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Meigs v. Saskatchewan Penitentiary (Institutional Head), 2016 SKCA 79

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Criminal Law – Habeas Corpus

The appellant appealed the decision of a Queen's Bench judge who denied his application for a writ of habeas corpus. The appellant had been returned to prison after he had violated the terms of his statutory release. The Parole Board suspended his statutory release and the Appeal Division of the Parole Board denied his appeal of the decision. The appellant then filed a habeas corpus application in the Court of Queen's Bench. The chambers judge declined to exercise jurisdiction, saying that there was a complete procedure in place under The Corrections and Conditional Release Act. He also found that the mandamus sought by the appellant was available to him only through the Federal Court.

HELD: The appeal was dismissed. The court found that the chambers judge had not erred in his decision with respect to habeas corpus because the appellant had recourse to the board and its appeal division, unlike the Supreme Court's decision in favour of an inmate's habeas corpus application in Khela v. Mission Institution. The chambers judge was also correct in his decision regarding the Federal Court's jurisdiction as to the appellant's request for mandamus.

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Richards Herauf Whitmore, July 5, 2016 (CA16081)

Civil Procedure – Appeal – Leave to Appeal
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Civil Procedure – Queen's Bench Rules, Rule 5-49 – Appeal

The appellant had been injured in a vehicle accident during the 1990s and began receiving benefits pursuant to The Automobile Accident Insurance Act (AAIA). The respondent, Saskatchewan Government Insurance (SGI), terminated the benefits. In 2002, the appellant successfully appealed SGI's decision to the Court of Queen's Bench pursuant to what was then s. 197 of the AAIA. After a long delay in the proceedings, SGI obtained an order from a Queen's Bench judge in chambers requiring the appellant to undergo an independent medical examination pursuant to Queen's Bench rule 5-49 (see: 2016 SKQB 165). The appellant appealed to the Court of Appeal to have the decision set aside. The respondent then applied to have the appeal quashed because she had not obtained leave to appeal as required by s. 8 of The Court of Appeal Act, 2000 (CAA). The appellant's first argument was that although the order in question was interlocutory, s. 199 of the AAIA provided a right of appeal. Her second argument was that the order made in Queen's Bench also fell within the meaning of injunction in s. 8(2)(a)(iii) of the CAA. HELD: The application was granted because leave to appeal was required and it had not been obtained. The appeal was quashed. The court held that the word "decision" in s. 199 of the AAIA meant the decision on the substantive merits of an appeal taken pursuant to s. 197. There was no right of appeal to the Court of Appeal related to interlocutory decisions made by the Court of Queen's Bench in the course of handling an appeal under s. 197. In the circumstances of this case, the order made by the Queen's Bench judge was not an injunction. Further, it was made pursuant to s. 36 of The Queen's Bench Act, 1998 and Queen's Bench rule 5-49 relating expressly to independent medical examinations.

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Richards Caldwell Herauf, July 4, 2016 (CA16082)

Civil Procedure – Court of Appeal Rules, Rule 4, Rule 13, Rule 28, Rule 29, Rule 43(2)
Civil Procedure – Appeal – Perfecting the Appeal – Factum
Civil Procedure – Appeal – Application to Strike for Want of Prosecution
Civil Procedure – Appeal – Notice of Appeal – Application for Leave to Amend

The appellant law firm appealed from the decision of a Queen's Bench judge dismissing its appeal from the local registrar's decision regarding the assessment of the appellant's accounts to two of its clients, the respondents (see: 2015 SKQB 248). The appellant failed to serve and file an appeal book or factum within 30 days as required by rule 43(2) of The Court of Appeal Rules. The respondents brought an application to compel the appellant to perfect its appeal and an order was granted that the appellant would have 45 days in which to serve and file its appeal book and factum. If the appellant did not do so, the respondents were given leave to apply for dismissal of the appeal for want of prosecution. Before the expiration of the period, counsel for the appellant filed a notice of motion to seek an order permitting amendments to the notice of appeal. Counsel for the respondents then filed a notice that sought to have the appeal dismissed for want of prosecution. At the hearing in chambers, the appellant's counsel provided a 40-page draft factum, advising that it would be filed the next day, which was the end of the 45-day period. The factum was filed and it was 36 pages long, using a small font size and spacing that did not comply with the rules. At the next hearing, the chambers judge ordered the factum to be removed from the court file because it did not meet the requirements of rule 29, and as a result, found that the appeal had not been perfected. The chambers judge referred the respondents' application to dismiss the appeal to a division of the court and included the appellant's application for leave to amend the notice of appeal as well as a new application by it for leave to file a factum exceeding 40 pages or, alternatively, time to file one that would be within the page limit. The issues on appeal were: 1) whether the appellant's appeal should be struck for want of prosecution; 2) whether leave should be granted to amend the notice of appeal; 3) whether the last version of the factum should be accepted for filing; and 4) what order as to costs was appropriate.
HELD: The court held with respect to each issue that: 1) the appeal should not be struck. Counsel for the appellant had taken the blame for the deficiencies in the factum filed and it was not appropriate to sanction the appellant for its lawyer's mistake; 2) the application for leave to amend the notice of appeal was dismissed because it contained matters that were not before the

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Queen's Bench chambers judge and therefore were not dealt with by him. The court also refused the application on the basis of the delay in bringing the proposed amendments; 3) the factum was not allowed because it contained arguments based upon the proposed amendments to the notice of appeal. The appellant was given leave to file a factum within eight weeks that complied with the rules and addressed only the issues raised in the notice of appeal. The appeal would be dismissed if the appellant failed to meet the terms of the order; and 4) the appellant was ordered to pay $3,000 in costs respecting this hearing. An order for solicitor-client costs was not given in light of the fact that the appellant had costs awarded against it in all the previous proceedings.

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Thompson v. O'Hara, 2016 SKCA 83

Richards Lane Ryan-Froslie, July 7, 2016 (CA16083)

Statutes – Interpretation – Powers of Attorney Act, 2002, Section 18.1
Power of Attorney – Accounting

The appellant appealed from the decision of a Queen's Bench judge to order an accounting by her pursuant to The Powers of Attorney Act, 2002 (POAA). The appellant was granted a power of attorney by her mother in 2002. After her mother died in 2013, the appellant became the executrix of her estate. The appellant and her mother owned one parcel of land as joint tenants and the appellant had a one-third interest in another parcel. In 2008, the appellant arranged the purchase of the lands and transferred their titles to herself and her husband (the other appellant). The respondent, a sister of the appellant, was granted an order for accounting of the appellant's management of their mother's property and financial affairs under the POAA. The respondent provided the accounting for 2002 to 2012. In February 2014, after their mother had died, the respondent brought a second application by way of notice of application to compel the appellant to produce an accounting pursuant to the POAA and to set aside the land transactions on the basis that she had breached her fiduciary duty by failing to pay the fair market value for the lands. The chambers judge found that the appellant had breached her duty on that basis. Since the estate was small, the judge relied on the foundational rules of the Queen's Bench Rules to characterize the application as a continuation of the respondent's first accounting application made before the death

of the mother. He ordered the appellant to pay to the estate the difference between the price she paid and the fair market value or alternatively to transfer the lands back to the estate. The appellants argued that the chambers judge erred in: 1) treating the second application after the mother's death as a continuation of the respondent's first application for an accounting made before her death; and 2) treating the application for an accounting, in effect, as an action for an accounting when the POAA makes no provision for the ordering of an action for an accounting.
HELD: The appeal was allowed. The majority held with respect to the issues that the chambers judge had erred in law because: 1) the POAA does not contain a provision to continue an application for an accounting against the attorney after the grantor's death. The first application was completed. The respondent should have applied for an accounting pursuant to s. 18.1 of the POAA; and 2) he treated the second application as an action for an accounting when such an action is not provided for in the POAA. Under ss. 18 and 18.1, the attorney is only required to provide an accounting, which is a bookkeeping and reporting exercise. In the decision of Richards, C.J.S., he agreed with the majority regarding the second issue but found that it was unnecessary to consider s. 18.1 of the POAA in order to resolve the appeal.

