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. 4 **February 15, 2016**

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R. v. Candido, 2015 SKCA 104

Jackson Caldwell Herauf, October 1, 2015 (CA15104)

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

The appellant was convicted after trial by a Provincial Court judge of refusing to provide a breath sample contrary to s. 254(5) of the Criminal Code. He appealed the conviction to the Court of Queen's Bench where it was dismissed. He was given leave to appeal to the Court of Appeal. After receiving a tip that an intoxicated male had left a bar, an RCMP officer found the accused in his vehicle at that location. Because he could smell alcohol on the accused's breath, the officer asked the accused to provide a breath sample. In the police cruiser, the accused tried unsuccessfully six times to provide a sample for the ASD, and the officer arrested him for failing to provide one. At trial, the accused was not represented by counsel. He did not testify but made an oral submission to the court that he believed there was something wrong with the device, that the officer did not have reasonable grounds for making the demand, and that there was no evidence he was intoxicated. He also argued that it had taken too long for the matter to come to trial. The trial judge found that as there was no evidence that there was anything wrong with the device and that this was a case of constructive refusal. The officer had a suspicion there was alcohol in the appellant's body, which met the test. The accused argued on his appeal that the trial judge told him not to testify, repeated that the officer had not had the necessary grounds to make the ASD demand, and that there was an inordinate delay between the stop and

the test. He further alleged that that there had been breaches of a number of his Charter rights. The summary conviction appeal judge reviewed the transcript and found that the trial judge had not told the appellant not to testify but had offered him little advice. However, the court was not the proper forum to consider the judge's conduct. The appellant's failure to give proper notice of the Charter arguments prevented the court from hearing them. The court held that the trial judge's findings of fact were sufficient for the Crown to have proven the officer had reasonable suspicion required by s. 254(2) and that there was no basis to allege an inordinate delay between the stop and the taking of the breath sample. On appeal from the summary conviction appeal judge's decision, the appellant relied upon the same arguments. HELD: The appeal was dismissed. The appeal judge had not erred by dismissing the appeal based upon the facts as found by the trial judge and the existing jurisprudence. The appellant's argument depended upon his case at trial having been presented differently because there was no evidence to support them. He had raised Charter arguments without notice and factual foundation. His appeal presumed that the court could hear the matter afresh. However, without the factual foundation, there was no proper basis upon which the court could intervene.

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R. v. Ballentyne, 2015 SKCA 107

Lane Jackson Caldwell, October 13, 2015 (CA15107)

Criminal Law – Robbery – Acquittal – Appeal
Criminal Law – Evidence – Corroboration
Criminal Law – Evidence – Identification

The Crown appealed the acquittal of the respondent of one count of robbery contrary to s. 344(1)(b) of the Criminal Code. The onus on the Crown from an acquittal pursuant to a question of law, pursuant to s. 676(1)(a) of the Code, was to demonstrate that the error might reasonably have had a material bearing on the acquittal. The facts of the case involved the respondent allegedly demanding cash from a bank teller. The respondent had arranged with an accomplice to enter the bank with him and act as his lookout. At trial, the Crown's case was comprised of: the teller's testimony identifying the respondent; a video of the scene in the bank on the day of the robbery; the testimony of the alleged accomplice who identified the respondent, recounted how he came to be involved and what had transpired in the bank; and a police officer who testified that he knew the respondent very well, having seen him daily for years, and identified him as the person in the video. One aspect of the accomplice's evidence was his testimony as to

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the conversation that he had had with the respondent a few days after the robbery. The trial judge stopped the Crown's examination on this point as impermissible hearsay. The trial judge acquitted the respondent because the only evidence he accepted was the teller's identification of the respondent. He discounted the officer's recognition evidence and suggested that the alleged accomplice based his testimony on the video. The grounds of appeal were that the trial judge erred: 1) by considering the evidence piecemeal and thereby failed to consider the officer's evidence could serve to confirm the accomplice's testimony; 2) by misapprehending the law in relation to corroboration, which led him not to consider the officer's evidence and the video as potentially confirmatory pieces of evidence; and 3) by preventing the Crown from cross-examining the alleged accomplice about his post-offence conversation with the respondent.

HELD: The appeal was allowed, the acquittal set aside and a new trial ordered. The court held that the Crown had satisfied the burden. With respect to the grounds, the court held that the trial judge had erred: 1) by failing to consider all of the evidence cumulatively. He had not considered the officer's evidence as being capable of confirming the alleged accomplice's evidence; 2) by failing to recognize the officer's identification of the respondent and the video as potentially corroborative; and 3) in preventing the Crown from asking the questions on the basis that it would be hearsay but statements made by an accused person to his alleged accomplice are not caught by the exclusionary rule against hearsay and are admissible. The court found that the three errors taken together potentially increased the quantity of evidence probative of guilt in a not insignificant way.

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Grey Owl Engineering Ltd. v. Propak Systems Ltd., 2015 SKCA 108

Jackson Caldwell Herauf, October 14, 2015 (CA15108)

Statutes – Interpretation – Builders' Lien Act, Section 2(1)(h), Section 22

The appellant appealed from a chambers decision of a Queen's Bench judge who declared the appellant's lien to be invalid on the basis that it was not filed in relation to an improvement as defined by s. 2(1)(h) of The Builders' Lien Act and ordered the payment out of funds held in court to secure the lien. The appellant provided engineering design services relating to storage tanks. The tanks were to be built by a company who had subcontracted with the respondent. The respondent contracted with the lessee of mineral rights to provide it with its services connected to a modular oil extraction system to be used on the leased land. The appellant completed its contract but the company

