer of proceedings to Ontario; 2) there was nothing regarding the law to be applied to the issues that necessarily weighed in favour of a transfer to Ontario (s. 10(1)(b)); 3) there was only one action, so multiplicity or proceedings did not apply (s. 10(1)(c)); 4) there was no risk of conflicting decisions (s. 10(1)(d)); 5) the court did not have evidence on the corporate structure of the corporate defendant, so there was nothing to conclude that the enforcement of an eventual judgment would be unavailable because it wasn't made in Ontario (s. 10(1)(e)); and 6) the fair and efficient working of the legal system could be accommodated by having the action proceed in Saskatchewan (s. 10(1)(f)). The plaintiff was also ordered to post security for costs because the plaintiff did not appear to have any assets in Saskatchewan to satisfy an order for costs. The court found a reasonable amount to post as security for costs was $15,000. The plaintiff was ordered to pay $7,500 to the Local Registrar within 60 days and the remaining $7,500 within 30 days of the matter being set down for a pre-trial conference. Further action on the matter was stayed until the first $7,500 was deposited and thereafter the matter would be stayed again if the second funds were not deposited as ordered. On the materials before the court it was unable to conclude that the delay was either inordinate or objectionable. The plaintiff was found to be entitled to costs of the application.

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Toth v. Konanz Estate, 2016 SKQB 58

Chicoine, February 22, 2016 (QB16059)

Civil Procedure – Affidavits – Cross Examination
Civil Procedure – Summary Judgment
Real Property – Sale of House – Failure to Disclose Defect – Patent or Latent Defect
Real Property – Sale of House – Misrepresentation
Real Property – Purchase/Sale – Structural Damage – Property Condition Disclosure Statement

The plaintiff applied for summary judgment for recovery of damages relating to the failure of the deceased to disclose certain structural defects in a residential property he purchased from her. The defendants were the executor of the deceased's estate and the power of attorney of the deceased at the time of the sale. The plaintiff claimed for misrepresentation, deceit, breach of contract, and negligence for failure on the part of the deceased to reveal the structural defects that were

hidden behind the east plywood wall in the basement of the property. The defendants argued that the case was not one that should be decided on a summary basis, and if it was, they want the opportunity to cross-examine affiants on their affidavits. A condition of the offer to purchase the property was the receipt of a Property Condition Disclosure Sheet (PCDS). The PCDS indicated that the deceased was not aware of any structural defects in the dwelling/improvements. When the plaintiff removed plywood off the East cinderblock partial basement wall there were "serious cracks, breaks, heave, and other structural defects" in the cinderblock wall. The plaintiff's engineer recommended that bracing be installed to prevent further inward movement of the partial basement walls. The power of attorney indicated that her only involvement was being present when the deceased spoke to the realtor. The deceased's son built the plywood wall and said it was cosmetic only. The plaintiff replaced the whole basement. He claimed $125,983.42, which included financing charges and loss of use of the home for seven months. The plaintiff also alleged that he did not take an opportunity to continue post graduate studies at a prestigious university because he could not sell the house as was. Also, he claimed punitive damages and aggravated damages for the mental distress and psychological harm caused by the ordeal. The issues were: 1) did the deceased make a fraudulent or negligent misrepresentation in the PCDS or commit the tort of deceit; 2) if she did, what was the proper measure of damages.

HELD: The court adopted the Hryniak case from the Supreme Court of Canada, which examined similar summary judgment rules in Ontario. The claim was not extraordinarily complex, the amount in issue was not great, and summary judgment would finally resolve all of the claims against all parties. The court declined to grant leave for cross-examination on affidavits filed noting that the new summary judgment rules do not speak to cross-examination on affidavits prior to proceeding to a hearing. The issues were resolved as follows: 1) the court found that the east partial basement wall was a structural defect that should have been disclosed. The act of constructing the plywood wall in front of the east cinderblock wall turned a patent defect into a latent defect. Failure to disclose or silence is an act of concealment of a material fact that has the same effect as an express misrepresentation. The six requirements for finding negligent misrepresentation set forth in Britt were found to be met. The tort of deceit and breach of contract were not considered; 2) the damages sought were found to be totally disproportionate to the actual damages incurred. The plaintiff's engineer's report described in a detailed manner the way to reinforce the partial basement walls. The plaintiff was only entitled to the cost to properly reinforce the partial basement walls in accordance with the engineers' recommendations. He was also entitled to the cost of the engineer's report, his time and labour to arrange for the work to be completed and for the inconvenience of the work. being completed. An award of damages of $20,000 was found to fully compensate the