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R. v. Olotu, 2016 SKCA 84

Jackson Whitmore Ryan-Froslie, July 7, 2016 (CA16084)

Criminal Law – Assault – Assault Causing Bodily Harm – Conviction – Appeal

The appellant appealed his conviction of sexual assault causing bodily harm contrary to s. 272(1)(c) of the Criminal Code. At trial in Provincial Court, the complainant testified that the appellant had had anal intercourse with her without her consent and was injured. At the time of the offence, she was inebriated and had no recollection of what had happened. The Crown's case consisted of the complainant's testimony, her assertion that she would never have consented and a series of text messages between the complainant and the appellant before and after the offence, showing that the complainant had not consented. The messages were relied upon by the accused as well. The defence argued that they could be interpreted to show consent. Because of intense pain, the complainant went to the hospital a day after

the offence. The examining physician testified as to the injuries and the medical records were submitted into evidence. The appellant testified to his version of what had happened but the trial judge stated that he believed the complainant and found that she had not consented. The appellant argued on appeal that the trial judge misapprehended the evidence, disregarded other evidence and failed to consider it in its totality in deciding whether the Crown had proven its case beyond a reasonable doubt, and had placed the onus on him to prove the complainant had consented.
HELD: The appeal was dismissed. The court found with respect to the appellant's first ground that the trial judge had not erred and that his reasons, considered in their totality against the evidence at trial, sustained his verdict. The court found with respect to the second ground that the trial judge had not shifted the burden of proof. The court noted that although the trial judge had not explicitly stated the steps outlined in R. v. W.D., he had applied the correct burden and standard of proof. The judge's finding that the appellant's evidence was not credible rested on the testimony of both parties, the cross-examination of the appellant wherein he contradicted himself, the text messages and the photographic evidence of the injuries suffered by the complainant.

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Jackson Ottenbreit Herauf, July 8, 2016 (CA16085)

Statutes – Interpretation – Criminal Code, Section 485(3), Section 799, Section 803(4)
Criminal Law – Provincial Court – Jurisdiction – Information – Dismissal for Want of Prosecution – Appeal

The appellant had been charged with assault under s. 266 of the Criminal Code. He appeared before the Provincial Court for the purposes of a trial relating to the information issued on the charge. The Crown advised that it would not be able to proceed with the trial and requested an adjournment because the wrong complainant had been subpoenaed. The judge adjourned the matter for ten days to be spoken to in court on that day. The appellant did not consent to the adjournment and he had not entered a plea. When the matter came before a different Provincial Court judge ten days later, the judge was informed that although the Crown was given time to subpoena the correct complainant, she was not present because the RCMP had not yet

responded to the Crown's requests after the adjournment to find her. The judge dismissed the information for want of prosecution. The Crown appealed to the summary conviction appeal court. The appeal court judge found that the second Provincial Court judge did not have jurisdiction to dismiss the information because it could only be done if ss. 485(3), 799 and 803(4) of the Code were applicable. In this case, they did not apply. The second judge should have determined whether a further adjournment was warranted but she failed to do so. The appeal was allowed and the matter remitted to the Provincial Court (see: 2016 SKQB 39). The appellant appealed on the ground that the appeal court judge had erred in determining that the second Provincial Court judge did not have jurisdiction to dismiss the information. Under s. 803(1), the second judge had the discretion to control the court's process. The Crown argued that a Provincial Court judge does not have jurisdiction to dismiss a charge for want of prosecution where the Crown has sought an adjournment of the matter that is set to be spoken to in docket, before the trial date has been set and where the Crown has not been called upon to present its case.
HELD: The appeal was dismissed. The court found that the appeal court judge had not erred. In this case, the purpose of the adjournment made by the first judge was for the matter to be spoken to in docket court. It was not an adjournment to a trial date. There was therefore no jurisdiction on the return date to dismiss the information for want of prosecution.

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R. v. Cyr, 2016 SKCA 86

Jackson Ottenbreit Whitmore, July 12, 2016 (CA16086)

Criminal Law – Murder – Second Degree – Conviction – Appeal
Criminal Law – Conduct of Trial – Jury Trial – Charge to Jury

The appellant was convicted of second degree murder of his common law spouse's two-year-old daughter. The death occurred as a result of the intentional infliction of blunt force trauma. On the night in question, the child was left in the care of the appellant when her mother went to work. The mother returned at 8:30 pm and checked on the child a couple of times before she and the appellant went to bed at midnight. The child appeared to be asleep. A friend passing the house noticed the front door was ajar at about 3:00 am and went into the house to tell them and then left. The mother discovered the child was dead at 9:00 am. There was no medical evidence as to when the

child had been injured or when she had died. The police search for evidence in neighbourhood garbage cans discovered such things as a pillowcase used in the house by the appellant with his DNA and that of the child on it. The principal issue at trial was who had caused the injuries to the child. The appellant's grounds of appeal pertained to the trial judge's charge to the jury. The defence argued that the trial judge erred by failing to give instructions to the jury regarding three matters arising from the address of Crown counsel.
HELD: The appeal was dismissed. The court reviewed the charge to the jury and found that the trial judge had not erred and that in the circumstances he had not been required to provide corrective instructions.

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Canadian Natural Resources Ltd. v. Campbell, 2016 SKCA 87

Jackson, July 15, 2016 (CA16087)

Civil Procedure – Appeal – Leave to Appeal
Statutes – Interpretation – Surface Rights Acquisition and Compensation Act
Surface Rights Arbitration Board – Appeal
Real Property – Lease – Oil and Gas Lease

The applicant, Canadian Natural Resources Limited (CNRL), applied for leave to appeal a decision of the Board of Arbitration pursuant to s. 71 of The Surface Rights Acquisition and Compensation Act. The majority of its numerous grounds related to the board's decision regarding compensation. The respondents, the landowners and their farming corporation, Wenton Farms Ltd., applied for leave to cross-appeal from the same decision.
HELD: The court granted leave to appeal to CNRL on each of its proposed grounds of appeal, finding that as a package, the grounds met the Rothman's criteria, such as the board erred in law in three ways: by basing its award for a loss of use of which there was no evidence; by disregarding evidence of rental for cultivated land utilized and the pattern of dealings as it related to compensation for loss of use; and by failing to provide adequate reasons. The owners' application for leave to cross-appeal was dismissed but for two grounds: one regarding the adequacy of the board's reasons, and one that raised an issue about the board's jurisdiction to grant compensation to CNRL for surface rights that it did not possess.

