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Subject Index

R. v. Sewap, 2015 SKQB 347

Rothery, November 3, 2015 (QB15407)

Criminal Procedure – Evidence – Recognition Evidence
Criminal Law – Evidence – Identification

The accused was charged with robbing a fellow prisoner of his canteen items at the Saskatchewan Penitentiary contrary to s. 334(1)(b) of the Criminal Code. The Crown sought to introduce "recognition evidence" to the jury at trial. A voir dire was held to determine the admissibility of the evidence of: 1) the food services officer as to the accused's identification made from a still photograph derived from a video recording; and 2) as to video recordings compiled by the security intelligence officer from footage taken in rooms where the alleged offence had occurred in the penitentiary. With respect to the first matter, the food services officer testified that at the time of the incident, he was in charge of supervising inmates in the production of meals at the penitentiary. The security intelligence officer at the penitentiary showed him a photograph and asked him if he knew who the person was and he identified him as the accused, who had been working in the kitchen for about one week as a dishwasher. He said that the accused's tattoo on the side of his head helped him to identify him from the photo and to identify him at the voir dire hearing. Regarding the compilation video, the intelligence officer testified that he did not know the accused. After the robbery occurred and the complainant could not identify the suspects, the officer used the films from surveillance cameras in the canteen and the surrounding areas to follow the movements of the complainant. It was from the videos that a photograph of the accused

was made, which allowed the food services officer to identify him. The video showed the accused, the complainant, other inmates and a scuffle.
HELD: The recognition evidence was considered admissible at trial. The court held that it could be tendered by the Crown to the jury. The court also admitted the compilation video recording into evidence. The security officer was entitled to identify the accused in the videos but could not usurp the role of the jury at trial by describing or interpreting for the jury what they might or might not be viewing.

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Haug v. Dorchester Institution, 2016 SKCA 55

Jackson Caldwell Ryan-Froslie, April 20, 2016 (CA16055)

Civil Procedure – Appeal
Statutes – Interpretation – Court of Appeal Act, section 20(3)
Statutes – Interpretation – Federal Court Act

The applicant was a dangerous offender serving an indeterminate sentence. The application was within an appeal he took against a decision in a civil action affecting him and his parents' estate. The applicant alleged violations of his ss. 7 and 15 Charter rights by the warden of the institution he was in. The chambers judge dismissed that application because the applicant did not establish a legal basis of his claims nor did the court have jurisdiction to hear them. The applicant applied to have that decision discharged or varied pursuant to s. 20(3) of The Court of Appeal Act, 2000. The applicant claimed various relief, including, but not limited to, $5,000 from the warden to compensate him for the violation of his Charter rights and an order that the warden return all of his CD-ROMs, diskettes, etc.
HELD: The appeal was dismissed. Section 20(3) of the Act only permits the court to consider whether to discharge or vary an order of a chambers judge. None of the relief sought by the applicant was related to the civil appeal that he was a party to. The relief sought by the applicant was not properly characterized as incidental to an appeal or a matter pending in the court. The appeal court also found support in s. 18 of the Federal Courts Act, which has been interpreted as depriving the appeal court of jurisdiction over prerogative writs against federal boards, commission, and other tribunals. The definition of federal board, commission, or other tribunal is broad and was found to include a warden of a federal institution. The Corrections and Conditional Release Act has grievance procedures for inmates and the Federal Court has the exclusive jurisdiction. The court did not interfere with the $500 costs ordered against the applicant and ordered a further $1,500 in costs in favour of the warden.

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Radiology Associates of Regina Medical PC Inc. v. Sun Country Regional Health Authority, 2016 SKCA 57

Jackson Caldwell Whitmore, April 21, 2016 (CA16057)

Civil Procedure – Costs
Civil Procedure – Appeal – Order to Quash – Moot
Contracts – Breach
Contracts – Interpretation

The appellant appealed a Court of Queen's Bench decision and the respondent applied to quash the appeal on the basis that it was moot. The matter involved the proper interpretation of a contract between the parties. The respondent argued that the contract did not extend to the appellant providing CT scans, whereas the appellant argued that it did. The appellant applied for an interlocutory injunction preventing the respondent from seeking and accepting bids for the provision of CT services. The chambers judge did not grant the interlocutory injunctive relief. The appellant appealed on the basis that the chambers judge misinterpreted the Mosaic case and that the chambers judge erred in finding that no irreparable harm would be suffered. The respondent argued that the appeal was moot because an injunction would not accomplish anything due to the fact that the respondent had already entered into an agreement with another provider for the CT services. HELD: The application to quash was granted. The appeal court applied authorities and concluded that any decision the court made with respect to the appeal would not resolve the controversy affecting the rights of the parties. The factual underpinning of the case changed so that granting an injunction would be moot. The appeal court also determined that it should not decide the appeal notwithstanding the finding that it was found to be moot. A consideration of the mootness factors did not impede the court from deciding the appeal; however, the court had to demonstrate sensitivity to the effectiveness or efficacy of judicial intervention. If the appeal was considered and decided in favour of the appellant, the court could only say whether an injunction should have been granted. The declaration would have no readily apparent meaningful consequence for either side but it could have a prejudicial effect on the eventual outcome at trial. The appeal court determined costs as follows: each party was ordered to bear its own costs with respect to the first chambers appearance at the Court of Appeal because the appearance was in the nature of case management where both parties sought directions; the second chambers appearance resulted in an order in favour of the respondent and there was no reason that the respondent should not receive its costs in the usual way; and the court declined to order costs on the mootness application, but

R. v. Gordon

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awarded the appellant costs of the appeal on lowest column of the Court of Appeal tariff for the appeal. The respondent rendered the appeal moot by its actions.

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R. v. Gordon, 2016 SKCA 58

Caldwell Herauf Whitmore, April 26, 2016 (CA16058)

Criminal Law – Appeal – Acquittal
Criminal Law – Appeal – Adverse Inferences
Criminal Law – Appeal – Beyond a Reasonable Doubt
Criminal Law – Appeal – Evidence as a Whole

The respondent was acquitted of Criminal Code charges alleging that he robbed an individual of cash, credit cards and a cell phone, contrary to ss. 343(b) and 344, and that he unlawfully confined that individual, contrary to s. 279(2). The Crown appealed pursuant to s. 676(1)(a) of the Criminal Code. The main issue at trial was the identity of the offender. The victim testified as to the identity of the accused and the police officer testified that the victim identified the respondent in a photo lineup identification. The crown argued that three errors of law were made by the judge and therefore a new trial was required: 1) the judge misunderstood the concept of proof beyond a reasonable doubt; 2) the judge drew an adverse inference from the failure of the Crown to call certain witnesses or offer an explanation for why those witnesses were not called; and 3) the judge failed to consider the evidence as a whole on the issue of identity.
HELD: The appeal was dismissed. The Court of Appeal dealt with the issues as follows: 1) the judge had seven reasons to question whether the respondent was the offender. The Crown argued that since the judge accepted the victim's evidence, the judge was not then permitted to disregard it. The appeal court found the Crown's interpretation of what occurred to be narrow. The judge found the victim's identification to be equivocal because of all the other circumstances of the case. Also, the Crown indicated its first ground of appeal was a question of law. However, the question improperly asked the appeal court to re-examine the judge's findings of fact to assess whether the verdict was unreasonable because the judge failed to infer guilt from the evidence. The appeal court did not find anything to indicate the judge misunderstood the criminal standard of proof beyond a reasonable doubt or his legal duty in that regard; 2) the judge drew an adverse inference in two of the seven reasons for having a reasonable doubt as to the identity of the offender based on the Crown's decision not to call certain witnesses. The respondent conceded that this was an error of law because the judge effectively speculated about matters that were

not in evidence and drew an adverse factual inference based on that speculation. The judge also erroneously commented negatively on the absence of an explanation for the Crown's election not to call certain witnesses. The appeal court, however, was not satisfied that the verdict would have been different. The errors did not have a material bearing on the verdicts; and 3) the judge did asses the identification evidence and his assessment of it did not constitute an error of law alone. A judge does not have to refer to every item of evidence considered. The appeal court held that the Crown did not have a right of appeal as articulated in the third ground.

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Moody v. Hunt, 2016 SKCA 63

Lane Jackson Whitmore, April 22, 2016 (CA16063)

Civil Procedure – Queen's Bench Rules, Rule 3-49
Real Property – Joint Property
Real Property – Land Titles – Miscellaneous Interest
Statutes – Interpretation – Family Property Act
Statutes – Interpretation – Homesteads Act, 1989

The appellant was the administrator of an estate and she appealed the decision of a Court of Queen's Bench judge that dismissed her application for a declaration that the estate was entitled to a half interest in certain property that was bequeathed to the deceased and his brother, as joint tenants. The property was the home of the deceased's father. The appellant and deceased lived in the home at the time the father made his will and they continued to live there when the father passed away. The deceased passed away after his father. The executors of the father's estate wanted to transfer the title to the brother as the surviving joint tenant. The applicant claimed a one-half interest pursuant to The Family Property Act, as a non-owning spouse under The Homesteads Act, 1989, and as the administrator of the estate. The appellant then applied as administrator and in her own right pursuant to rule 3-49 of The Queen's Bench Rules seeking a declaration that an interest against the home entitled the estate to one-half interest in the residence. The chambers judge found that the father left the property to the two as joint tenants and therefore when the deceased died, the right of survivorship dictated that his interest in the property was extinguished and his interests then accrued to his brother. The Homesteads Act, 1989 was found not to apply because the transfer of property from the brothers' executors was not a disposition as defined by the Act. The appellant appealed, claiming that the home was a "family home" as defined in The Family Property Act and, therefore, the brothers' interests were distinguished.