plaintiff. He was not entitled to damages for loss of use of the home. The plaintiff's claim for damages for the university opportunity was too remote. The aggravated and punitive damages were denied. The plaintiff was entitled to pre-judgment interest. The power of attorney did not owe a duty of care to the plaintiff because there was no contractual relationship between her and the plaintiff. Costs in the amount of $3,000 were awarded to the plaintiff from the deceased.

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R. v. Tornberg, 2016 SKQB 59

Danyliuk, February 24, 2016 (QB16067)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Care and Control – Conviction – Appeal

The appellant appealed his conviction of being in care or control of a motor vehicle with a blood alcohol content exceeding the legal limit. He appealed on the ground that the trial judge erred in determining the Crown had established that he was in care and control of his vehicle. The charge arose as a result of an RCMP officer finding the appellant asleep in his vehicle, which was parked with the engine running on the shoulder of a highway. It took some time to wake the appellant and the officer observed that the appellant had glossy eyes, his speech was incoherent and the vehicle smelled strongly of alcohol. The appellant testified at trial that he had been drinking at a keg party at the west end of the city and after leaving the party started to feel the effects of alcohol and decided to stop driving. He pulled over to sleep and said that his plan was to call his brother for a ride in the morning when he awoke. The trial judge determined that the statutory presumption of care and control under s. 258 of the Criminal Code had been rebutted by the accused but went on to find that the Crown had established the three elements of care and control. The defence argued that after the trial judge had found that the appellant had no intention of driving, he should have been acquitted. There were no acts of care and control. Further, the trial judge had not properly assessed the testimony of the appellant in accordance with R. v. W. (D).
HELD: The appeal was dismissed. The standard of review on this appeal involved factual findings as established by R. v. Boudreault. The trial judge had not erred in her findings. The appellant relied upon cases that the court found to be out-of-date. An intention to set a vehicle into motion is not an essential element of the offence. On the facts, the judge concluded that there was a reasonable risk of danger that the appellant would change his mind and drive while impaired. The court found that the contents of the transcript indicated that trial judge had considered but not accepted the appellant's account and did not feel a

reasonable doubt was raised by it.

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R. v. Macnab, 2016 SKQB 61

Scherman, February 24, 2016 (QB16060)

Criminal Law – Approved Screening Device – Forthwith
Criminal Law – Blood Level Exceeding .08 – Approved Screening Device – Grounds for Demand – Reasonable Suspicion
Criminal Law – Blood Level Exceeding .08 – Charter of rights, Section 10(b) – Right to Counsel – Prosper Warning
Criminal Law – Defences – Charter of Rights, Section 10(b)

The appellant appealed his conviction for driving over .08 contrary to s. 253(1)(b) of the Criminal Code, on the grounds that the judge erred in: 1) finding the officer had a reasonable suspicion, pursuant to s. 254(2), that he had alcohol in his body when she made the ASD demand; 2) finding the ASD was performed forthwith as required by s. 254(2)(b); 3) finding his rights to counsel pursuant to s. 10(b) of the Charter were not breached; 4) finding that the Charter right was not further breached when the accused informed the officer that he was waiving his rights to counsel and the officer did not then provide a Prosper warning; and 5) holding that if there was a Charter breach the certificate of analysis evidence would have been admitted in any event. An officer received a report of a complaint that the driver of a truck that had passed a semi, stopped and stood on the travel portion of the highway to urinate, and then passed the semi again with an oncoming vehicle in the passing lane. The officer located and stopped the truck. The sole occupant was the appellant. Upon approaching the truck, the officer noticed the smell of alcohol and asked the appellant to accompany her back to the police vehicle. The appellant admitted to drinking only after the officer told him she could smell alcohol. The officer gave the appellant an ASD demand and the test registered a fail. The accused was then read the Intoxilyzer demand and was transported to the detachment. The appellant indicated a lawyer he wanted to talk to, but the lawyer was not available for half an hour. The officer told the appellant he could wait for half an hour, contact another private counsel lawyer, or contact Legal Aid. After looking through the phone book, the appellant said to forget it and just get it over with. The appellant blew .11 and .10.
HELD: The appeal was dismissed. The issues were determined as follows: 1) the appeal court gave deference to the trial judge's finding of credibility. The appeal court further held that the trial judge applied the correct test for suspicion of alcohol as found in Yates and the evidence was reasonably capable of supporting the trial judge's conclusion; 2) the demand was made at 3:27 and the fail was registered at 3:42. The appellant argued that the trial judge's error related to the absence of