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with whom it had contracted abandoned the project before the tanks were built and failed to pay the appellant $95,800. The appellant then registered its lien against the leased land pursuant to the Act. The chambers judge granted the respondent's application pursuant to s. 56(1) of the Act to vacate the lien, accepting the respondent's argument that the tanks were not sufficiently affixed to the land as required by s. 2(1)(h).
HELD: The appeal was allowed and as a result, the parties resumed the positions they occupied before the application was made and the appellant's lien continued to be a charge on the funds in court until further steps were taken by the parties. The trial judge had erred in considering what constituted an improvement under s. 2(1)(h). The issue was whether the appellant had provided services "on or in respect of an improvement" and was entitled to claim a lien under s. 22 of the Act. The approach to interpreting the legislation as set out in Hansen requires that the focus is on the main contract rather than individual subcontracts and therefore s. 22 should be given an expansive reading. The appellant was entitled to claim a lien as it provided services. The definition of improvement in s. 2(1)(h)(iii) extends rights to those who provide design services and are contracted with a subcontractor. The improvement in this case was the project for the extraction of oil and was not confined to storage tanks.

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Saskatchewan Government Insurance v. Petrisor, 2015 SKCA 109

Richards Caldwell Ryan-Froslie, October 16, 2015 (CA15109)

Administrative Law – Judicial Review – Saskatchewan Automobile Injury Appeal Commission

The respondent was involved in a vehicle accident in 2008 after which he complained of injury to his neck and lower back and began receiving benefits from the appellant pursuant to The Automobile Accident Insurance Act (AAIA). In 2010 the appellant terminated his benefits on the basis that his accident-related injuries did not prevent him from working. The appellant's medical director took the position that the respondent's back pain was not caused by the accident but by a pre-existing condition. However, the respondent's physician had ordered a lumbar spinal X-ray following his first visit after the accident. The respondent appealed to the Automobile Injury Appeal Commission. The appeal was allowed on the basis that the appellant had failed to follow recommendations made by the respondent's medical assessment team that he should undergo a rehabilitation program and a graduated return-to-work program. The Commission set aside the appellant's decision because the respondent had reported

a lower back injury following the accident that was not treated completely in accordance with the recommendations made by the medical team. The grounds of appeal were that the commission failed to properly apply s. 101(1.1) of the AAIA and that it ignored relevant evidence in coming to its conclusion.
HELD: The appeal was dismissed. Section 194(1) of the AAIA authorizes an appeal from a decision of the commission on a question of law. The argument that the commission misapplied s. 101(1.1) because it made benefits available to the respondent even though his lumbar problems were not caused by the accident was rejected. The cause of the back problems was a question of fact, not of law, and therefore, there was no appeal available on that point. Further, the commission based its decision to overturn the appellant's decision on the basis that the treatment plan was not followed. The appellant had not argued that there was something legally improper about the commission's approach in that regard. The court found that the commission had regard to all the relevant evidence. The commission had not made an unreasonable finding of fact by declining to accept the medical director's assessment of the source of the respondent's ongoing pain.

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R. v. Luu, 2015 SKCA 128

Jackson Ottenbreit Ryan-Froslie, October 19, 2015 (CA15128)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine
Criminal Law – Controlled Drugs and Substances Act – Conspiracy to Traffic – Cocaine
Criminal Law – Evidence – Circumstantial Evidence

The appellant appealed his conviction after trial in Provincial Court on charges that he and another accused possessed cocaine for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. Other charges include: conspiring with persons to commit trafficking of cocaine contrary to s. 5(1) of the Act; possession of cocaine for the purposes of trafficking contrary to s. 5(2) of the Act, thereby committing an offence contrary to s. 465(1) of the Criminal Code; and possessing $5,000 knowing that it was obtained as a result of an indictable offence contrary to s. 354(1) and s. 355 of the Code. The charges arose after the police received a tip that a group of Asian males had come to Saskatoon to sell drugs. Two people (Ms. Ly and Mr. Ycson) travelled together and the accused travelled alone to Saskatoon, arriving on the same day. The accused rented a room at a hotel and he and the other two people stayed there. The police conducted

surveillance of the room and the individuals in question. The accused was only seen by the police outside the hotel and once in a different location where he spoke to Ycson, whereas Ycson and Ly were both noted leaving the hotel and moving to different locations in the city. They were never seen with drugs, nor were they seen handing anything to anyone, but the police drug expert believed that their actions were consistent with delivery of drugs. After the individuals were arrested the police found about 7 grams of cocaine on Ycson's person. The police searched the hotel room and found the accused's identification and wallet and his bag containing $7,900 in cash packaged in various bundles. They also found packages of cocaine hidden in Ly's suitcase. Yscon was charged separately, and the case against the accused and Ly included the testimony of the police officers as to what they had observed and what they had seized and of a police expert who testified that the behaviour of the accused and co-accused was consistent with drug delivery. The essential issues related to the accused were whether there was a conspiracy and whether he was a part of it. The trial judge followed the Carter analysis and concluded that the Crown had proven conspiracy with respect to Ly and Ycson and decided on a balance of probabilities that the accused was a member of the conspiracy because he arrived the same day as the others, rented the room in which the cocaine was found, and had been present in it because his identification was found therein, and the money in his bag was packaged in such a way that the expert concluded that it was consistent with drug money. The trial judge found the accused guilty on all three counts.
HELD: The appeal was dismissed. The court found that the trial judge had not erred and his verdict was one that a properly instructed jury could have reasonably rendered.

