The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 18, No. 20 **October 15, 2016**

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Criminal Law – Driving over .08 – Certificate of Analysis – Qualified Technician
Statutes – Interpretation – Criminal Code, Section 258(1)

The Court of Queen's Bench, sitting as a summary conviction appeal court, overturned the respondent's conviction from the Provincial Court. The respondent was charged with impaired driving and driving while over .08. The Certificate of Qualified Technician indicated that the Attorney General designated the technician, whereas, his vive voce evidence indicated that a named person designated him. The trial judge found that there was evidence that the technician was a qualified technician by virtue of the certificate. The vive voce evidence was not found to rebut the presumption created by the certificate. On appeal, the judge acquitted the respondent finding that the trial judge committed an error in law by failing to address key rebuttal evidence raised in cross-examination of the technician, such failure constituting an error in law. The appeal court judge did not go on to consider whether the trial judge erred in admitting certain evidence after finding the respondent's s. 8 Charter rights had been violated. The following questions of law were raised: 1) did the appeal court judge misconstrue the trial judge's reasons; and 2) did the appeal court judge err in finding that the evidence

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of the technician in cross-examination amounted to evidence to the contrary that he was a qualified technician.
HELD: Leave to appeal was granted and the Charter matter was remitted to the summary conviction appeal court. The questions were determined as follows: 1) it was held that the appeal court judge erred by misconstruing the reasons of the trial judge. The trial judge did refer to the cross-examination evidence; and 2) the certificate was evidence of the status of the technician pursuant to s. 258(1)(g) of the Criminal Code and s. 25(1) of the Interpretation Act, in the absence of evidence to the contrary. The court had to determine whether the officer's lack of clarity as to his status was to be considered "evidence to the contrary" sufficient to undermine his status as a qualified technician and, therefore, prevent the admissibility of his certificate. The court found that the Adams case stood for the proposition that confusion by an officer as to his appointment does not satisfy the evidential burden on an accused. The technician's answers in cross-examination were not found to raise a reasonable doubt as to his qualification. His answers were found to illustrate that he may not have properly understood the question. The court held that it had jurisdiction to remit the Charter matter back to the summary conviction appeal court for determination because it was practical and expedient to do so.

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Ottenbreit Caldwell Ryan-Froslie, June 8, 2016 (CA16072)

Criminal Law – Appeal
Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking
Criminal Law – Habeas Corpus

The appellant applied for a writ of habeas corpus ad subjiciendum to the Court of Queen's Bench challenging the lawfulness of his detention in the Regina Correctional Centre. He appealed the dismissal of that application because: the judge failed to address the allegation of Charter breaches; there were jurisdictional errors; and there was an overall lack of due process. The appellant was sentenced to 18 months for possession of marihuana for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. The appellant asked for a review of his sentence alleging the sentencing judge had obstructed justice. He also claimed $384,000 in compensation from the Crown prosecutor and the

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judge. The appellant had a next friend argue the "organized pseudolegal commercial argument" litigant tactics that had been argued and denounced in other courts.
HELD: The appeal was dismissed. The Queen's Bench judge directly and properly addressed the application on its merits holding that the appellant was the subject of a valid and existing warrant of committal from which no appeal was taken. The appeal court did not have jurisdiction to address the appellant's jurisdiction and due process arguments in an appeal from the dismissal of his application for writ of habeas corpus.

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Ammazzini v. Anglo American PLC, 2016 SKCA 73

Ottenbreit, June 10, 2016 (CA16073)

Civil Procedure – Class Actions – Certification – Application to Stay – Appeal
Civil Procedure – Class Action – Standing
Statutes – Interpretation – The Class Actions Act, Section 5.1

The applicants sought leave to appeal from an order made in Queen's Bench chambers that conditionally stayed their proposed multi-jurisdictional class against Anglo American PLC, De Beers Canada Inc., etc. (respondents) pending a certification decision in a similar class action commenced in Ontario by Brant, its representative plaintiff (see: 2016 SKQB 53). Brant also applied for status either as a respondent or an intervenor on the leave motion and if it was successful, on the appeal. The applicants (prospective appellants) advanced numerous grounds of appeal. For example, they argued that the chambers judge erred in law by concluding that s. 5.1 of The Class Actions Action grants a representative plaintiff from another jurisdiction the right to adduce evidence in the certification proceedings. The respondents argued that the judge's order for the stay was discretionary and attracted a high degree of deference. With respect to the application by Brant, he argued that his right to participate in the appeal flowed from his successful application for a stay in the court below. The prospective appellants submitted that Brant could not be a party or an intervenor in the leave application or the appeal because of the absence of an express statutory provision permitting him to do so, relying upon the decision in Wuttunee v. Merck Frosst. The applicant suggested that the question of his standing should be referred to a panel of the court for consideration.
HELD: The application for leave was granted. The Court of

R. v. V. (L.)

R. v. Wade

Richer v. Canada (Attorney General)

Rodrigues v. Campbell

Appeal chambers judge found that the proposed notice of appeal met the test set out in Rothmans: it had sufficient merit and importance. It raised significant issues regarding the right of representative plaintiffs from other jurisdictions to make applications at a certification application. The application by Brant was left to the panel hearing the appeal as prescribed by s. 17 of The Court of Appeal Rules. The issue of standing arising out of ss. 4(2)(c) and 5.1 of the Act was an important one.

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R. v. V. (L.), 2016 SKCA 74

Richards Jackson Herauf Whitmore Ryan-Froslie, June 13, 2016 (CA16074)

Criminal Law – Assault – Sexual Assault – Sentencing

The appellant appealed his conviction of sexually assaulting his teenage daughter contrary to s. 271 of the Criminal Code. The Crown appealed the three-year sentence imposed on the appellant by the sentencing judge (see: 2014 SKQB 278). It submitted that the sentence should be increased to five years of imprisonment. With respect to the appellant's appeal, he argued that the trial judge erred in law by admitting into evidence an incriminating diary he had kept while he and the complainant were on a holiday because the descriptions in the diary regarding sexual touching of the complainant engaged the similar fact rule. The entries were evidence of criminal acts falling outside of the time frame of the charges laid against the appellant and were tendered for the purpose of establishing his guilt. The evidence was presumptively inadmissible and the onus had been on the Crown to rebut it. The Crown took issue with the length of the sentence. It noted that the sentencing judge had not granted its request for a firearms prohibition because the appellant's crime was not violent. It suggested that the Court of Appeal should clarify the meaning of "major sexual assault" by confirming that penile penetration is not a necessary element of such an assault and establishing a new starting point sentence of four years for offenders who commit such assaults against children.
HELD: The appellant's appeal of his conviction was dismissed. The Crown's appeal of the sentence was allowed and the appellant's sentence was increased to four years of imprisonment. The court found with respect to the appellant's appeal that the diary was admissible evidence. The trial judge appeared to have considered the contents of the diary in

reaching his decision and insofar as the entries described sexual touching of the complainant, the similar fact rule was engaged. The trial judge had not taken any assessment of the admissibility of the diary, possibly because the appellant's counsel had not objected to its admission. However, the contents of the diary were admissible as similar fact evidence because of their probative value based on the degree of connectedness between the similar fact evidence and the alleged offences, as required by the Supreme Court in its decision in R. v. Handy. The diary was adduced by the Crown to reinforce the complainant's credibility and to help establish the actus reus of the offence with which the appellant had been charged. The prejudice caused to the appellant was reduced because his trial was by judge alone and the probative value of the evidence outweighed the risk of prejudice. Regarding the Crown's appeal of the sentence, the court reviewed its decisions in R. v. Bird and R. v. Sandercock. It confirmed that the latter case established that penile penetration was not a necessary feature of major sexual assault. After the decision in Bird, the court had consistently applied the three-year starting point concept to sentencing for offences against adult victims but the court had never expressly endorsed the concept in cases involving sexual assaults against children because it had not wanted to fetter the discretion of sentencing judges by establishing a range. They must consider the aggravating and mitigating circumstances of each case. In this appeal, the court found that the trial judge made errors in principle when he sentenced the appellant. His conclusion that as the offence did not involve violence he would decline to make a firearms prohibition order was wrong in law and an order should have been made. The trial judge misapprehended the nature of the crime. It was a crime of violence. The gravity of the offence was also misapprehended. The court held that a fit sentence of four years would be proportionate to the gravity of the offence and the degree of responsibility of the offender.