evidence to justify the delay. The trial judge reviewed the evidence with respect to the forthwith requirement and according to the appeal court he correctly instructed himself. The appeal court held that it would be inappropriate to reverse the trial judge's findings that the evidence was reasonably capable of supporting the trial judge's view; 3) the officer did not give the appellant's name to the lawyer's assistant nor was the appellant permitted to speak to her because she was not a lawyer. The appeal court concluded that there was no denial of the appellant's right to counsel when he was not allowed to speak to the assistant. Nor was it a breach not to provide the appellant's name and the detachment phone number. The officer did indicate she was calling from the detachment; 4) the trial judge was correct in concluding that it was not a Prosper situation. The warning does not arise unless the individual has been making diligent efforts to obtain counsel. In this case the appellant was not diligent, he clearly had options available to him; and 5) it is common for judges to undertake a Grant analysis even though no Charter breach was found. The appeal court found that the appropriate factors were considered by the trial judge and thus there was no basis to conclude that his decision was in error.

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R. v. MacKinnon, 2016 SKQB 64

Dawson, February 25, 2016 (QB16054)

Criminal Law – Sentencing – Assault
Criminal Law – Sentencing – Failure to Comply with Recognizance
Criminal Law – Sentencing – Remand Time
Criminal Law – Sentencing – Sentencing Principles
Criminal Law – Sentencing – Unlawful Confinement

The accused pled guilty to three Criminal Code charges: 1) assault contrary to s. 266; 2) fail to comply with an undertaking contrary to s. 145(3); and 3) unlawful confinement contrary to s. 279(2). The accused and complainant were in a relationship and the accused became angry at the complainant. He threw her on the couch several times, threw her on the floor, and grabbed her by the hair, all while refusing to let her leave his home. He hit her on the head and she passed out. The accused confined the complainant until the next morning when the complainant got to the bathroom and called 911. The offences had a significant impact on the complainant physically, emotionally and financially. The accused was 42 years old and living with his ex–common law spouse to co-parent their five-year-old son. He was employed throughout his adult life. The accused had battled with alcohol for most of his life, but had not consumed alcohol since January 2015. He indicated that he had been drinking heavily on the night and did not remember anything.

The accused had a previous criminal record of six offences, dating back to 1990. He had one assault and several fail to comply with a recognizance. After the incident he also pled guilty to another assault, which had occurred prior to the incident, and was sentenced to 30 days' time served and one-year probation. The accused expressed remorse and apologized to the complainant. The accused served in remand for 97 days. The Crown argued that the accused was not entitled to 1:1.5 credit for remand because he was detained pursuant to ss. 524(4) and 524(8) of the Criminal Code.

HELD: The offences of unlawful confinement and assault are grave and serious offences. The court concluded that the principle of parity required a period of incarceration for the offences. The aggravating circumstances included: the accused had a relationship with the complainant; the confinement was for several hours and the accused repeatedly stopped the complainant from leaving; the accused had a previous criminal record with a previous assault conviction and several convictions for failing to comply with a recognizance; and the emotional consequences to the complainant were significant. The mitigating circumstances were: the accused entered guilty pleas; he was a functioning and contributing member of society; he had support from a former partner; he co-parented his child; he accepted responsibility for his actions and expressed remorse; it was 17 years since his last conviction; and he abided by strict conditions for eight months. The accused was sentenced to eight months incarceration for the unlawful confinement and three months consecutive time for the assault. A period of probation of two years followed each offence. The sentence for the breach of recognizance was one month consecutive time. The accused was sentenced to 30 days time served for the prior assault and therefore 30 of the 97 days were attributed to that sentence. The court found that because the accused committed the offences of unlawful confinement and assault while on recognizance the court was limited to granting credit for time spent on remand following cancellation of his recognizance on a 1:1 basis. The accused was given remand credit of 67 days. He was thus sentenced to a total of 9 months and 23 days. The terms of probation included: abstaining from drugs and alcohol, and non-attendance at establishments primarily serving or selling alcohol; participating in assessment and programming for addictions, anger management and personal counselling; and no contact with the complainant. Ancillary orders and a victim surcharge were also made.