HELD: The appeal was dismissed. The brothers were granted an identical interest. The Family Property Act and The Homesteads Act, 1989 did not assist the appellant because they did not change the nature of the interest given to the deceased.

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Gary L. Redhead Holdings Ltd. v. Swift Current (Rural Municipality No. 137), 2016 SKCA 65

Ottenbreit, May 11, 2016 (CA16065)

Administrative Law – Appeal – Leave to Appeal
Civil Procedure – Appeal – Leave to Appeal
Municipal Law – Assessment Appeal
Statutes – Interpretation – Municipal Board Act

The applicant applied for leave to appeal the decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board pursuant to The Municipal Board Act. The applicant appealed the assessment of properties in the respondent rural municipality alleging they were too high. The Board of Revision decided in favour of the respondent. The respondent cross-appealed before the board, arguing that the assessment should have actually been even higher because there was an error made in the Market Adjustment Factor (MAF) used. The board agreed with the respondent; however, the increased MAF was not implemented because not all affected properties in the rural municipality were part of the court action and there would thus be an inequity. The applicant argued that the MAF should be reduced and argued that the board's delay in implementing a change to the MAF was a mistake. The committee dismissed the applicant's appeal, but found the board had erred by not implementing the increased MAF. The applicant argued that: 1) the committee erred in law by increasing the assessed value when the respondent did not appeal; and 2) the committee exceeded its jurisdiction by denying the applicant procedural fairness by increasing the assessment on a basis not raised by either party on appeal to the committee.
HELD: Leave to appeal was granted. The court was satisfied that neither ground of appeal was destined to fail. There was therefore sufficient merit in both grounds of appeal. Further, the issues were of sufficient importance given the engagement of s. 256(1) of the Act.

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Mosaic Potash Esterhazy Ltd. Partnership v. Unifor Local 892, 2016 SKCA 68

Lane Jackson Whitmore, April 20, 2016 (CA16068)

Administrative Law – Appeal
Administrative Law – Judicial Review – Arbitration – Collective Agreement
Administrative Law – Judicial Review – Saskatchewan Human Rights Code
Administrative Law – Judicial Review – Standard of Review – Reasonableness
Labour Law – Arbitration – Judicial Review
Labour Law – Collective Agreement – Last Chance Agreement

The appellant appealed a decision that sustained the grievance submitted by the respondent and overturned the appellant's dismissal of the grievor. The chamber's judge held that the arbitrator's conclusions were reasonable. The 53-year-old grievor was terminated from his employment with cause in 2014. He had been employed with the appellant since 1980 as a loadout operator, which was a safety sensitive position. In 2011, the appellant introduced a program that required all employees in safety sensitive positions to undergo drug testing. In February 2012, the griever was tested for alcohol and was in violation of the program so was required to undergo an assessment by a company providing employee assistance programs. The program concluded that the grievor met the criteria for alcohol and drug dependence and made six recommendations. A return to work agreement was entered into with 11 terms. In 2013, an unannounced substance test was performed and the grievor tested positive for cannabis. Another assessment by the same company was performed. A last chance agreement (LCA) was signed by the parties. The agreement indicated that the appellant could discharge the grievor if he violated the policy and that any action by the union could only be to determine whether the LCA was violated. In 2013, there was an unannounced substance test and the grievor tested positive for alcohol and his employment was terminated. The grievor grieved his dismissal indicating that he was terminated because of his disability. The arbitrator allowed post-termination evidence. She determined that she had the jurisdiction to substitute a penalty other than that provided in the LCA. She also held that the LCA was illegal because it attempted to limit the arbitrator's jurisdiction by precluding an assessment by a human rights tribunal or an arbitrator. The arbitrator found that the appellant failed in its duty to accommodate. She indicated that giving the grievor one last chance would not cause the appellant undue hardship. The appellant appealed to the Queen's Bench Court and the chambers judge ruled the standard of review was reasonableness. The appellant appealed based on the standard of review the chambers judge applied to discrete issues. The appellant argued that the arbitrator ignored the principle of stare decisis when she chose to ignore the binding decision of the Supreme Court of Canada in Cartier, which indicated that post-termination evidence was only admissible if it shed

light on the reasonableness and appropriateness of the action in issue. The appellant argued that the arbitrator used the grievor's continued efforts post-termination to deal with his sobriety as a reason for overturning the termination. They argued that the applicable standard of review should have been that of correctness as it relates to the application of Cartier. The appellant also argued that it was an error for the chambers judge to accept as reasonable the arbitrator's conclusion that it had to accommodate the grievor to the point of undue hardship. The conditions imposed by the arbitrator were also unreasonable according to the appellant. Lastly, the appellant argued that the chambers judge erred in accepting as reasonable the arbitrator's treatment of the LCA.
HELD: The appeal was dismissed and the grievor was reinstated as ordered by the arbitrator. The Court of Appeal agreed with the chambers judge with respect to the use of post-termination evidence. The appeal court also agreed that the grievor's return to work, under conditions, would not result in undue hardship for the appellant. The appeal court did not disagree with chamber's judge's comments regarding the limitation to the effectiveness of an LCA and its unenforceability.

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R. v. Wiebe, 2016 SKPC 43

Matsalla, April 8, 2016 (PC16053)

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

The accused was charged with driving while impaired, contrary to s. 253(1)(a) of the Criminal Code, and driving while his blood alcohol content exceeded .08, contrary to s. 253(1)b) of the Code. The defence brought a Charter application alleging that the accused's ss. 8 and 10(b) rights had been violated and sought the exclusion of the evidence obtained as a result of the breaches under s. 24 of the Charter. A voir dire was held. The accused did not testify. The Crown's only witness was the investigating RCMP officer. He testified that he had seen the accused driving his vehicle very slowly through town at 2:00 am and peering through the windshield as if he could not see through it. The road conditions were very slippery. The officer stopped the accused's vehicle and could smell alcohol coming from the vehicle and then from the accused during the course of their conversation. The officer saw a case of beer in the vehicle and did not believe the accused when he denied that he had had anything to drink, and so detained him, advising him that it was for the purpose of a roadside breath sample. In

the police cruiser, the officer told the accused how the ASD machine operated. He asked the accused again if he had had anything to drink and the accused said that he had drunk one beer about two hours earlier. The officer made the formal demand for the breach sample and the accused indicated that he understood. After failing the test, the officer arrested the accused for driving while over .08 and advised him of his right to counsel and the availability of Legal Aid. When asked whether he understood, the accused said yes and that he did not wish to contact a lawyer. He was told that he would be taken to the RCMP detachment to provide two breath samples. The officer then made calls to arrange for a breath technician and for the accused's vehicle to be towed. He also left the cruiser to look for items in the accused's vehicle that the accused requested and took a telephone call from the detachment about another incident that he might have to investigate before leaving to drive the accused there. The accused argued that: 1) the officer did not have reasonable grounds to suspect that he had alcohol in his body; 2) the breath samples were not taken "as soon as practicable"; and 3) his rights to obtain counsel upon being detained were not respected.
HELD: The application was dismissed and the Certificate of Analysis was admitted into evidence. The court found that there had not been any breaches of the accused's Charter rights and held with respect to the issues that: 1) the officer had reasonable grounds to suspect that the accused had alcohol in his body and that his belief was supported objectively; 2) the delay of 16 minutes was explained and the sample was taken as soon as practicable; and 3) there was no evidence that the accused was confused or did not understand what was happening and concluded that when he declined to contact a lawyer, he validly and unequivocally waived his right to counsel.

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R. v. Kosar, 2016 SKPC 48

Jackson, April 26, 2016 (PC16046)

Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 10(b), Section 24(2)
Criminal Law – Driving with a Blood Alcohol Level Exceeding .08 – Reasonable and Probable Grounds – Blood Sample
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08
Traffic Safety Act – Motor Vehicle Offences – Driving Without Due Care and Attention

The accused was charged with impaired driving, driving while over .08, and driving without due care and attention contrary to s. 253 of The Traffic Safety Act. The charges resulted when the accused rolled the all-terrain vehicle (ATV) he was driving in an open field. The accused's

friend and neighbour testified for the Crown. The friend was also driving an ATV at the time of the rollover. He noticed four or five beer cans on the floor of the accused's garage floor prior to driving the ATVs but he did not see the accused consume any of the beer or any other alcohol. The rollover occurred when the accused drove into a drainage ditch. The friend said he would have also hit the ditch if he had not been behind the accused and he also indicated that the accused's brake lights came on right before the ditch. The friend detected the odour of alcohol on the accused's breath when he attended upon him right after the rollover. The friend did not observe any other signs of impairment. The rollover occurred at about 6:30 pm. The officer testified that, after speaking to the friend and having a brief interaction with the victim, he believed he had grounds to make a formal s. 254(3) breath demand and that an ASD demand was not required. The accused was arrested as he was being loaded into the ambulance. Just prior to arriving at the hospital, the officer gave the accused his rights to counsel. The accused indicated he did not want to call a lawyer. The officer indicated he had reasonable and probable grounds because there was an accident, the accused had a glassy eye, and there was the smell of stale alcohol coming from the accused. An expert also testified for the Crown. She indicated that the blood alcohol concentration of the accused would have been between .189 and .216 at the time of the accident. The issues were: 1) whether the officer had reasonable and probable grounds pursuant to s. 254(3) of the Criminal Code to make a valid demand for breath samples; 2) whether the implementational component of s. 10(b) of the Charter was breached by the delay in giving him his rights until 8:10 pm when he was arrested at the scene and by failing to administer rights to counsel just prior to the blood demand at 9:01 pm; and 3) s. 24(2) analysis of any breaches.

