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Jackson, March 4, 2016 (CA16028)

Criminal Law – Judicial Interim Release Pending Appeal
Criminal Law – Sexual Assault – Child Victim

The accused appealed his sexual assault conviction and sought an order to be released from custody pending his appeal, pursuant to s. 679 of the Criminal Code. The accused was sentenced to six years incarceration. The ground for appeal was that the trial judge misapprehended the evidence by relying on a theory of conviction not supported by the evidence. Specifically, he argued that the trial judge erred in accepting the Crown's submissions that it did not matter what form the sexual assaults were. The accused also applied to adduce fresh evidence and suggested that he did not have a fair trial. The Crown conceded that the ground of appeal was not frivolous, but suggested that it was weak. Further, the Crown submitted that the accused's lengthy record of over 60 convictions, including eight fail to appear charges, warranted concern as to whether the accused would surrender himself to custody. The Crown also argued that it was not in the public interest to release the accused.
HELD: The court determined that the application for release must be considered in light of the sole ground of appeal and not with respect to the application to adduce fresh evidence or other arguments made. The court concluded that the accused did not discharge the onus required to permit his release. Specifically, the court was concerned with whether the accused would surrender himself into custody and was not satisfied that it was in the public interest that he be released. The court noted

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that the accused had supports in the community and that the offence was historical, but nonetheless determined that his release would not be granted after considering the following: the nature and circumstances of the offence; the strength of the ground of appeal; the accused's circumstances; the impact of his release on the confidence of the public in the administration of justice; and the delay in proceeding with the appeal.

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Ottenbreit Caldwell Ryan-Froslie, March 7, 2016 (CA16029)

Criminal Law – Appeal – Acquittal
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Criminal Law – Defences – Self-defence
Statutes – Criminal Code, Section 25(1), Section 34(1)

The respondent police officer push-kicked the complainant in the abdomen in the process of arresting him. The Provincial Court convicted him of assault causing bodily harm contrary to s. 267(b) of the Criminal Code. On appeal, the Queen's Bench Court set aside the conviction and entered an acquittal (appeal court decision). The Crown then applied for leave to appeal the appeal decision. The complainant was a chronic alcoholic in poor physical condition, blind in one eye and homeless. He weighed between 120 and 140 pounds and was cognitively impaired. The respondent was over six feet tall, weighed 215 pounds and was in good physical condition. The respondent had dealings with the complainant over 100 times, including many arrests. On the day of the charges the respondent followed the complainant to the Brief Detox Unit (BDU) having advised him he should go there. When complainant did not enter the BDU, he was arrested. The complainant asked the respondent twice if he wanted to fight. The video from the BDU security camera showed the complainant approach the respondent with his hands at his sides when the respondent took one step forward and push-kicked the complainant in the abdominal area. The complainant fell backwards, causing him to hit his head on a cement wall. The respondent only admitted that he kicked the complainant when the video surfaced. The respondent's expert witness at trial indicated that the kick was a well-executed front kick intended to repel aggression and that the use of force in this case was proportional to the assaultive behaviour he faced. The issue at trial was whether the respondent used more force than was necessary to either defend himself pursuant to s. 34(1) or effect the arrest under s. 25(1) of the Criminal Code. The trial judge held that, on an objective basis, the respondent's use of force was excessive. The trial judge disregarded the

1996, Section 2

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expert's opinion that the respondent's use of force was proportionate and noted that there was a difference between force being consistent with police training and being lawful. The appeal court found that the trial judge erred by failing to analyze the timing of the events depicted in the video, and he therefore reviewed the video in detail and drew his own conclusions from it. The Crown raised the following issues on appeal to the Court of Appeal: 1) did the appeal court judge misinterpret ss. 25(1) and 34(1) of the Criminal Code; 2) did the appeal court judge misapprehend the evidence and the trial judge's reasons for judgment; and 3) did the appeal court judge err by applying the wrong standard of appellate review.

HELD: The majority of the court granted leave to appeal and restored the conviction entered by the trial judge. The parties and court agreed that the provisions of s. 34(1) as they read prior to May 2012 were applicable. The issues were determined as follows: 1) the appeal court judge erred by misunderstanding the applicable test and inappropriately focusing on the respondent's belief. The appeal court judge reviewed cases that led him to focus on the doctrine of mistake of fact, which was not argued by the respondent at trial and were not part of his grounds of appeal; 2) the trial judge accepted some but not all of the expert's evidence, as he was entitled to do. The trial judge also reinterpreted the video evidence, which was found to be an error by the Court of Appeal. The trial judge considered the factors without weighing the use of force to a nicety. He was determining the objective reasonableness of the force based on the factors; and 3) the appeal court judge properly instructed himself on the standard of review but failed to analyze the decision of the trial judge based on that standard, namely, whether the evidence was reasonably capable of supporting the trial judge's conclusion based on the evidence as a whole. The dissenting judge would have granted leave to appeal but then would have dismissed the appeal. The dissenting judge of the Court of Appeal found that the appeal court judge erred in his approach but reached the right conclusion that the trial judge erred. The trial judge ignored the fact that the encounter was only three seconds long and he mischaracterized the thrust-kick as extreme force. The respondent had to react quickly. The trial judge also erred in questioning whether the respondent honestly believed he was in danger of harm.

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R. v. Miller, 2016 SKCA 32

Lane Caldwell Ryan-Froslie, March 10, 2016 (CA16032)

Criminal Law – Appeal – Sentence
Criminal Law – Sentencing Appeal – Global Term
Criminal Law – Sentencing – Circumstances of the Offender – Medical

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Condition
Criminal Law – Sentencing – Luring a Child
Criminal Law – Sentencing – Sexual Assault – Person Under 14

The Crown sought leave to appeal the respondent's sentence for one count of sexual assault contrary to s. 271 of the Criminal Code and one count of luring a child contrary to s. 172.1(1)(a) of the Criminal Code. The respondent received a sentence of 14 months incarceration for the sexual assault and nine months concurrent for the luring charge. The complainant was 13 years old at the time of the offences and the respondent was 19 to 20 years old. The respondent was born with spina bifida. The respondent and complainant began communicating through a social discovery website and that led to texting. The complainant was more than a passive participant in the conversations alluding to the prospect of sexual activity. After the complainant's grandfather passed away (the complainant lived with her grandparents and called her grandfather "dad"), the respondent asked her if she would like to call him "daddy". On the night of the sexual assault the complainant snuck out of her house and met the respondent.
HELD: The global sentence imposed was not fit and the appeal was allowed. The SOIRA order was made in error at sentence and it was amended to be for the life of the respondent. The global sentence was increased to three years, which was at the low end due to the unique circumstances. The sentencing judge erred in his application of the principle of parity by failing to note the significant differences between the case and that of Whiting, which he relied on. In this case, the complainant did not remove her own clothes, was sexually assaulted despite saying "no" before the act commenced, and the assault was preceded by more than one day of communication. The sentencing judge also failed to consider the luring offence as a discrete and separate offence. Luring is a very serious offence and if the sentencing judge was imposing sentences on a concurrent basis he should have considered it as elevating the overall gravity of the offences and the respondent's moral culpability in their commission.

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R. v. Roode, 2016 SKCA 34

Ottenbreit Herauf Ryan-Froslie, March 9, 2016 (CA16034)

Criminal Law – Criminal Harassment – Acquittal – Conviction

The Crown appealed the respondent's acquittal after trial in Provincial Court with respect to a charge of criminal harassment contrary to s. 264(3) of the Criminal Code. It argued that the trial judge had erred in law by concluding it was an element of that offence that the complainant have contemporaneous knowledge of the harassing

conduct and requested that the acquittal be set aside and a conviction entered or a new trial ordered. Defence counsel acknowledged that the trial judge had erred but argued that the acquittal should not be set aside because, based on the evidence, the elements of the offence were not proven beyond a reasonable doubt.
HELD: The appeal was allowed and a new trial ordered. The court found that the trial judge's legal error led to a failure on his part to consider all elements of the offence and that he had also failed to make clear findings of fact with respect to the elements.