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R. v. Paterson, 2015 SKPC 66

Gordon, May 14, 2015 (PC15137)

Criminal Law – Defences – Charter of Rights, Section 7, Section 11, Section 24(1)
Criminal Law – Disclosure – Lost Evidence
Criminal Law – Driving with a Blood Alcohol Level Exceeding .08
Criminal Law – Impaired Driving
Criminal Law – Evidence – Lost Evidence

The accused was charged with driving while over .08 and with driving while impaired, contrary to ss. 253(1)(a) and 253(1)(b), respectively. The accused argued that his ss. 7 and 11 Charter rights were breached because his right to make full answer and defence was denied when evidence was lost that would have aided in his defence. The accused

requested a stay of proceedings pursuant to s. 24(1) of the Charter. Police received a call at 1:50 am that the vehicle the accused was driving was being driven erratically at various speeds all over the road. The officer stopped the accused at 2:15 am and he noted a smell of alcohol coming from the accused's breath. The accused admitted having two or three drinks. The accused was given the ASD demand in the police vehicle and he failed the test. The accused was arrested and given his rights at 2:18 am. The accused indicated that he wanted to call a lawyer so he was placed in a room at the detachment and given phone books and there were names and numbers of lawyers on the wall. He talked to Legal Aid. After the incident the officer realized that the video recording equipment in the Intoxilyzer room had not been working. The officer indicated that he did not try to download the recording soon after the incident because it was not his practice to provide it as disclosure unless there was a not-guilty plea. The video of the room, if it had been available, would have shown the accused not the Intoxilyzer equipment. The accused argued that the video was required so that he could decide if he had an argument with respect to the presumption of accuracy of the machine given the 2012 amendments to the Criminal Code.
HELD: The court concluded that there is no legal requirement that the accused be recorded in the Intoxilyzer room. The Crown was not negligent. Evidence was not concealed or destroyed. The technician could have been called and cross-examined by the accused. The accused could have also testified if something seemed to be going wrong with the machine and he would have had the test sheets from the machine available to him. The evidence the accused was looking for was pure speculation. The court concluded that the accused did not meet the burden that there was actual prejudice to him.

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R. v. Cole, 2015 SKPC 109

Gordon, September 8, 2015 (PC15138)

Criminal Law – Criminal Law – Breathalyzer – Presumption
Criminal Law – Driving with a Blood Alcohol Level Exceeding .08 – Breath Sample – As Soon As Practicable, Section 258(1)
Criminal Law – Evidence – Expert Evidence

The accused was charged with driving while his blood alcohol level exceeded .08, contrary to s. 253(1)(b). The accused attended the police detachment to retrieve a seized firearm. Constable H. noted the odour of alcohol coming from the accused and he admitted that he had been drinking the night before. The officer watched the accused get into his vehicle and drive away. Constable H. and Constable W. got into a

police vehicle and pulled the accused over. The accused was pulled over midday in a residential area. When the accused failed the ASD, he was arrested for impaired driving. The stop occurred at 11:33 am and they left for the detachment at 12:07 pm. The officers waited at the scene for the tow truck for the accused's vehicle before taking him to the detachment. The first breath sample was at 12:40 pm. The issues were: 1) whether each breath sample was taken as soon as practicable after the time of the offence so that the Crown could rely on the presumption of identity in s. 258(1) of the Criminal Code; and 2) if the Crown could not rely on the presumption, whether their case failed. HELD: The court decided the issues as follows: 1) the court found that s. 148 of The Traffic Safety Act provided the officers with the legal authority to arrange to have the accused's truck impounded. The section requires the accused's vehicle to be impounded or immobilized. The court determined that the use of the word "immobilize" in the legislation meant that it had a different meaning from "impound". The court found that the officers remained at the scene 15 minutes longer than they needed. The tow truck was not called for 12 minutes after the fail result and eight minutes after the Breathalyzer demand because the officers were looking for the forms to complete for the impounding of the vehicle. The officers should have looked at alternatives to waiting for the tow truck. The Crown failed to prove beyond a reasonable doubt that the Breathalyzer tests were taken as soon as practicable and, therefore, the Crown could not rely on s. 258(1)(c) of the Criminal Code. The court was not prepared to take judicial notice of the elimination rates of alcohol and the plateau of the blood alcohol level to calculate the possible blood alcohol concentration of the accused at the time of driving. The Crown did not call an expert to provide the necessary information. The accused was found not guilty.

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Gordon, October 7, 2015 (PC15135)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Care or Control
Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Care or Control

The accused was charged with having the care and control of a vehicle when his blood alcohol content exceeded the legal limit, contrary to ss. 253(1)(b) and 255(1) of the Criminal Code, and with having care and control of a vehicle while his ability to operate it was impaired by alcohol, contrary to ss. 253(1)(a) and 255(1) of the Code. The accused was self-represented and a pre-trial conference was held to ensure that

he received disclosure and knew how to subpoena witnesses if necessary, as well as to explain the trial process and the law in the area. An officer had found the accused in the driver's seat of his vehicle, which was parked near a bar where the accused and his girlfriend had been visiting with friends. The accused had given his keys to one of his friends earlier in the evening because the latter wanted to leave early but in fact did not and returned the keys to the accused. When the accused and his girlfriend were ready to leave, they discussed how they would get home and the girlfriend contacted another friend to ask if he would give them a ride. While waiting for this person, the accused went to his car to retrieve his wallet and passport, which he had left in it. He was in the driver's seat so that he could reach across to lock the passenger door when he saw the police cruiser and decided that he should remain there. The accused testified that he had no intention of driving and the keys were inside his jacket pocket because he remembered reaching for them when the officer asked him for them. Witnesses who testified on behalf of the accused confirmed that the accused had gone to his car to get something and that he had arranged a ride. The officer testified that the keys were in the accessory position in the ignition but the vehicle was not running.
HELD: The accused was found not guilty on both charges. The court found that the accused had rebutted the presumption and that the inherent risk of putting his vehicle in motion was not a realistic risk in this case.