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Tagseth v. Tagseth, 2016 SKQB 66

Rothery, March 1, 2016 (QB16082)

Family Law – Child Support – Adult Student

Family Law – Child Support – Unilateral Termination of Relationship
Family Law – Child Support – Variation – Termination

The respondent sought an order terminating his obligation to pay child support for a child, arguing she was no longer a child of the marriage. The petitioner argued she continued to be a child of the marriage because she continued to live with the petitioner and was a first year university student. The respondent argued she was no longer a child of the marriage because: she was 19; she was only taking three classes; and she unilaterally terminated her relationship with him.
HELD: The minimum threshold for full-time studies is three classes. The court also found that the child was working toward a reasonable career. It was clear that both parties would have supported the child in her university studies if they were still married. The child was just 19 and was found to be far from a mature person with respect to the choice to terminate her relationship with the respondent. The court found that the respondent's efforts to establish a relationship with his daughter were less than stellar. The child was not held solely accountable for having no relationship with her father. Even if unilateral termination was found, it was but one factor for the court to consider. The child was found to be a child of the marriage and the respondent was found to be responsible to support her. The court found the presumptive rule, payment in accordance with s. 3(2)(a) of the Federal Child Support Guidelines, to be appropriate. The order was made to terminate August 31, 2016, unless the parties agreed on child support payments for the then upcoming university term.

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Rutledge v. Ahenakew, 2016 SKQB 81

Zuk, March 9, 2016 (QB16085)

Landlord and Tenant – Appeal – Residential Tenancies Act – Security Deposit

The landlords appealed the residential tenancy decision requiring them to return the $1,500 deposit to the tenant respondents. The hearing officer found that the landlords failed to remit the security deposit to the Office of the Residential Tenancies (ORT) within ten business days as required by The Residential Tenancies Act, 2006. The grounds of appeal were if the hearing officer: 1) breached s. 34(3) of the Act by failing to take into account extenuating circumstances that caused late payment of the damage deposit and failed to find that it was grossly inequitable to order return of the security deposit to the tenants; and 2) failed to provide the landlords with an opportunity to provide evidence, thereby denying the landlords a fair hearing. The tenancy agreement expired on May 31, 2015, at which time the tenants vacated

the property. The landlords believed damage was caused by the tenants and therefore submitted a claim to the tenants seeking retention of the $1,500 security deposit to be applied against damages of $3,294.50. The tenants disputed the claim and so sent the landlords a letter advising of the hearing date. The landlords were therefore notified of the requirement to pay the $1,500 damage deposit to the ORT by July 2015. The landlords did not remit the payment because incorrect credit card information was inadvertently provided to the ORT on June 30. Correct credit card information was obtained, but after the deadline. The hearing went ahead, but after limited evidence, the hearing officer concluded that the landlords had violated s. 33(5) of the Act by not remitting the $1,500 on time, and so ordered return of the damage deposit to the tenants.

HELD: The issues were discussed as follows: 1) the landlords indicated that they were changing credit cards at the time the incorrect information was inadvertently provided. When the landlords realized the mistake, they contacted the ORT. The hearing officer did not directly address s. 34(3) of the Act in his original decision. When the landlords asked for clarification the hearing officer indicated that the landlords had not established extenuating circumstances. The court was unable to determine what evidence the hearing officer relied on to make his determination. The hearing officer's decision did not contain any reference to evidence of extenuating circumstances. If a landlord fails to remit payment as required, there are two options provided in s. 34(2): a) the director can order the return of the security deposit to the tenant without a hearing; or b) the matter proceeds to a hearing where the hearing officer may order return of the security deposit. The hearing officer is not obliged to return the security deposit where there is evidence of extenuating circumstances. The landlords must also satisfy the hearing officer that the return of the security deposit to the tenants would be grossly inadequate; and 2) the landlord must be given an opportunity to present their case if a hearing is held. The court could not determine if the hearing officer allowed the landlords to present evidence of the extenuating circumstances. The absence of reasons were found to be a breach of the duty of fairness and therefore an error of law. The hearing officer's decision was quashed and the matter was referred back to the ORT for a new hearing.