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Mosaic Potash Colonsay ULC v. United Steelworkers, Local 7656, 2016 SKCA 78

Richards Jackson Herauf, June 27, 2016 (CA16078)

Administrative Law – Judicial Review – Appeal
Labour Law – Arbitration – Judicial Review

The appellant appealed from the decision of a Queen's Bench judge in chambers to dismiss its application for judicial review of

an arbitrator's decision. The appellant had terminated one of its employees after he had submitted to a urine test, which revealed that he had been using marijuana. The termination was grieved by the respondent union. The appellant then asked the arbitrator to order that the proceedings before him be recorded and transcribed on the ground that the transcript was essential to a judicial review of the arbitrator's ultimate award. The union opposed the application. The arbitrator denied the application because recording arbitration proceedings was not a normal practice and he was reluctant to impose additional formality on the proceedings when the union opposed it. The appellant brought a judicial review application on the ground that the arbitrator's failure to order a transcript was a denial of procedural fairness. The chambers judge's dismissal of the application was on the basis that it was premature. The arbitrator's decision was interim in nature. In trials, such decisions were not reviewable by an appeal court until it was in the context of the final decision of the trial court.
HELD: The appeal was dismissed. The court agreed with the chambers judge's decision that the judicial review application was premature.

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R. v. Rivard, 2016 SKPC 66

Kovatch, May 17, 2016 (PC16055)

Criminal Law – Assault
Criminal Law – Evidence – Beyond a Reasonable Doubt
Criminal Law – Evidence – Credibility

The accused was charged with assault contrary to s. 266 of the Criminal Code. The issue was whether the Crown proved the charge beyond a reasonable doubt. The complainant was eight years old and testified that the accused asked her if she wanted a ride home. She indicated that when she said no the accused got out of his vehicle and grabbed her by the arm. The accused was a neighbour that lived at the far end of her street. The complainant gave two similar statements to police. The complainant repeated the contents of the statement in cross-examination. The accused testified that he did not recognize the complainant and that he had no interaction with her on the day in question. He indicated that his vehicle did not have power windows and that he would have to remove the inside panel of the door to manually turn down the window. He also indicated that due to health difficulties he would have difficulty bending over to grab a

grocery bag as the complainant had indicated.
HELD: The court found both witnesses to be fairly convincing and credible. The court was troubled by the complainant's statements that the accused was creepy, especially given she had indicated that she had not seen him much or for quite some time before the incident. The court also found it difficult to see how an eight year old could have struggled free of a grown man. The court was uneasy about convicting on the basis of that evidence. There were also examples of the accused's evidence causing the court to be uneasy. The court was unable to determine which witness to believe and therefore the accused was found not guilty.

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R. v. Letendre, 2016 SKPC 76

Morgan, May 20, 2016 (PC16058)

Criminal Law – Evidence – Admissibility – Statement Against Interest
Criminal Law – Evidence – Admissibility – Warned Statements

The accused was charged with criminal offences and a voir dire was held to determine the voluntariness of both the warned audio/videotaped statement (the first statement) and the oral statement (the second statement). The accused did not implicate himself in the shooting in the warned statement but, almost immediately after, did so in the second statement. The accused's vehicle was seized for involvement during the shooting. The accused arranged to meet an officer at the detachment to discuss return of the vehicle. The accused was arrested upon his arrival at the detachment. The accused signed a KGB form before the interview resulting in the first statement. When the accused was asked whether he intended to give a statement he replied no, explaining that he had a disease that took away his ability to make a statement and that he had some memory problems. The officer stopped the interview after two hours and seven minutes when no progress was being made. The second statement occurred when the accused and officers were leaving the detention area and the accused indicated he wanted to speak off the record. He began talking about the shooting and the officer immediately stopped him and told him he would have to record it with the warnings from the first statement still being in effect. The accused acknowledged what the officer was saying and the accused gave an inculpatory statement. The accused did not want to go back on video.

HELD: It was clear from the videotaped interview that the consent form was fully explained. The officer was not threatening in any way. The operating mind test was met on the first statement. There was no doubt that he knew he was talking to the police, and that he knew what he said could be used to his detriment. The court held that the statement made by the officer regarding talking to a prosecutor was not an actual inducement, it did not have any effect on making the accused speak. There was also not a promise. The court concluded that the Crown proved beyond a reasonable doubt that the first statement was voluntary. The accused argued that the second statement should have been and could have been recorded. There is no rule requiring a statement taken in police custody to be recorded but there must be a sufficient substitute for a recording to satisfy the court of voluntariness. There was nothing to contradict the officers stating that there were no threats or promises made to the accused. The court also had no doubt that the accused had an operating mind. The officers only provided a record of what transpired in the second statement, there was no verbatim recording of any sort. The officers only had notes intended to refresh their memories. The court had concerns with the accuracy of what was said. The court had doubt as to how complete the evidence was as to what was said. There were also minor inconsistencies. There was an obligation on the officers to properly record, in some manner, what was happening. The court concluded that there was no satisfactory reason given as to why the second statement was not recorded, with either recording equipment or through detailed and contemporaneous notes as to what was said and by whom. The second statement was not admitted.

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Abstract Construction Ltd. v. Wagman, 2016 SKPC 77

Demong, June 1, 2016 (PC16060)

Civil Procedure – Evidence – Credibility
Contracts – Building Contract – Breach
Contracts – Breach of Contract – Mitigation
Contracts – Breach of Contract – Non-payment
Contracts – Breach of Contract – Renovations
Contracts – Breach of Contract – Repudiation
Contracts – Interpretation – Implied Term
Contracts – Set-off

The plaintiff agreed to renovate the defendant's basement pursuant to a contract dated May 27, 2013. The plaintiff claimed

for monies for goods and services provided. The defendant refused to pay the money on the basis that: the work was deficient and contrary to the engineer's requirements; money was demanded as a pre-condition to remedying the deficiencies, which was contrary to the terms of the agreement; and the abrasive manner, etc. of the plaintiff along with the deficiencies and his attempt to unilaterally amend the terms of the agreement were all a breach of the agreement, thereby allowing the defendant to treat the contract at an end. The plaintiff acknowledged some deficiencies and indicated a readiness to repair them, but the defendant would not allow it and repudiated the agreement. The defendant had an engineer prepare a report outlining work to be done to her basement to prevent water problems. The defendant indicated that she gave the report to the plaintiff; however, he denied receiving the report. The plaintiff indicated the repairs would cost $17,325.00 and payment was to be made on the engineer's "OK". The work was completed on July 4 and the plaintiff sent an email to the defendant on September 1 when payment had not yet been received. On September 28, the parties met with the engineer who noted that not a single aspect of the job the plaintiff had done met the specifications of the engineer's report. After the meeting there was no agreement as to whether the plaintiff would remedy the deficiencies or even be allowed to remedy them. The plaintiff's counsel did not cross-examine the defendant or the engineer on their recollection of the meeting on September 28 where they both indicated the plaintiff was very angry. The defendant eventually retained another contractor to remedy some of the deficiencies and had to pay over $30,000. HELD: The court accepted the defendant's evidence over the plaintiff's where it differed. The defendant and engineer were credible witnesses. The court agreed with the defendant that the work was to be done in accordance with the recommendations set forth in the engineer's report. The plaintiff did not comply with the specific recommendations set forth in the engineer's report and, therefore, significant, time-consuming and relatively expensive remedies were required. The court accepted the defendant's version of the September 28 meeting. The defendant reasonably concluded that she would not feel safe if the plaintiff's employees returned to her home, nor could she trust their work. The work done by the plaintiff was not substantial completion of the contract. The court was not satisfied that the Consumer Protection and Business Practices Act nor the common law granted a contractor the right to remedy deficiencies for the services provided under a contract. The court agreed that there was an implied term in the contract that the plaintiff could remedy deficiencies, but it was subject to circumstances that would make it unreasonable to extend that

right. The court found that it was not unreasonable for the defendant to refuse to let the plaintiff into her home for a second time to remedy the deficiencies. The plaintiff's action was dismissed and judgment was awarded in the defendant's favour for costs associated with the expert witness, the engineer.