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Lawson v. Rees, 2016 SKCA 37

Ryan-Froslie, March 16, 2016 (CA16037)

Civil Procedure – Court of Appeal Rules, Rule 15

The appellant appealed the decision of a Queen's Bench judge in chambers that granted an interim order. The parties had been married for three years and they had entered into a written agreement in which the respondent gave up her rights to spousal support. The interim order provided for the payment by the appellant of $10,000 per month in spousal support, child support, a shared parenting regime for the only child of the marriage and exclusive possession of the family home. The decision was rendered six months after the hearing and as spousal support was ordered retroactively for four months, the appellant was consequently in arrears. In addition, the monthly amount of spousal support found owing by the chambers judge was affected by his finding that the appellant had stopped paying household expenses during the period in arrears. The appellant appealed only with respect to the amount of spousal support and arrears. Pursuant to Court of Appeal rule 15, the appellant then applied for an order staying execution of the spousal support arrears. He argued that there was no evidence to support the chambers judge's finding that he stopped paying the bills for the family home and that he should be credited for those payments.
HELD: The application was allowed and the stay of the enforcement of retroactive spousal support was granted. There was an arguable issue with respect to the chambers judge's conclusions that the appellant had stopped paying the household expenses, the effect of the written agreement on the granting of interim spousal support, and the quantum of the support. If the order was enforced, the appellant would be prejudiced. The respondent's means were limited and there was a real prospect that she would be unable to repay any overpayment of spousal support.

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Campbell v. Campbell, 2016 SKCA 39

Ottenbreit Herauf Whitmore, March 22, 2016 (CA16039)

Family Law – Custody and Access – Appeal
Family Law – Custody and Access – Variation – Material Change
Family Law – Custody and Access – Variation – Additional Review Clause

The appellant appealed the dismissal of his application to vary parenting arrangements set forth in a consent divorce judgment from 2012. The appellant and respondent have twins, aged 12 at the time of appeal. Pursuant to the consent judgment, the primary residence of the children was with the respondent, and the appellant had specified parenting time. The order incorporated a term allowing a review of the arrangements in the event of a material change or if the parenting arrangement was no longer meeting the needs of the children. The chambers judge indicated that he thought the review clause did not create an additional basis to review, beyond that provided in the Divorce Act, but then he went on to proceed as if the review clause created a second and permissible test to vary the parenting arrangement. The chambers judge concluded that the conflicting evidence did not satisfy him that the current parenting arrangement was no longer meeting the children's needs. The issues on appeal were whether the chambers judge erred: 1) by determining that the review clause did not contain a second and permissible test for review and variation of the parenting arrangement absent a material change in circumstances; 2) in his application of the review clause to the evidence before him; 3) by deciding the matter in chambers rather than directing the matter to a pre-trial conference; 4) by accepting a brief of law on behalf of the respondent but refusing leave to counsel for the appellant to file materials in response; and 5) by awarding costs in favour of the respondent.
HELD: The appeal was allowed. The appeal court dealt with the issues as follows: 1) the appeal court determined that as soon as the review clause was incorporated into the judgment it became part of a court order, and principles regarding interpretation of court orders applied. The court concluded that the structure and language of the review clause suggested that it allowed for a second avenue of review beyond that of a material change. The court materials leading to the consent order showed that the parties never did agree on the interpretation of the review clause. After reviewing cases, the court concluded that court orders can contain variation provisions that do not require a material change in the circumstances. The review in this case required something less stringent than a material change; and 2) the chambers judge did not undertake a sufficient analysis of what was in the best

interests of the twins. The appeal court found that the chambers judge erred by interpreting the "needs" of the children to be only the bare minimum needs. The chambers judge should have determined whether the parenting arrangement was no longer meeting the children's needs in the context of their best interests. The court allowed the appeal and ordered the matter to proceed to pre-trial. The remaining issues were not dealt with.

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R. v. Woroschuk, 2016 SKPC 27

Kovatch, March 1, 2016 (PC16024)

Criminal Law – Blood Alcohol Level Exceeding .08 – Approved Screening Device – Reasonable Suspicion
Criminal Law – Blood Alcohol Level Exceeding .08 – Breath Sample – Observation Period
Criminal Law – Breathalyzer – Presumption – Evidence to the Contrary
Criminal Law – Non-suit

The accused was charged with driving while impaired and driving over .08. She was stopped driving away from a bar in the early hours and she indicated she had one drink when taken to the patrol car for an ASD test. The ASD demand was read and a fail resulted from the test. The accused was arrested, given her Charter rights and the formal breath demand. The officer that approached the accused's vehicle indicated that he had a reasonable suspicion that the accused had alcohol in her body because he did not believe that she only had one drink and she was leaving a bar. There were no other obvious signs of impairment. The other officer, the one that brought the ASD, said that the accused told him that she had had two drinks with the last drink about an hour prior to the stop. That officer indicated that he detected a moderate smell of alcohol but did not observe any overt signs of impairment. On cross-examination the officer admitted that there was a 10 mg percent margin of error with the machine used for the breath samples. The accused blew 100 and 90. The accused moved for non-suit arguing that her blood alcohol content could have been as low as 80 mg and, if so, no offence had been committed. The accused also made three arguments for acquittal: 1) there were not proper grounds for the ASD demand because the officers did not have a reasonable suspicion that the accused had alcohol in her body. The seizure of breath was therefore unlawful and a breach of the accused's Charter rights; 2) there was not a proper observation period prior to the breath samples and therefore there was evidence to the contrary; and 3) there must be a reasonable doubt as to the accused's guilt because her blood alcohol level could have been as low as 80 mg.
HELD: The non-suit was dismissed. The court found that there was

evidence to convict the accused. The issues were determined as follows: 1) the court found that the officer had a reasonable suspicion resulting in a proper ASD demand. Further, the court indicated that even if there was not a reasonable suspicion the court would not have excluded the evidence after a Grant analysis; 2) the officers testified that there was a proper observation period and there was no evidence to the contrary. In the absence of evidence to the contrary the Crown could rely on the presumption in s. 258(1)(c); and 3) section 258(1)(c)(iv) required the court to regard the lowest breath sample reading as being the accurate assessment of the accused's blood alcohol level. Therefore, the accused's blood alcohol reading could be as low as 80 mg; however, evidence from the officer's cross-examination could not be considered as evidence to the contrary rebutting the presumption of breath concentration at the time of driving. The court concluded that without evidence to the contrary there was not a reasonable doubt and the accused was found guilty.

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R. v. M. (J.), 2016 SKPC 34

Hinds, March 4, 2016 (PC16027)

Criminal Law – Sentencing – Youth Criminal Justice Act – Custodial Sentence
Youth Criminal Justice Act – Sentencing – Possession of Stolen Property

The youth pled guilty to three charges contrary to s. 355 of the Criminal Code charges: 1) possessing a firearm of a value less than $5,000 knowing that it was obtained by the commission of an offence punishable by indictment); 2) possessing a truck of a value exceeding $5,000 knowing it was obtained by the commission of an offence punishable by indictment; and 3) possessing American currency of a value not exceeding $5,000 knowing it was obtained by the commission of an offence punishable by indictment. He also admitted that he breached three conditions of his current community supervision order. The youth was an Aboriginal person who was a voluntary long-term committal to the Ministry of Social Services from when he was a baby until his recent eighteenth birthday. His involvement with the justice system began when he was 15 and he had been sentenced on seven previous occasions, having 26 prior convictions. He had been incarcerated on four prior occasions. Seventeen of the convictions were for non-compliance with court orders. The youth had last completed grade eight. He did not have family support. The youth began using alcohol at the age of 12 and drugs at the age of 11. A drug and alcohol assessment indicated a high probability of substance dependency disorder. The youth struggled with homelessness and transiency. His

parents both attended residential schools and the youth indicated that he believed their parenting skills were affected and therefore his life was greatly impacted. A psychological report concluded that the youth had an IQ in the extremely low range. He had an intellectual disability known as an Intellectual Developmental Disorder. A medical assessment concluded that the youth had brain impairment due to FASD and that he was at a high risk of seeking out alcohol and drugs to self-medicate for anxiety.
HELD: The appropriate sentence for the Criminal Code offences was found to be 30 days secured custody and 15 days community supervision followed by six months probation. The court did not take any further action for the breaches of the community supervision order. The youth's involvement in criminal activity was heavily impacted by his diagnosis and his inherent vulnerability. The seriousness of the offences was found to be moderate. The court concluded that the youth did not intentionally or reasonably foresee harm to the owners of the property because of his brain impairment or damage. There were no other aggravating circumstances and the court noted guilty pleas at an early stage to be mitigating. Because the youth had failed to comply with non-custodial sentences, the court could impose a custodial sanction. The court found that a custodial sentence was required to properly reflect the purposes of sentencing and hold the youth accountable for the offences committed. A deferred custody order was not appropriate because the youth did not have a stable long-term residence to go to. Further, given his 17 convictions for breaching court orders, it was unlikely that he would be able to comply with the several conditions that usually accompany deferred custody and supervision orders. The youth's three convictions for escape lawful custody made an open custody sentence inappropriate. The conditions of the probation order included: an approved residence, a curfew, assessment and program participation, no possession of firearms, etc., attending school, day programming, and employment as advised by the youth worker.