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Baniak, October 9, 2015 (PC15126)

Criminal Law – Arrest – Reasonable and Probable Grounds
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Criminal Law – Blood Alcohol Level Exceeding .08 – Breath Sample – As Soon As Practicable – Presumption s. 258(1)(c)
Criminal Law – Breathalyzer – Presumption
Criminal Law – Care and Control over .08

The accused was charged with impaired driving and driving over .08 contrary to ss. 253(1)(a) and 253(1)(b) of the Criminal Code, respectively. The accused argued that evidence should be excluded pursuant to s. 24 of the Charter on the basis that: his arrest could not be supported on an objective basis because the officer did not have adequate opportunity to observe any indices related to motor coordination; and failing to administer an ASD resulted in a breach of

the accused's ss. 8 and 9 Charter rights. The accused also applied for a stay of proceedings because disclosure was not provided in a timely manner. The accused was very still and slumped over his steering wheel. A witness aroused the accused and shut off his truck. There were empty beer cans in the back seat, and the witness testified that the accused was drunk. The witness advised the officer what he observed but did not mention the smell of alcohol. When the officer went to the accused's vehicle, he noted that: the accused had vomited on himself; there was empty beer cans and a whiskey bottle; and the accused had slurred speech and was in a daze. The officer noted the smell of alcohol coming from the accused once he was placed in the police vehicle. The officer determined that he had the grounds for a breath demand without first using the ASD. The officer could not recall whether he arrested the accused for care and control of a vehicle before he exited his vehicle. The issues were: 1) was a valid demand made pursuant to s. 254(3) of the Criminal Code; 2) did the police officer have the grounds to arrest the accused when he did; 3) were the breath samples taken as soon as practicable; 4) was the observation period followed properly; and 5) were the offences proven beyond a reasonable doubt. HELD: The late disclosure was not of a nature to unduly prejudice the accused or require an adjournment. The issues were determined as follows: 1) the demand does not have to be in any specific form as long as it is clear to the accused that he has to give a sample of his breath. The officer read the demand from his card and indicated that the accused understood. There was a valid demand made so that the presumption in s. 258(1)(c) was triggered; 2) the officer's grounds were not only his observations, they were supplemented by the witness. The court held that the grounds for the arrest and breath demand existed. The officer's subjective belief as to the accused's degree of intoxication could be supported objectively when the court considered all of the information that the officer had; 3) once the accused was placed in the police vehicle, they proceeded directly to the police detachment. The first sample was taken 24 minutes after the demand. The court concluded that both samples were taken as soon as practicable; 4) the observation period was properly followed; and 5) the accused was found guilty.

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R. v. Glubis, 2015 SKPC 143

Agnew, October 15, 2015 (PC15127)

Criminal Law – Evidence – Credibility
Excise Tax Act – Failure to Report Collections
Income Tax – Failure to Report Income

The accused was charged with 17 counts contrary to the Income Tax Act and the Excise Tax Act. The accused argued that he did not realize that he had failed to report income amounts and therefore lacked mens rea. The accused farmed and operated a business selling tires. His bookkeeping for both enterprises was rudimentary. All of the income was deposited into one account with no reconciliation of the account being done. The Canada Revenue Agency (CRA) found discrepancies between the accounting records submitted and the actual bank deposits. The accused was charged with underreporting his farm income and his tire income in the years 2007, 2008, and 2009. The income sources included unreported: grain sales; equipment rentals and custom work; land rent; refunds; tire sales; and truck sales. The Crown also argued that the accused collected but did not report GST collected for those years. The accused's wife was also able to claim an increased GST credit because the family income was below what it should have been for those years.

HELD: The court reviewed the accused's credibility and noted instances where it was lacking. The court found that the accused deliberately chose not to report the weed control income and GST received from SaskPower. The accused also failed to report the income and GST collected from the rental of certain pieces of equipment for those years. The court was unable to conclude beyond a reasonable doubt that the accused deliberately omitted these rentals from his income tax, or that he deliberately chose to not report the GST he collected. The accused received refunds of some levies paid on grain sales but they were not included in his income. The court concluded that the accused was aware that these payments were income and should have been reported, but chose not to keep track of them for income tax purposes. Wilful blindness was sufficient for the mens rea of tax evasion, and therefore the court was convinced of the accused's guilt with respect to the levies. Wilful blindness was also sufficient to find the accused had the requisite mens rea for tax evasion of chemical company refunds that he argued were "rewards", not income. The majority of unreported income was from grain sales. There were 62 reported grain sales and 26 unreported sales. All of the good quality grain sold was reported while the poorer quality sales were not reported. The court found that the accused could not have simply forgot or not noticed that he did not report 30 percent of his grain sales. The court also did not find it a coincidence that the accused did not claim the broker expenses in relation to the unreported sales but he did for the reported sales. The accused said that he thought he did not have to report 12 grain sales from one purchaser because it was paid while he was in litigation with the purchaser. The court found that this did not make sense. The court concluded that the accused deliberately chose not to report crop sales in 2007, 2008, and 2009. The court was unable to conclude beyond a reasonable doubt that the accused chose not to report the land rent amounts, or even that he was wilfully blind as to whether or not they had been reported. The accused's unreported

tire income comprised much less of his total tire income as compared to the unreported grain sales. The court found it possible that the accused lost invoices and payment for some transactions. The court was not convinced that any of the tire sales were deliberately not reported. The accused also had some truck sales for a profit of $10,980.93. He argued that the pickup truck sales were not reported because they were personal use vehicles even though he charged but did not claim GST. The accused did claim some repairs for the vehicles. The court found that the accused deliberately chose not to report the pickup truck sales profit and GST. He purchased 11 trucks and sold most shortly after. The court did not find that the accused would need 11 trucks for personal use. The court came to the same conclusion with respect to the sale of a semi-tractor. Once the audit was complete the accused did not have any cash consequences because his CCA was able to off-set all tax payable. The court did not agree with the accused that since he did not have to pay any tax after the audit he had no incentive to fail to report. The court noted that the accused had to use part of his CCA, which was no longer available to him. The court held that the amount specified in the information was merely a particular and did not make it necessary for the court to amend the information for the exact amounts. Also, the Kienapple principle was not found to apply even though there were charges contrary to the Income Tax Act and the Excise Tax Act for the same entry, provided the amounts were not duplicated. The accused evaded paying tax on $308,595.02 and he failed to report GST collections of $1,225.