HELD: The issues were determined as follows: 1) there was no issue with the officer's honest belief that the accused was impaired. The officer's observations were made at dusk and dark and he never returned to the scene to assess the hill just before the ditch. The officer indicated that he thought a sober person would not hit that ditch. The court found that the statement made by the officer set the tone for the investigation. The smell of alcohol on the accused's breath and the knowledge that the friend had observed beer cans would have satisfied the criteria for an s. 254(2) ASD demand, but not the reasonable and probable grounds required to make the blood demand upon the accused. The accused's ss. 8 and 9 Charter rights were therefore breached; 2) the court found the accused's arguments to be without merit. There was no breach of the accused's s. 10(b) rights. If giving the accused his rights just before arrival at the hospital was a breach, the court said that it would have been trifling and incidental nature in the circumstances. Also, there is no s. 10(b) obligation to give rights again prior to the blood demand; 3) the court concluded that the breach was serious and favoured exclusion of evidence. The court found that the impact of the conduct on the Charter-protected interests of the accused

did not favour inclusion or exclusion of the evidence. The court also found that the third Grant factor, namely, society's interest in adjudication on the merits, neither favoured inclusion or exclusion. The court concluded on the voir dire that, when considering all of the factors, the evidence of the blood analysis should be excluded. The court also held that the Crown did not prove beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol. The court relied on the friend's evidence to determine that the Crown had not proved the charge of driving without due care and attention.

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R. v. Meszaros, 2016 SKPC 50

Baniak, April 25, 2016 (PC16049)

Criminal Law – Care and Control over .08 – Presumption
Criminal Law – Defences – Charter of Rights, Section 10(b)
Criminal Law – Disclosure
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08

The accused was charged with driving while impaired and with driving over .08, contrary to ss. 253(1)(a) and 253(1)(b) of the Criminal Code, respectively. The accused went to a vehicle dealership one afternoon and started yelling at one of the supervisors. The receptionist was told to call the police and leave her desk. As she walked passed the accused she could smell alcohol on his breath. She also said that the accused was unstable and had slurred speech. The police arrived at the dealership at 3:10 pm. The officer observed the accused sitting in the driver's seat of a truck when he arrived at the dealership. The truck was running and the accused indicated that someone was coming to pick him up. The officer said the accused had slurred speech and admitted to having five drinks. The officer noticed that the accused had trouble with his balance and dexterity when he was asked to exit the truck. There was one empty can of beer in the truck and one unopened can. The officer arrested the accused. He was read the rights and warning from a standard issue card. The officer indicated that the accused said, "No, I don't, 08-80" when asked if he wanted to contact a lawyer. A breath demand was made and the accused was transported to the detachment. The observation period had to be restarted after the accused burped. The breath samples were taken at 4:05 and 4:27. The officer indicated that he did not give the accused opportunity to use the phone at the detachment because he was 100 percent confident that the accused did not want to talk to a lawyer. He indicated that a Prosper warning was not given because the accused never mentioned an intention to call a lawyer. The issues were whether: 1) the accused's

right to counsel was breached, and if so, should the Certificate be excluded; and 2) the statutory presumption in s. 258(1)(a) of the Criminal Code was rebutted, and if so, did the Crown establish beyond a reasonable doubt that the accused was in de facto care or control of the motor vehicle while in the driver's seat.
HELD: The issues were analyzed as follows: 1) there was no evidence that the accused invoked his right to counsel, and therefore, the officer was not required to ask again or to provide the accused with another opportunity to consult counsel. Another opportunity only would have arisen if there was a change in the circumstances, such as the non-routine investigative procedure. The issue of waiver did not arise because the accused did not invoke his right to counsel. There was no Charter breach and, therefore, the court did not undertake a s. 24(2) Grant analysis; and 2) the accused was deemed to have care or control of the truck because he was in the driver's seat and it was running. The court concluded that the accused did not establish that he did not occupy the seat for the purpose of setting it in motion. The court held that the accused had actual or de facto care or control of the vehicle and could put the vehicle in motion and create a realistic risk or danger to persons or property. The Crown did not fail in its obligation to provide timely and complete disclosure because video footage was not available. The video recorders in all police vehicles were broken with no plans to repair them. The lack of video footage had no bearing on the outcome of the trial, nor was it found to affect the overall fairness of the trial.

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R. v. Mowrey, 2016 SKPC 57

Kovatch, April 25, 2016 (PC16044)

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

The accused was charged with impaired driving and driving while her blood alcohol content exceeded .08. During the trial, a voir dire was held regarding the admissibility of evidence. The defence argued that the accused's s. 10(b) Charter rights had been breached. The accused had been stopped by a police officer who was responding to a 911 call advising that the accused was driving erratically. The officer noticed that the accused's eyes were bloodshot, her speech was slurred and that she smelled of alcohol. The accused admitted that she had been drinking and the officer then made the ASD demand. The accused asked the officer what would happen if she refused, and he told her she would be charged with refusal. The accused continued to ask questions

about the situation but eventually took the test and failed it. The officer advised her that she was under arrest and read her Charter rights. It was a standard police recitation and included reference to Legal Aid. When asked whether she understood, the accused said yes and advised that she did not want to call a lawyer. The officer then made the standard breath demand and explained that the samples would be taken at the police station using a different machine. The accused was asked whether she understood and she eventually said yes but objected that she was not being given a choice. The officer inquired again whether she wanted to call a lawyer and she said no. At the station, the officer asked her again whether she wanted to consult with a lawyer. The officer testified that he did not remember what conversation followed except that the accused said no. Defence counsel suggested that the accused had said: "Who am I going to call at this time of night?" and that the officer responded that he could not advise her. The accused testified that although she told the officer that she understood, she had not, and if she had, she would have called a lawyer. She did not see any posters advertising legal counsel and there was no phone or phone book in the hallway of the station where the officer had asked her. The defence argued the accused's s. 10(b) rights were violated at the station when she asked who she should call. At that point, the police should have stopped the investigation and given her an opportunity to consult with a lawyer. Even if the accused had not formally invoked her rights, the officer had initiated the process again by asking the accused at the police station and was therefore required to meet the informational obligation of advising of Charter rights. He should have advised her of her right to call any lawyer, to inform her of Legal Aid and to provide her with a phone book or list of lawyers and make a phone call.
HELD: The court found that there had been no breach of the accused's s. 10(b) Charter rights and the evidence was admissible. The court found that the accused was well-educated and intelligent and had clearly indicated that she understood her rights when the ASD demand was made and at no time thereafter had she indicated that she wished to invoke her Charter rights. When the officer reiterated the question whether she wanted to call a lawyer at the police station, the officer had not failed to meet any informational requirements regarding the Charter rights.

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Ulvild v. Olympic Motors (SK) I Corporation, 2016 SKPC 68

Demong, May 10, 2016 (PC16056)

Small Claims – Payment for Goods and Services – Jointly and Severally
Civil Procedure – Agency – Ratify

The plaintiff operated an automotive business and claimed against the two defendants, jointly and severally, seeking payment for goods and services. The corporate defendant argued that the individual defendant should be obligated because it simply acted as an agent. The individual defendant argued that he never directed the plaintiff to do the repairs and, in any event the repairs were required because of damage caused by the corporate defendant. The individual took the vehicle to the corporate defendant to be repaired. When the corporate defendant could not repair the vehicle they took it to the plaintiff for repair. The plaintiff indicated that he did not know whose vehicle he was working on and assumed he was repairing the vehicle for the corporate defendant. He was required to purchase expensive parts and was given permission from the corporate defendant to do so. The individual defendant denied knowing his vehicle was sent to the plaintiff. After six months, the individual defendant said that he was advised the vehicle could not be repaired so he had the vehicle towed home. The individual defendant made an insurance claim and was paid $24,950 based on the insurer's conclusion that mice had eaten through the electrical wiring. The insurer determined that the loss of the vehicle arose by virtue of accidental means rather than mechanical failure.
HELD: The court was satisfied that the corporate defendant did not seek the individual defendant's authorization to have the plaintiff do the repairs. The plaintiff obtained the approval to order expensive parts from the corporate defendant, with no evidence that the individual defendant was ever contacted for his approval. The individual defendant also had discussions with the plaintiff once he found out where his vehicle was and it appeared that he was prepared to allow the plaintiff to work on the vehicle. That conduct operated to ratify the corporate defendant's authority to direct the plaintiff to do the work. The court held that there was nothing more than a mere suggestion that the corporate defendant did something to damage the vehicle while it was in their possession. The individual defendant was found to be obligated to pay the plaintiff for the goods and services rendered.

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Ward v. Wilson, 2016 SKPC 73

Green, May 16, 2016 (PC16057)

Small Claims
Statutes – Interpretation – Water Security Agency Act

The defendant obtained approval from the rural municipality to dig a trench across a public grid road to prevent flooding in his house. The defendant said there was no lawful authority to do the trenching because the Water Security Agency did not give prior written approval

as required by The Water Security Agency Act. Because of the trenching, the plaintiff had to travel an extra distance of four miles a day to get to his property. The plaintiff sought damages of $1,000 for the extra distance travelled. The defendant argued that the rural municipality had authority over the grid road pursuant to The Municipalities Act. The plaintiff claimed on the basis of a breach of a statutory duty imposed.
HELD: The defendant did not technically comply with the Act because the trenching was "work" within the Act and s. 59(1) requires written approval. The court concluded, however, that the breach did not give rise to a cause of action by the plaintiff. The damage of driving an extra distance was not the kind of harm the statutory duty was designed to give the plaintiff protection from. The type of harm sought to be protected is damage from water as a result of the "work" done. The court did not need to consider whether the permission granted by the rural municipality was in itself lawful authority, though the court did note that, because the rural municipality did eventually repair the trench, there was evidence the road was under its authority. The defendant was also found to have acted reasonably.