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Aquila Holdings Ltd. v. Edenwold (Rural Municipality No. 158), 2016 SKCA 88

Jackson, July 15, 2016 (CA16088)

Civil Procedure – Appeal – Leave to Appeal
Civil Procedure – Appeal – Stated Case
Statutes – Interpretation – Municipal Board Act, Section 33.1
Civil Procedure – Court of Appeal Rules, Rule 16

The applicants applied for leave to appeal the decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board pursuant to s. 33.1 of The Municipal Board Act (MBA). The applicant claimed legal interests in a parcel of land subject to a reduced tax agreement with the prospective respondent, the Rural Municipality of Edenwold (RM). The RM decided not to honour the agreement because it believed that there had been change of ownership in the parcel between the two applicants. The applicants appealed the RM's decision to the Board of Revision, which refused to hear the appeal because it was filed outside of the appeal period. The applicants then appealed to the committee, which held that they had not been out of time to appeal to the board, but that it had no authority to consider the legality of the agreement at issue or the legality of the RM's actions to cancel it. It also found that if it did have jurisdiction, it did not have the authority to require the RM to provide an agreement that was entirely within the discretion of the RM's council. The applicants' proposed grounds of appeal were that the committee had erred in law and jurisdiction in three ways: in concluding that it did not have the power under The Municipalities Act (MA) to determine whether the property was exempt from taxation under that Act; in finding that its power to correct errors for assessed taxes upon exempt property did not extend to exemptions arising by agreement pursuant to s. 295 of the MA; and in declining to exercise its jurisdiction to grant relief to the applicants for enforcement of its tax exemption. The RM agreed that the grounds raised the question of jurisdiction regarding tax exemption agreements. It argued that leave should be denied on the basis that the committee's decision was correct although it had erred in interpreting the appeal period under s. 226 of the MA and if it had found that it had jurisdiction, it should have dismissed the appeal because the ownership of the parcel had passed from one applicant to the other, which meant that the agreement was not in effect.
HELD: The application was granted and leave to appeal was granted. The court found that the question of jurisdiction met the

criteria established in Rothmans. The court reviewed the question of the differences between applications by way of stated case and those for leave to appeal under the MBA after it was amended in 1996 by s. 33.1. The court also reviewed the arguments of the respondent and concluded that they did not constitute an application to vary the committee's decision pursuant to Court of Appeal rule 16 and therefore the respondent was not required to obtain leave.

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Chinichian v. Mamawetan Churchill River Health Region, 2016 SKCA 89

Jackson, July 15, 2016 (CA16089)

Civil Procedure – Appeal – Leave to Appeal
Civil Procedure – Appeal – Self-represented Litigant
Statutes – Interpretation – Saskatchewan Employment Act, Section 3-35, Section 3-36

The self-represented litigant applied for leave to appeal a decision of the Saskatchewan Labour Relations Board pursuant to s. 4-9 of The Saskatchewan Employment Act. The applicant had been terminated without cause from her employment as the executive director of the respondent health authority. She filed a complaint under Division 5 of the Act, alleging that her dismissal constituted discriminatory action taken against her because she had complained about two other employees. The occupational health officer reviewing the complaint found that the respondent's decision to terminate the applicant was not causally connected to the applicant's health and safety concerns, which would be protected by s. 3-35(4). The applicant appealed to an adjudicator. Although the adjudicator found that there had been a discriminatory action, it had been taken for a good and sufficient other reason pursuant to s. 3-35. The applicant appealed to the board under s. 4-8. The board rejected the applicant's grounds of appeal but remitted the matter back to the adjudicator to provide a corrigendum for her decision in respect of the causal connection between the complaints made by the applicant against the other employees. The adjudicator issued her corrigendum, stating that the applicant had not established the causal connection between her termination and the complaints.
HELD: The application for leave to appeal was dismissed. As the applicant had not provided grounds of appeal, the court formed the issues on her behalf. It determined that the major questions

of law were whether the board erred by not finding: 1) a breach of natural justice because the adjudicator took 14 months to deliver her decision. The court held that it would not grant leave to appeal after applying the Rothmans test because the law in this area had been established in United Food and Commercial Workers v. Tora Regina; and 2) that the adjudicator wrongly placed the onus on the applicant under the Act to prove a causal connection. The court found that although the adjudicator misinterpreted s. 3-36(4) of the Act, it had not affected her decision because she had found that the applicant had not established the causal connection and alternatively, if she was wrong in that finding, the respondent had established a good and sufficient reason for dismissing the applicant.

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R. v. Alsager, 2016 SKCA 91

Richards Caldwell Whitmore, July 21, 2016 (CA16091)

Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Sentence
Criminal Law – Obstructing a Peace Officer
Criminal Law – Wildlife Regulations

A father and son that operated a game farm received a substantial fine after being convicted of using an aircraft to hunt wildlife contrary to s. 47(1) The Wildlife Regulations (WR), 1981. They were also prohibited from obtaining hunting licenses and from carrying a firearm in an aircraft. The father was also convicted of obstructing a peace officer, contrary to s. 129(a) of the Criminal Code, for which he received a suspended sentence with one year of probation that included a condition that he not carry a firearm except on property owned by him or his son. The father and son appealed to the Queen's Bench Court where the conviction appeals were dismissed and the sentence appeals were allowed. The fines were reduced and the prohibition against carrying a firearm in an aircraft was set aside. The father's appeal against the obstruction conviction was allowed and his conviction was quashed. The Crown and father and son appealed to the Court of Appeal. The father and son were patrolling their property line from a helicopter when the manager of a seismic crew working in the area made a call after he heard what he thought were gunshots coming from the helicopter. A conservation officer observed the son take a rifle into the helicopter. An open box of shotgun shells, with three missing shells was located between the seats of the helicopter. A

box of shells was also located on the floor of the passenger side of the helicopter. The father would not give the firearm to the conservation officer, but he did retrieve it for RCMP officers. The father and son argued that they had shot a deer being attacked by coyotes, but only after the father had put the helicopter low to the ground so that the son could exit the helicopter and shoot the deer. On appeal, the judge overturned the obstruction conviction because he found that the conservation officer did not advise the father of a lawful basis for demanding that he turn over the firearm and, therefore, the Crown failed to prove that the father knew the conservation officer was acting in the lawful execution of his duties. He also found that the fines were not proportionate to the gravity of the offences committed and were demonstrably unfit. The father's fine was reduced to $3,500 plus $1,400 surcharge and the son's fine was reduced to $2,500 plus a $1,000 surcharge. The appeal judge also set aside the one-year prohibition against carrying a firearm in an aircraft because the trial judge did not appreciate that much of the game farm was inaccessible by land. The issues on appeal were whether the appeal judge erred in: 1) setting aside the father's conviction for obstruction; 2) failing to overturn the WR convictions; and 3) reducing the sentences imposed.