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Hinds, October 13, 2015 (PC15128)

Criminal Law – Defences – Charter of Rights, Section 9, Section 10(b), Section 24(2)
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Criminal Law – Impaired Driving – Refusal – Approved Screening Device – Administration – Forthwith
Criminal Law – Motor Vehicle Offences – Refusal to Provide Breath Sample – Approved Screening Device – Malfunction or Improper Operation

The accused was charged with failing or refusing to comply with a breath demand contrary to s. 254(2) of the Criminal Code. Police were called by a taxi driver when his two intoxicated passengers got into a vehicle and drove away. At the roadside the officer noted the smell of alcohol coming from the vehicle. Two officers also noted the smell of alcohol coming from the accused when he was in the back of the police

vehicle. The accused was stopped at 3:21 am and the ASD demand was made at 3:34 am. At 3:37 am an officer called to have an ASD brought to them. The ASD arrived eight minutes later. The accused had eight opportunities to blow into the ASD over a five minute period. The accused was arrested for not providing a sample at 3:51 am. When he was read his right to counsel the accused indicated that he wanted to talk to a lawyer right away. They arrived at the detachment at 4:00 am and the accused was given an opportunity to contact a lawyer. The issues were: 1) did the police delay in making the ASD demand; 2) did the police administer the ASD test to the accused forthwith; 3) if there was police delay surrounding the ASD, did it result in a violation of the accused's ss. 9 and 10(b) Charter rights; 4) if the accused's ss. 9 and 10(b) Charter rights were violated, should the refusal evidence be excluded pursuant to s. 24(2); and 5) did the Crown prove beyond a reasonable doubt that the accused failed to comply with the breath demand.

HELD: The issues were dealt with as follows: 1) the Crown established that both officers took a reasonable amount of time to investigate the complaint prior to the ASD demand. The ASD demand was made as soon as the officer formed the suspicion that the accused had been driving and had alcohol in his body; 2) the court found that the officers took a laid-back approach to obtaining the ASD for the sample. They knew they were going to investigate a possible intoxicated driver and even took three minutes after the demand for the officer to call for a machine. The police did not administer the ASD forthwith and, therefore, the ASD demand was not lawful; 3) the accused did not have an obligation to comply with an unlawful ASD demand. The accused's detention was arbitrary and violated s. 9 of the Charter. His rights under s. 10(b) of the Charter were also breached because those rights were not suspended during the detention. The accused's s. 10(b) rights should have been implemented before his attempts to blow in the ASD; 4) the breaches were serious because the court found that the police conduct was deficient in various ways. The first Grant factor favoured exclusion of the evidence. The impact of the Charter breach was moderate to serious and also favoured exclusion. Society's interest in adjudication of the case on its merits favoured inclusion of the evidence. The impact of the police misconduct and the impact of the accused's Charter rights was found to be serious enough to outweigh society's interest in adjudicating this case on its merits. The evidence was excluded to maintain public confidence in the administration of justice; and 5) the court considered the last issue even though it was unnecessary given the previous findings. The accused told one officer that he smoked and suffered from asthma. The accused made numerous attempts to blow into the ASD and claimed that he was trying to blow into it. The Crown therefore needed to prove that the mouthpiece was in good working order. The Crown failed to prove that the ASD and mouthpiece were in good working order and therefore the court had reasonable doubt respecting the mens rea of the

offence.

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Wilson, October 2, 2015 (QB15301)

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Family Law – Spousal Support – Retroactive
Family Law – Spousal Support – Spousal Support Advisory Guidelines

The parties married in 1984 and separated in 2011. All of their children were over 18 and independent. During the marriage, the petitioner wife was a homemaker and primary caregiver for the children. She had a grade 11 education. The petitioner worked some short-term jobs since separation but had to leave each due to medical problems. The petitioner's income in 2012 was $2,545 plus $12,052 in spousal support. In 2013 her total income was $13,299. The respondent husband worked in the oil field industry but was let go in January 2012. There was evidence that he was happy with the loss of his job so that he could move out of province to be with his girlfriend. He did not look for work for the remainder of 2012 and had an income of $80,000 that year. The respondent did not have any income in 2013, saying that he was depressed from his marriage breakdown. The respondent also did not work much in 2014 but continued to have some money deposited into his bank accounts. He made an assignment in bankruptcy in 2014. The respondent had obtained employment in 2015 but was let go shortly before the trial. The respondent argued that he could not work due to depression; however, his girlfriend after the separation testified that he was not depressed. A summary from the respondent's therapist indicated that he was being treated for his depressed mood. The issues were: 1) property division: was there an agreement reached at the pre-trial conference; did the respondent fail to provide full and frank disclosure so that the agreement should be set aside; and is further distribution of family property warranted; and 2) spousal support: was the petitioner entitled to spousal support; if so, what should the quantum and duration of spousal support be; if paid by a lump sum, what should it be; and was the petitioner entitled to retroactive support for the period after separation to trial.