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R. v. Roode, 2016 SKPC 36

Schiefner, March 8, 2016 (PC16028)

Criminal Law – Evidence – Admissibility – Similar Fact

The Crown applied for an order to call similar fact evidence at the accused's trial. The accused was charged with knowingly uttering a threat and with breaching terms of a probation order by attending within 100 metres of the complainant's address. The Crown sought to admit a handwritten message, the first message, left on the window of a

house the complainant resided in. The second message was left on the complainant's car and was the means by which the Crown alleged the accused threatened the complainant. The Crown argued that the first message was similar fact evidence for the purpose of establishing the accused's involvement with the second message. A voir dire was held to determine whether the first message would be allowed. The Crown also tendered 22 photographs of a person the complainant believed to be the accused walking up and down the driveway next to the complainant's residence. The accused was arrested shortly after the police attended at the complainant's car, and paper and a pen were located on his person. The Crown sought to tender the pen and paper, which the police witness indicated was similar to the paper used for the second message. The accused also tendered photographs of footprints by the complainant's car that the police witness indicated were similar to the accused's footwear. The accused objected to the admission of all the photographs, the pen and the paper, arguing that they were not relevant. The Crown argued that the messages were sufficiently similar because they both contained threatening words, both had similarities in unusual spelling, phrasing and writing used, and involved or were directed to the complainant. Also, the Crown said the accused was found near the complainant's residence on both occasions and he had a pen and paper on the second occasion.

HELD: The purpose of the similar fact evidence was to establish identity so the court adopted the two-stage test from Arp. The court first examined whether or not it was likely that the same person left both messages. The court looked at the degree of similarity of the two messages and not at evidence that was independent of the similarities between the two messages. The second stage determines whether or not there was some linkage between the accused and the similar act. The court determined that the pen, paper and photographs of the footprints were not relevant to the first or second stage and were therefore inadmissible for the voir dire. The photographs of the person on the complainant's driveway were admissible with respect to the second stage of the inquiry and were accepted as full exhibits on the voir dire. The court confined their use to the question of whether or not there was a nexus between the accused and the similar fact. The court concluded that there were no striking similarities in the two messages when examined objectively. There was no hallmark or trademark linking the two messages to one person. The court held that the cumulative effect of the similarities were insufficient to satisfy the court that one person was likely responsible for both messages. The Crown's application to admit the first message at the trial of the accused under similar fact evidence was denied. The court did not determine the second stage of the Arp test.

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R. v. McWilliams, 2016 SKPC 39

Hinds, March 11, 2016 (PC16029)

Criminal Law – Approved Screening Device – Refusal to Provide Sample – Forthwith
Criminal Law – Defences – Charter of Rights, Section 9, Section 10(a), Section 10(b), Section 24(2)

The accused was charged with failing or refusing to comply with an ASD demand made to her by a peace officer pursuant to s. 254(2) of the Criminal Code, contrary to s. 254(5) of the Criminal Code. The accused argued that the ASD demand was not made forthwith and therefore she did not have to comply. She also argued that because the demand was not lawful her detention was contrary to s. 9 of the Charter and her rights under s. 10 of the Charter were breached. A witness testified that an SUV was swerving behind her and hit two parked cars. Two officers attended and one officer asked the accused to get out of her vehicle. The officer took the accused's licence out of her purse when she passed over it a few times while looking for it. The accused indicated that her last drink was five and then seven hours prior. The officer noticed the accused had slurred words and was unsteady on her feet. The officer noticed the odour of alcohol coming from the accused when she was placed in the back of the police vehicle. An ASD demand was given to the accused 30 minutes after the accident. The accused said she wanted to talk to her friend but was denied. She was also told she could not call a lawyer and a refusal charge was explained to her. The accused was charged with refusal after she refused to attempt to provide a sample. The accused was taken to the detachment and taken to a phone room to speak to a lawyer. The issues were: 1) did the police delay in making the ASD demand; 2) if there was police delay did it result in a violation of the accused's ss. 9 and 10(b) Charter rights; and 3) if the accused's ss. 9 and 10(b) Charter rights were violated, should the refusal evidence be excluded pursuant to s. 24(2).
HELD: The issues were analyzed as follows: 1) the Crown argued that when the officers arrived it was not readily apparent what happened and the accused was initially detained for the purposes of accident investigation pursuant to s. 253 of The Traffic Safety Act. An officer indicated that it was only after he had the accused in the back seat that the focus shifted to an impaired driver investigation. The court held that the officer formed a reasonable suspicion that the accused had alcohol in her body 18 minutes before the ASD demand was made. During the 18 minutes, the accused was not informed of the reason for her detention, which was a breach of s. 10(a) of the Charter; 2) the ASD demand was not made forthwith. The ASD demand was not lawful so the accused did not have an obligation to comply with the demand. The detention was arbitrary and violated s. 9 of the Charter. Because the demand was unlawful the accused's s. 10(b) Charter rights were not suspended during the period of detention. Her s. 10(b) rights were

breached; and 3) the court found the police conduct deficient in various ways leading to the conclusion that the officer showed a reckless disregard for the accused's Charter rights. The first Grant factor favoured the exclusion of the evidence. The impact of the breach on the interests of the accused was moderate to serious. The court found that society's interest in the adjudication of the case on its merits was high. The court concluded that balancing the factors, the police misconduct and the impact on the accused's Charter rights was serious enough to outweigh society's interest in the case's adjudication on its merits. The refusal evidence was excluded.

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R. v. Bouchard, 2016 SKPC 40

Snell, March 10, 2016 (PC16030)

Criminal Law – Breathalyzer – Certificate of Qualified Technician – Affidavit of Service – Application to Cross-examine

The accused applied pursuant to ss. 4(7) and 258(7) of the Criminal Code for an order requiring the attendance, for the purpose of cross-examination, of the person who prepared an affidavit that stated the accused had been served with a copy of the "Certificate of a Qualified Technician". The accused argued that because there was nothing in the serving person's notes or typed supplementary occurrence reports, there was no way to know if service in fact occurred.
HELD: The court held that something more than just wanting to raise the issue was required. Subsection 4(6) requires the accused to accept that proper service took place, unless they can point out something to the court that might suggest otherwise. The application was denied.

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R. v. Lambert, 2016 SKPC 41

Martinez, March 10, 2016 (PC16036)

Criminal Law – Motor Vehicle Offences – Impaired Driving
Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 9

The accused was charged with: 1) impaired driving; and 2) driving while her blood alcohol content exceeded the legal limit. The defence brought a Charter application, alleging that the accused's s. 9 Charter

right had been breached and as a consequence, the Certificate of a Qualified Technician should be excluded from evidence pursuant to s. 24(2) of the Charter. A blended voir dire and trial was held. The accused had been seen drinking in a bar by an RCMP officer when he walked through it earlier in the evening. At that time, he had noted that the accused, who was seated at a table in the bar, appeared to be intoxicated because her eyes were glossy and droopy. When the accused was seen driving in the parking lot of the bar about five hours later by the same officer, he stopped her immediately, believing that her ability to drive might be impaired. The stop occurred before the officer observed any driving behaviour. The officer testified that after stopping the accused he could smell alcohol coming from her vehicle, that her speech was slightly slurred, and that it took her some time to find her wallet and registration. The officer then arrested the accused for impaired driving. She was taken to the detachment, where she provided breath samples. The defence argued that the officer's belief that the accused was impaired as grounds for arrest was not objectively supported.