HELD: The Crown sentence and conviction appeals were allowed and the father and son's appeal against their convictions was dismissed. The issues were determined as follows: 1) the mens rea of the obstruction charge did not include knowledge by the father that he was under investigation for hunting from a helicopter. The appeal judge therefore erred. The Crown proved each of the necessary elements of the offence; 2) the father and son's argument did not account for the judge's finding as a fact that the son shot at coyotes while the father operated the helicopter. Their argument also failed to account for the broad definition of "hunting" that included searching for animals from an aircraft; and 3) the appeal judge made numerous errors when reducing the fines. The judge concluded that the seismic manager's safety was not at issue. The appeal judge concluded that previous charges did not relate to unlawful hunting and therefore discounted their importance in sentencing. The appeal judge could not substitute his own sense of the way in which the prior convictions should have had an impact on the sentence for the judge's assessment of the issue. The fines given by the trial judge were not demonstrably unfit. The Court of Appeal found two problems with the appeal judge's approach to removing the prohibition of carrying a firearm in an aircraft for one year: the trial judge did not overlook the hardship the prohibition would bring to the father and son; and the appeal judge considered that a licence could be obtained to hunt from an aircraft, however, as a practical matter it was not possible to obtain such a licence.

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Holtby-York v. Saskatchewan Government Insurance, 2016 SKCA 95

Richards Ottenbreit Ryan-Froslie, August 3, 2016 (CA16095)

Statutes – Interpretation – Automobile Accident Insurance Act, Section 144, Section 203

The appellant appealed from the decision of the Automobile Injury Appeal Commission (see: 2014 SKAIA 36). The commission upheld the decision of Saskatchewan Government Insurance to refuse to include the appellant's deceased husband's Canada Pension Plan (CPP) disability payments as income when calculating the appellant's survivor benefits. At the time of his death, the deceased had been unemployed and receiving both workers' compensation and CPP disability benefits as a result of a work-related injury. The appellant argued that: 1) the CPP benefits were "earned" from all his employments and would fall within the definition of "yearly employment income" for the purpose of s. 144(1)(a) of the Automobile Accident Insurance Act (AAIA); 2) the Personal Injury Benefits Regulations provides in s. 17(2)(b)(vii) the calculation of yearly employment income includes the "cash value of any other benefit"; 3) as s. 203 of the AAIA treats benefits such as CPP payments as "employment income", then to maintain consistency, the benefits should also be included as employment income for the purposes of s. 144(1)(a); and 4) the words "earned or would have earned" in s. 144 (1)(a) creates ambiguity and it must be interpreted in favour of the appellant to uphold Charter values, otherwise it would discriminate against an insured with disabilities.
HELD: The appeal was dismissed. The court held with respect to each ground that: 1) the deceased was not employed at the time of his death and did not meet the definition of employment contained in s. 2(1)(p) of the Act. The CPP payments received by the deceased were equivalent to insurance, not remuneration from employment. Further, such payments are not "earned" within the meaning of the word used in s. 144(1)(a) of the AAIA; 2) the benefits listed under s. 17(2)(b) of the Regulations must be interpreted by reference to the other words in the list. They related to compensation or benefits pertaining to employment, which CPP benefits are not; 3) it interpreted s. 203 of the AAIA as meaning that if an insured was entitled to disability benefits from CPP or a similar program from a jurisdiction outside Saskatchewan, the insurer can reduce the insured's income

replacement benefit by the amount of the disability benefit. Therefore, s. 203 did not treat CPP disability benefits as employment income; and 4) it interpreted s. 144(1)(a) as meaning the income earned over a 12-month period and it was not ambiguous. In the absence of ambiguity, the Charter values principle did not apply.

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Zettl v. Spence, 2016 SKCA 97

Caldwell Herauf Ryan-Froslie, August 3, 2016 (CA16097)

Family Law – Custody and Access – Variation

The appellant appealed against the decision of a Queen's Bench judge in chambers. The appellant had applied to vary the parenting arrangements established under a consent order made with respect to the seven-year-old son of the appellant and the respondent. At the time the consent order was made in 2014, the appellant was living in Saskatoon and the child was living with the respondent in Regina. Before negotiating the consent order, a psychologist had prepared a child and custody assessment in which he recommended that the child remain in the primary care of the respondent with the appellant having weekend access three times per month. The psychologist also recommended shared parenting if the appellant were to move to Regina, but noted that it appeared unlikely to occur in the short term and would require cooperation between the parties. Shortly after the issuance of the consent order, the respondent moved to Warman. The appellant then brought the application to vary the existing order on the basis of a change in circumstance and replace it with an order that the parties co-parent the child on a week-on/week-off basis. The parties filed affidavits for the hearing of the application. The appellant deposed that he had selected a school for his son in Saskatoon that would be equidistant from his home and the respondent's. The respondent deposed that she had moved to Warman because she could work from home and be present for her son and her other children when they weren't in school. The son was doing well in the neighbourhood school and was enrolled in a number of extracurricular activities. She attested that she had never agreed to the idea of shared parenting. The judge decided that although the order could be varied on the basis of the respondent's relocation, it was not in the child's best interests to vary the current arrangement, primarily because the respondent was at home full-time and earning income. The appellant's employment required him to

work long hours and his new wife was at home looking after her two young children. The judge's decision appeared to find that the appellant's proposal would result in a reduction of time the child would spend with either him or the respondent whereas the generous access supplied to the appellant under the previous order would permit maximum exposure to both parents. The appellant appealed on the grounds that the judge erred by: 1) making a final order in the presence of conflicting affidavit evidence instead of setting the matter down for a pre-trial conference; 2) failing to take into account the maximum contact principle in s. 6 of The Children's Law Act, 1997; and 3) failing to take into account the psychologist's evidence and recommendation regarding shared parenting.
HELD: The appeal was dismissed. The court held with respect to each ground that: 1) a chambers judge's discretion permitted him to determine a matter on the basis of affidavit evidence and to make a final order pursuant to both The Children's Law Act and the Divorce Act. The appellant had not asked the judge to set the matter down for a pre-trial conference or hearing. The judge had not erred when he determined that the evidence was sufficient to assess the merits of the appellant's application; 2) the trial judge had implicitly considered s. 6 of the Act when he concluded that the appellant's proposal of shared parenting would actually diminish the amount of time the child would spend with each of his parents; and 3) while the judge made no reference to the psychologist's assessment, the court did not find that he had erred. The circumstances had changed since the time of the report to such an extent that a new inquiry into the child's best interests would have had to be undertaken. The judge properly focused on the evidence before him to make the determination.

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101060873 Saskatchewan Ltd. v. Saskatoon Open Door Society Inc., 2016 SKCA 98

Richards Lane Ryan-Froslie, August 10, 2016 (CA16098)

Real Property – Lease – Option to Purchase – Appeal

The appellant appealed the decision of a Queen's Bench judge regarding the validity of an option-to-purchase clause in the lease of its property to the respondent. The appellant had sought a declaration that the option was void and unenforceable because it was vague and uncertain. The judge found that there was an implied term in the option that the appellant would convey title to the respondent free of mortgage encumbrances

(see: 2015 SKQB 154). The grounds of appeal were that the judge erred with respect to: 1) a number of factual findings; and 2) finding a valid option to purchase.
HELD: The appeal was dismissed. The court found with respect to the grounds that the trial judge had not erred with respect to: 1) his findings of fact and where he had erred, the error had not affected the outcome of his decision; and 2) basing his decision on the basis of "open contract" cases rather than the "implied term" approach as the result was similar: an agreement for the sale of land includes an implied term that a purchaser is entitled to receive a title free from mortgage encumbrances. In this case, the option to purchase set out the parties, the property and the price. It was an implied term of the option that the respondent's right to purchase the property included the right to a good and marketable title in fee simple.