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R. v. Goforth, 2016 SKQB 8

Gunn, January 6, 2016 (QB16160)

Criminal Law – Evidence – Witness – Expert Witness

The accused were charged with second degree murder and manslaughter and with unlawfully causing bodily harm, respectively, to two sisters in their care. The Crown sought to tender Dr. Sharon Leibel (Leibel) as an expert in the area of child abuse, specifically of children under the age of 16, including determining causation of injuries. A voir dire was held in which the defence questioned Leibel's qualifications and her ability to offer opinion evidence in the areas suggested by the Crown. The issue was whether the Crown had satisfied its burden to show that Leibel was a properly qualified expert in the areas in which it sought to elicit opinion evidence. In this case, the Crown intended to obtain evidence regarding: 1) Leibel's examination of the two children when they were taken to the hospital. Leibel would describe J.G.'s malnourishment, indications that she had been deprived of food and water for a period of time before her death, and marks on her body consistent with being restrained and held in one position for an extended period of time and being gagged. Leibel would then testify that all of her observations and the condition of J.G. was consistent with child abuse and/or non-accidental causes. Leibel's evidence regarding the second child, N.B., would rest upon the similar

observations that she had made during her examination of the child at the hospital. Leibel had been a family physician for over 30 years and treated many children under the age of 16. She had taken courses over the past 22 years offered by the American Professional Society on the abuse of children. Her expertise was in getting children to relax and talk to her. She had been involved in the Child and Family Services Unit that was set up to assist in providing opinions in suspected child abuse cases when children were brought to hospitals for treatment of injuries.
HELD: The court found that Leibel was an expert entitled to provide opinion evidence to the jury in some areas. She was not qualified to provide evidence of causation and would not be permitted to describe her observations as "child abuse" because that would usurp the role of the jury. The court outlined the specific matters on which Leibel could testify. She would be permitted to testify regarding her examinations of the children in the hospital, including a description of the marks she observed and identification of them as being bruises or burns. She would not be permitted to testify whether in her opinion they were of recent origin or of their cause, specifically whether they were caused intentionally or accidentally. Leibel could testify as to the physical state of the children including their weight and her conclusion that they were malnourished. She could not offer her opinion as to how long the period of deprivation was.

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R. v. Sewap, 2016 SKQB 50

Rothery, February 16, 2016 (QB16143)

Constitutional Law – Charter of Rights, Section 11(b)

The accused was charged with robbery contrary to s. 344(1)(b) of the Criminal Code. The alleged offence, stealing an item from a fellow prisoner at the Saskatchewan Penitentiary, took place on May 4, 2013. The trial date was set for May 2016. The accused applied for a judicial stay of proceedings on the basis that his right to a trial within a reasonable time under s. 11(b) of the Charter had been breached. The defence argued that the pre-charge delay of eight months ought to be considered as well, thereby increasing the delay to a total of 36 months.
HELD: The application was dismissed. The court found that this was not an exceptional case that warranted including the pre-charge time in the overall s. 11(b) analysis. The police had not taken an inordinate amount of time in laying the charge because the nature of their investigation required the time. Regarding the post-charge delay, the court found that the institutional delay of 22 months in this case was not unreasonable.

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R. v. Abdalla, 2016 SKQB 128

Kalmakoff, April 26, 2016 (QB16127)

Criminal Law – Motor Vehicles Offences – Driving with Blood Alcohol Exceeding .08 – Sentencing – Restitution – Appeal

The accused was charged with driving with while her blood alcohol content exceeded .08, contrary to s. 253(1)(b) of the Criminal Code. At trial she pled guilty and was sentenced to pay a fine of $1,300 and a surcharge of $390. At the time of sentencing the Crown requested that a restitution order form part of the sentence and sought an adjournment to enable it to gather evidence regarding the appropriate amount. The prosecutor told the judge that the accused had crashed her car into a house and caused extensive damage but the amount was unknown. The judge denied the request and declined to make a restitution order because it was not realistic in this case: the accused had recently immigrated to Canada and only had income from a student loan. She and her husband were recently divorced and she was supporting four children. The Crown appealed on the ground that the trial judge erred in law in the way that he addressed the issue of restitution. The Crown also sought leave to adduce fresh evidence regarding the damage caused by the accused. The homeowner had had to replace the siding on her house where the accused's car damaged it. That cost was covered by insurance. However, the new siding did not match the colour of the rest of the house so she paid $4,000 to have it replaced as well. Her insurance premiums had increased by the amount of $467 per year for three years as a result of her claim, resulting in an increase of $1,400.

HELD: The appeal was dismissed. The court held that it would grant the application to adduce fresh evidence. The Crown could not have had the material available to it at the time of trial and it was relevant to the issue of restitution. The evidence was credible and might have affected the judge's decision. The trial judge had erred in law by declining to make a restitution order because he had not permitted the Crown to present all relevant evidence. He also erred because the only factor that he considered was the accused's ability to pay restitution. However, it was not appropriate for a sentencing court to grant restitution where there is uncertainty over the amount of loss. The court found that there was uncertainty in this case because the accused disputed whether it was necessary for the homeowner to replace all the siding. Despite the admission of fresh evidence, the judge was also correct in declining to order restitution in relation to future increase in the homeowner's insurance premiums, as future loss is not included in s. 738(1)(a) of the Code. The judge erred for the foregoing reasons but

the errors did not affect the sentence.

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1348623 Alberta Ltd. v. Choubal, 2016 SKQB 129

Danyliuk, April 21, 2016 (QB16128)

Civil Procedure – Evidence Credibility
Civil Procedure – Evidence – Expert Evidence
Real Estate – Sale of Building – Caveat Emptor
Real Estate – Sale of Building – Failure to Disclose Defect – Patent or Latent Defect
Real Estate – Sale of Building – Misrepresentation – Fraudulent – Negligent

The plaintiff purchased an apartment building from the defendant in 2007. The building ended up having serious structural problems and had to be demolished. The accepted offer was subject to numerous conditions. The plaintiff received reports that the roof was good. The deficiencies noted that a phase one environmental study resulted in a reduction in the purchase price. The renovations started on the top floor, where increasing amounts of damage were discovered. The plaintiff said that he was not aware of the repair history of the building prior to purchase and thought that the reduction in purchase price would cover all repairs. The defendants objected to the plaintiff's expert report on the basis that it was not based on assumptions but rather based on reports that were not in evidence. The third parties in the action were the property manager and real estate company. The property manager testified that after roof repairs in 2005 there were no further roof leaks, although some leaks had occurred due to other difficulties with the eaves. The issues were: 1) credibility; 2) if the doctrine of caveat emptor was still in force; 3) if the property was defective, and, if so, was the nature of the defect latent or patent; 4) if any misrepresentations were made to the plaintiff and, if so, by whom were they made and were they negligent or fraudulent; 5) if liability on the part of the defendants was established, were the third parties liable to the defendants; 6) if the plaintiff sustained loss or damage; and 7) what the proper cost award was.
HELD: The plaintiff's action was dismissed. The issues were dealt with as follows: 1) the court concluded that the plaintiff was not credible and his testimony was given little or no weight; 2) Saskatchewan courts have held that caveat emptor continues to exist and apply. There are four general exceptions to the application of the principle; 3) there were defects with the building. The plaintiff ignored or minimized the reports prior to closing. The moisture and mold issues were patent defects, not latent ones. There was visible water damage. Caveat emptor applied to the patent defects; it was the plaintiff's responsibility

to detect the patent defects. If the defects were latent the court determined that defendants did not have actual knowledge of the extent of the issues with the building. The plaintiff failed to prove on a balance of probabilities that the defendants, and third parties, had knowledge as to the existence and extent of the moisture and mold issues in the building; 4) the contract of purchase and sale included terms that there were no other representations, warranties, guarantees, promises, or agreements and that the plaintiff was purchasing the building as it stood. The exclusion clause could be a defence to the plaintiff's contract claim, but it was found not to prohibit the tort claim for negligent misrepresentation. The plaintiff claimed the manager made four representations: a) the building had a new roof. The plaintiff inspected the roof and relied on professional inspections, all prior to closing. The plaintiff was aware of the state of the roof; b) the 2007 water damage was not due to the eaves trough problem. The defendants and third parties did believe that the problems were caused by the eaves trough; c) the building was in good shape. The manager's statement was mere trade puffery; and d) the manager would buy the building if he was not so busy. The court found the statement to be "talking up" a product much the same as the statement that the building was in good shape. The court then reviewed the five elements of negligent misrepresentation. A special relationship existed between the parties. None of the representations were untrue, inaccurate, or misleading. The plaintiff did not prove that it relied on the negligent representation. The court drew an adverse inference with respect to the plaintiff not tendering evidence of the other reports. If there was any reliance on the statements it was not reasonable in the circumstances; 5) if there were misrepresentations leading to the defendants' liability, the court indicated that it would have no hesitation in also ordering indemnity as against the third parties, the manager and the real estate company; 6) the plaintiff never actually suffered any damages himself because he did not put any money into the purchase, but rather obtained money for the purchase from investors pursuant to a joint venture agreement. The plaintiff could not rely on rule 2-1(1) of The Queen's Bench Rules because that was aimed at personal representatives and trustees. The joint venture agreement did not create a trust. Further, for a claim pursuant to rule 2-1 to succeed the claim had to be brought in a representative capacity. The plaintiff was also found to have failed to prove the damages alleged to be suffered; and 7) the issue of costs was reserved.