HELD: The application was granted and the evidence excluded. The court found that the officer's observations in the parking lot coupled with the belief that the accused was inebriated because of what she had noted earlier in the bar were not capable of elevating her suspicion to objectively reasonable grounds to believe that the accused's ability to drive was impaired by alcohol. As the officer did not have reasonable grounds to arrest the accused, her arrest was arbitrary and an infringement of s. 9 of the Charter occurred. The court conducted a Grant analysis and found that that the infringement was serious. The accused was held in the police cruiser for half an hour and then provided samples of breath at the detachment. Despite society's interest in preventing this kind of driving offence, the court held that it would bring the administration of justice into disrepute if the conscripted evidence were allowed into evidence at trial. Therefore, the second charge was dismissed. The court had a reasonable doubt that the accused's ability to drive was impaired and dismissed the first charge.

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Sanscartier v. Harlingten, 2016 SKQB 68

Danyliuk, March 2, 2016 (QB16083)

Contracts – Breach
Real Estate – Sale of House – Caveat Emptor
Real Estate – Sale of House – Negligent Misrepresentation
Civil Procedure – Summary Judgment

The plaintiffs brought an action against the defendants for breach of

contract and negligence in connection with the purchase of a house from the defendants, Mr. and Mrs. Harlingten. The other defendant, Koehn, was the realtor for the plaintiffs in the transaction. The plaintiffs made an application to amend their statement of claim and the defendants made an application for summary judgment against the plaintiffs. All of the parties filed affidavits, as did a former tenant of the Harlingten's who had rented the house just prior to the sale. The tenant deposed that she told the Harlingtens that she could smell fuel oil in the house during the summer of 2011. They conducted an investigation and arranged to have an old oil tank removed from the basement. Later Mrs. Harlingten, a licenced realtor, noticed the smell and hired a remediation company to remove any residual oil in the floor and to paint the exposed wood and concrete with a sealant. In September 2011, the defendants listed the house for sale and the plaintiffs viewed it with Koehn. He had sold the house previously but did not recall the oil tank and did not mention it to the plaintiffs. The plaintiffs made an offer, which the defendants accepted subject to a house inspection and review of the property disclosure statement, which the defendants provided. In it they described their removal of the oil tank and the subsequent cleaning of the area. After the inspection was conducted, the sale was completed and the plaintiffs moved into the house. In 2012 the plaintiffs advised that the smell of the oil was a problem. Eventually the plaintiffs paid $146,000 to remove the basement floor and replace the soil underneath due to a finding that the ground was contaminated. The plaintiffs claimed that the defendants breached the contract because they had not received a house reasonably fit for habitation and free of material defects, which was an express or implied term of the contract and because the property condition disclosure statement was incomplete, untrue or inaccurate. The plaintiffs claimed as well that the defendants made representations, set out in the disclosure statement, which induced them to enter into the contract. They alleged that the defendants knew the representations to be false or made them negligently. Regarding their application to amend their statement of claim, the plaintiffs sought to add that a claim that Koehn owed them a fiduciary duty, which he breached.

HELD: The application for summary judgment was granted and the plaintiffs' claim dismissed. The court reviewed the affidavits, the property disclosure statement and answers given by the plaintiffs in their questioning. On the basis of that evidence, the court found that with regard to the plaintiffs' claim in contract there was no germane issue for trial as it did not find that the contract contained an express or implied term that the house was reasonably fit for human habitation. The evidence showed that the plaintiffs read the disclosure statement and there was no evidence that the statement was improperly completed or that the defendants had tried to deceive the plaintiffs. Similarly, the plaintiffs' claim that the defendants breached their duty of care by making representations upon which they relied, the court found that it was not satisfied on a balance of probabilities that they

were untrue or inaccurate or otherwise misleading and thus the court could not find that there was a genuine issue for trial. With respect to the plaintiffs' application to amend their statement of claim, the court refused to grant it because insufficient facts were pled to ground a claim in fiduciary duty.

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Kusch Estate v. Muller Estate, 2016 SKQB 69

Labach, March 1, 2016 (QB16063)

Civil Procedure – Legal Representation – Removal of – Possible Witness
Power of Attorney – Accounting
Wills and Estates – Disclaim Interest – Mental Competency
Wills and Estates – Executor – Renunciation

The applicant, J.O., was the executrix of the estate of R.K., and the respondent, B.D., was the executor of the estate of O.M. The two deceased were sisters. O.M. executed a will naming R.K. and the respondent as joint executors with specific bequests to R.K. and the residue of her estate to be divided equally between R.K. and the respondent. She also executed an Enduring Power of Attorney naming R.K. as her attorney. By 2009 R.K. was managing O.M.'s financial affairs for her. In 2010, R.K. executed a Power of Attorney naming the applicant or, alternatively, her son J.K. as her attorney. In 2012, R.K. executed a will naming the applicant as her executrix. R.K. left the bulk of the estate to her son, with the respondent and his wife being specifically bequeathed $30,000. J.K. began looking after R.K.'s and O.M.'s affairs. In 2013 R.K.'s health care providers indicated that she was consistently disoriented to time and place and had difficulty following commands so she was moved to a long-term personal care facility. O.M. passed away later in 2013 at 97 years old. Shortly after her death, the respondent drafted a document indicating that R.K. gave up her appointment as executor of O.M.'s estate. The document was signed by R.K. and witnessed by a staff member at the home. The estate lawyer asked for a formal renunciation and therefore the respondent and his wife attended on R.K. again and she signed the document. At the same time the respondent and his wife had R.K. sign a document giving up any monetary gain from O.M.'s estate in favour of the respondent. The respondent's wife and the staff member witnessed the signature. The staff member provided an affidavit indicating that R.K. was consistently confused in the care home. R.K. died in 2014 at the age of 92. The issues were: 1) was R.K. mentally competent at the time she disclaimed her interest in the estate of O.M.; 2) did the respondent or his spouse unduly influence R.K. to disclaim her interest in the estate of O.M.; 3) should the estate of R.K. be required to provide an accounting

of the deceased's actions as power of attorney for estate of O.M.; 4) should the applicant and J.K. be required to provide an accounting of their actions as power of attorney for R.K. to the estate of O.M.; 5) should the applicant be required to provide an accounting of the estate of R.K. to the respondent; 6) should the law firm be removed as counsel for the estate of R.K.; 7) should the law firm be directed to disclose its files pertaining to the will of R.K. and any files wherein they acted for O.M., to the respondent; and 8) should the respondent be granted leave to cross examine the care home staff member on her affidavit.
HELD: The issues were decided as follows: 1) the court determined that it was not possible to determine the issue of R.K.'s capacity on the basis of the conflicting affidavit evidence filed. A trial of the issue was required; 2) the applicant did not provide any evidence that R.K. was actually unduly influenced or that there was a presumption of undue influence at play and, therefore, the undue influence application was dismissed; 3) and 4) section 18.1 of The Power of Attorney Act, 2002 addresses the situation where the authority of the attorney had terminated. The requirement to account was not extinguished by R.K.'s passing. The court was satisfied that an applicant must show cause why an accounting should be ordered. The court said it was clear that the respondent was concerned with whether four of O.M.'s properties were sold for fair market value and whether the proceeds were deposited into O.M.'s bank account. The court ordered that R.K.'s estate provide an accounting of the four sales of O.M.'s real property that R.K. carried out as O.M.'s attorney. The court did not order that the applicant or R.K.'s son provide an accounting of their actions as Power of Attorney for R.K. to the estate of O.M. The estate is not one of the listed categories of persons that can demand an accounting pursuant to s. 18.1; 5) the respondent asked for an order pursuant to s. 55 of The Trustee Act, 2009 requiring the applicant, as executor of R.K.'s estate to provide an accounting to the respondent who was a beneficiary of the estate. The respondent brought the application as executor of O.M.'s estate, but the estate was not a beneficiary of R.K.'s estate and thus was not an interested person that could request the accounting. The court was not satisfied that it had authority under s. 55 of The Trustee Act, 2009 to order that the applicant provide an accounting of R.K.'s estate to the respondent as executor of O.M.'s estate. The court also indicated that even if it had authority, the court was not satisfied that cause had been shown to order the accounting; 6) the respondent argued that the law firm should be removed from acting for the estate of R.K. because it was highly likely that one of the lawyers would be called as a witness. The court could not see how the lawyer's dealings with R.K. in 2012 would have any bearing on her mental capacity 12 to 20 months later so as to require the lawyer to be a witness for the applicant. Previous case law has determined that a lawyer should be removed if the lawyer was going to have to act as advocate and witness for the same party. There was no evidence that the law firm ever represented O.M.; 7) the court was not satisfied that the lawyer's will file for R.K. would be relevant.