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B. (C.L.) v. B. (J.A.), 2016 SKCA 101

Ottenbreit Herauf Whitmore, August 10, 2016 (CA16101)

Family Law – Custody and Access – Interim
Civil Procedure – Court of Appeal Rules, Rule 59

The appellant mother appealed against the decision of the Queen's Bench chambers judge granting the respondent husband unsupervised access to their eight-year-old son and six-year-old daughter and also applied to adduce fresh evidence on the appeal. In an earlier proceeding the appellant had obtained an order that stipulated the respondent's access would be exercised under supervision of his parents for at least three months. This order was made because the children had made allegations of improper behaviour by the respondent that, if true, would constitute sexual abuse. The chambers judge also ordered a custody and access assessment to focus on the credibility of the children. The parties selected the psychologist who would conduct the assessment. In his report, the psychologist concluded that he had not believed the son's disclosure and that the alleged abuse had not occurred. He recommended that the parties should share parenting. The respondent then applied for an order that his parenting time be increased and that it be unsupervised. The appellant tendered an affidavit prepared by another psychologist who cast doubt on the other psychologist's analysis and conclusions. The chambers judge determined that the time limit set in the previous order permitted him to change the interim access provisions after the expiration of the period

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and that the change would not disturb the status quo in a manner contrary to Guenther v. Guenther. The judge then reviewed the evidence provided by the two psychologists and found that he was unable to reach factual conclusions as to whether sexual abuse had occurred and left that determination to the trial judge. He found that the evidence of the respondent's interaction with the children during the three-month period allowed him to evaluate the potential for harm if the children were alone with the respondent. The judge weighed the risk to the children of being abused against the risk of further deterioration of their relationship with respondent caused by supervised access and concluded that it was in their best interests for them to have unsupervised access and extended it to include overnight access. The appellant argued that the chambers judge erred: 1) by ignoring the governing principles regarding variation of interim orders; and 2) in omitting crucial evidence or misapprehending the evidence. The appellant applied to admit as fresh evidence a 345-page transcript of conversations that she had with the two children regarding sexual abuse, which she argued was new evidence that would shed new light on the issue of access in the future.

HELD: The appeal was dismissed. The court awarded $9,000 in costs against the appellant based upon previous proceedings and this appeal. The appellant's application to adduce fresh evidence was dismissed. The court found that: 1) the principle set out in Guenther that an interim order cannot be changed unless the evidence established some risk applies generally to changes in custody and primary residence but was not applicable in this case as the issue was one of access. The status quo in an interim application is usually that which existed during the parents' relationship rather than after separation and would not include the period of supervised access. The chambers judge correctly stated that any change in access would not disturb the status quo and was correct in determining that the judge who had imposed the three-month period had contemplated changes to the order respecting supervised access; and 2) the crucial evidence that the appellant's ground rested upon was scientific articles regarding the topic of sexual abuse. The court found that the record showed that the appellant had not properly tendered that evidence before the chambers judge. The court could not find that the judge had materially misapprehended the evidence before him as probative in assessing the risk of future sexual abuse. The chambers judge had not conducted a viva voce hearing to permit the psychologist to be cross-examined on his report because the appellant chose to attack it via the affidavit provided by the psychologist she had chosen. Regarding the application to adduce fresh evidence, the court found that although the material was new and relevant it would not be

admitted. As it did not differ greatly from the evidence that was before the chambers judge, it would not result in a different conclusion regarding the risk of unsupervised access and its reliability was questionable.

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Lunn v. Phillips, 2016 SKPC 93

Demong, July 11, 2016 (PC16078)

Civil Procedure – Provincial Court – Small Claims – Procedure

The plaintiff brought an action for recovery of goods and services provided in the course of excavating the basement of the defendant's house. The action was tried in Small Claims Court and the decision was reserved. The trial judge then informed the parties that they had been mistaken regarding the manner in which damages should be proven and advised that it would hear additional evidence on the issue. The defendant's lawyer then proceeded to write multiple letters to the trial judge, indicating among other things that he disagreed with that decision and sought the opportunity to present argument and extension of time for the purpose of filing documents regarding the damages assessment.
HELD: The court set down the dates for the damages assessment portion of the trial. The court noted that proportionality was implicit within the objectives of The Small Claims Act, 1997 to resolve matters in a timely and cost-effective fashion. The court would not sanction in this case or any other case, counsel sending multiple letters to it seeking multiple orders, with little or no evidence.

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Phillips Legal Professional Corporation v. Fond Du Lac First Nation, 2016 SKPC 94

Demong, July 14, 2016 (PC16081)

Civil Procedure – Adjournment
Civil Procedure – Default Judgment

The plaintiff claimed the recovery on a quantum meruit basis for legal services allegedly provided by them. Default judgment was entered in December 2015, jointly and severally against some,

but not all, defendants. Two defendants applied to set aside the default judgment alleging that they had a valid defence. The plaintiff was successful in obtaining an adjournment and one day before the adjourned date requested another adjournment indicating that the application may not be necessary if collection attempts at other defendants was successful. The court did not receive any materials from either party by the deadline imposed by the court. The plaintiff then asked that the matter be dismissed even though the plaintiff had not filed its documents. The plaintiff argued severe prejudice because the defendant had not filed documents. The plaintiff filed four letters with the court in two days.
HELD: The plaintiff lacked the courtesy or experience to recognize that requests to the court and to opposing counsel for adjournments should be brought early. The court directed that the plaintiff comply with the court procedures in the Queen's Bench Rules, including identifying the specific relief sought. The adjournment was consented to by the defendant and the court did grant the adjournment.

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R. v. Iron, 2016 SKPC 95

Scott, July 18, 2016 (PC16079)

Criminal Law – Evidence – Identification

The accused was charged with operating a motor vehicle in a manner dangerous to the public, contrary to s. 249(1)(a) of the Criminal Code, and with operating a vehicle while being pursued by a peace officer, contrary to s. 249.1(1) of the Code. The only issue was whether it was the accused who had driven the vehicle. Police officers testified that they had seen a vehicle travelling over 100 km/h in a 60 km zone. They followed it in a high speed chase but gave up. They could not see the driver. Instead they checked the licence plate number of the vehicle and found it was registered to the accused. They were advised by the police communications officer that the address of the registrant was in Meadow Lake but his name was also associated with an address in Saskatoon. The officers went to that address and waited. When they saw what they thought was the same vehicle stop at the house, they drove to the passenger side of it and looked at the driver for three seconds before he drove away. They then found a photograph of the registered owner on the SGI database and concluded that the accused was the driver. They described the driver as an Aboriginal male about 20 to 25

years old wearing a baseball cap and a black sweater. The video pictures taken from the police cruiser camera were not clear. The officers spoke to the manager of the building and the occupant of the address given to them but neither of the people interviewed knew the accused. Both officers identified the accused in the courtroom. He was the only one present other than the lawyers and the court personnel.
HELD: The accused was found not guilty. The court found the corroborating evidence that the accused was the owner of the vehicle and that his vehicle was seen near where he might have lived was not sufficient to confirm the reliability of the eyewitness testimony of the officers.