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Capitol Steel Corp. v. Graham Construction and Engineering, 2016 SKQB 86

Danyliuk, March 11, 2016 (QB16086)

Arbitration – Appeal – Leave to Appeal
Civil Procedure – Appeal – Leave to Appeal

The applicant was contracted by the respondent, the general contractor, to supply steel to a project. The parties disagreed on what the applicant's obligations were under the contract. The parties went to binding arbitration as required by their contract. The applicant then filed an application for leave to appeal parts of the arbitration agreement. The respondent applied to have security money in the amount of $518,230.24 released to it. At the time of the court hearing the applicant argued that its leave application should not be dealt with because the arbitrator still had jurisdiction over an outstanding delay claim. The respondent argued that it was entitled to have the leave application brought by the applicant heard to keep the matters between the parties moving.
HELD: The court held that the matter should not proceed on the merits at that time. The parties had already agreed to split the matters to be addressed in front of the arbitrator so they had already agreed to a somewhat bifurcated arbitration procedure. The court found that to wait to hear this appeal would promote fairness and efficiency so that all matters could be before the court at once. Both applications were adjourned sine die, pending disposition of the delay claim by the arbitrator.

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Drouin v. Jones, 2016 SKQB 88

Megaw, March 11, 2016 (QB16087)

Family Law – Child Support – Variation
Family Law – Costs – Evidence from Child

The respondent applied to vary the child support order between the parties. The parties had a 17-year-old child who resided with the respondent, then the petitioner, and then back with the respondent as of May 2014. The petitioner's 2015 income was $88,563.59, but he indicated his income going forward would be $59,885 due to the difficult economy in Saskatchewan. The only application was to vary child support, yet it included an affidavit from the child voicing her concerns about the petitioner's ability to parent. The respondent also brought the child to court. The petitioner sought an order directing the child's removal from the court.
HELD: There was no evidence available to support the petitioner's suggested future decline in income. The 2015 income was used to calculate the petitioner's child support obligation pursuant to the Federal Child Support Guidelines from January 1, 2015. The petitioner's child support obligation for the period from June 2014 to the end of 2014 was ordered to be based on his 2014 income of $120,363. The arrears were ordered to be paid at the rate or $500 per month. The court

declined to remove the child from the courtroom because she had already been exposed to the ongoing litigation and the court wanted her to hear the comments made about the inappropriateness of having her provide an affidavit and of being present in the courtroom. The respondent was not awarded costs even though she was successful in her application. Also, given the peculiar circumstances of the matter, with the child providing evidence and being present, the court ordered the respondent to pay the petitioner costs of $750 forthwith.

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Gelsinger v. Gelsinger, 2016 SKQB 97

Goebel, March 18, 2016 (QB16090)

Family Law – Child Support – Variation
Family Law – Custody and Access – Variation
Family Law – Default Judgment – Setting Aside – Queen's Bench Rules, Rule 10-13

The parties had two children together and the petitioner had a child, who was 16, from a previous relationship. An interim order was made in the respondent's absence when he did not appear on the return date of the application. The petitioner later noted the respondent for default and divorce and child support orders were made. The petitioner was granted primary care of the children and the respondent was ordered to pay child support pursuant to the Federal Child Support Guidelines based on an income of $80,000. The respondent applied to: set aside the divorce, child support order, and interim order; have leave to file an answer and counter petitioner including relief under The Family Property Act; and have an order for interim shared parenting and child support reflecting the actual income of both parties. The respondent said he had retained a lawyer and was surprised to learn that he did not attend court. The respondent hired another lawyer once he learned of the divorce judgment. The respondent was not in arrears with the ordered child support. The oldest child had since moved in with the respondent.
HELD: The court exercised its jurisdiction and set aside the noting of default and granted the respondent leave nunc pro tunc to file an answer and counter-petition. The divorce was severed to remain intact. The court did not set aside the interim order that had been in place for several months with the respondent's knowledge. The court could not see any basis upon which to vary the interim primary parenting order for the younger two children. The court did vary the interim order to include a specific parenting order so that the respondent could have contact with the youngest children without interference by the petitioner and to give the respondent primary care of the oldest child.