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R. v. Black, 2016 SKPC 82

Harradence, June 3, 2016 (PC16062)

Criminal Law – Application to Expunge Guilty Plea
Criminal Law – Attempted Murder
Criminal Law – Dangerous Offender Application

The accused entered a guilty plea to a charge of attempted murder contrary to s. 239 of the Criminal Code. He was represented by counsel. The accused signed an agreed statement of facts to be used in the Crown's dangerous offender application. The accused's counsel also indicated that he had conducted a plea comprehension inquiry pursuant to s. 606(1.1) of the Criminal Code. The accused then applied to set aside his guilty plea. The accused had a GED 12 and had a basic understanding of the legal and parole system. The accused was also charged with sexual assault and the Crown told him that they would accept a guilty plea to either charge and that they would be seeking a dangerous offender designation. The accused indicated that he did not recall talking to his counsel about intention. He did agree that he told his counsel and the police in a warned police statement that he intended to kill the victim. The accused also said he did not recall a dangerous offender application being discussed with him by his counsel. The counsel indicated that he did discuss a dangerous offender application with the accused, but agreed that he did not review the consequences of a successful application with him. The counsel indicated that given the accused's childlike quality he told the accused he would go to jail forever.
HELD: The guilty plea was presumed to be valid. The court was satisfied that the accused knew he was entitled to a trial, but that he instructed his lawyer to attempt to negotiate a plea. The accused indicated that he was convinced that he was threatened into admitting he set the victim on fire although he was unable to identify any individuals who had threatened him. The court found it more likely that the accused was assisted by other inmates in reconstructing his memory. The court found it was unable to rely on the accused's recollection of the discussions he

had with his lawyer. The accused arrived at his decision to plead guilty after several months of deliberation and with legal assistance. Further, the court concluded that the accused knew of the dangerous offender application prior to the guilty plea. The court was satisfied that any further particulars of the potential sentence would not have caused the accused to change his mind regarding his plea. The application to set aside a guilty plea was dismissed.

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R. v. Tran, 2016 SKPC 84

Hinds, June 10, 2016 (PC16064)

Criminal Code – Theft

The accused was charged with stealing the property of the complainant of a value not exceeding $5,000, contrary to s. 334(b) of the Criminal Code, and committing mischief by willfully damaging that property, contrary to s. 430(4) of the Code. The accused and the complainant lived in homes separated by a parcel of land owned by the City of Regina. The parcel was 12 feet wide and 81 feet deep and appeared to be part of the accused's yard because there was no fencing separating it from his side or backyard. He took the care of the grass on this lot, believing that he owned it. In 2011 the city notified the accused that it owned the lot and would sell it to him. The accused wanted to purchase it and paid the city a $500 deposit and signed a letter indicating that he agreed to the city's terms and conditions, which included that it would prepare an agreement for sale and forward it to his solicitor. Later correspondence from the city indicated that the complainant was interested in purchasing her proportionate share of the parcel. Various letters from the city to the accused changed the dimensions of his original proposed purchase. He testified that he had paid the city the sum of $5,000 to buy six feet of land. In April 2015, the Crown alleged that the complainant purchased the northern one-half portion of the lot, which extended her property line approximately six feet. When informed by a workman who was going to install a new fence on behalf of the complainant six feet beyond her existing fence, the accused removed the sod on it and placed it on his property.
HELD: The accused was found not guilty. The Crown had failed to prove that on the date of the alleged offence that the complainant owned the land. It had not submitted the documents that proved ownership as required by s. 79 and s. 82

of The Land Titles Act, 2000.

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LeBlanc v. Lexterra Land Ltd., 2016 SKPC 85

Demong, June 1, 2016 (PC16073)

Civil Procedure – Provincial Court – Small Claims – Procedure – Language
Statutes – Interpretation – Language Act, Section 11

The plaintiff filed his claim and documents with the Provincial Court in the French language as he wished to proceed in that language.
HELD: The court issued its fiat regarding the plaintiff's claim and his desire to use French. It held that pursuant to s. 11 of The Language Act, a party has the right to use the French language but does not have the right to be addressed by either the court, the officers of the court, party litigants or witnesses in the French language because they have the corresponding right to be conduct their affairs in either English or in French. The plaintiff would be allowed to file pleadings and documents in either language. As English was the trial judge's primary language, any materials filed in French would be transcribed at the court's cost for the benefit of the judge and the court officers. The trial will be conducted in English but the court would ensure that a translator will be in attendance to assist the court and the party litigants. The court will bear the cost of the translator.

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R. v. F. (R.D.), 2016 SKPC 89

Martinez, June 30, 2016 (PC16077)

Constitutional Law – Charter of Rights, Section 2(b)
Criminal Law – Publication Ban
Statutes – Interpretation – Criminal Code, Section 486.4(2.2)

An application was made by the Attorney General for Saskatchewan (the respondent) by the Crown prosecutor under s. 486.4(2.2) of the Criminal Code for a mandatory publication ban of any information that could identify victims who were young persons at the time of the mass shooting in La Loche. The Crown's application was made after it had earlier obtained a

discretionary publication ban under s. 486.5 of the Code of any information that could identify any of the victims named in the attempted murder charges faced by the accused. The prosecutor also renewed his application for the discretionary publication ban. The applicants, a number of national media organizations, sought a declaration that s. 486.4(2.2) was unconstitutional on the ground that it unjustifiably infringed their right to freedom of expression under s. 2(b) of the Charter and asked the court to deny the prosecutor's application under s. 486.5.
HELD: The court found that although it did not have the power to declare that s. 486.4(2.2) was not constitutionally valid, it could and did find it that it was invalid in this specific case because it infringed upon the rights protected by s. 2(b) of the Charter and was not saved by s. 1. It held that there was no pressing and substantial need in the circumstances to protect the privacy of young victims of a crime committed by an adult. Therefore, s. 486.4(2.2) did not apply in this case. With respect to the prosecutor's application to renew the discretionary publication ban under s. 465.5, the court held that it was not in the interest of the proper administration of justice to grant it. The court reviewed the Dagenais/Mentuck test and the factors set out in s. 486.5(7). On the evidence and because of the nature of the particular offence, it found in particular that there was no risk that the victims would suffer harm or need an order for their security or protection if their identities were disclosed. The identities of many of the victims had been made known to the public before the ban.