HELD: The issues were discussed as follows: 1) the court found that no final agreement with respect to property was reached. There was a paragraph indicating that any property division issues that were not settled between the parties should be directed to trial. There was no consensus on all the essential terms of the agreement. There were items

such as proceeds from the sale of a truck, boat, motor, fishing equipment, household goods, and cash from a bank account that had to be divided. The respondent was ordered to pay the petitioner $1,250 to equalize the property; and 2) the petitioner claimed and was found to be entitled to both compensatory and non-compensatory spousal support. The court found that the therapist's summary was primarily summarizing what the respondent had told him. The court determined that the petitioner and the respondent's ex-girlfriend were more credible than the respondent. It was held that the respondent spent the previous four years trying to avoid payment of spousal support to the wife. The respondent was intentionally unemployed since January 2012. The court found the Spousal Support Advisory Guidelines (SSAG) to be a useful tool in calculating spousal support. The court used the higher end of the range from the SSAG because the petitioner was entitled to primarily compensatory support. The respondent should have paid $3,000 per month in 2012, so he owed the petitioner an additional $23,948 for that year. The court imputed an annual income of $50,000 to the respondent for the years 2013, 2014, and 2015 and determined that spousal support of $1,900 per month was appropriate. The retroactive support was ordered to be paid by a lump sum spousal support order. The respondent would therefore not be able to deduct the spousal support sum. The respondent was found to owe the wife $86,548 in retroactive support, but after considering the loss of the tax deduction the court ordered that he pay her $68,500 within 30 days. The petitioner was found to be entitled to spousal support until December 2017 and, therefore, ongoing spousal support in the amount of $1,900 was ordered.

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Callow v. West Vancouver School District No. 45 (Board of School Trustees), 2015 SKQB 308

Megaw, October 2, 2015 (QB15302)

Civil Procedure – Jurisdiction of the Court – The Court Jurisdiction and Proceedings Transfer Act
Civil Procedure – Jurisdiction of the Court – Inherent Jurisdiction
Civil Procedure – Jurisdiction of the Court – Natural Justice
Civil Procedure – Originating Application

The applicant applied by originating application. The applicant was a teacher who was employed and laid-off out of province 39 years ago. The respondent British Columbia school board argued that they had laid-off the applicant to reduce the service level due to declining enrollment and decrease in operating funds. The applicant grieved the lay-off and the arbitrator found in favour of the board. On appeal it

was ordered that the arbitrator had to consider whether the dismissal as stated was just an excuse because they were actually dismissing him for poor performance. The arbitrator died before the arbitration. The applicant had attempted to continue his action in various provinces and at various court levels. In all but one case the action has been dismissed. The one not yet dismissed was waiting for decision. There were orders in British Columbia and Ontario prohibiting the applicant from initiating any further litigation on the matter. The applicant sought: a return to his employment; back pay for 39 years; and to lift any prohibitions to any actions in British Columbia. The respondent argued three grounds for dismissal of the application: 1) the court did not have jurisdiction to consider the matters pursuant to The Court Jurisdiction and Proceedings Transfer Act. The applicant argued that the court had jurisdiction pursuant to its inherent jurisdiction and based on natural justice; 2) the matters in dispute were previously decided and therefore res judicata applied; and 3) the limitation period expired.
HELD: Neither party had a connection to Saskatchewan. Nor was any part of the employment contract made in Saskatchewan. To accept jurisdiction there would have to be a real and substantial connection to Saskatchewan. The concept of inherent jurisdiction does not extend to an ability to sit in appeal of another province's decision or to re-hear a matter that another province had already rendered a decision on. It also does not allow a court to assume jurisdiction where it does not legally have one. Natural justice also did not assist the court in accepting jurisdiction. The court concluded it did not have jurisdiction and the matter was dismissed. Costs in the amount of $2,000 were awarded to the respondent.

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L. (J.G.) v. L. (M.L.), 2015 SKQB 309

Brown, October 5, 2015 (QB15303)

Family Law – Spousal Support – Duration of Spousal Support
Family Law – Spousal Support – New Common Law Relationship
Family Law – Spousal Support – Non-compensatory
Family Law – Spousal Support – Spousal Support Advisory Guidelines

The issue was ongoing spousal support. The parties began cohabitation in 2005 and had one child together. The petitioner also had two children from a previous relationship that lived with the parties. The respondent's annual income in 2013 and 2014 was $93,673.81 and $95,764.00, respectively. When the parties' child was a year old the petitioner obtained employment as an EA, which paid $18.00 per hour. She obtained employment as a bus driver for four hours per day when

the parties separated. Her income was $26,015.20 in 2013 and $39,306.84 in 2014. The petitioner began cohabiting with a new partner in a house they purchased jointly. The petitioner made the $56,000 down payment on the house.
HELD: The court held that ongoing spousal support for a further four years was appropriate. The court ordered payment of $900 per month commencing October 1, 2015, and allowed either party to initiate a review after September 2017 to determine if either parties' income had changed or their needs or means were altered by a new partner such that a change to spousal support was warranted. There was not a strong argument that the petitioner should receive spousal support on a compensatory basis. She had been out of the hotel and restaurant industry, for which she had training, for a decade or longer because of her first marriage. The court determined that spousal support was due on a non-compensatory basis. The respondent had an ability to pay and the petitioner had a need. The petitioner's new partner earned $55,000 per year, had two children from a previous relationship, and did not have significant assets. The new partner contributed to the living expenses but nothing else. He was not considered a significant factor by the court. The court found that the petitioner required spousal support for at least a few more years to reach self-sufficiency. Neither party received a sizeable or unequal payment of family property. The petitioner did not receive a significant cash payment or liquid asset to supplement her income. The Spousal Support Advisory Guidelines (SSAG) gives credit of six months payment for every year of marriage. The court determined the length of spousal support payments should be slightly longer because the parties were together close to eight years and still had a young child.