However, if the law firm did represent O.M., her estate would be entitled to the files and no waiver of privilege would be required. The court ordered that any files in the possession of the law firm wherein they acted for O.M. in the sale of properties after February 2008 be disclosed to the respondent; and 8) the court ordered a trial of the issue, and therefore, it was not necessary to address the respondent's request to cross-examine the staff member.

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Lapchuk v. Saskatchewan (Department of Highways), 2016 SKQB 72

Megaw, March 2, 2016 (QB16064)

Civil Procedure – Jurisdiction

The plaintiff was an employee of the Saskatchewan Government Department of Highways. He was terminated from his position and brought an action against the department and the other defendants. The defendants brought a successful application to strike the plaintiff's action against them (see: 2015 SKQB 358). However, one aspect of the plaintiff's claim was not the subject of the previous application: the recovery for damages for detinue, conversion and trespass to personal property based on the plaintiff's allegation that some of his personal property had not been returned to him by the Government of Saskatchewan. This claim was for an ergonomic desk and chair that the plaintiff had left in his office. The plaintiff appealed the decision but had not perfected his appeal until this application and claim for detinue was first decided. The Government sought to strike the remaining claim. There was, in addition to the court's decision, a grievance arbitration in process. The issue before the court was whether it had jurisdiction to entertain the claim for the missing personal property. HELD: The application to strike the remaining aspect of the claim was granted. The court held that it did not have jurisdiction on this part of the plaintiff's action. The dispute between the plaintiff and his former employer involved the application of the provisions of the collective agreement. The court found that on the facts of the case, the claim for the return of the missing personal property was intertwined with the facts surrounding the employment situation, and the plaintiff was therefore required to pursue his remedy in the arbitration forum due to the existence of the collective bargaining agreement.

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Robinson v. Hospitals of Regina Foundation Inc., 2016 SKQB 74

Megaw, March 3, 2016 (QB16065)

Civil Procedure – Queen's Bench Rule 5-49

The plaintiff commenced an action alleging that she was wrongfully dismissed from her employment with the defendant and also advanced a complaint with the Saskatchewan Human Rights Commission (SHRC). The complaint was referred to the Court of Queen's Bench for determination. The defendant applied to have the civil action and the human rights complaint consolidated and to proceed together to trial. In order to do this, the defendant sought to set aside minutes of settlement agreed upon by the parties pursuant to s. 29 of The Queen's Bench Act, 1998, despite the fact that the minutes stated that the civil action would be stayed until the final disposition of the human rights complaint. The defendant argued that the minutes should be set aside because the plaintiff had agreed to submit to a medical examination but then objected to the questions that the defendant proposed to submit to the physician and the appointment was cancelled. The defendant further requested that the medical examination be ordered pursuant to Queen's Bench rule 5-49 and sought that the physician respond to specific question pertaining to the plaintiff's medical condition.
HELD: The defendant's application was partially successful. The court refused to set aside the minutes of settlement. It found that the failure of the defendant to obtain what it wanted on the independent medical examination was not a basis to do so. The court ordered that the plaintiff submit to an independent medical examination and enumerated the questions the defendant could ask of the physician.

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R. v. Goforth, 2016 SKQB 75

Gunn, March 4, 2016 (QB16070)

Criminal Law – Murder – Second Degree – Sentencing
Criminal Law – Manslaughter – Sentencing

The accused, T.G., was convicted after trial by a judge and jury of the second degree murder of J.G. and unlawfully causing bodily harm to N.B. K.G. was convicted of manslaughter in the death of J.G, and unlawfully causing bodily harm to N.B. as well. A sentencing hearing was held. The issues were: 1) what the period of parole ineligibility should be as the conviction for second degree murder resulted in a mandatory life sentence; 2) the appropriate sentence for K.G. based on his conviction for manslaughter; and 3) the appropriate sentence for both accused for unlawfully causing bodily harm. The accused were approached by Social Services in 2011 to take two young girls, J.G., who was three years and eight months of age at that time, and her sister J.N.,

who was two years old. The placement was made on the basis that the accused were persons of sufficient interest because of a family connection between the birth mother and K.G. As a result of this kind of placement, Social Services was not required to visit the home or supervise the placement. In late July 2012, J.G. was taken to the emergency ward. Her body was covered with bruises and sores. She died of brain injury after suffering a cardiac arrest secondary to malnutrition and dehydration. J.N. too suffered from malnutrition and dehydration. She had an infected sore on her leg, a bladder infection and pneumonia. The court found that there was proof beyond a reasonable doubt that the aggravating factors in sentencing were that the victims were deprived of sufficient food for a period of three to four weeks and during that period the accused had never taken them to a doctor. The malnutrition was obvious to anyone. There was no direct evidence that the victims were restrained but the court found that they were confined in their room. In terms of T.G.'s case, the court found the aggravating factors to be that she was the primary caregiver and had denied the basic necessities to the two very young, vulnerable children over a sustained period. She had held a position of trust. The abuse took place over a long period of time. There was no evidence of T.G. having an intellectual disability or having addiction problems. The mitigating factors considered by the court included that she had no previous criminal record. She was of First Nations heritage and attended a residential school and had suffered from some racism in her life. T.G. and K.G. had been married for 23 years, and she had raised three sons to adulthood and was regarded as a good parent and upstanding member of her church and the community. Many letters of reference were filed on her behalf. T.G. expressed remorse and had accepted responsibility for the offences. With respect to K.G., the court found that the same aggravating factors applied to him. The mitigating factors included that he had no criminal record. He had worked his entire adult life and supported his family. Many references were filed on his behalf.

HELD: The court determined the sentencing issues as follows: 1) T.G.'s parole ineligibility would be 17 years; 2) K.G. was sentenced to imprisonment for 15 years for manslaughter, reduced to 14 years after the court gave him credit for 3 months remand time and observing restrictive conditions of bail for nine months; and 3) both accused were sentenced to five years imprisonment for causing bodily harm to be served concurrently.

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R. v. Boutin, 2016 SKQB 77

Kalmakoff, March 4, 2016 (QB16084)

Criminal Law – Appeal – Stay of Proceedings
Criminal Law – Defences – Charter of Rights, Section 11(b)
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08

The accused was charged with driving while impaired and driving while over .08, contrary to ss. 253(a) and (b) of the Criminal Code, respectively. The charges were stayed by the trial judge three times. The accused was arrested and charged in June 2008 and the trial was completed in August 2010. The charges were stayed pursuant to s. 11(b) of the Charter. The Crown appeal was allowed in July 2011 and the matter was remitted back to the trial judge for continuation. The trial continued in September 2011 and it was determined that the accused's s. 7 rights had been violated because the Crown failed to make full disclosure and a stay was granted. The Crown's appeal was allowed in July 2012 and the matter was remitted back to the trial judge for continuation. The matter only came back before the court in February 2015 when the accused was arrested on unrelated matters. The matter was heard in June 2015 where the accused applied for stay of proceedings alleging a violation of his s. 11(b) rights. The accused's s. 11(b) Charter rights were found to be violated and a stay was granted. The trial judge found that the accused suffered actual prejudice that his actions had not contributed to. The prejudice resulted from: changes to The Traffic Safety Act; increased administrative driving suspensions; changed temporary licence criteria; and also from jurisprudence that developed relating to rights to counsel. The Crown appealed. The issues were whether the trial judge erred: 1) in finding that there was a violation of the accused's right to be tried in a reasonable time; 2) in finding that a stay of proceedings was the appropriate remedy; and 3) in finding that there was a violation of s. 11(b), if a new trial should be ordered.
HELD: The Crown's appeal was dismissed. The issues were determined as follows: 1) seven years and two months had elapsed from the time of arrest to the stay of proceedings in June 2015. Three years and two months of the delay was appellate delay, which is not used to determine a s. 11(b) violation. The trial judge was correct in finding that the delay of four years warranted Charter scrutiny. There was no evidence that the accused voluntarily waived any periods of delay. The trial judge found that the Crown was entirely responsible for the delay from February 2014 to June 2015 because they made no attempt to locate the accused. The Crown was found to bear responsibility for a significant portion of the four-year delay, which was well beyond what was usually considered acceptable for a relatively uncomplicated summary conviction proceeding. The appeal court found that it was reasonable for the trial judge to draw the inference that the accused had been prejudiced by the fact of the delay, rather than the fact of being charged. The trial judge's decision with respect to prejudice and her decision balancing prejudice against societal interest in a trial of the charges on the merits were decisions entitled to deference; 2) the Court of Appeal has been very clear that once delay is found to be

unreasonable, a stay of proceedings is the minimum remedy that the court may grant; and 3) it was not necessary for the court to determine this issue.