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R. v. Wade, 2016 SKQB 177

Zuk, May 18, 2016 (QB16176)

Criminal Law – Criminal Harassment – Sentencing – Appeal

The appellant appealed her sentence. She had pled guilty to a charge of criminal harassment contrary to s. 264 of the Criminal Code. The Provincial Court judge suspended the passing of sentence, placed the appellant on probation for a period of three years and prohibited possession and consumption of alcohol. The appellant was directed to receive assessments for alcohol addiction and to participate in counselling. The appellant was prohibited from having contact with the complainants and their children. The appellant had accepted the period of probation at the time of sentencing. In 2013 the appellant had been convicted of numerous charges resulting from her attempts to have

communication with her son and grandchildren. The son had suffered during his childhood from the appellant's alcoholism and wanted to prevent her from damaging his children in the same way. After her sentence for the 2013 had expired, the appellant contacted her son a number of times, which resulted in the new charge under s. 264 of the Code. In her appeal she argued that the period of probation was excessive and requested that the condition in the probation order prohibiting her from possessing or consuming alcohol or non-prescription drugs be removed. She contended that the sentence was more severe than would be imposed in comparable circumstances, contrary to s. 718.2(b) of the Code;
HELD: The appeal was dismissed. The court found that the sentencing judge had not failed to take into account parity in sentencing. The cases relied upon by the appellant had not involved the offender being convicted of previously harassing the same complainant.

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Richer v. Canada (Attorney General), 2016 SKQB 179

Zuk, May 18, 2016 (QB16190)

Criminal Law – Habeas Corpus
Criminal Law – Incarceration – Security Classification

The applicant applied for a writ of habeas corpus and sought his immediate return to minimum security and compensation for his alleged unlawful term of segregation. The applicant was transferred from a minimum security institution to a medium security institution upon Correctional Service Canada (CSC) determining that he was selling tobacco within the institution. The applicant admitted owning the tobacco but he denied selling it. He indicated that he had the tobacco for smudging purposes, as was permitted if the proper protocols were followed. The applicant did not follow the proper protocols because he said he did not have access to the written protocol. Tobacco was located both on the applicant's person and in his room. The applicant alleged that his s. 10(b) Charter right was violated when he was not given a phone book or list of lawyers as requested. He did talk to a lawyer about a week later. The applicant was not provided with the full disclosure of the allegations against him by the four informants. The applicant did acknowledge receiving a copy of the handbook provided at the institution that prohibited tobacco among other things, like food and candy. He pointed out that, although they were prohibited, food and candy

could be purchased at the canteen. The issues were: 1) was the applicant denied rights to retain and instruct counsel without delay contrary to s. 10(b) of the Charter; 2) did the CSC's refusal to provide the applicant with the names of the informants and full details of the allegations made against him breach his right to a fair hearing pursuant to s. 11(d) of the Charter; 3) did the unavailability of the Standing Order that allowed possession of tobacco for smudging purposes render it procedurally unfair to have proceeded with the applicant's reclassification; and 4) if the applicant's transfer to medium security was unlawful, was he entitled to compensation for his transfer to a higher security classification.
HELD: A habeas corpus application first requires establishing that there was a deprivation of liberty and then a consideration of whether there was a legitimate ground for the deprivation. The issues were determined as follows: 1) the court concluded that the applicant was advised of his rights to counsel and that he agreed to speak to a lawyer on a future date, which he did. The applicant's s. 10(b) Charter rights were not breached; 2) the respondent relied on s. 27(3) of the Corrections and Conditional Release Act (CCRA) for withholding the information. The court found that the applicant's argument that the withholding of information somehow prejudiced his ability to respond to the allegations failed. The reclassification was a result of the corrections officers locating tobacco on the applicant and in his room; 3) there was no evidence that the applicant was unaware of the tobacco prohibition. Also, prior to his habeas corpus application, the applicant never asserted that he possessed tobacco for the purpose of smudging. He also never sought any information from the institution regarding the tobacco policy; 4) the applicant's transfer was not wrongful and, therefore, he did not sustain any damages.

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R. v. Evans, 2016 SKQB 180

Layh, May 20, 2016 (QB16187)

Criminal Law – Actus Reus – Dangerous Driving
Criminal Law – Dangerous Driving Causing Death
Criminal Law – Dangerous Driving Causing Injury
Criminal Law – Mens Rea – Dangerous Driving

The accused was charged with two counts of dangerous driving causing death, contrary to s. 249(4) of the Criminal Code, and one count of dangerous driving causing bodily harm, contrary to

s. 249(3) of the Criminal Code. The accused picked up three co-workers and proceeded on route to work outside of the city. It was foggy and dark. The accused's truck collided with an oncoming heavy truck. The driver of the heavy truck testified that the accused's vehicle pulled into his lane of traffic to pass a vehicle. Two of the accused's passengers were instantly killed. The accident occurred on a portion of the highway with a single solid yellow line, which allowed traffic heading in the direction the accused was travelling to pass. The issue was whether the accused caused the deaths and injury of his passengers by dangerous driving.
HELD: Neither the deaths nor injury of the passengers could be the measure as to whether the accused drove dangerously and committed the actus reus of the offences. The actus reus was whether the driving was objectively dangerous in the circumstances. The court found that the testimony of the observers immediately before the collision established that the accused's driving was objectively dangerous. The court then discussed the jurisprudence on the mens rea of the offences. The injured passenger testified that she was not concerned with the accused's driving and that, before she fell asleep, he was driving below the speed limit. The court was not convinced that the accused's driving was characterized by the fault element necessary to convict. The mens rea had not been made out and the accused was acquitted of all counts of dangerous driving.

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R. v. F. (A.), 2016 SKQB 186

Zarzeczny, May 26, 2016 (QB16188)

Criminal Law – Evidence – Beyond a Reasonable Doubt
Criminal Law – Sexual Assault – Victim under 16
Criminal Law – Sexual Interference – Victim under 16
Criminal Law – Sexual Touching – Victim under 16

The accused was charged with three Criminal Code offences: 1) touching a victim under the age of 16 for a sexual purpose, contrary to s. 151; 2) invitation to sexual touching by the same victim, contrary to s. 152; and 3) sexual assault against the victim, contrary to s. 271. There were approximately 4,500 text messages between the accused and victim over 61 days. The mother and victim also testified. The mother and the accused began a romantic relationship, and he would occasionally sleep overnight at the mother's home. On voir dire, the court ruled the video-taped statement of the victim admissible and it was

applied to the evidence at trial. The victim indicated that the accused starting coming into her room when her mother was in the hospital and it just starting with cuddling. She indicated that the texting became sexual and that they both did it. The victim said she asked the accused to come into her room and that is when the touching occurred. The accused wrote letters to the mother, victim, and the victim's siblings expressing his regret. The accused was not examined or cross-examined on the letters as to their meaning. The accused also testified. He indicated that he did cuddle the victim and would kiss her on the forehead upon leaving, but at no time did he touch her in any other way and he said he had no sexual desires for the victim. The accused said that he participated in some of the "sexy" text messages because he was telling the victim what she wanted to hear and that he did not want to hurt her feelings or upset her. The accused was also unable to provide an explanation as to why he was only in the victim's room when the mother was not there. HELD: The court reviewed the text messages and concluded that the victim was looking for love and affection. The accused often discouraged the victim from talking of self-harm. The court found those messages to corroborate the accused's evidence that he saw his relationship with the victim as a father-daughter one. The texts also revealed that the accused was going into the victim's room and they were cuddling, kissing, and hugging. There were no references in the texts to sexual touching by the accused or the victim. The court found this to be inconsistent with any suggestion that the relations and activities between the accused and the victim had become sexually intimate in nature. The court concluded that the Crown did not establish, beyond a reasonable doubt, that the whole of the evidence, including the evidence of the accused, established the guilt in respect to any of the three counts faced by the accused. The court said that if there was sexual touching, interference, or a sexual assault during the relationship, there would have been some reference to it in the text messages. The court indicated that the victim's testimony and video-taped statement were given every possible consideration. The court doubted the reliability of the victim's evidence in the context of the whole of the evidence. The accused was found not guilty.