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Tiffen v. Stevenson Estate, 2015 SKQB 310

Megaw, October 7, 2015 (QB15304)

Civil Procedure – Application to Strike Statement of Claim
Civil Procedure – Queen's Bench Rule 7-9

The plaintiff claimed entitlement to a share of the money received by Mr. S., now deceased, from Saskatchewan Government Insurance (SGI) through a death benefit settlement. The defendant, the Public Guardian and Trustee (PGT), applied on behalf of Mr. S. to have the statement of claim dismissed for: 1) disclosing no reasonable cause of action; 2) being frivolous, vexatious, or an abuse of process of the court; and 3) for being scandalous. In 2011 Mr. T. died in a motor vehicle accident. The PGT determined that Mr. T. and Mr. S. were in a spousal relationship and an action was commenced to claim against Mr. T.'s

executors to recover money pursuant to The Family Property Act and The Dependents' Relief Act, 1996. The claims were settled at pre-trial conference. The plaintiff argued that he was hired by Mr. T.'s estate to appeal SGI's refusal to provide death benefits and that his payment would be half of the money received. The plaintiff indicated that he caused SGI to reverse its decision and spousal death benefits were paid to Mr. S. in the amount of $62,913; the plaintiff sought to recover $31,456.50. The PGT argued that there was never an agreement regarding the death benefits. The PGT indicated that it had submitted the claim for spousal death benefits.
HELD: The court decided the defendant's arguments as follows: 1) the plaintiff did plead the necessary ingredients for a claim in contract and, therefore, it was not plain and obvious that there was no reasonable cause of action set forth; 2) the evidence filed could be considered by the court. The defendant argued that Mr. S. was incompetent at the time of any agreement and the PGT did not request the plaintiff's assistance. The court could not conclude that the plaintiff was acting with an ulterior motive and, therefore, the court could not conclude that the plaintiff's claim was frivolous, vexatious, or an abuse of process of the court; and 3) nothing in the material suggested that the plaintiff was trying to cast Mr. S. in a derogatory light and, therefore, the court could not conclude that the plaintiff's action was scandalous.

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Trudeau, Re (Bankrupt), 2015 SKQB 312

Thompson, October 7, 2015 (QB15308)

Bankruptcy and Insolvency – Student Loans – Discharge

The bankrupt assigned in bankruptcy in 2013. His major liability was his debt to Canada Student Loans that had been proven to make up 63 percent of the total unsecured claims in bankruptcy. The trustee and the Minister of National Revenue acting on behalf of the Canada Student Loans Program (CSLP) appeared at the bankrupt's discharge hearing to seek a condition on his discharge. As the bankrupt ceased being a student in 1999, his student loan liabilities were dischargeable pursuant to s. 178(1)(g) of the Bankruptcy and Insolvency Act (BIA). The bankrupt obtained a bachelor's degree in economics, which permitted him to obtain employment in 2000 with the Canadian Revenue Agency (CRA). At the time of the application, the bankrupt was 48 years old and earning an average net income of $77,700 in the two years before he made his assignment. Between 2000 and 2013 the bankrupt had made two consumer proposals, one of which he defaulted on. His declared assets were only $7,000 and all were identified as exempt. His debt totalled approximately $30,500 and of

that $19,000 was the CSLP claim.
HELD: The registrar ordered the bankrupt to pay $18,000 to the bankruptcy estate at a rate of $300 per month and that he would be suspended from discharge for two years. The registrar found that the bankrupt had received an education because of student loans. He failed to provide sufficient justification for the shortfall between his debts and assets.

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Sane v. Sane, 2015 SKQB 313

Turcotte, October 7, 2015 (QB15309)

Family Law – Child Support – Interim – Variation
Family Law – Spousal Support – Interim – Variation

The respondent husband applied to vary an interim order granted in 2012 with respect to issues of income determination, child and spousal support and custody of the parties' three children. He sought joint custody of the children, retroactive variation of child support and termination of spousal support. The petitioner sought further or better reply and disclosure of documents in respect of a notice to disclose dated June 2015. The interim order was made in the absence of any evidence or appearance by the respondent. The order granted the petitioner sole custody of the children. The judge imputed income of $101,000 to the respondent and, on the basis of that amount, directed the respondent to pay $1,300 per month in interim child support and $700 per month in interim spousal support, effective June 2012. At a management pretrial conference, the respondent was directed to provide sufficient documentation of his 2011 and 2012 income, serve and file a financial statement and provide evidence of family debt in his name. Apparently this information was not provided. At the time of this hearing, the information before the court of the respondent's financial status was deficient. He had filed only T4 information slips for 2013 and 2014, records of employment for 2012 to 2015 and some pay deposit slips but had not provided his 2013 and 2014 income tax returns. The petitioner argued that the respondent had not fully disclosed all the income that he was receiving. The respondent's 2012 income tax return showed income of $35,800.
HELD: The court granted the petitioner's request for further reply and disclosure. It made an order directing the respondent to submit documentation regarding tax returns, disability payments, employment insurance benefits, pay deposit slips and a property statement in form 15-26B of the Queen's Bench Rules within 60 days of the date of the fiat. With regard to the respondent's application to vary the interim order, the court held that the custody of the children should

remain with the petitioner but stated that the respondent should have weekly contact with them via Skype. Because of the conflict in the affidavit evidence of the parties, the matter should proceed to trial. However, on the basis of the respondent's income as revealed by his tax returns, it would be unfair not to alter the child and spousal support terms. Based on his income of $48,000 and the petitioner's income of $32,700, child support was set at $869 per month. The respondent was ordered to pay $365 per month as his proportionate share of the children's s. 7 expenses. Based upon the annual incomes of the parties, the petitioner was not entitled to spousal support. The court was not prepared to terminate spousal support but would suspend it until February 2016 to allow the parties to finalize the terms of the order for disclosure. The court refused to make any decision with regards to retroactively adjusting the child or spousal support or to rescind any arrears of support that had occurred under the interim order. These matters were left to be determined by the trial judge.