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Director under The Seizure of Criminal Property Act, 2009 v. Dickenson, 2016 SKQB 82

McMurtry, March 9, 2016 (QB16074)

Criminal Law – Drug Offences – Forfeiture

The director under The Seizure of Criminal Property Act, 2009 applied for forfeiture of currency in the amount of $18,450 seized by the RCMP from the respondents, L.D. and A.S. The director claimed that the money was proceeds of unlawful activity in that it was property acquired by the sale, transfer or exchange of controlled substances, as defined by the Controlled Drugs and Substances Act. The respondents were stopped by an RCMP officer because the vehicle was exceeding the speed limit. The vehicle was not registered in either of their names but belonged to someone else. A criminal record check revealed that the respondents had convictions. The driver, L.D., had been convicted for possession of narcotics and possession for the purpose of trafficking. L.D. was very nervous during the stop and explained that he was a professional driver who was driving the vehicle to Toronto on behalf of someone he named as Philip, which was not the name of the registered owner. He said that he was not being paid but Philip was paying his expenses. He and A.S. were arrested and the vehicle searched. L.D. had $6,800 in cash in his belongings as well as a small amount of marijuana. In A.S.'s suitcase the police found $11,650 in cash, bundled in small amounts held by elastics kept in a plastic bag. A.S. provided four affidavits, each of which gave conflicting explanations for why she was carrying such a large amount of cash. L.D. said that he was carrying cash because he intended to take a holiday after delivering the truck. HELD: The application was granted and the property forfeited to the Crown. The court found that the respondents' evidence was not credible and that carrying the$18,000 in cash, packaged in an unusual manner, was consistent with drug trafficking.

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R. v. Toulejour, 2016 SKQB 84

Allbright, March 11, 2016 (QB16103)

Criminal Law – Sentencing – Dangerous Offender – Indeterminate Sentence

The accused pled guilty to three counts of aggravated assault pursuant to s. 268 of the Criminal Code, one count of unlawful confinement contrary to s. 278 of the Code, and two counts of assault with a weapon contrary to s. 267(a) of the Code. All of the offences were committed between 2009 and 2010 against the accused's common law wife and three of her children, who were at the time three, four and eleven years of age. The accused bit the victims repeatedly on different parts of their bodies. He had committed similar assaults by biting three other women with whom he had relationships in the past as well as their children. Although charged and convicted of the earlier offences, the accused had not been given a sentence in a federal prison. His criminal behaviour commenced when he was 21, which was when he began abusing alcohol. He then went on to become a heavy user of marijuana and became involved in the drug trade. The Crown applied for and obtained an assessment order pursuant to s. 752.1 of the Code. The assessment was conducted by a psychiatrist, who prepared a report. A pre-sentence report addressed potential Gladue factors and the availability of appropriate programming for violence and domestic violence prevention in the community of Black Point in which the accused proposed to live. The accused's counsel then filed a notice under The Constitutional Questions Act, 2012, in which it was submitted that the accused's s. 7 and s. 15 Charter rights were violated by s. 753(1) of the Code and that the provisions were unconstitutional in light of the decision in R. v. Boutilier. The defence argued that the section was overbroad, because it failed to consider his treatability and it discriminated against Aboriginal offenders due to of the lack of programs available in his home community, which put him at risk of an indeterminate sentence. The pre-sentence report indicated that the accused had been raised in a stable family environment where neither parent drank alcohol. The accused himself thought very highly of his parents and had not suffered from any abuse from them. However, his older siblings all abused alcohol, and in his opinion he committed the offences when he was under the influence of alcohol or drugs. In the opinion of the psychiatrist, the accused did not demonstrate any remorse or concern for his victims and relied upon his substance abuse as an excuse for his behaviour. The psychiatrist was unable to find any similar cases where an adult bit other adults or children and could not offer an opinion regarding whether any treatment would be able to help the accused. When asked by the defence if the accused's behaviour might stop if he avoided all relationships with women or contact with children, the expert witness said yes. Otherwise, the accused was assessed as being at high risk to reoffend. The accused said that he would take any programming available and was extremely committed to improving himself. He had stopped using alcohol and drugs while in remand and had developed his spirituality.
HELD: The Charter application was dismissed. The court found that the

dangerous offender scheme from the time of its inception to the 2008 amendments was not unconstitutional on the grounds of overbreadth and there was no breach of the accused's s. 7 Charter rights. The accused was designated a dangerous offender and sentenced to imprisonment in a penitentiary for an indeterminate period pursuant to s. 753(4) of the Code. The court could not be satisfied that there was a reasonable expectation that a lesser measure than indeterminate imprisonment would protect the public based only upon the theoretical proposal of a treatment plan that the accused avoid relationships of the kind that had triggered his offending in the past.

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R. v. Komarnicki, 2016 SKQB 90

Danyliuk, March 14, 2016 (QB16089)

Criminal Law – Appeal – Conviction – Standard of Review
Criminal Law – Blood Alcohol Exceeding .08
Criminal Law – Breathalyzer – As Soon As Practicable
Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 10(b)
Criminal Law – Evidence

The appellant appealed his conviction contrary to s. 253(1)(b) for driving over .08. He was driving in congested traffic when his vehicle was struck from behind. Police attended, and the officer noticed alcohol coming from the accused's breath and made an ASD demand. The appellant blew a fail and was arrested. The appellant indicated that he wanted to contact legal counsel when first given his rights, but later declined to call a lawyer at the detachment. The officer then read an additional waiver of rights to counsel to the appellant before giving breath samples. The issues were: 1) what the appropriate standard of review was; and 2) if the trial judge erred in determining the Crown had established the appellant had operated his vehicle while over .08. The appellant argued that the trial judge erred when she determined: a) there had been no breach of the appellant's ss. 8 and 9 Charter rights. The appellant said that his rights were breached because the officer did not have the requisite reasonable grounds to make a demand for a full breath sample. The appellant also indicated that the information he provided to the officer was done under compulsion and therefore was inadmissible; b) there had been no breach of the appellant's s. 10(b) Charter rights; c) the investigating officer misspoke when she testified that the roadside screening device showed a blood alcohol content of .08, rather than greater than .08; and d) that the full breath tests were taken as soon as practicable. The appellant argued that there were 38 unexplained minutes.
HELD: The appeal was dismissed. The issues were dealt with as

follows: 1) with respect to factual grounds the appeal court had to determine whether there was evidence upon which a trier of fact, properly instructed, could reasonably reach the verdict. On questions of law, such as Charter issues, the appellate court should intervene if the decision is not correct in law unless, in the case of defence appeals, there was no substantial wrong or miscarriage of justice that occurred; and 2) a) the trial judge did not accept the appellant's account of the offence. The trial judge found that the officer did not tell the accused that he was legally compelled to answer questions put to him at the scene. The appellant was found to have lied to the officer. The court determined that the appellant did not meet the standard for overturning any of the factual findings. The court held that the trial judge did not err when she ruled that it was open to use the appellant's utterances to form a reasonable suspicion leading to the roadside breath test, and subsequently reasonable grounds to demand a full breath test; b) the appellant again argued against factual findings made by the trial judge. The trial judge did not believe the appellant, and she did not accept his testimony. The appellant failed to be diligent in pursuing his right to counsel. The officer properly read the appellant a Prosper warning; c) the trial judge was satisfied that the officer knew a fail on the ASD meant the person had a blood/alcohol level higher than .08 and not just .08. The appeal court also agreed with the trial judge when she stated that it was widely recognized that a fail can give the requisite grounds for a breath demand pursuant to s. 254(3). The appellant concentrated on the officer's answer to one question and did not take the entire testimony into account as the trial judge correctly did; and d) the trial judge found that 20 minutes were required for the officer to watch the appellant to ensure he did not consume anything, belch, or vomit. The breath technician recommended this waiting period in addition to the waiting period between samples. The trial judge concluded that there were only six to seven unexplained minutes, which she did not find led to a conclusion that the breath samples were not taken as soon as practicable. The appeal court agreed that the delay was only six or seven minutes. The trial judge was accorded deference on this aspect, given it was a factual determination.