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R. v. Vavra, 2016 SKQB 219

Currie, June 23, 2016 (QB16217)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Acquittal – Appeal
Constitutional Law – Charter of Rights, Section 24(2) – Appeal
Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Breath Demand – Reasonable and Probable Grounds – Appeal

The Crown appealed the acquittal of the accused after trial in Provincial Court of the charge of driving over .08. The accused had brought a Charter application alleging that the officer did not have reasonable grounds to make a breath demand under s. 254(3) of the Criminal Code and therefore the accused's ss. 8 and 9 Charter rights had been violated and the evidence of impairment should be excluded under s. 24(2). A police officer testified that he observed the accused drive through a flashing red light. The officer stopped the accused and noted a strong smell of alcohol. When asked if he knew that he gone through a red light, the accused seemed confused and said that he thought that it was yellow and that he had been arguing with his passenger. He answered that he had had a couple of drinks. The officer observed that the accused had glassy, bloodshot eyes. He had trouble taking out his wallet and finding his licence and was slow to respond to questions. The officer made the demand for the accused to provide a breath sample on a Breathalyzer at the police station. The accused complied and the samples showed that he was over .08. The trial judge found that the officer had reasonable grounds to suspect that the accused was impaired or over .08 but did not have reasonable grounds on an objective basis. The accused had not been speeding or driving erratically

and he explained to the officer why he had driven through a red light. As a result, the trial judge found that the accused's ss. 8 and 9 Charter rights had been violated and it was appropriate to exclude the evidence, the Certificate of a Qualified Technician, from trial under s. 24(2) of the Charter. The Crown argued that the trial judge erred in law in ruling that the officer did not have reasonable grounds to make the breath demand and that the Certificate must be excluded.
HELD: The appeal was allowed and the court set aside the acquittal. The matter was remitted to the trial judge for consideration of the charge on the basis that the evidence was not excluded. The court held that there was an objective basis for the officer's belief that the accused was driving while impaired. The trial judge considered all of the factors that were in the knowledge of the officer at the time he made the demand and held that all of them taken together could support the inference that the accused was not impaired. The trial judge erred in law because the time for determining which inference was correct was a determination for trial and should not be made at the stage of considering whether the police officer had reasonable grounds to believe that the accused was impaired.

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R. v. Tuboku-Metzger, 2016 SKQB 222

Meschishnick, July 18, 2016 (QB16218)

Criminal Law – Interim Release – Conditions

The accused was charged with possession of cocaine for the purposes of trafficking. At a show cause hearing held to determine whether the accused could be released, counsel for the Crown and the defence jointly proposed conditions of release. One of the conditions was that the accused would submit to a search of her person, vehicle and residence on demand by a police officer. The Provincial Court judge refused to include it and substituted a condition that a search could only occur where the police officer had a reasonable suspicion that the accused was in breach of the conditions of release. The Crown applied under s. 521 of the Criminal Code for a review of the release order on the grounds that the judge erred in law or that his decision was inappropriate.
HELD: The application was granted. The court found that as the judge had not provided any reasons for his ruling, it could not conduct a review of the decision to determine whether there was an error of law or whether it was inappropriate. The court

ordered that the condition agreed to in the joint submission should be reinstated, relying upon the decisions in R. v. Selskiy and R. v. Sheepskin.

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R. v. Kreklewich, 2016 SKQB 223

Kalmakoff, June 27, 2016 (QB16211)

Criminal Law – The Controlled Drugs and Substances Act – Trafficking
Constitutional Law – Charter of Rights, Section 11(b)
Criminal Law – Procedure – Stay of Proceedings – Abuse of Process

The accused was charged in June 2013 with three counts of trafficking a controlled substance contrary to s. 5 of the Controlled Drugs and Substances Act. The charges were laid as a result of a major RCMP drug investigation. The accused was a minor player and secondary target. The accused's counsel requested disclosure just after the accused was charged. Because of the size of the investigation, the electronic disclosure package was large. Aside from not being able to open some of the documents, the accused's counsel continued to request reasons from the Crown regarding their refusal to disclose certain documents. The prosecutor acting for the Crown was unable to obtain such information from the RCMP. The parties agreed at this hearing that a response to the disclosure requests was required before the accused would agree to set the matter down for trial. In May 2015, the prosecutor filed a stay of proceedings. Shortly afterward, the prosecutor in charge of the entire investigation inquired into the reason for the stay and decided to recommence proceedings in June 2015. The accused's counsel immediately requested the same disclosure information. Although the Crown did provide new documents, the dispute continued until the defence counsel advised the Crown that he would have to withdraw because he had received information inadvertently from the Crown identifying a confidential informant. The accused applied for a stay of proceedings. He alleged that the Crown's non-disclosure had been an abuse of process. An additional aspect of this abuse was the effect on him of the Crown's inadvertent disclosure of the informant because it added significant expense and delay as he would have to obtain new counsel. The accused also alleged that his s. 11(b) Charter right had been violated and a judicial stay of proceedings was the appropriate remedy.

HELD: The court ordered that the proceedings against the accused be stayed because it found that his s. 11(b) Charter rights had been violated. With respect to the abuse of process, the court was not satisfied that the prosecutors' decisions, initially to stay the charge followed by the recommencement, amounted to an abuse of process. The defence had not established that the Crown's actions were oppressive or vexatious or taken in bad faith. Regarding the infringement of s. 11(b), the court noted that in this case, the delay had been extremely lengthy and more than 17 months of it was directly attributable to the actions of the Crown. The prejudice suffered by the accused was significant, in that he lost his employment as a result of the charge. The court found that the accused's counsel should withdraw in the circumstances. The loss of his present counsel meant that the accused might have to defend himself at trial or incur much more expense and delay in order to retain new counsel. The court balanced the interests of the seriousness of the offence against the minor role that the accused played in the investigation and the Crown's failure to disclose and decided that the delay was unreasonable.

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R. v. Chmelyk, 2016 SKQB 225

Allbright, June 28, 2016 (QB16230)

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

The accused was charged with impaired driving, contrary to ss. 253(1)(a) and 255(1) of the Criminal Code, and with driving while his blood alcohol content exceeded .08, contrary to ss. 253(1)(b) and 255(1) of the Code. The defence alleged that the accused's ss. 8, 9 and 10(b) Charter rights had been violated and that the evidence of impairment should not be admitted under s. 24(2). A voir dire was held and counsel agreed that the evidence from it deemed admissible would become evidence at trial. The officers involved in the case testified that they had seen the accused stop his vehicle to talk to two different women in a period of time on a street known as "the stroll" where prostitutes worked. The accused's driving itself was not improper. At approximately 9:00 pm, the officers stopped the vehicle believing that the accused was violating s. 286.1 of the Code. The accused smelled of alcohol, had bloodshot eyes and his speech was