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Law Society of Saskatchewan v. Abrametz, 2016 SKQB 134

McMurtry, April 21, 2016 (QB16144)

Civil Procedure – Subpoena Duces Tecum – Application to Quash
Statutes – Interpretation – Legal Profession Act, 1990, Section 39, Section 63
Civil Procedure – Queen's Bench Rules, Rule 6-13

The applicant Law Society of Saskatchewan (LSS) sought an order pursuant to Queen's Bench rule 3-26 and s. 63 of The Legal Profession Act, 1990, allowing its designates to enter the office and the residence of the respondent, Abrametz, and the office of Abrametz's accountant at MNP for the purpose of searching and seizing records. The LSS had issued and served the subpoenas on the accountant and MNP, seeking to compel them to produce the records at the LSS office within five days of service, without notice to Abrametz. Abrametz applied pursuant to Queen's Bench rule 6-13 for an order requiring the LSS's deputy director and complaints counsel to attend and submit to cross-examination on her affidavits that had been filed by the LSS in support of its application. He also applied for an order quashing the subpoena duces tecum issued to himself, his accountant and MNP as an abuse of process. He took the position that s. 39 of the Act, which establishes the subpoena power, must be considered in relation to the specific discovery provision in s. 63. The LSS had been investigating Abrametz for conduct unbecoming a lawyer in relation to his trust accounts. The LSS argued that it required the documents sought in this application to determine whether Abrametz had exploited his clients and his firm trust account as part of a scheme to evade payment of income tax. The court agreed with Abrametz that the LSS's application should not be heard until his applications to cross-examine counsel on her affidavits and to quash the subpoena were determined. In Abrametz's first application, he argued that the purpose of cross-examination of counsel was necessary to clarify information deposed to by her and was solely within her knowledge and to inquire into the basis for her assertion that she had reasonable and probable grounds to believe that the records sought by the LSS were located within the offices described in the subpoena. Counsel responded that she had no knowledge of matters relevant to the investigation beyond the contents of documents that had already been provided to Abrametz. In his second application, Abrametz took the position that the subpoenas were a circumvention of the discovery process provided in s. 63 of the Act. The LSS argued that a narrow interpretation of s. 39 would unduly hamper its ability to investigate members' conduct.
HELD: The court dismissed Abrametz' application to cross-examine counsel on her affidavit. It found that he had not met the requirement of proving that there was a legitimate need for clarification of the information or that it was solely within the knowledge of the affiant as set out in Wallace v. Canadian Pacific Railway. The court granted Abrametz's application to quash the subpoenas. It held that it was an abuse of process by the LSS to compel production of documents outside of a hearing.

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101189551 Saskatchewan Ltd. v. Tach Investments Ltd., 2016 SKQB 135

Mills, April 22, 2016 (QB16131)

Civil Procedure – Summary Judgment
Torts – Unjust Enrichment

The plaintiff brought an application for summary judgment against both defendants. The plaintiff purchased land and a building that was owned by Brookridge and Tach held the first mortgage. Tach was in the process of foreclosing on the property. Brookridge and its directors would be responsible for any deficiency if the property was sold for an amount less than the mortgage. The plaintiff made an offer to purchase, naming both of the defendants as the sellers. The acceptance of the offer was signed by Tach but not by Brookridge. The offer included a provision for adjustments. The lawyers for Tach prepared a statement of adjustments, but the lawyers for the plaintiffs did not do so before the closing date but requested to be informed if there were any prepaid rents or damages held by Brookridge's lawyers and, if there was, to be paid those amounts. Tach's statement did not disclose any adjustments for rent or damage deposit as it was unaware of any. In fact, a tenant of Brookridge had paid a damage deposit and overpaid its rent in the amount of $57,000. The plaintiff paid the purchase price. After closing, it became aware of the tenant's claim for a credit in that amount and commenced this action to seek return of the money on the basis of unjust enrichment. Tach issued a statement of defence but Brookridge did not. Tach argued that there were genuine issues requiring trial, such as whether it was the seller of the property and whether rental overpayment was an adjustable item in the sale agreement.
HELD: The plaintiff was granted summary judgment for the amount claimed. The court found that it was appropriate to deal with the summary judgment application in respect of both defendants since joint and several liability against them was sought. The court found that there was uncontroverted evidence that Tach was a seller and that the overpayment of rent was included in the adjustments provision in the sale agreement. Tach was unjustly enriched by retaining the overpayment, which was not in accordance with the offer to purchase, and the plaintiff had suffered a corresponding deprivation. There was nothing in the legal relationship between the parties that justified Tach keeping the funds. Any claim that Tach had against Brookridge was not affected by the plaintiff's summary judgment application.

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S. (M.D.) v. S. (D.W.), 2016 SKQB 136

Ball, April 22, 2016 (QB16125)

Family Law – Custody and Access – Interim

The petitioner and the respondent had four children during the course of their marriage. They separated in 2010 and the petitioner applied for interim orders, including arrangements for the parenting of the children. The court made an interim order that the parties would have joint custody with the primary residence of the children to be with the petitioner. The respondent would have access at reasonable times and on every other weekend. The parties reconciled for two years but then separated again. In 2012 the petitioner applied for an order enforcing the 2010 interim custody order. At that application, the court found that both parents were capable of parenting, but in the short term it confirmed terms of the 2010 order. A number of pre-trial conferences were held without resolving matters, and during that time, the parenting arrangements changed substantially. The oldest child began residing with the respondent in December 2014. In December 2015, the second oldest child began residing with the respondent. They stayed with the petitioner on alternate weekends. The applicant then brought this application for an order pursuant to ss. 23(1)(a) and (e) of The Children's Law Act and pursuant to the 2012 court order, confirming the original interim order that the four children of the marriage have their interim primary residence with her and that the respondent have specified parenting time on one day each week and alternating weekends. The petitioner alleged that the respondent was attempting to influence the two youngest children to reside with him.
HELD: The court ordered that the status quo parenting arrangement should remain in place until trial. In this case, the status quo was not the arrangements as they had been in 2010 and in 2012. The court found that the arrangements had evolved since the 2010 order by agreement of the parties and the changes had not occurred because the respondent was attempting to alienate the children from the petitioner.

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R. v. Schubert, 2016 SKQB 137

Kalmakoff, April 26, 2016 (QB16132)

Criminal Code – Motor Vehicle Offences – Assault with a Weapon
Criminal Code – Motor Vehicle Offences – Dangerous Driving
Criminal Code – Defences – Defence of Property

The accused was charged with two counts of assault with a weapon,

contrary to s. 267(a) of the Criminal Code, and one count of dangerous driving, contrary to s. 249(1)(a) of the Code. The accused had stopped at a gas station. While he was inside, a former girlfriend of his opened the cab of the truck and took his cell phone. The accused needed his cell phone because he received his assigned towing jobs from his employer on it. A struggle ensued between the accused and the woman, and she got into another vehicle driven by the other victim. The accused followed the vehicle throughout downtown Regina. He struck the rear end of it twice when it had stopped at intersections. Eventually, he struck the rear end of the vehicle again and knocked it off the road into a snowbank. The accused then positioned his truck in such a way as to block the vehicle from leaving. The Crown alleged that the accused used his tow truck as a weapon to commit assaults on the two victims and that his actions in the course of doing so amounted to dangerous driving. The accused denied committing the assaults and driving dangerously. He argued that he was making a lawful arrest pursuant to s. 494(2) and that his actions were authorized by s. 25(1)(a) of the Code. The two victims did not testify. The Crown's witnesses were limited to a number of people who had observed the chase and/or collisions. HELD: The accused was found not guilty of the first two counts of assault. He was found guilty of dangerous driving. The court found that he had not made out the defences under s. 35 (defence of property) or pursuant to ss. 25 and 494(2) of the Code. Regarding the assault charges, the court found that it had a reasonable doubt that the accused intentionally struck the other vehicle or lunged at it while it was stuck in the snowbank. Regarding the charge of dangerous driving, the court found that the accused's acts in chasing the other vehicle and his persistent pursuit of it after colliding with it while driving through a city, was objectively dangerous to the public and that his driving was a marked departure from the standard of care of a reasonable driver. In the circumstances, the accused's driving actions were not objectively reasonable nor did he believe they were. His actions were not proportionate or necessary after the victim had stolen his cell phone. Thus, the accused had not made out the defences and the Crown had disproved them beyond a reasonable doubt.