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D. (J.) v. D. (C.), 2016 SKQB 91

Smith, March 15, 2016 (QB16096)

Family Law – Custody and Access

The parties had been involved in a long dispute regarding their parenting arrangements for their three children. In 2013 the petitioner had applied for orders granting him interim custody of the children

with their primary residence to be with him and exclusive possession of the family home. Because both parties alleged that they had mental health problems, the court ordered that they should have psychological assessments done and directed the preparation of a custody and access report. On an interim basis the court ordered that the parties would have joint custody and that the children would reside with the respondent mother during the week and with the petitioner on the weekends. In 2014 another application was heard regarding what the petitioner should pay in child support. The court did not change the parenting arrangement and determined the petitioner's income so as to set child and spousal support in accordance with the Guidelines. Late in 2014 the parties entered into minutes of settlement at a pre-trial conference in which they agreed that the respondent could remain in the family home but would pay an equalization payment of $120,000 to the petitioner. Child and spousal support would continue at the rates established earlier and the parents would have joint custody and share parenting of the two youngest children on a week-on, week-off basis. Because the oldest son was hostile to the petitioner, the parties agreed to take high conflict mediation and ensure that the son would receive counselling. If the issue of ongoing parenting of him was not resolved after counselling, the matter would return to pre-trial. The relationship between the petitioner and the oldest son had not improved and the parties returned to court requesting that a workable parenting plan be created. The parties again raised each other's mental health as a problem with respect to parenting. The respondent also sought to re-open the minutes of settlement and to have the court determine the amount of child support owed by the petitioner.
HELD: The court granted the parties joint custody. The oldest son's primary residence was to be with the respondent but on every second weekend he would reside with the petitioner. The other two children would also spend that weekend with the petitioner but otherwise, they would live with each parent every other week. The court declined to open the minutes of settlement regarding the equalization payment for the house. Regarding child support, the court imputed a slightly higher amount of income to the petitioner than the amount used in the first order. The amount of child support owed by the petitioner was then adjusted and recalibrated to acknowledge the shared parenting arrangement.

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B. (B.K.) v. L. (J.L.), 2016 SKQB 93

Chow, March 16, 2016 (QB16080)

Family Law – Custody and Access – Variation
Family Law – Spousal Support – Variation

The parties were the parents of five-year-old twins. Their common law relationship ended when they separated in 2011. The petitioner petitioned for joint custody and a shared parenting arrangement shortly thereafter. He also sought an order preventing the respondent from relocating from Estevan to Moose Jaw. The court granted the parties interim joint custody and ordered that the primary residence of the children would be with the respondent unless she moved to Moose Jaw. The parties then consented to a judgment pronounced in 2011 that confirmed joint custody and permitted the respondent to relocate to Moose Jaw and the petitioner was afforded specified access. The issues of child and spousal support were also resolved. The order stated that spousal support would be in the amount of $1,500 per month for a fixed period of 23 months and that the amount should not be varied during the period regardless of any change in circumstances. The petitioner paid support to the respondent for approximately three months following judgment. The relationship between the parties deteriorated after the consent judgment and a number of applications were made by both parties during the following two years for variation and other relief, culminating in another court order issued in 2013 curtailing the petitioner's access and directing that the exchange of the children be supervised. In 2014 the respondent relocated from Moose Jaw to Regina. She had moved to Moose Jaw to take a training program but dropped out because she received an employment offer in Regina and relocated there. The petitioner commenced another unsuccessful application to vary. At the time of the consent judgment the petitioner had been working in the oil fields and income was imputed to him in the amount of $120,000 per year. Since that time he had lost his job and was unemployed for a long period. He relocated to Regina and was now employed again and lived with his new girlfriend and her two children. The house was organized so that his children could visit and have their own rooms. The petitioner applied to vary the consent order regarding the children and requested it be changed to a shared parenting arrangement. He also applied to vary or expunge retroactively the arrears of spousal support. He argued that the respondent's decision to forgo her educational plans was a material change that justified his cessation of support payments. The respondent argued that the petitioner failed to demonstrate a material change and on that basis, opposed his claim for shared parenting. Because the court had required supervised exchanges and curtailment of the petitioner's access, the respondent contended that there was a change in circumstances so that she should be given sole custody of both children. HELD: The application was granted in part. The court varied the terms of the original custody and access order because it was satisfied that the relocation of the petitioner to Regina constituted a material change in circumstances. The court order requiring supervised access was clearly interim. The court held that the parties would continue to have joint custody of the children as they were presumed to have under s. 3 of The Children's Law Act, 1997. The original consent judgment provided

that the parties would have joint custody and neither party appealed it. Each subsequent court order had confirmed joint custody. The respondent may have been the children's primary and psychological parent but had not acknowledged the petitioner's request for additional access. The children's best interest would be best served by a parenting arrangement that maximized their time with both parents while preserving the stability that the respondent had provided in their lives. The court ordered that the children should continue to reside primarily with the respondent but that the petitioner's access should be expanded and provided a specific schedule. The court rejected the petitioner's argument that the respondent's decision to return to work as opposed to pursuing her education constituted a material change and dismissed the application to expunge or retroactively vary the arrears of spousal support. The judgment sought to be varied was a final order to which the petitioner consented and based upon the clear unequivocal wording of the order, it was dispositive of the matter.

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J.C. Berezowski Farms Inc. v. Pioneer Grain Co. Ltd., 2016 SKQB 94

Layh, March 16, 2016 (QB16081)

Civil Procedure – Pleadings – Statement of Claim – Striking Out – Want of Prosecution

The defendant brought an application to have the plaintiffs' claims in four different actions struck for delay in prosecution. The actions related to alleged crop loss suffered by farmers caused by the seed sold by the defendant to them that was not disease-resistant. The statements of claim were issued in 2004 by a lawyer who died in 2007. A notice of change of solicitor was filed in 2007 naming a law firm as the new solicitors. No other steps had been taken on the file. The defendant also alleged that the statements of claim were never properly served upon it. The court file did not contain evidence of acknowledgement of service. However, there were letters from counsel for the defendant in 2005 indicating that it was aware of the pending litigation.
HELD: The application was granted. The court found that pursuant to the discretion given to it in former Queen's Bench rule 18, the defendant was served within the mandatory six-month period. With regard to the defendant's application under Queen's Bench rule 4-44, the court found that: the delay of 14 years was inordinate; the plaintiffs had not presented a justification or excuse for the inordinate delay; and applying the factors enumerated in International Capital Corporation v. Robinson Twigg & Ketilson, it was not in the interests of justice to continue the actions.

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Hamilton Construction Corp. v. Superior Construction Solutions Inc., 2016 SKQB 95

Scherman, March 17, 2016 (QB16104)

Statutes – Interpretation – Builders' Lien Act, Section 86

The plaintiff brought an application to vacate a written notice of a claim of lien filed by the respondent with the City of Saskatoon on October 2, 2014, on the grounds initially that no action was commenced by the respondent in respect of its lien claim within two years from the date the claim was discovered as required by s. 5 of The Limitations Act (LA). The date of the respondent's last work on the contract was November 19, 2013, and thus the limitation period expired two years later. As at the date of this application, no action had been commenced by the respondent against it at the judicial centre of Saskatoon. The respondent stated that that it had in fact commenced a claim against the plaintiff and others, including the city, on July 16, 2015, at the judicial centre of Regina. The respondent failed to serve its statement of claim within six months but had received a 30-day extension from the court pursuant to s. 87(2) of The Builders' Lien Act (BLA) and had just served the plaintiff. The plaintiff argued that despite the fact that the action was commenced within the limitation period, the respondent had not complied with the requirements of s. 86(2) of the BLA because it was not commenced at the judicial centre of Saskatoon and was thus a nullity and the order to vacate the lien should issue. The respondent argued that the Regina claim satisfied the requirements of the LA and the matters raised by the plaintiff were irregularities that could be remedied by the court transferring the action to Saskatoon. The issue was whether the commencement of the Regina claim satisfied the requirements of the BLA and operated to keep the respondent's claim of lien against the city alive.
HELD: The application was granted. The court applied principles of statutory interpretation and held that s. 86(2) of the BLA was mandatory and thus an action must be commenced at the judicial centre nearest to which the land is situated. As the respondent had not complied, its claim of lien should be vacated and was declared null and void. Section 87(2) of the BLA dictated that a court could not order the transfer of the claim unless it was commenced initially at the correct judicial centre.