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R. v. Ratt, 2016 SKQB 190

Zuk, May 27, 2016 (QB16191)

Criminal Law – Appeal – Sentence

Criminal Law – Breach of Probation
Criminal Law - Mischief
Criminal Law – Theft of a Motor Vehicle
Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Sentencing Principles

The 19-year-old appellant pled guilty to three Criminal Code charges: theft of a motor vehicle, contrary to s. 333.1(1); breach of probation, contrary to s. 733.1(1); and committing mischief not exceeding $5,000, contrary to s. 434. He was sentenced to 12 months' incarceration for the theft and six months concurrent for the other two charges. He was also placed on probation for 18 months following his release from jail. The appellant appealed his sentence, arguing that the 12 months was demonstrably unfit and should be replaced with time served, which was six weeks pre-sentence and seven months post-sentence. He also requested that the probation be reduced to 12 months. The intoxicated appellant was willfully blind to the fact that the vehicle he got a ride in from his friend was stolen. The vehicle was damaged when it was driven into a ditch. The mischief charge resulted when the appellant broke a window at his girlfriend's residence. He was subject to a probation order at the time of the incidents. The pre-sentence report indicated that the appellant grew up with his mother and stepfather and there were no abuse issues. He had a grade nine education and limited work experience. His mother was not willing to have him live with her because he had previously stolen from her and the children in her home. The grounds of appeal were: 1) did the judge err by misstating and overstating both the appellant's degree of responsibility and the gravity of the offence; 2) did the judge err in basing his sentence primarily on the appellant's previous conviction and his unwillingness to attend a 12-month residential treatment program; 3) did the judge err in completely disregarding any mitigating factors and ss. 718.2(d) and (e) of the Criminal Code; 4) did the judge err in imposing a sentence that was too much of a jump from the appellant's previous sentences; and 5) did the judge err by failing to award any credit for time served.
HELD: The grounds of appeal were dealt with as follows: 1) the court could not find any basis to conclude that the sentencing judge misunderstood the appellant's involvement in the incident. There was no indication that the sentencing judge mistakenly believed the appellant to be the one that actually stole the vehicle. The court reviewed cases and established a range of sentences from six months to three years' incarceration for the offence. The appeal court concluded that the sentencing judge did not make an error in assessing the gravity of the offence; 2) the appellant had 21 prior Criminal Code convictions. He had been placed on probation one month before the offences for mischief, assault, break and enter, being at large, and failing

to attend court. The pre-sentence report concluded that the appellant was a high risk to reoffend. The sentencing judge appropriately considered the appellant's recent convictions. The court did not, however, resentence the appellant for his past offence. The sentencing judge could review the appellant's prior criminal record to determine the normative beahviour of the appellant and where repeated related behavior is revealed the court may consider the repeat criminal behaviour as an aggravating factor causing the sentence to be increased. The sentencing judge did not place undue emphasis on the appellant's unwillingness to participate in treatment; 3) the appeal court found that it was clear the sentencing judge gave a reduced sentence from what he was contemplating given the mitigating factors and Gladue factors. The sentencing judge indicated that he would have otherwise sentenced the appellant to 18 months to two years less a day; 4) the appeal court indicated that it would have imposed a sentence of nine months' incarceration followed by 18 months' probation. The court afforded the sentencing judge deference and did not conclude that the sentence was demonstrably unfit; and 5) the sentence of twelve months was reduced by 63 days of credit for 42 days of remand time. The Crown conceded to the remand credit of 1.5. The appellant also failed to establish that the 18-month probation order was an improper discretion by the sentencing judge.

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R. v. M. (G.), 2016 SKQB 191

Megaw, May 30, 2016 (QB16184)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Pre-sentence Report
Criminal Law – Sentencing – Sentencing Principles
Criminal Law – Sexual Touching – Invitation – Person under 16

The accused pled guilty to an offence contrary to s. 152 of the Criminal Code when she invited someone not quite 14 years old to have sexual intercourse with her husband. The accused was not present at sentencing but her counsel was. The accused and her husband knew the person was under 16. The accused's only criminal record was an aggravated assault conviction in 2000. The pre-sentence report author indicated that the Indian Residential Schools Adjudication Report did not support the accused's claim that she attended residential schools. The accused and her siblings were apprehended by Social Services for alcohol and violence in the home as well as neglect. The

accused married at a young age and had four children, all of whom were apprehended and later adopted. She indicated that her husband was abusive towards her. The accused later had three more children with another individual. The accused may have suffered from Fetal Alcohol Syndrome. She had addiction issues but had been sober for three years. The accused was assessed as a medium risk to offend.
HELD: The court proceeded with sentencing in the accused's absence pursuant to s. 650.01(3)(c) of the Criminal Code. The court found the accused to be genuinely remorseful for her actions. The offence was significant with a need for the sentence to deter and denounce the behavior. The mitigating factors were the accused's acceptance and responsibility for the offence and that it was a one-time occurrence. The Gladue factors were found to support a lower period of incarceration, but increased length of probation. A fit sentence was determined to be 18 months, but the Gladue factors reduced it to 12 months' incarceration followed by a two-year period of probation. The probation included terms for assessment and treatment. The accused was not given increased credit for time served.

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Caldwell v. Rhode, 2016 SKQB 193

Danyliuk, May 30, 2016 (QB16193)

Builders' Lien – Extension
Builders' Lien – Order to Vacate – Builders' Lien Act, Section 55
Limitations of Actions – Builders' Lien

Three parties registered builders' liens against the defendants' land. Nothing occurred since November 2012 when examinations for discovery were held with one of the lien holders. The defendants applied to strike the action because it was not set down for trial within the statutory time limit. One lien holder opposed the application, noting that it was waiting to continue with its action until one of the defendants completed their claim against his former solicitor for negligence. The issues were: 1) did the liens expire and should their claims be struck under s. 55 of The Builders' Lien Act; 2) if the liens did expire, should they be extended; and 3) is the last registered lien statute-barred pursuant to s. 5 of The Limitations Act.
HELD: The application was successful and the action was struck. There was no suggestion that the negligence claim against a former solicitor had any bearing on the builders' lien application. The issues were determined as follows: 1) the builders' lien

regime affords claimants extraordinary remedies and therefore strict compliance with the statutory provisions is required. The purpose of s. 55(1) is to protect defendants from a plaintiff who launches an action and then does nothing to pursue the claim. In this case, the court determined that the first two liens were well beyond the two-year statutory limit and ought to be struck; 2) one of the lienholders argued that the lien should be extended, but did not make an application to do so. Even if a formal application for extension is not required, the court found that there was no reasonable explanation that justified the delay and the extension sought. An extension was not granted; and 3) the third lien holder never even issued a statement of claim. The court held that The Limitations of Actions Act did apply and held that the claim was discoverable or actually discovered when the claim of lien was registered, which was January 2011. Five years had passed, a long time after the two-year limitation period. The lien was expired. The court ordered the Saskatchewan Land Titles Registry to cancel and vacate the three registered liens.