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R. v. Beuker, 2016 SKQB 138

Scherman, April 26, 2016 (QB16133)

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

The accused was charged with possession of child pornography. A

significant amount of child pornography was stored on an external hard drive that was connected to a server computer used by the accused. He was in physical possession of the server and hard drive and used them daily. The accused argued that he did not download the child pornography and did not know that it was on the system. There was remote access capability to the system. A search warrant was obtained for the accused's residence. The police searched the external hard drive while at the accused's residence and located images meeting the definition of child pornography. The accused and his girlfriend were arrested, given the police warnings and read their rights to counsel. They each gave statements at the police station. The remote access allowed the officers to view the images on the accused's hard drive but they could not copy the files to their computer, nor could they move or copy files from the officer's computer to the accused's. A thorough search of the computer revealed 256 images and 198 videos of child pornography. The accused said his parents accessed his computer but that there was no chance they put the child pornography on there. The accused also denied using the network or installing a file sharing program or creating the disk image where the pornography was located. The forensic computer expert testified that an aMule program had been installed and uninstalled on the accused's computer. Also, there were 348 images of child pornography that had been deleted from the accused's computer. A cleansing program was also located on the computer. A cleansing program can be used for anti-forensic purposes because it overwrites data on unallocated space making previously deleted items unable to be found. The expert testified that it would be impossible for a hacker to hack the accused's system because of his password choices. He also indicated that there would be some record on the accused's computer if it had been accessed remotely. The accused pled guilty to six counts of breaching his undertaking contrary to s. 145(3) of the Criminal Code, four of which were for residing at a house with internet and possessing a device capable of storing data. HELD: The court did not believe the accused's evidence that: he provided his father, mother, and brother with the administrative password; he did not use aMule and other file sharing programs to download child pornography; and he did not create the file containing the child pornography. The court went on to consider whether, nonetheless, it had a reasonable doubt of the accused's guilt. The court noted that the accused was not honest with the police. The accused's regard for the law was questioned by his pirating of thousands of movies and videos games that he knew was wrong. He also failed to abide by the terms of his recognizance. The court held that it was not credible that the accused did not know the child pornography images were on the computer and hard drive that he controlled. It would have been so unlikely that a person could have accessed the accused's computer remotely and he not know about it. The accused was in his apartment during most of the times when child pornography was being downloaded. If there was a remote user during these times, the accused

would have been notified on his screen. The evidence with respect to the parents' computers satisfied the court that there was no possibility that the child pornography was placed on the accused's system by either of them. The court was satisfied that the Crown proved the accused's guilt beyond a reasonable doubt.

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Painchaud v. 101183985 Saskatchewan Ltd. (c.o.b. Turtleford Main Street Market), 2016 SKQB 139

Allbright, April 26, 2016 (QB16134)

Civil Procedure – Queen's Bench Rule 7-9
Civil Procedure – Pleadings – Statement of Claim – Striking Out – No Reasonable Cause of Action
Civil Procedure – Pleadings – Statement of Claim – Striking Out – Abuse of Process

The plaintiff brought an action in negligence for damages caused to her by a slip-and-fall accident that occurred while she was shopping in a grocery store. She named three parties as defendants in her statement of claim: the numbered company that owned the land on which the grocery store was located; Brown, the director of that company and owner of the store at the time of the accident; and Garvalena, the husband of Brown. The plaintiff alleged that Garvalena was an owner of the property and a manager of the store. Garvalena brought an application pursuant to Queen's Bench rule 7-9 requesting an order striking out the plaintiff's statement of claim on the basis that: 1) it disclosed no reasonable cause of action; or 2) it was an abuse of process. The applicant filed an affidavit that stated he was not the owner of the property nor a manager or employee of the store, although he helped his wife occasionally. The plaintiff's affidavit alleged that Garvalena was present in the store on the day of the accident and was aware that there was water on the floor and appeared to assume some responsibility for the safety of the customers in the store after the accident.
HELD: The defendant's application to strike the plaintiff's claim on the ground that it disclosed no reasonable cause of action was denied. Under rule 7-9(2)(a), the court could consider only the statement of claim but not the statement of defence or the defendant's supporting affidavit, and it found that the although the claim was skeletal, it was not an appropriate case to strike as disclosing no reasonable cause of action. However, the court granted the application to strike the claim as an abuse of process under Queen's Bench rule 7-9(2)(e). The defendant's affidavit established that he had no legal ownership of or responsibility for the grocery store.

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Holfield v. Smith, 2016 SKQB 140

Labach, April 26, 2016 (QB16135)

Family Law – Division of Family Property – Constructive Trust

The parties began living together in March 2009 and purchased a house together. In April 2010 the parties transferred the title into the name of the respondent. They continued to cohabit until March 2011 when the petitioner moved out. In August 2011 he commenced a claim against the respondent by filing a petition requesting division of the family home and property pursuant to a constructive or resulting trust. The respondent applied to have the petition struck or dismissed on the ground that it disclosed no reasonable claim. The petitioner admitted that as the parties were not married nor had they cohabited for two years or more, the definition of spouse in the Divorce Act or The Family Property Act were inapplicable. However, under the common law, the definition of spouse did apply and his claim was valid.
HELD: The application was dismissed. The court held that the petitioner had made out a reasonable claim. It found that the Family Law Division of Queen's Bench had jurisdiction to hear the matter pursuant to the authority granted to it to hear family law proceedings under s. 7(2) of The Queen's Bench Act, 1998, and particularly under s. 7(2)(t) that governs the division of property between spouses or persons who have lived together as spouses. By including that provision, the Legislature clearly intended to include the circumstances of unmarried parties who had lived together less than two years.

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R. v. Malek, 2016 SKQB 142

Tholl, April 27, 2016 (QB16145)

Criminal Law – Assault – Sexual Assault – Conviction – Appeal
Criminal Law – Assault – Sexual Assault – Sentencing – Appeal

The appellant appealed his conviction and sentence after trial in Provincial Court. The appellant had been charged with sexual assault contrary to s. 271 of the Criminal Code. The appellant and the complainant testified and the trial judge preferred the evidence of the complainant and found the appellant guilty. The defence had submitted that a conditional discharge was appropriate but the trial judge suspended the sentence and imposed a nine-month period of probation.

The appellant was ordered to provide a sample of his DNA and comply with the Sex Offender Information Registration Act for a period of ten years. The appellant argued that the trial judge should have found the complainant not to be credible and that she had concocted the allegations because she was angry at losing a promotion. The sentence was unfit because of the effect it had on the appellant's immigration status. His application for citizenship would be delayed for 18 months and he would have difficulty obtaining visas to travel to other countries.
HELD: The appeal of the conviction and sentence was dismissed. The court found that there was no error in the trial judge's assessment of credibility, findings of fact or application of the law. Regarding the sentence, the court also found that there were no grounds to interfere with it. The trial judge concluded that a conditional discharge was not in the public interest, based on the fact that the offence took place in the context of an employer/employee relationship and took into account the effect on the victim. The judge had reviewed and commented upon the immigration issues. The making of the ten-year SOIRA order was mandatory pursuant to s. 490.012 and s. 490.013 of the Criminal Code.

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Litzenberger v. Hootz, 2016 SKQB 146

Layh, April 27, 2016 (QB16139)

Family Law – Custody and Access
Statutes – Interpretation – Children's Law Act, Section 3

The petitioner father brought an application for an interim order granting him joint custody of and equal parenting time with his four-year-old son. The petitioner and the respondent were not married nor had they lived together after the birth of the child. The boy had lived with the respondent and she had permitted the petitioner to have access on an irregular basis, despite the petitioner's persistent requests for regular access and overnight visits. When their son was three years old, the respondent agreed that the petitioner could have regular access. On a number of occasions the respondent had indicated that the parties should live together and after the petitioner had purchased a house, she refused to move in with their child.
HELD: The application for joint custody was granted and the petitioner was awarded overnight access for one night on one week and for the weekend on the other week, as well as two hours on three other days. The court found that because the petitioner met the tests set out in Giles v. Beisel, it changed the custodial status established by s. 3 of The Children's Law Act from sole custody held by the respondent to joint custody in that the petitioner had shown his continued involvement

with his son from birth to the present. It was in the child's best interest for the petitioner to have interim joint custody. With respect to the respondent's argument that the existing status quo should not be altered on an interim application, the court found that the status quo in this case was always in a state of flux due to the conduct of the respondent. It was therefore not an issue in this application.

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R. v. Assiniboine, 2016 SKQB 149

Danyliuk, April 29, 2016 (QB16141)

Criminal Law – Home Invasion – Sentencing
Criminal Law – Sentencing – Aboriginal Offender

The accused pled guilty to seven counts primarily involving break and entry to commit robbery. Three of the offences amounted to home invasions and two occurred during a one-night crime spree. The accused was 19 years old at the time he committed the offences. He had a criminal record of 53 convictions for offences committed while he was between the ages of 14 and 19. The pattern of offending showed an escalation in the seriousness of his offences. In the first break and entry, the accused stole an axe. He brought two other accomplices to the break and entries that he committed the next night and threatened the lives of the residents with the axe during the home invasions. The victims' impact statements indicated that they were still frightened to be in their homes and relived the terror they felt when the accused and his accomplices broke into their houses. At the time of his initial plea, counsel for the defence had requested a Gladue report. The judge did not order one but instead directed that pre-sentence report be prepared. The report stated that thee accused spent his childhood in foster homes because his mother struggled with substance abuse. He started drinking at the age of six and was using drugs by the age of nine and indicated that he committed most of his offences when he was intoxicated. The accused had only completed grade 7. He was given opportunities to complete his education but had failed to attend classes. While in custody in the past, the accused was involved with Aboriginal reintegration programs through the Saskatoon Tribal Council, but on release he ceased his involvement. Similarly, he refused to obtain community-based addictions assistance when he was not in custody. Although he denied it, the accused appeared to be a member of the Native Syndicate gang. The accused had no employment history. The author of the report assessed him as being in the 98 percentile for recidivism. The Crown's position was that a global sentence of 12 years less remand time of 1.9 years (at an agreed 1.5 credit) should be imposed. The defence agreed with the remand time calculation but

argued that an 8-year sentence, less that remand time, should be imposed.
HELD: The accused was sentenced to 11 years imprisonment with 1.5 credit for time on remand. The court found that the mitigating factors for the accused were his age, that he had pled guilty and expressed remorse. The court declined to accept as mitigating that the accused was intoxicated or that the offences were unplanned. Regarding the Gladue factors, the court found that the background of the accused as an Aboriginal offender was satisfactorily addressed by the pre-sentence report and found that the accused's moral blameworthiness was reduced to some extent. However, his lengthy criminal record and refusal to obtain help for his problems were still considered aggravating factors. Pursuant to s. 348.1 of the Criminal Code, the home invasion offences were considered an aggravating factor as well. The accused had not known the victims and threatened them while armed with an axe. In one home invasion, he had worn a mask. The crimes could not be seen as unplanned. The accused had had younger accomplices and he had assumed a leadership role in the commission of the offences.