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Berg v. Berg, 2016 SKQB 96

Danyliuk, March 18, 2016 (QB16097)

Family Law – Family Property

The petitioner sought an order for the return of some moveable property, repairs to real property, reimbursement for unpaid utilities, compensation for the respondent's breach of a court order and costs. The parties had lived together on a 40 acre parcel of land that included the family home and outbuildings. After they separated, the petitioner had applied for an order that she be granted interim exclusive possession of the family home, household goods, yard site and buildings on the yard site. The respondent replied that he had two businesses and his shops related to them were located on the acreage. The court ordered that the petitioner had interim exclusive possession of the family home located on the acreage and to all its contents. In this application the petitioner alleged that the respondent broke into one of the shops thereby damaging the door and frame and removed two snowmobiles. The respondent admitted that he had attended at the property and damaged the door when he found that the petitioner had changed the locks without his consent. The original court order also provided that the respondent was to pay all utilities. The petitioner had listed them as including telephone, internet and satellite TV charges. The respondent had not paid the monthly bills for these items because the accounts for internet and satellite TV were opened after the separation.
HELD: The petitioner's application was dismissed regarding her request for the return of the snow mobiles, but allowed regarding her request for payment of utilities. The repair costs were left to be determined for pre-trial conference. The court reviewed the wording of the order and found that it clearly specified that the petitioner had exclusive possession of only the family home. The terms of the order displaced the general provisions of the statutory definition of family home found in ss. 2, 5 and 6 of The Family Property Act. Therefore, s. 19 did not apply here and the petitioner was not entitled to compensation. The court declined to order the return of the snowmobiles as s. 4 and s. 43 of the Act allowed the respondent to possess and deal with this property, although he was accountable to the petitioner for it. The court ordered that neither party should remove any item located on the acreage yard site and in any outbuilding without prior written approval of the other party. Regarding the petitioner's claim for reimbursement for utilities, the court ordered the respondent to pay the petitioner the amount claimed because the order clearly included the items in the future. No order was made as to costs as success was divided.

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Eastview Housing Association Ltd. v. Gerard, 2016 SKQB 98

Barrington-Foote, March 18, 2016 (QB16091)

Landlord and Tenant – Residential Tenancies Act – Appeal

The appellant housing authority appealed the decision of a hearing officer of the Office of Residential Tenancies. The respondents were in arrears of rent and the appellant served a notice to vacate the premises pursuant to s. 57 of The Residential Tenancies Act, 2006. The appellant then applied for an order for possession pursuant to s. 70 of the Act. At the hearing, the tenant admitted that she was in arrears and proposed to resolve the matter by paying them and to pay the rent in full for the following three months. The hearing officer found that the appellant had made a case for immediate possession but decided that it was not just and equitable to grant the order without first giving the tenant an opportunity to carry out the terms of her proposal. He adjourned the matter to give the tenant that opportunity and stipulated that the hearing could be reconvened at the request of the appellant. Otherwise, the application would be dismissed.
HELD: The application was granted. The matter was remitted to the hearing officer for reconsideration. The court found that the standard of review was reasonableness, which applied here because the issue related to an administrative decision-maker's interpretation of the home statute and raised issues of discretion. The hearing officer erred in law by refusing to grant the order sought because he took into account whether the tenant paid the future rent, an irrelevant consideration in the context of the application.

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Pratt v. Kay, 2016 SKQB 105

Scherman, March 24, 2016 (QB16099)

Statutes – Interpretation – Intestate Succession Act, 1996, Section 2
Wills and Estates – Estate Administration – Application for Appointment as Administrator

The applicant and the respondent both applied to be the administrator of the estate of Owen Kay, who died intestate in November 2014. The applicant applied for summary judgment to determine who should be appointed. The applicant argued that she was the common law spouse of the deceased as defined in The Intestate Succession Act, 1996. The respondent disputed that the applicant was a common law spouse at the time of his death, and as his aunt, she should be appointed under the priority provisions of s. 11 of The Administration of Estates Act. The applicant filed evidence that showed that she and the deceased had

cohabited from 2010 to August 2014. Prior to his death, they resumed cohabitation. The evidence was uncontradicted.
HELD: The application for summary judgment was granted as the court was satisfied that there was no need for a trial of an issue. On the basis of the affidavit evidence, the court found that the applicant and the deceased were spouses as defined in The Intestate Succession Act. The applicant therefore had the first right to apply for letters of administration to the estate. The court ordered that the applicant be appointed the administratrix of the deceased's estate.

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Alternatifbank A.S. v. Arslan, 2016 SKQB 106

Barrington-Foote, March 24, 2016 (QB16095)

Judgments and Orders – Foreign Judgments – Registration
Limitation of Actions – Foreign Judgments

The plaintiff bank applied pursuant to s. 12 of The Enforcement of Foreign Judgments Act (EFJA) to register two payment orders issued by the Mersin 6th Enforcement Office of Turkey against the respondent. The respondent argued that service was not lawful in the Turkish jurisdiction and that the two-year limitation period pursuant to The Limitations Act had expired. In Turkey a payment order can be issued without first receiving judgment from a court. The order is served on the debtor who has seven days to object to it. If there is no objection, the order becomes final. The payment orders were served on a village headsman and posted to the door of the respondent's last known address. The respondent confirmed that he had moved from the residence and did not know of the orders until after the expiration of seven days. The applicant never attempted to serve the orders on the respondent's business address in Turkey. The applicant argued that service on the headsman and posting on the residence door constituted good service in Turkey. Both parties attempted to qualify lawyers as experts in the area of service requirements in Turkey. The applicant's expert testified that the respondent was properly served according to Turkish law. The respondent's expert testified that the section referred to by the applicant's expert did not apply in the manner she suggested. He argued that the clause "last known address" meant his last publicly known address and that service could only be made at the address given in the registration system, as was done, if the publicly known address was not suitable. The orders were issued May 2013 and the application was filed March 2016.
HELD: The application was dismissed on the basis of ss. 4(d) of the EFJA, service in foreign proceedings. The court qualified both parties' witnesses as experts on service, as requested. The application was for

registration pursuant to the EFJA and therefore the ten-year limitation period specified in s. 5 of the EFJA applied. The court found that a default judgment cannot be enforced in Saskatchewan, and cannot be registered pursuant to s. 12 of the EFJA, if either of the circumstances specified in ss. 4(d) existed. The court accepted the respondent's expert's opinion that the orders should have been served at the respondent's business address, or some other last known address. The court concluded that there was insufficient evidence to conclude that the address shown in the registration system was a publicly known address or the last known address within the meaning of the Turkish provisions. The court also held that there was insufficient evidence that actual notice in a timely fashion was met pursuant to the second condition in ss. 4(d).

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Regina Qu'Appelle Health Region (Mental Health Inpatient Services Division) v. R. (M.M.), 2016 SKQB 108

Elson, March 29, 2016 (QB16100)

Statutes – Interpretation – Mental Health Services Act, Section 24.1
Mental Health – Patient Detention

The respondent M.M.R. requested a review of his long-term detention order made pursuant to s. 24.1(3) of The Mental Health Services Act in May 2015 (see: 2015 SKQB 163). The respondent was committed to the Saskatchewan Hospital for a period of one year to receive treatment for Schizoaffective Disorder. The order was made after the respondent stopped taking his medications. The psychiatrist and the psychologist who had been responsible for the respondent's treatment at the hospital testified at the hearing as did the respondent. It was the psychiatrist's opinion that the respondent was not ready for discharge because the risk of relapse remained significantly high. He recommended that that respondent remain in hospital for the entire duration of the long-term order.
HELD: The long-term order made in May 2015 was affirmed pursuant to s. 24.1(7) of the Act directing the respondent to be detained in the Saskatchewan hospital for not more than one year. Because the respondent's mother had raised the issue of the role of the courts in making and reviewing orders under the Act, the court reviewed the legislation to ascertain its purpose relating to involuntary treatment provisions. It found that the role of the courts related to the purpose was met by supervising the process and assessing whether the treatment proposed was compatible with a detained person's best interests.

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