The respondent's income was also amended to $76,442 and the petitioner's was found to be $43,500. The court made an interim child support order reflecting the change.

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Reiter v. Powell, 2016 SKQB 99

Dawson, March 23, 2016 (QB16092)

Wills and Estates – Estate Administration – Accounting
Wills and Estates – Estate Administration – Executor – Removal
Wills and Estates – Executors – Conflicts of Interest

The applicant applied for an order that the respondents renounce their right to probate the last will and testament of the deceased, or in the alternative, for an order that the respondents be terminated as executors of the estate. The applicant also sought an order that the respondents be required to provide an accounting for the estate. The applicant was the son of the deceased and the respondents were her daughters. There were also seven other children. The deceased appointed the respondents as executors of her will in 2008. The deceased appointed a son as her alternate executor. The sole beneficiary of the estate was the deceased spouse, the parties' father. The deceased died in early 2015 and her husband died in October 2015. The respondents were also named as executors for their father's estate. The applicant also brought a separate application to remove the respondents as executor of the father's estate. The respondents were powers of attorney for their father before his death and there was some dispute about their conduct in that regard. They were ordered to provide an accounting and eventually withdrew from being his attorney. The accounting they provided was incomplete. The respondents indicated that they sent all of the account information for their father and mother to the Public Trustee's office, who they thought was going to do the accounting. In January 2016 the Public Trustee wrote to the applicant indicating, among other things, that: there were a number of large e-transfers from the father's account to an unknown account; there were numerous potentially inappropriate charges on the deceased's credit cards, made both before and after her death; and the credit cards were paid from the father's account. The respondents indicated that they were being assisted with the deceased's estate by Mennonite Trust and that letters probate were not necessary because the title to the house was in the joint names of the deceased and the father. In January 2016, the court ordered the respondents to provide a list of assets of the estate along with an indication of the administration of the assets to date. In response the respondents filed an affidavit listing the amounts in bank accounts and indicating that it would take

an accountant four to six months to prepare the accounting. Another affidavit was filed in March 2016 by one of the respondents showing that $4,000 was withdrawn from the father's account to pay a law firm for the accounting of the actions taken as power of attorney granted by the father. All of the beneficiaries, other than the respondents, consented to the application.
HELD: There are five criteria to be considered in determining whether an executor should be removed: 1) the terms of the will as it relates to the obligations of the executrixes; 2) the terms of the will as it relates to the beneficial interest of the parties; 3) the nature of the assets to be administered; 4) the activities of the executrixes in carrying out their obligations under the will; and 5) any conflicts of interest that arise under the administration of the estate assets. The sole beneficiary of the estate was the father and the respondents were in a position of conflict with his estate given their failure to comply with the order for accounting while acting as his power of attorney. All of the beneficiaries of the father's estate, except the respondents, consented to the application. The respondents did not undertake any administration of the deceased's estate in a year except to set up an estate account. The court held that the facts demonstrated the respondents' lack of proper capacity to execute their duties or lack of reasonable fidelity in accordance with the established test. It was in the best interests of the deceased estate to have the respondents removed as executors and replace by the named alternate executor. The respondents were also ordered to provide an accounting of the administration of the estate since death within 90 days.