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R. v. Clark, 2016 SKQB 150

Barrington-Foote, April 20, 2016 (QB16147)

Criminal Law – Home Invasion – Sentencing

The accused pled guilty to breaking and entering a dwelling house and committing an assault, pursuant to s. 348(1)(b), and to uttering a death threat, pursuant to s. 264.1(1)(a) of the Code. The accused had reported the theft of firearms and ammunition from his vehicle to the RCMP and named a person, J.N., who was rumoured to be the thief. A month after the theft, the accused went to J.N.'s house trailer with six friends. A party was in progress there and the accused and his group entered the trailer. The accused demanded that J.N. return his property and threatened to kill him if he did not get it back. J.N. denied that he had the guns but said that he knew who had stolen them and offered to take the accused to his home. The accused punched J.N. in the face at least nine times, which resulted in bruising. He pushed him off the trailer's balcony and J.N. fell four feet to the ground, but did not suffer any serious injury. Later J.N. admitted that he had stolen the guns and was convicted of several offences. Neither he nor anyone who had been at the house party on the night of the offence provided a victim impact statement. After arrest, the accused was released on his recognizance and subject to strict conditions with which he had complied for the following three years. The accused had expressed remorse and written

a letter of apology to J.N.. He was 29 years of age at the time of the offence and had worked for his father's company for seven years. His criminal record consisted of one conviction of drunk driving in 2004. The accused had paid support regularly for his nine-year-old son and was a good parent. The accused had the support of his parents, his extended family and a large group of friends. Many people in his community had provided character references. Their letters said that the accused's actions that night were out of character. A petition signed by 286 people was filed with the court, asking that the accused not be incarcerated because the accused was not a threat to the community. The Crown submitted that although there was no need for individual deterrence or rehabilitation, the accused should serve a four-year incarceral sentence, a starting point established by earlier sentences given to offenders involved with home invasions. The defence argued that a 90-day sentence with a probation period was appropriate because the offence was not a classic home invasion – there was no forced entry or weapon, the assault was relatively minor and there were a large number of people at the party in J.N's trailer.
HELD: The accused was sentenced to imprisonment for 11 months on the home invasion charge and three months for uttering death threats to be served concurrently. The court found that there was no mandatory starting point in determining a fit sentence for home invasion. In this case, the accused had accepted responsibility for the crime and had expressed remorse. Other mitigating factors were that he had only one prior conviction and was a productive respected member of his community. After arrest, he had behaved in an exemplary fashion and complied with strict conditions for three years. The aggravating circumstances were that the accused had planned the offence and was prepared to use threats and/or actual violence to achieve the return of his property. The assault was not trivial and the accused's self-help actions were also aggravating factors. The fact that J.N. had stolen the accused's property did not disentitle him to less protection than any other victim or that his house trailer, used as a party house, was less of a home.

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Garand v. Garand, 2016 SKQB 151

Megaw, April 29, 2016 (QB16142)

Family Law – Child Support – Interim
Civil Procedure – Contempt

The petitioner applied for an order for child support and a finding that the respondent was in contempt. In December 2015 the court had ordered that the parties would have shared parenting of their child, a

four-year-old daughter, on a week on/week off basis that would take place in Regina. The respondent was commuting between Calgary and Regina because of his work in the former city. In February 2016, the respondent took the child with him to Calgary and kept her there. The petitioner made an application without notice in March to compel the return of the child. The court granted the application and the decision was communicated to the respondent. The respondent did return the child but not as soon as he learned of the order. In his affidavit, the respondent indicated that the December parenting order was not satisfactory because it was difficult for him to travel and offered no apology for his conduct nor an intention to comply with the December order in the future. The respondent estimated his 2015 income to be $56,000 and the petitioner's was $57,000. The petitioner argued that the respondent's income was higher because he was the principal of a corporation that showed 2014 income of $144,000. Consequently, she argued that his income should be determined to be $136,000.
HELD: The respondent was found in contempt. He was fined the sum of $1,000 and ordered to pay the petitioner the amount of $2,000 in costs for the contempt proceedings. The court determined that in an interim application the most appropriate method for determining income for child support purposes was to use the estimate of actual income and add to it an amount for pre-tax corporate income. The tax amount shown from the 2014 financial statement for the corporation was $12,000. Therefore, that amount was added to the respondent's income for support purposes and was set at $67,100. According to s. 3 of the Guidelines, the respondent was ordered to pay the petitioner $555 per month. The court chose not to apply any offset of this amount in accordance with s. 9 of the Guidelines. The issue could be considered at pre-trial and trial when actual parenting time for each party had been established.

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Alignvest Private Debt Ltd. v. Naber Specialty Grains Ltd., 2016 SKQB 152

Rothery, April 29, 2016 (QB16171)

Debtor and Creditor – Receiver – Approval of Sale

The receiver of the assets of Naber Specialty Grains Ltd. and Melfort Grain Terminal Ltd. (the debtors) applied for court approval of a sale of the assets to Alignvest Private Debt Holdings Inc. (Alignvest Holding), an affiliate of Alignvest Private Debt Ltd. (the sole secured creditor of the debtors). The receiver had attempted to sell the assets on a going concern basis for some time but had received only one offer and it had not been approved by the court (see: 2015 SKQB 384). Alignvest

Holding submitted a formal offer for the assets for the sum of $4.25 million. The receiver supported court approval of the sale. The Canadian Grain Commission (CGC) sought a lengthy adjournment of the sale approval application and an order directing the receiver implement a claims process on the ground that some grain producers may have grain stored at the debtors' facility under agreement with them.
HELD: The sale was approved. The court found that the receiver had acted properly, that Alignvest Holding was the only purchaser willing to pay the proposed amount, and the sales process had been open and fair. The application by the CGC was dismissed. There was no evidence that the producers were anything other than unsecured creditors. The claims process would be unnecessary and costly.

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R. v. Chu, 2016 SKQB 157

Scherman, May 4, 2016 (QB16153)

Constitutional Law – Charter of Rights, Section 13
Criminal Law – Controlled Drugs and Substances Act – Trafficking – Sentencing – Forfeiture

The accused was charged and convicted of trafficking and conspiracy to traffic in cocaine (see: 2014 SKQB 414). In his defence he testified that he had not trafficked in cocaine but admitted that he had trafficked in steroids and Oxycontin, and provided details regarding his operation. This testimony was given under the protection of s. 5(2) of the Canada Evidence Act (CEA) and s. 13 of the Charter. As part of his sentencing, the Crown applied for: forfeiture of certain property under s. 490.1 of the Criminal Code and s. 16(1) of the Controlled Drugs and Substances Act (CDSA); forfeiture of other specified property pursuant to s. 462.37(3) of the Code as "proceeds of crime"; and a fine of at least $236,000 pursuant to ss. 462.37(3) and 462.37(4)(v) of the Code in respect of other "proceeds of crime" property not available for forfeiture. As the evidence proved the forfeiture sought relating to the property identified as offence-related, it was the other types of forfeiture that were disputed in the Crown's application. The offender argued that his testimony could not be considered because of ss. 11(c) and 13 of the Charter. The issues were: 1) whether s. 5 of the CEA and ss. 11(c) and 13 of the Charter prevented the Crown from relying on the accused's evidence in its application; and 2) if so, whether the evidence established a basis for the forfeitures and the fine sought on the basis of being offence-related property and proceeds of crime. The accused argued that regarding the first issue, the forfeiture proceeding fell within the meaning of "any other proceedings" under s. 13 of the

Charter and therefore his testimony could not be considered. The Crown's position was that the accused's evidence was not incriminating and forfeiture proceedings were not "other proceedings" within the meaning of s. 13. Regarding the second issue, the Crown conceded that, to the extent that the proceeds of crime here had their origin in trafficking in Oxycontin and steroids, s. 462.37(1) was not available as a basis for forfeiture because the trafficking of those substances was not the designated offence for which the accused was convicted. However, because the proceeds of trafficking of those substances qualified as proceeds of crime as defined by s. 462.3(1) of the Code, forfeiture was available under the pattern of criminal activity provisions of s. 462.37(2.01 to 2.07). As well, since some of such proceeds were not available to be forfeited, the court should order a fine in lieu under s. 462.37(3). The fine suggested was $236,000.
HELD: The application was granted. The court found with respect to each issue that: 1) the evidence that the Crown was relying upon was not incriminating because the Crown's reliance was not to prove any of the essential elements of the offence for which the accused was being tried. Thus, s. 13 of the Charter was not engaged. Section 5(3) of the CEA did not help the accused either, because the forfeiture proceedings here were part of the same trial in which the evidence was heard. If the court's conclusion regarding s. 13 of the Charter was wrong, the court determined that the other requirement of s. 13 did not apply since the forfeiture proceedings were not "other proceedings". Sentencing is an integral part of the criminal trial; and 2) the court was satisfied on the balance of probabilities that the proceeds of either trafficking in cocaine or in steroids and Oxycontin were what funded the purchase of the property. The court found that the property identified by the Crown as property forfeited as proceeds of crime was in fact proceeds of crime. The requirement under s. 462.37(2.01) were met that the accused had committed two serious offences because his trafficking in OxyContin qualified as such an offence. On the basis of his evidence that he had committed the offence more than once in the previous 10 years, he was therefore engaged in a pattern of criminal behaviour. The court found that the accused's income from sources unrelated to the designated offence could not reasonably account for the value of all of his property. The court reviewed the evidence regarding the monies generated by his steroid-trafficking operation over the 26-week police investigation and found that it would have been over one million dollars in profit. These proceeds of crime were not available for seizure. The court accepted the Crown's figure and ordered the accused to pay a fine of $236,000. In default of payment, the accused would serve a consecutive term of two years of imprisonment.