slurred. The officer arrested the accused for impaired driving and made the breath demand. He read the accused his right to counsel and provided the police warning. The accused said that he understood. At the police station the accused was placed in a phone room as he indicated that he wanted to speak to a particular lawyer. The officer called the lawyer at the two numbers given by the accused at least seven times and left voice messages. As none of the messages were answered, he asked the accused if he wanted to speak to another lawyer or to Legal Aid duty counsel, but the accused declined. After waiting until almost 11:30 pm, the breath samples were taken from the accused showing his blood alcohol content was well over .08. The accused testified that he had been visiting Saskatoon on the day in question. He had drunk approximately seven beers between 2:00 and 9:00 pm at a restaurant. After leaving it, he drove around looking for a bingo hall. As he was unfamiliar with Saskatoon, he stopped two different female pedestrians to ask them for directions. At the police station, the accused said that when he couldn't reach his lawyer, the officer had refused to allow him to call his mother who would have been able to contact the lawyer. This evidence was contradicted by the officer in cross-examination. The defence argued that: 1) the accused's ss. 8 and 9 Charter rights were breached because he was arbitrarily detained when the officers stopped him; 2) the officer did not have reasonable grounds to believe that the accused had committed an offence under s. 253 and therefore did not have a basis on which to make a breath sample demand; and 3) the accused's s. 10(b) Charter rights were violated because he had not received a reasonable opportunity to contact a lawyer of his own choosing before submitting his breath samples.
HELD: The Charter application was dismissed and the breath sample evidence admitted. The accused was found guilty of both charges. The court found with respect to each issue that: 1) the accused was not arbitrarily detained. The officers' suspicions were reasonable in the circumstances and the stop was made for a legitimate purpose; 2) the officer's evidence was credible. His belief that the accused was impaired was reasonable on both a subjective and objective basis. The officer had reasonable grounds to make the demand; and 3) it accepted the evidence of the officer and rejected that of the accused regarding the opportunity given to the latter to exercise his right to counsel. The officer refrained from obtaining breath samples as long as he could before the two-hour time frame elapsed. There was no breach of s. 10(b).

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Capital One Bank (Canada Branch) v. Campbell, 2016 SKQB 229

Rothery, June 29, 2016 (QB16220)

Debtor and Creditor – Credit Card – Joint and Several Liability
Civil Procedure – Queen's Bench Rules, Rule 7-5
Contracts – Formation – Evidence

The plaintiff bank sued the defendant for $8,120 plus interest for monies owed pursuant to a MasterCard issued to her. The defendant submitted that she was not liable because it was her deceased ex-husband who had incurred the card debt. She claimed that she had no knowledge of her ex-husband's dealings with the card or any customer agreements that she may or may not have received in the mail. The defendant deposed that she had her own credit card with a different financial institution and denied that she had ever used the card issued by the plaintiff. The plaintiff brought an application pursuant to Queen's Bench rule 7-5 for summary judgment and the defendant consented to it being heard on that basis. The evidence showed that the defendant's ex-husband and she had both signed an application for the card in 2003. The plaintiff argued that by signing the form, the defendant had accepted its offer of the card. The defendant was also liable under s. 36(5) of The Cost of Credit Disclosure Act, 2002, because she had completed a transaction on the card in May 2012. The statement of account showed that she had used the card.
HELD: The application for summary judgment was dismissed. The court distinguished Canada Trust Co. v. Menzies because the defendant had only signed the application not the agreement. The plaintiff had failed to prove its claim on the balance of probabilities because it had not submitted any more documentation than the statement of account. The plaintiff had issued individualized credit cards to the defendant and her ex-husband in 2011 and the one transaction relied upon by the plaintiff was the only transaction incurred on their individualized credit cards. There was no evidence regarding the one alleged use of the card by the defendant.

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L.-B., (L.), Re, 2016 SKQB 237

Megaw, June 30, 2016 (QB16226)

Family Law – Child in Need of Protection – Permanent Order

The Ministry of Social Services sought a permanent order with

respect to five children. Their mother (O.L.) and their maternal grandmother (M.L.) both sought to have the children returned to the care of O.L. The father of the three eldest children supported their return to O.L., but if that was not possible, he wanted them placed with a First Nations family. The father of the two youngest children had not appeared at the hearing. The three eldest children had been in care for 40 months after being apprehended because of domestic violence and O.L.'s alcohol and substance abuse. Social Services had apprehended the two youngest children at the time of their birth and they had remained in care since then. At the time of the hearing the children were aged nine, eight, five, two and six months. After the two apprehensions, Social Services had entered into various parental service agreements with O.L., identifying her problems with alcohol and violence. Referrals were made to various programs to assist O.L., but she had not attended them. In addition to her alcohol problem, O.L. had been charged with a number of criminal offences involving violence. She promised that she would now attend programming to deal with her issues. M.L. had obtained a designation as a person of sufficient interest and indicated that she would act as a resource to O.L. and care for the children while O.L went through the necessary programming.
HELD: The application was granted. The court found that the children were in need of protection under s. 11 of The Child and Family Services Act and made an order for the children to be made to permanent wards of the Ministry pursuant to s. 37(2) of the Act. The court found that the children had been in care for too long and it was in their best interests to be placed for adoption. The court found that O.L. had not provided any evidence that she would be able to deal with her problems nor had M.L. tendered any evidence to support a plan to allow her to parent the children.

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Harding v. Warkentin, 2016 SKQB 238

Krogan, July 4, 2016 (QB16227)

Wills and Estates – Dependants' Relief – Maintenance

The applicant wife applied pursuant to The Dependants' Relief Act, 1996 (DRA) for an order that the estate of her deceased husband provide reasonable maintenance for her. The applicant and the deceased were married for 37 years. She deposed as to the difficulty of her life with him because he was abusive and an

alcoholic. He refused to support her except for providing a small monthly allowance for groceries. The applicant looked after the farm house, a large garden and the farmyard and livestock as well as contributing her labour to the farming operation. After the deceased developed serious health problems, the applicant provided physical care for him by herself for 11 years until his death. The executor of the estate opposed the application because he felt that the deceased had made adequate provision for the applicant in his will and that her evidence of her contributions to the marriage and her husband's farming operation was not credible. The deceased's estate was valued at $3,338,150. The deceased had bequeathed to the applicant four quarters of farmland (including the home quarter), all the grain inventory he owned at the time of death and a vehicle. As the latter two items were owned by the deceased's farm corporation, those bequests failed. The value of the land was determined to be $530,000 and the family home's value was $250,000. The house required significant repairs in the amount of $100,000. The total net value of the applicant's assets added to the value of the bequest was $1,373,000. The applicant's annual income was $26,900, composed of government pension payments and rent from pasture land owned by her. After receipt of the four quarter sections bequeathed to her, she could expect to earn an additional $18,900 per year, increasing her before-tax annual income to $45,800.

HELD: The application was granted. The court ordered that in addition to the testamentary bequests, the applicant would receive the tax-free sum of $500,000 from the deceased's estate because it found, pursuant to s. 6(1) of the DRA, the deceased had not made reasonable provision for the maintenance of the applicant as his dependant. The court considered: the applicant was the sole dependant of the deceased; her income; her age and that she could no longer work; the quantity and quality of her contribution to the farming operation; and the exemplary care she provided to the deceased. In addition, the court assessed the provision made for the applicant under the will against what the applicant would have received in a division of property under The Family Property Act and the maintenance that she would have been entitled to under the Divorce Act. The court also examined the applicant's entitlement from the point of view of unjust enrichment and the deceased's moral obligations to her.

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Kavanagh v. Miller, 2016 SKQB 239

Dovell, July 6, 2016 (QB16232)

Wills and Estates – Wills – Holograph Will
Statutes – Interpretation – Wills Act, Section 37

The applicants applied to have a document signed by their deceased mother to be declared a testamentary disposition. The deceased and her common law spouse, the respondent, instructed their lawyer to make wills in 2009 in which they named each other the executor and sole beneficiaries of their estates. In the case of the deceased's will, the residue of her estate included a residential property. If the respondent did not survive her for 30 days, the residue was to be divided equally between the applicants. After his spouse's death in 2014, the respondent obtained letters probate in 2014 following which, title to the residential property was transferred to his name. The applicants registered a miscellaneous interest in the property. The respondent found some documents amongst the deceased's belongings, which included a handwritten note dated 2012. It stated the residential property was to be divided between the applicants. The respondent brought the note to the attention of the applicants and they brought the application to determine whether the document was a testamentary disposition. They argued that it was a holograph will under s. 8 of The Wills Act. HELD: The application was dismissed. The court found that under s. 37 of the Act, the document did not meet the requirements of a testamentary disposition as to intention and it was too vague and uncertain. The court concluded that the deceased's will should not be modified on the basis of speculation regarding the subsequent document.