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Reiter v. Powell, 2016 SKQB 100

Dawson, March 23, 2016 (QB16093)

Wills and Estates – Estate Administration – Accounting
Wills and Estates – Estate Administration – Executor – Removal

The applicant sought an order that the respondents renounce their right to probate the last will and testament of the deceased, or in the alternative, an order that the respondents be terminated as executors of the estate. The respondents were daughters of and powers of attorney of the deceased. The applicant was one of the respondents' siblings. The parties' mother executed a will appointing the respondents as executors of her estate. The alternate executor was a son. The sole beneficiary of the mother's estate was the father, the deceased. The mother died in January 2015 and the deceased died in October 2015. In 2015 there was a dispute regarding the respondents' conduct as the deceased's power of attorney. In June the respondents were ordered to provide an

accounting of their conduct within 60 days. The respondents withdrew as the deceased's power of attorney in September 2015. An incomplete accounting was provided because it did not provide explanations for the uses of funds. The deceased named the respondents as his executors, naming a son as the alternate executor. The beneficiaries of the estate were the deceased's children; there were ten children. The public trustee wrote to the parties and indicated his concern over documents provided by the respondents. For example, there were a number of large value e-transfers of funds from the deceased's bank accounts and numerous potentially inappropriate charges on a credit card paid by the deceased's funds. The Public Trustee recommended an independent accounting firm be retained to conduct a forensic review of the accounts owned by the deceased for the period the respondents acted as his attorney. The respondents provided affidavits indicating that Mennonite Trust was assisting them with the administration of the estate and that probate was not necessary because the house was owned jointly between the mother and the deceased. They estimated it would take four to six months to have a full accounting prepared and did not offer any explanation with respect to the issues raised. A supplementary affidavit was filed by the respondents explaining that $4,000 was withdrawn from the deceased's account while he was living to pay a law firm regarding the accounting that had been ordered. The order did not include a term that the estate pay for the accounting. HELD: There are five criteria to be considered in determining whether an executor should be removed: 1) the terms of the will as it relates to the obligations of the executrixes; 2) the terms of the will as it relates to the beneficial interest of the parties; 3) the nature of the assets to be administered; 4) the activities of the executrixes in carrying out their obligations under the will; and 5) any conflicts of interest that arise under the administration of the estate assets. The court listed numerous concerns with the respondents' actions that were identified in the evidence. Further, all of the beneficiaries of the deceased's estate, aside from the respondents, consent to the application. The court concluded that the respondents lacked the proper capacity to execute their duties and/or want of reasonable fidelity in accordance with the established test. The respondents were removed as executors of the deceased's estate.

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Bachman v. Sheidt, 2016 SKQB 102

Mills, March 28, 2016 (QB16107)

Wills and Estates – Proof of Will in Solemn Form
Wills and Estates – Testamentary Capacity – Undue Influence

The applicant applied to the court to have her deceased father's will proved in solemn form. She alleged that at the time of the signing of his will in 2009 that the testator did not have the necessary capacity to do so and that the contents of the will came about as a result of undue influence exerted on him by his son, who was named executor in the will. In a will written in 2007, the testator had given the applicant two quarters of farmland. In the 2009 will, the testator provided that the bequest was subject to her brother's right of first refusal to it. The applicant provided evidence by way of her affidavit and that of her stepmother of the deterioration in the testator's memory and provided the opinion that the deceased lacked testamentary capacity. The applicant also produced the deceased's medical records, specifically the results of annual examinations conducted by a specialist to whom the deceased had been referred because of memory impairment. In 2009, the specialist assessed the deceased as having mild to moderate dementia but was functioning independently. The lawyer who prepared the will also provided an affidavit and the notes that he had taken during the course of his consultations with the deceased. He knew the deceased very well and had assisted him in drafting his previous wills. Because of the nature of his practice, the lawyer was aware of the issues related to elderly clients and their capacity with respect to their wills. In his opinion the deceased was capable of understanding what property he held and how he wanted it to be distributed. The testator was aware that his daughter might be upset when he changed his will. Because he was estranged from her, the testator asked that his son ask her if she wanted to keep the land. When told that she did so, the deceased indicated that he wanted to change his will so that his son was given a right of first refusal because he was actively farming and his daughter was not.
HELD: The application was dismissed. The court could not find a genuine issue to be tried on the issue of testamentary capacity or undue influence. With respect to the issue of capacity, the court noted that a diagnosis of mild to moderate Alzheimer's did not raise a genuine issue to be tried. The court concluded that the medical records did not raise a genuine issue and the lawyer's evidence supported that conclusion. The applicant did not have any contact with the testator at the time he executed his will and could not provide evidence of conversations with him. The allegation of undue influence was not supported by any evidence and it was not a genuine issue to be tried if the only issue raised was that a child received a benefit from a parent under a will.