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Bzdel v. Canadian Pacific Railway Co., 2016 SKQB 158

Chicoine, May 4, 2016 (QB16172)

Statutes – Interpretation – Builders' Lien Act, Section 57

The Manitoba and North Western Railway Co. (MNWR) and the CPR applied under ss. 57(1) and 60 of The Builders' Lien Act for an order to permit it to pay into court the statutory holdback and for an order to vacate seven written notices of liens and claims of lien and one written notice of lien. Eight parties were named as respondents on the application, including the general contractor, Hoban, and seven subcontractors who had contracted with Hoban. MNWR had held back the 10 percent statutory amount of $203,000 after paying Hoban the remainder of the contract price. When Hoban failed to complete the project, CPR cancelled Hoban's contract, and as a result several contractors delivered and registered builders' liens. One subcontractor, ASR Transport, delivered a written notice of lien to CPR claiming the amount of $203,500. In the chambers hearing in August 2015, counsel on behalf of a number of the parties presented a consent order to the judge. He issued the consent order stating that the statutory holdback was $203,000 and directing CPR to pay that amount into court. Nine written notices of lien and claims were ordered to be vacated. The seven subcontractors then brought this application for payment out of the funds in court under s. 57(4) of the Act on a proportionate basis to the exclusion of the other two subcontractors, ASR Transport and Dave's H20 to Go (Dave's) on the ground that they were not entitled at law to share in the holdback funds paid into court. In the case of ASR, the applicants argued that ASR had not registered a lien in the Land Titles Registry against the title of MNWR, as required by s. 56 of the Act, but had delivered a written notice of lien to CPR. Only persons who had registered their claims of lien against the title and who subsequently had liens vacated when the holdback funds were paid into court under s. 57(1) had a right to claim the holdback funds on an application for payment out under s. 57(5). The applicants objected to Dave's lien because it was registered one day after the court ordered payment in of the holdback amount. They argued that under s. 57(4), which states that where an order is made under s. 57(2) to pay the holdback into court and to vacate the registration of the claim of lien, all of the liens vacated cease to attach to the amounts subject to a charge under s. 33.
HELD: The application was dismissed and the court declined to order payment out of the funds to the seven applicants. The court found that both ASR Transport and Dave's had the right to participate in the distribution of the holdback funds paid into court by CPR. With regard to ASR, the court held s. 57 applied to any claim of lien arising under the Act whether registered at the Land Titles Registry or in the form of a written notice of lien. ASR was entitled to participate in an action to enforce its claim against the amount paid into court. With respect to the applicant's position regarding Dave's, the court found that funds paid

into court pursuant to an order made under s. 57(2) do not lose their character as holdback funds. There was no relationship between the amount of liens that were ordered to be vacated and the amount paid into court. Dave's was entitled to participate in any action commenced to enforce its claim of lien, including this application.

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MNP Ltd. v. Denis, 2016 SKQB 159

Smith, May 5, 2016 (QB16154)

Bankruptcy – Application to Annul Discharge
Civil Procedure – Costs – Solicitor-Client Costs
Torts – Fraud

The applicant, trustee in bankruptcy for the respondent, sought to annul his discharge in bankruptcy from September 2012 and replace it with a new conditional discharge order on the basis that: 1) the respondent failed to disclose that he held beneficial title to certain lands at the time of his assignment in bankruptcy; and 2) the respondent's discharge was obtained by fraud, in bad faith, and by his failure to discharge his obligations. A numbered company, an added respondent, was the owner of the lands. In 2006 the respondent and his wife owned six quarters of farmland, but were about to lose them to their mortgagee. The respondent's siblings arranged to each buy a quarter (the relative quarters) with the respondent providing a down payment of $65,000. The siblings leased the land to the respondent with hopes that he would eventually be in a position to buy the relative quarters back. In 2006, the respondent made a proposal under the Bankruptcy and Insolvency Act. The respondent declared that he paid $65,000 to his siblings with respect to the relative quarters and further he described his interest in the relative quarters as part ownership. A proposal was accepted by the respondent's creditors and he continued to farm the land. There was a flood in 2007 and the respondent did not recover from that crop failure. He defaulted under his proposal and was therefore automatically assigned into bankruptcy in 2011. An advisory corporation serving farmers incorporated the numbered company as a vehicle to acquire land and obtain financing. The applicant and the respondent's siblings sold a quarter to the numbered company in 2012, after the discharge in bankruptcy. The siblings also eventually agreed to sell the numbered company, the relative quarters, for the amount paid for them. The voting shares in the numbered company were owned by an affiliate of the advisory corporation with an option for the respondent and his wife to purchase all of the shares prior to March 2017. The numbered company secured financing for the purchase of the land, and the terms of the lease between the numbered company and

the respondent included a term that if he defaulted under the terms of the lease the option to purchase was voided and the numbered company would remain the owner of the land. In early 2016 the respondent was in default of his lease obligation to the numbered company.
HELD: There was no secrecy or an attempt of secrecy such that fraud could be made out by the applicant. The respondent's interest, if any, in the relative quarters was known to the applicant. The respondent and his siblings were transparent throughout. The respondent did hope to reacquire the relative quarters, but he would have had to do a number of things to do so. The court indicted that it did not have to decide whether the Saskatchewan land titles law allowed the holding of a beneficial interest. The applicant's application was dismissed. The respondent and added respondent requested solicitor and client costs, but the court did not find that the applicant's behavior was scandalous, outrageous, or reprehensible. The court did, however, order substantial costs of $3,000 given the preparation of affidavits, detailed briefs, etc.

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Saskatchewan Government Insurance v. Young, 2016 SKQB 162

Megaw, May 5, 2016 (QB16161)

Statutes – Interpretation – Small Claims Act, 1997, Section 39

The respondent applied to have the appellant's appeal dismissed. The appellant appealed a decision made after a small claims trial. It served and filed a noticed of appeal that was accompanied by a copy of the request for transcript within the time prescribed by The Small Claim Act, 1997. Transcript Services provided a letter to the local registrar enclosing the transcript of the evidence and advised that it was also forwarding copies of it to the appellant and to the respondent, but copies of the letter were not received by them. The respondent's solicitor checked the file in the Local Registrar's office nine months after the trial and discovered that no transcript had been filed. He advised counsel for the appellant and took the position the appeal was deemed dismissed pursuant to the provisions of s. 39(5) of the Act. The manager for Transcript Services supplied an affidavit deposing that the transcript had been sent by the provincial government's interoffice mail system at the time it was requested. There was no evidence that it had not been received.
HELD: The application was dismissed. The court held that pursuant to s. 39(9), it ordered that the transcript should be allowed to be filed and the appeal to proceed. The appellant had done everything required of it pursuant to the Act. The provisions of s. 39 did not require the appellant to follow up with the local registrar's office to see if the

transcript had been filed. In a case such as this, s. 39(9) of the Act provides the court with the ability to exercise its discretion to remedy the problem and ensure that justice is achieved where a transcript could not be filed within the six-month period.

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FCC Group Investment Corp. v. Saskatchewan (Director of Corporations), 2016 SKQB 166

Scherman, May 6, 2016 (QB16158)

Corporation Law – Liquidation and Dissolution – Plan of Arrangement
Statutes – Interpretation – Business Corporations Act, Section 186.1, Section 210, Section 220

The shareholders of the applicant corporation approved a plan of arrangement and sought an order approving it pursuant to s. 186.1 of The Business Corporations Act. The plan involved a proposed liquidation and dissolution, which was included in the definition of arrangement under s. 186.1(1)(e). It has 275 shareholders from 19 countries but could not locate 37 of them. The applicant proposed to undertake a two-year outreach program and if the shareholders could not be found, their pro rata entitlement to return of its capital would accrue and be paid to the remaining shareholders. The applicant argued that the court had the power to approve the arrangement under ss. 186.1(4), 203(8) and 210(m) of the Act. The respondent opposed approval of the plan on the basis that s. 204 of the Act required a corporation to distribute its assets among its shareholders according to their respective rights on dissolution and s. 220 directed that if a shareholder was unable to be found, his property should be converted to money and paid to the Minister of Finance. Under s. 220(3), the shareholder could apply to the Minister for payment on proof of entitlement.
HELD: The court held that it did not have the power to approve the proposed plan of arrangement. The court applied the rules of statutory interpretation, specifically the presumption of coherence and overlap, to the provisions of the Act and found that the applicant was using s. 186.1 for a purpose that the legislature did not intend. The applicant could have proceeded to dissolution under Division XVI. In s. 210(m) the legislature intended to give the court the ability to order disposition of property of creditors and shareholders but not to deal with a shareholder's right to distribution on dissolution.

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