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Kinsley v. Prairie Machine & Parts MFG. (1978) Ltd., 2016 SKQB 198

Scherman, June 2, 2016 (QB16189)

Civil Procedure – Discovery – Examination for Discovery – Objections
Civil Procedure – Queen's Bench Rules, Rule 5-27

The plaintiff claimed wrongful dismissal by the defendants and also sought aggravated or punitive damages. The plaintiff made an application pursuant to rule 5-27 of the Queen's Bench Rules when the defendant's officer would not answer certain questions during examination. The plaintiff was laid off after 21 years of employment with the defendants. There were 42 other employees also laid off. The plaintiff was paid eight weeks of salary, in lieu of notice of termination. The plaintiff argued that he was chosen to be one of the employees laid off because he had medical conditions, but that given the knowledge of the medical conditions, the employer had an obligation to accommodate him or be in contravention of The Saskatchewan Human Rights Code. The officer of the defendants refused to answer questions relating to five categories: 1) the profitability of the defendants on the grounds of relevance; 2) the details of meeting, notes taken, or email discussion in connection with the decision to lay

off employees and the involvement of consultants on the grounds of relevance; 3) whether the defendants terminated other employees suffering from a disability based on relevance; 4) whether other employees were in a similar job position to the plaintiff and their wages based on relevance; and 5) questions that called for speculation or related to legal advice that the defendants may have received.
HELD: To be appropriate, the questions to an adverse party must relate to a matter put in issue by the pleadings. The specific information being sought by the questions had to tend to prove or disprove the matter in issue. The court reviewed each category of questions to determine whether they were appropriate: 1) the court could not see how evidence relating to the defendants' financial position post termination was information that would prove or disprove whether the plaintiff's medical condition was a factor in the decision to terminate him. The objections made to the category 1 questions were validly made; 2) the court found that the category 2 questions could prove or disprove whether the plaintiff's medical condition was a consideration in the decision to terminate him rather than others. The court concluded that the questions relating to those matter fell within the scope of an issue in the claim and the evidence sought was relevant. The questions relating to the involvement of outside consultants was also relevant, except for when it involved legal advice; 3) the plaintiff was attempting to introduce collateral evidence with questions relating to termination of other employees with disabilities. The collateral issues were not in the pleadings and the defendants' objections to those questions was found to be valid; 4) the plaintiff's allegations of bad faith in his pleadings was limited to bad faith as it related to their knowledge of his health issues. There was no allegation that there was a policy or other entitlement to job protection based upon seniority or superior job qualifications; and 5) the defendants were entitled to object and not provide answers to questions respecting the legal advice received. The questions were irrelevant. The court did identify one question from each of category 1 and 5 and all of category 2 as being relevant. The plaintiff was granted the opportunity to continue the questioning for those questions, but not to have a de novo right to further questioning. The plaintiff was awarded costs below the tariff given his limited success.

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R. v. Favreau, 2016 SKQB 199

Zarzeczny, June 3, 2016 (QB16248)

Criminal Law – Bail Review – Application

The accused was released from custody pursuant to conditions after a Bail Review Judgment. The parties agreed to the addition of provisions to her release.
HELD: The court added the following conditions to the accused's bail conditions she shall continue to report to a probation officer at the time and with the frequency directed by the probation officer; and after the completion of the electronic monitoring period she shall continue to observe a curfew and be present in her approved residence from and after 10:00 pm until 5:00 am.

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1348623 Alberta Ltd. v. Choubal, 2016 SKQB 200

Danyliuk, June 8, 2016 (QB16200)

Civil Procedure – Costs – Defendants – Third Parties
Civil Procedure – Queen's Bench Rules, Rule 11-1

The defendants and third parties applied for costs following a judgment of the court. The third party sought an order that their costs be awarded against the plaintiff as opposed to the defendants. The plaintiff pursued the defendants and third parties with vigor during the trial. The issues were: 1) should the assessable costs of the third parties be awarded as against the defendants or as against the plaintiff; 2) what was the appropriate column on the tariff of costs to have the costs of this action assessed; 3) were the second counsel of the defendants and third parties reasonably required, such that costs for their attendance ought to be awarded; and 4) what was the appropriate disposition of the $40,000 paid into court as security for costs.
HELD: The court dealt with the issues as follows: 1) the court ordered the third parties' costs be awarded against the plaintiff. The ordinary rule that the costs of third parties lie against the defendants is not absolute. Fairness in this case was found to dictate that the plaintiff bear the third parties' costs. For the plaintiffs to succeed against the defendants it was likely imperative for the plaintiff to show wrongful acts or omissions on the part of the third parties who were acting in an agency capacity with respect to the defendants; 2) the court considered the following factors: complexity of the case; importance of the case; duration and conduct of the proceedings; urgency of the matter; the amount at issue; whether experts were involved;

parity and expectations; access to justice; discretion and reasonableness; and any other relevant matter. The case was found to be moderately complex with several legal issues that needed to be addressed. Some of the issues were well-settled. There were complex issues of evidence, but not the most complex. The importance of the case was found to be moderate with a relatively lengthy two-week civil trial. There was no urgency to the matter, but the claim was for a significant amount (over $1.7 million). The dispute over the scope of the expert's testimony added to the complexity of the trial. The court found that it would be a reasonable expectation that a cost award on column 3, the highest, would be granted. The court concluded that an award of costs in column 2 was not unreasonable or unfair whereas an award under column 3 would be; 3) the court did not find the presence of second counsel as untoward and concluded that they were reasonably necessary to properly present the case; and 4) the court found that the defendants and third parties would not be prejudiced if the money in court was not paid out until the assessment process was completed.

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Envirotec Services Inc. v. University of Saskatchewan, 2016 SKQB 201

Zarzeczny, June 9, 2016 (QB16201)

Civil Procedure – Disclosure of Documents – Access to Information Act
Civil Procedure – Disclosure of Documents - Costs
Civil Procedure – Disclosure of Documents – Criteria
Civil Procedure – Disclosure of Documents – Privacy Act
Civil Procedure – Disclosure of Documents – Relevance
Civil Procedure – Disclosure of Documents – Solicitor-Client Privilege

The plaintiff was an environmental services company and the respondent hired them to collect waste oil from its underground storage tank (UST). The plaintiff removed the contents of the UST and sold the waste oil to a third party customer. Unknown to the plaintiff and the respondent, the UST had been contaminated with highly toxic polychlorinated biphenyls (PCB). The plaintiff immediately notified Environment Canada (EC) and the respondent. The plaintiff sought damages for the contamination and subsequent cost of remediation of its equipment, including pumper truck, the hydrocarbon storage tank and the recovery of the amount of claims made against it by the third party purchaser of the contaminated oil. The plaintiff

estimated its claim exceeded $1 million. Mediation had not yet taken place at the time of the application. The plaintiff applied for orders against the respondent for further and better production of documents. The plaintiff argued that the respondent undertook an internal investigation into the source and extent of PCB contamination and may also have conducted an internal investigation to identify the current or former employees who may have purposely released PCB contaminated oil into the UST. The plaintiff also applied for orders against the third party, EC, for production of documents relating to their investigation. The EC file consisted of 278 pages. The plaintiff received 108 pages from EC, many documents were heavily or entirely redacted. The issues were: 1) did the plaintiff establish a basis for further, additional and more fulsome discovery and production of documents, including the full report without redactions from the respondent; 2) should an order issue requiring the EC to produce the entire or additional contents of its investigation file without redaction be made; and 3) are the claims asserted by either respondent applicable, and if so, to what extent and with what result.

HELD: The court determined the issues as follows: 1) the report the plaintiff wanted was eight pages long and the author asserted that he prepared the report in confidence and as a confidential internal document. The court applied the Wigmore criteria and found that the report was intended for internal respondent purposes; however, it was doubtful that the information contained in the report, including the redacted portions, were obtained by the author from confidential respondent sources. The redacted portions did not raise issues of confidentiality essential to the full and satisfactory maintenance of the relations between the respondent and the author. Nor was the relationship one that the community had any particular concern or interest in and therefore was not one that required it be sedulously fostered. The court found the relationship would not be injured with disclosure of the redacted portions of the report. The entire report was ordered produced without redaction; 2) the EC respondent claimed it could redact or refuse to disclose based on: the Access to Information Act; the Privacy Act; public interest immunity; and solicitor-client privilege. No documents that contained information not relevant to the issue were ordered to be produced. The documents in respect to which solicitor-client privilege was claimed were not ordered to be produced. The court was satisfied that the privilege applied and was valid. The court ordered the inspection report be produced provided that there may be redacted personal telephone numbers and personal opinions or views. Site photographs were ordered to be produced, as was an email exchange. The pages with the preliminary report of analysis was ordered produced

because it was directly relevant to the issue of the concentration of the PCBs found in samples from the UST. Internal EC communications were not ordered to be produced because they were not relevant. The chronology of events of the EC was relevant and ordered to be produced. With respect to the transcript of interviews conducted by EC, the court found that there were other available approaches to the parties short of court order for production. The court did, however, give leave to either party to renew their application if counsel considered it necessary once and after further pre-trial steps had taken place. Costs in the cause were ordered.