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P.J.D. Holdings (1989) Ltd. v. Kasa Construction Ltd., 2016 SKQB 103

Chicoine, March 28, 2016 (QB16108)

Statutes – Interpretation – Builders' Lien Act, Section 56(4)

The applicant sought an order declaring that the claim of lien of the respondent was void and further for an order pursuant to s. 56(4) of The Builders' Lien Act (BLA) for the return of the sum of $13,000 paid into court by the applicant a year earlier to vacate the lien from the affected land. The respondent then applied for an order directing that the monies in court be paid to it as the party entitled to receive same, also pursuant to s. 56(4) of the BLA. The applicant had failed to pay an invoice for materials and labour totaling $10,400 rendered in October 2013 by the respondent for work done at the applicant's request. The respondent's director learned in December that the applicant would not pay, and in January 2014 he filed a lien against the property. In January 2015 the applicant filed an application without notice to the respondent for an order under s. 56(1) of the BLA vacating the respondent's lien upon payment into court of the amount of the lien plus 25 percent security for costs. The applicant's director filed an affidavit that the respondent's work was deficient and caused damages exceeding the amount of the lien. The court vacated the lien in March 2015 when the funds were paid into court. A copy of the order was sent by registered mail to the registered officer of the respondent, but the director of the respondent claimed that he never received it. He learned that the lien had been vacated only when notice of this application was served. The issue was whether the respondent's claim against the applicant was barred by the two-year limitation period set out in s. 5 of The Limitations Act or whether any specific provisions of the BLA would allow the court to make a determination regarding the entitlement to monies between the parties in spite of the fact that an action was not commenced by statement of claim within two years of the date when the lien claim arose. The applicant relied upon the Queen's Bench decisions in Syed and West Dee Construction. The respondent argued that the Court of Appeal's decision in Axcess Capital Partners was authority for the proposition that s. 56(4) of the BLA creates a substantive right for a lien claimant to request payment of lien money paid into court on application, without trial and without the necessity of issuing a statement of claim.

HELD: The application was granted. The court found that the respondent's claim was statute-barred by s. 5 of The Limitations Act. The court could not distinguish this case on its facts from those in the cases of Syed and West Dee. The Court of Appeal's decision in Axcess was not intended to apply to the issue in this case and did not overrule findings made in Syed or West Dee concerning the application of the two-year limitation period set out in s. 5 of The Limitations Act. An application under s. 56(4) does not revive the right to commence a proceeding in respect of a claim that is already statute-barred.

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Canadian Association of Elizabeth Fry Societies v. Chief Coroner (Office of), 2016 SKQB 109

Meschishnick, March 30, 2016 (QB16109)

Statutes – Interpretation – Coroner's Act, 1999, Section 37

An inquest coroner was appointed to conduct an inquest into the death of an inmate, Kinew James, at the Regional Psychiatric Centre in Saskatoon. The Canadian Association of Elizabeth Fry Societies and the Elizabeth Fry Society of Saskatoon (the applicants) applied for standing at the inquest pursuant to s. 37 of The Coroner's Act, 1999, but the coroner denied it. The applicants then applied to the court for judicial review of the coroner's decision and sought that it be quashed and that they be granted standing. The coroner stated in his decision that the applicants did not have a substantial interest in the outcome of the inquest and to have a substantial interest in the outcome it must be possible for the applicants to be subject to recommendations from the jury. He could not envisage any circumstances where the jury in this instance would have recommendations directed to the applicants. HELD: The application was granted. The court quashed the decision and referred that application for standing back to the coroner. The court found that the standard of review of the coroner's decision was that of reasonableness because the decision was made by an administrative body involving an interpretation of its own statute and the application of facts to the interpretation. The court interpreted s. 3 and s.54 of the Act that pertained to the purpose of the Act and the findings of a jury and concluded that the purpose of an inquest is much broader than the production of recommendations from the jury. The phrase "substantial interest in the inquest" therefore has a much broader meaning than that suggested by the coroner. The court held that his decision regarding the interpretation of s. 37 of the Act and the application of the facts to that interpretation was not a possible and acceptable outcome.

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