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Raghuraman v. Macnab, 2016 SKQB 240

Dovell, July 12, 2016 (QB16233)

Civil Procedure – Summary Judgment
Civil Procedure – Pleadings – Statement of Claim – Striking Out
Civil Procedure – Queen's Bench Rules, Rule 7-9

The applicants brought an application pursuant to Queen's Bench rule 7-9 to have the plaintiff's statement of claim brought against them struck for being frivolous, scandalous, vexatious and an abuse of process. In the alternative, the applicants applied pursuant to Queen's Bench rules 7-2 and 7-9 for summary dismissal of the plaintiff's claim against them on the ground that it failed to make out the essential elements of the tort of malicious prosecution. They also sought an order for

elevated costs because of the complexity of the application and the unfounded claims of the plaintiff alleging reprehensible conduct by them. The plaintiff had been charged with an assault on his wife contrary to s. 266 of the Criminal Code. The applicant McNab acted for the Crown at trial under the supervision of the applicant Zerr, the Regional Crown Prosecutor for Saskatoon. The plaintiff represented himself because his application for court-appointed counsel was dismissed. The Provincial Court judge acquitted the accused because the Crown had not proven the case beyond a reasonable doubt. The plaintiff then commenced this action against the applicants, alleging amongst other things, that they had decided to prosecute him when they knew that they could not convict him, had lied to the judge that the case was straightforward in order to prevent him from obtaining legal assistance and delayed disclosure to harm his defence. The applicants filed their statements of defence in which they denied each allegation. The issues were whether: 1) the claim should be struck pursuant to Queen's Bench rule 7-9; 2) it was appropriate to determine the case by summary judgment; 3) the claim for malicious prosecution should be summarily dismissed; and 4) the plaintiff should be ordered to pay elevated costs if the claim was struck or dismissed.
HELD: The application was granted. The court found with respect to each issue that: 1) the statement of claim should be struck. The court compared the statements of claim and defence, the transcript of the trial and admissions made by the plaintiff in an affidavit. The contradictions led the court to conclude that the plaintiff's claim was frivolous, scandalous and vexatious and an abuse of process because all of the allegations of misconduct were unfounded; 2) if the claim had not been struck, the court would have determined that it was appropriate to determine it by summary judgment as there was no genuine issue to be tried pursuant to rules 7-2 to 7-7; 3) the claim for malicious prosecution should be summarily dismissed as the plaintiff had not established that the prosecution was undertaken without reasonable cause or that it was motivated by malice; and 4) enhanced costs were awarded in the amount of $2,000 based on double the Column 3 amount of the Tariff pursuant to Queen's Bench rule 11-1(3)(e) because the plaintiff had made serious unfounded allegations against the applicants.

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Kopacz v. Dane, 2016 SKQB 242

Brown, July 25, 2016 (QB16237)

Family Law – Custody and Access – Custody and Access Report
Family Law – Custody and Access – Interim Order
Family Law – Custody and Access – Shared Parenting

A custody and access assessment regarding the child was ordered in October 2015, but because it was not yet available the court had to determine, on an interim basis, where she would attend kindergarten. Both parties had supportive partners with step-children close to the child's age, however, the petitioner resided in Saskatchewan while the respondent resided in Manitoba. The parties had a shared parenting arrangement alternating residences every two weeks. The respondent's new partner had primary residence of her two children from a previous relationship. The petitioner's new partner had access to his children three out of four weekends each month. The child had extended family members in both locations. The respondent worked construction, which meant time away during some projects but also flexibility when things were slow. The petitioner worked at a preschool that the child attended when she was with her. The respondent proposed a schedule that would allow the child to attend kindergarten in Manitoba and then still spend 50 percent of her time with the petitioner. The school schedule in the petitioner's town was not put into evidence.
HELD: There was a compelling reason to come to a determination that significantly impacted the parenting arrangement on an interim basis. The court determined that it was in the best interests of the child to retain as much of the present status quo as possible. It was ordered that the child would commence kindergarten in Manitoba in the fall. The court found the respondent's proposed schedule to be reasonable in the circumstances and that it provided for the best interests of the child on an interim basis in several ways. A schedule for each month was outlined by the court with a direction that the petitioner have ten additional days in July and August 2016 because the respondent had ten extra days in September and October. The respondent was also required to keep track of when he was home and away due to work.

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Flett v. Laidlaw, 2016 SKQB 244

Brown, July 20, 2016 (QB16239)

Family Law – Custody and Access – Interim Order
Family Law - Custody and Access – Shared Parenting
Family Law – Custody and Access – Voices of the Children

The respondent sought an interim change to the shared parenting regime of the last decade so that the child would reside with her 75 percent of the time. The respondent relied on Gerbert's recent interpretation of Guenther for her position. The child was with each parent for alternating weeks since the parties separated in 2006. The petitioner had moved several times in the decade and was currently located in a town 83 km from the city the respondent resided in. The child attended school in the city the respondent resided in and he had some difficulty in school. The child had to leave at 6:45 am and attended an afterschool program when he was with the petitioner. When the child was with the respondent, he woke up at 8:00 am and he went home to the respondent after school. The respondent also requested a Voices of the Children report. HELD: The application for interim relief was dismissed. The court found that Gerbert did not provide a way, in the present situation, to substantially change the parenting regime on an interim basis. It was not established that the current shared parenting regime put the child at risk in some way nor was there some other compelling reason to overturn the current parenting arrangements. The court was concerned with the petitioner's penchant to move frequently. According to Gerber, the primary residence is not to be changed on an interim basis unless the child was at risk or there was some other compelling reason. Even though the child was 12, the court declined to order a Voices of the Child Report because he was not precocious or advanced academically. The court directed the parties to attempt to agree to appropriate child support once income tax information had been exchanged.

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D. (A.) v. B. (A.), 2016 SKQB 246

Scwann, July 22, 2016 (QB16241)

Family Law – Custody and Access – Variation

The court proposed switching the petitioner's mid-week access to Monday instead of Tuesday given concerns that the respondent would not have anywhere to stay in town during the petitioner's access. The court gave the parties leave to make further submissions in that regard. Prior to the parties making further submissions, the petitioner brought an application to vary the access so that he would have access every Monday from 5:00 to 8:00 pm, unless the Monday was a statutory holiday, in

which case he would have access on Wednesday evening. The application was unnecessary. The petitioner refused to assist in access exchange driving because, in his view, the reason for the travel was due to the respondent unilaterally moving a few years ago.

HELD: The court concluded that the access schedule would not be varied because of the parties' antipathy towards each other and the consequent complications of any adjustment to access time. Preserving the existing access schedule was also found to be in the child's best interests because it maintained certainty and reduced inevitable parental interaction and conflict. The respondent's application was dismissed.

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