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R. v. Maximnuk, 2016 SKQB 202

Dawson, June 10, 2016 (QB16202)

Criminal Law – Assault – Assault Causing Bodily Harm
Criminal Law – Firearms – Careless Use

The accused was charged with committing an assault and causing harm to the victim contrary to s. 267(b) of the Criminal Code and with storing firearms in a careless manner contrary to s. 86(1) of the Code. The first charge came about after the RCMP received a complaint that there had been an assault on the victim. The victim, the father of the accused, lived on a remote farm in a house located very near the house occupied by the accused and his wife. The officers testified that when they arrived at the victim's house, they observed that he was bleeding from cuts to his head and hands and showed bruising. He did not appear to be inebriated. Photographs of the victim's injuries were submitted. The victim testified but was a difficult witness because he wanted to protect the accused. He said that he could not recall very much of the assault but when examined by the Crown pursuant to s. 9(2) of the Canada Evidence Act, he confirmed that the accused had punched him with his fist and hit him with a crutch. The defence argued that the victim was not credible because he had been drinking and was often forgetful. The second charge was laid after the police then went to the accused's house. They asked the accused's wife if the accused had any firearms and she showed them four guns that were leaning against the wall of a room. They were not loaded and had the bolts in. The officers did not find any ammunition. The accused's wife testified that they had lost livestock to predators coming into the yard. She and the accused had shot a number of coyotes. The ammunition was kept in a cabinet in

another room and the guns were not visible to anyone who was visiting.
HELD: The accused was found guilty of assault causing bodily harm. The court found the victim to be a credible witness and the other evidence confirmed what had happened. The accused was found not guilty of careless storage of firearms.

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R. v. Ozipko, 2016 SKQB 203

Schwann, June 10, 2016 (QB16194)

Criminal Law – Defences – Mental Disorder
Criminal Law – Psychological Assessment – Not Criminally Responsible

The accused applied for an order under s. 16 of the Criminal Code declaring him not criminally responsible for causing the death of one man and inflicting injuries on two other victims. The accused attacked the victims without provocation. He had no previous record of mental illness. Pursuant to a court order under s. 672.12 of the Code, the accused was assessed by a forensic psychiatrist. On the basis of his interview with the accused, the police reports, witness statements and statements made by the accused, the psychiatrist diagnosed the accused as having schizotypal personality disorder, a precursor to schizophrenia and having obsessive compulsive disorder. In his opinion the accused did not know what he was doing at the time of the offence and as a result of his psychosis was acting on an urge. The psychiatrist testified that the accused was not malingering.
HELD: The application was granted and the accused was found not criminally responsible. The court found that the accused suffered from a mental disorder at the time he committed the offences and that the disease deprived him of the capacity to make a choice as to whether his actions were right or wrong.

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Estevez Cota v. Madrid, 2016 SKQB 204

Ball, June 10, 2016 (QB16203)

Family Law – Custody and Access – Children's Law Act
Family Law – Custody and Access – Hague Convention

Family Law – Custody and Access – Jurisdiction

The parties had two children. The petitioner resided in Saskatchewan and the respondent resided in the United States. The child started the school year with the petitioner but did not return to his care after a visit with respondent at Christmas 2015. The respondent objected to the jurisdiction of the court in March 2016. The parties were in a relationship in California from 2008 until the petitioner's deportation to Mexico in January 2010. In March 2013 the respondent and child travelled to Vancouver to be with the petitioner. The respondent left in October 2013 due to her visa expiring. The second child was born after she left Canada. The respondent also indicated that she could not move from San Diego because of restrictions on moving in the joint custody arrangement she had with the father of her oldest son. The respondent signed a Custody and Access agreement presented to her by the petitioner in December 2015. The agreement indicated that the parties would have joint custody of both children with the petitioner having primary care of the oldest son for the remainder of the 2015-16 school year and the respondent primarily caring for him in the 2016-17 school year and subsequent school times. The parties also agreed to having Saskatchewan be the application jurisdiction. The respondent's lawyer in California witnessed the agreement and attached a certificate of independent legal advice. The respondent argued that she was coerced into signing the agreement because she believed she had to sign it to have the child returned to her. The issues were: 1) did the court have jurisdiction over custody of the children pursuant to s. 15 of The Children's Law Act and, if so, should it decline to exercise its jurisdiction pursuant to s. 16 of the Act; and 2) should the court grant an order for custody and access pursuant to the Act.

HELD: The court held that: 1) the court had jurisdiction over the oldest child pursuant to s. 15(1)(c) and (a) and custody over the youngest child pursuant to s. 15(1)(c). The court declined to exercise jurisdiction over the youngest child pursuant to s. 16 of the Act. The oldest child's habitual residence was Saskatchewan at the time the application was made and the agreement contained a term naming Saskatchewan as the jurisdiction. Because the child was physically located in California for a visit did not change his habitual residence. The court found that the agreement was valid and binding on both parties. The court applied the factors set out in Pichler to determine that the court should exercise jurisdiction over the custody and access of the oldest child; and 2) for the petitioner to have the child returned to him he would have to make an application under the Hague Convention. The court did find that the agreement conferred upon the petitioner "rights of custody" as required for a Hague Convention application. The custody application was adjourned

sine die on 14 days' notice to allow the petitioner to bring the Hague Convention application.

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R. (A.) v. R. (R.), 2016 SKQB 206

Gabrielson, June 14, 2016 (QB16204)

Family Law – Custody and Access – Best Interests of the Children
Family Law – Custody and Access – Mobility Rights – Primary Residence
Family Law – Custody and Access – Voices of the Children Report

In 2011 the trial judge ordered that the children's primary residence was with the petitioner provided she did not move from Prince Albert. The judgment indicated that if she did move, the children's primary residence would be with the respondent. The petitioner was unsuccessful in her attempt to vary the judgment in 2014. On appeal the Court of Appeal ordered that a trial should take place to determine whether the best interests of the children were the same as they were in 2011. A Children's Voices report was also ordered. After 2011 the petitioner formed a new relationship and had a child in 2012. The petitioner applied to move to her new spouse's location, which was five hours away, on the following basis: she was in a long-term relationship with him; he had a construction business in the area he lived in; she and the children were being evicted in Prince Albert because of their dog; she was unable to find suitable housing in Prince Albert; etc. The respondent opposed the application because he regularly had the children with him for 12 nights a month, was unlikely to be posted as an RCMP member close to the town the petitioner wanted to move, and the children spent time with his parents' in the area. In addition, he contacted the petitioner's landlord who indicated they were not being evicted; the petitioner had moved to be with her new spouse before the chambers decision came down. She continued to reside there while she continued with her appeal. She transferred primary residence of the children to the respondent. The issues were: 1) was the threshold test met; 2) were the best interests of the children the same as they were in 2011; and 3) what order should be made.
HELD: The issues were determined as follows: 1) the threshold test appeared to have been judicially determined by the Court of Appeal decision because it was persuaded by the petitioner's submissions that a trial should take place to determine the best

interests of the children. The court was also satisfied that the circumstances had changed since the judgment in 2011 because the petitioner had moved and formed a more permanent spousal relationship, and she had a child with her new spouse. The respondent also had a new spousal relationship and another child. The children no longer lived in Prince Albert, and their schools were unilaterally changed without the petitioner's knowledge; 2) the court applied the seven issues laid out by the Supreme Court of Canada: a) the relationship between the children and the petitioner was good. The court was satisfied that the child's decision that he wished to live with the petitioner was not influenced by the plaintiff showing him a text between her and the respondent; b) the children adapted to life with the respondent and his wife; c) the children had maximum contact with each parent; d) one child expressed wishes to live with the petitioner. The other child was too young to participate in a Voices report, but the parties agreed the children should not be separated. The court accepted the evidence of the author of the report that the child did want to live with the petitioner; e) the petitioner's reason for moving was relevant in the circumstances. The petitioner was residing in rental accommodation in Prince Albert and then moved to a home where each child would have a bedroom; f) the children had already adapted to a change in custody; g) the children had already been moved from their school and community when they moved to live with the respondent; and h) the court found the most dominant factor to be the children's wishes. The court found it in the best interests of the children to primarily reside with the petitioner in her new home; and 3) the court ordered that the children would reside with the respondent until the end of the 2016 school year, and effective September 1, 2016, the children's primary residence shall be with the petitioner. The respondent was given access every second weekend with the exchange town outlined.

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R. v. Schnurr, 2016 SKQB 207

Brown, June 14, 2016 (QB16196)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Conviction – Appeal
Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Approved Screening Device
Statutes – Interpretation – Criminal Code, Section 258(1)(c)
Constitutional Law – Charter of Rights, Section 8, Section 9, Section 10(b)

The accused appealed his conviction of driving while over .08 contrary to s. 253(1)(b) of the Criminal Code. The appellant had been stopped by an RCMP officer because someone had reported that he was driving erratically. The officer made an ASD demand at 10:35 pm. However, he did not have a roadside screening device with him because the rural detachment had only one device. He contacted the other officer who did have it, and they arranged to meet at the detachment. The officer and the appellant then drove there and the arresting officer testified that the other officer arrived "shortly thereafter". The test was administered and the accused failed it at 10:50 pm. The officer advised the appellant of his rights and asked if he wished to contact counsel, and the appellant declined. He was then given the police warning and at 10:56 the formal breath demand was made. The officer again asked the appellant if he wished to contact counsel and was told that he didn't. The first sample was obtained at 11:18 and indicated a blood alcohol content of 100 milligrams and the second sample indicated 90 milligrams. The defence argued at trial that the appellant's ss. 8 and 9 Charter rights had been violated because of the circumstances in which the ASD demand was made and the test taken. The demand was not made forthwith in contravention of s. 254(2) of the Code because the defence maintained that there had been a 15-minute delay while the appellant and the officer waited for the other officer to arrive. The defence also questioned the Intoxilyzer results because the officer had testified that the machine used may have had an error ratio of .10 and therefore the .09 reading could have been .08. Therefore it was not proven beyond a reasonable doubt that the appellant was over the limit. The trial judge found that there had been no Charter breaches. As the defence did not cross-examine the officer on what "shortly" meant so there was no time frame established in which to determine whether there was a realistic opportunity for the appellant to contact counsel at the detachment before the ASD test. The trial judge was not persuaded that a reasonable doubt was provided within the meaning of s. 258(1)(c) such that the presumption could not be relied upon. The officer was not an expert.

HELD: The appeal was dismissed. The court found that the trial judge did not make a palpable or overriding error in reaching the factual conclusions that he did. The evidence supported his finding that that the 15-minute delay was explained and justified by the travel time from the site of the demand to the detachment and waiting until the ASD was delivered. The court found that trial judge had not erred in his conclusion that the 15-minute delay was not unreasonable or unjustified in the circumstances, and there had not been a breach of the appellant's ss. 8, 9 or 10(b) Charter rights. The trial judge had not erred in determining that

the officer's opinion regarding the accuracy of the Intoxilyzer was not enough evidence to rebut the presumption that the appellant's blood alcohol content was greater than 80 milligrams in 100 millilitres of blood.

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Baumung Estate v. Bayer Inc., 2016 SKQB 221

Barrington-Foote, June 23, 2016 (QB16210)

Civil Procedure – Class Action – Carriage Motion

The applicant applied for an order granting his counsel carriage of his class action litigation in Saskatchewan. He also sought orders discontinuing a competitive class action in Saskatchewan (the T action) and preventing future competitive proceedings. The counsel for the plaintiff in the T action also sought an order that they be granted carriage for their action. The T action was commenced in Saskatchewan in March 2015, naming four defendants, one who was a defendant in the applicant's action. In November 2015 the counsel for the T action filed notice of application for certification of the action as a national class action. Another action, the M action, was commenced in Ontario in March 2015. The counsel for the applicant is also the counsel for the plaintiffs in the M action. The counsel for M was granted an order giving them carriage of the action in Ontario and discontinuing all other competitive class actions in Ontario. The counsel for the T action consented to the Ontario order having decided to pursue the T action in Saskatchewan. The applicants commenced their action in Saskatchewan in December 2015. The applicants argued that their carriage order should be granted for the following reasons: their action was better conceived and more fully developed; their theory of the case was superior; there would be significant advantages to granting carriage in Saskatchewan to the same counsel as in the M action; and their law firm's well-established ability to move class actions forward unlike the law firm in the T action.
HELD: The test in a carriage motion requires the application of a non-exhaustive list of six factors. The relative experience and resources of counsel were appropriate considerations, but past misconduct, or the failure to expeditiously or successfully pursue certain claims must be focused on whether it prevented the firm or lawyer from pursuing the action in the best interests of the class. The court concluded that the counsel in T had the experience and resources to conduct the national class action in the best interests of the entire class. The applicants argued that

their action should be preferred because it dealt with the lack of a warning on the drug in question. According to the applicant, the additional claims in the T action would be a formidable hurdle to prove. The court was not satisfied that it was in the best interests of the class to pursue only a claim based on the failure to warn. The T action was also more advanced than the applicant's action. The counsel for the T action were committed to moving forward with its application to certify a national class action in Saskatchewan. The applicants sought carriage, but with a view to having as little as possible happen in Saskatchewan because they would seek certification of a national class action in Ontario. The court held that the fact that the applicants had been granted carriage in Ontario was of little, if any, significance. The court granted carriage to the counsel for the T action. The applicant's action was stayed.

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Rodrigues v. Campbell, 2016 SKQB 228

McMurtry, June 29, 2016 (QB16213)

Landlord and Tenant – Appeal – Residential Tenancies Act – Damage Deposit
Landlord and Tenant – Appeal – Residential Tenancies Act – Notice of Hearing
Residential Tenancies Act – Appeal

The appellant, the former tenant, appealed a decision of a hearing officer appointed under The Residential Tenancies Act, 2006, claiming that the hearing officer erred in permitting the landlord to keep her security deposit. The appellant indicated that she did not receive notice of the hearing. The Office of the Residential Tenancies (ORT) file contained a copy of a letter sent to the appellant and landlord, by regular mail, advising them of the hearing date. The hearing officer agreed with the landlord's claim and allowed the retention of a portion of the security deposit.
HELD: The appellant's real concern was her inability to participate in the hearing before the hearing officer. Sections 82 and 82.1 deal with service of parties and requires that a former tenant be served with notice by personal service, registered mail or electronic mail, unless otherwise specified in the Act. The Act allows for service of a notice of hearing by ordinary mail when the claim deals with the disposition of the security deposit. The Act deems the service to be successful. The hearing officer was entitled to proceed with the hearing in the absence of the tenant

in accordance with s. 82(4). The tenant did not provide any evidence to substantiate her claim. No error of law or jurisdiction was established and the appeal was dismissed.

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