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Harper v. Bennet, 2015 SKQB 314

Megaw, October 8, 2015 (QB15310)

Civil Procedure – Pleadings – Statement of Claim – Striking Out

The self-represented plaintiff commenced an action against RCMP officers involved his arrest following his refusal to provide his driver's licence and registration during a routine traffic stop. He also sued the tow truck driver who moved his car following the arrest. His claims against the other defendants were not clear from his statement of claim. Each of the defendants applied to dismiss the claim pursuant to s. 7-2 of the Queen's Bench Rules. The plaintiff's pleadings were rambling. He had been involved in an earlier suit that had been dismissed with costs awarded against him because of the deficiencies in his pleadings.
HELD: The court granted the application. The court found that the plaintiff's claim was unintelligible and dismissed the action pursuant to rule 7-9. Costs were awarded against the plaintiff in favour of each group of defendants in the amount of $800 per group because the award of costs against the plaintiff in his previous action was not sufficiently high to forestall his effort in this action.

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Currie-Johnson v. Johnson, 2015 SKQB 315

Megaw, October 8, 2015 (QB15311)

Family Law – Child Support – In Loco Parentis

The petitioner applied for interim child support for the three children of the marriage. The parties were married in 2009 and separated in 2012. The respondent became the parent to two children of the petitioner's from different relationships and the parties had one child together. No evidence was presented to explain why the biological fathers of the two other children had not been involved in their lives nor why they had not provided any support. The respondent's income was established at $23,500. The petitioner's income was mentioned as low but the amount was not given. The respondent requested that his access to the children occur in Creighton, Manitoba, where he was living. The petitioner objected because of the expense that such an arrangement would cost.
HELD: The court awarded the petitioner's application for interim child support. Regarding the respondent's biological child, the court ordered that the respondent pay support in accordance with the Guidelines. Pursuant to s. 5 of the Guidelines, the court found that there was no evidence regarding why the children to whom the respondent stood in loco parentis did not have support from their biological fathers nor why the petitioner had not pursued them for support. The court decided that it was not appropriate to assess the respondent's obligation to pay child support on the full amount of the Guidelines. He was ordered to pay 50 percent of the applicable Guidelines amount with respect to each of the other children. He was also responsible to pay his proportionate share of s. 7 expenses for his child and 50 percent of his proportionate share of s. 7 expenses for them. The court requested that the parties should submit a draft order setting forth the calculation of the child support based on the incomes as found and the determination of the application of s. 5 of the Guidelines. It denied the respondent's application regarding access because of the petitioner's limited means. The respondent would be entitled to exercise reasonable access in the town where the children resided with the petitioner.

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Basso v. Reesor (Basso), 2015 SKQB 316

Sandomirsky, October 8, 2015 October 21, 2015 (addendum) (QB15312)

Family Law – Child Support – Interim – Variation
Family Law – Child Support – Interspousal Contract

The petitioner father applied to vary a judgment and child support

order, both of which were achieved by the consent of the parties after a pre-trial conference conducted in 2012. The consent judgment gave the parties joint custody of their three children: a daughter born in 1997 and twin sons born in 2000. The consent order required the petitioner to pay child support in the amount of $1,500 from 2011 to December 1, 2013. After that date, child support was to be based upon the Guidelines. In the fall of 2013, the parties entered into a written agreement to vary the child support provisions of the order. The agreement stated that the annual income of the petitioner was $150,000 and the respondent's was $24,000, and that based upon those incomes, support in the amount of $2,123 would be payable from January 2014 as long as the children remained children within the meaning of the Divorce Act. The agreement was registered with The Enforcement of Maintenance Orders Act, 1997 pursuant to s. 7.1 and filed with the court. Since then the petitioner's employment had ended. He was receiving employment insurance as well as dividend income and income from odd jobs, which amounted to income for the child support purposes to be $34,000. The respondent's income was now $37,000. The oldest child was no longer a child of the marriage and was working. One of the sons was living with his maternal aunt elsewhere and the respondent paid $500 per month to her sister. The other son was living with the petitioner.

HELD: The court granted the application. It found that the court had no jurisdiction to vary private support contracts between the parties but as the agreement in this case had its origins in the court order, the court would permit the application. The applicant had successfully demonstrated a material change in circumstances. The court found that there was a split custody arrangement regarding the sons and thus s. 8 of the Guidelines applied. After establishing the amount owed by each party according to the Guidelines, the court found that the respondent was required to pay $30 per month to the petitioner. The court held that the previous court order precluded it from making a retroactive adjustment for the period to December 2013. The parties had chosen to fix the rate of child support for a defined and definite period to be followed by review and adjustment according to the Guidelines. The extension agreement could be retroactively varied because it originated in the 2012 court order. The petitioner's income in 2014 was higher than the amount on which the agreement was based. Using it and the higher income of the respondent for the same year, the court found that there was a shortfall of $24 per month for that period and ordered the petitioner to pay the respondent $294 as retroactive child support.

ADDENDUM dated October 21, 2015: See Basso v. Reesor (Basso) 2015 SKQB 329.

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Nahorniak v. Nahorniak, 2015 SKQB 317

Megaw, October 8, 2015 (QB15313)

Family Law – Custody and Access – Interim – Variation
Family Law – Child Support – Farming Income

The respondent wife brought an application to vary the order made by a Queen's Bench judge in April 2015. She applied for shared parenting, compensatory parenting time and the ability to have the court's order enforced by a police officer. She also applied for an order setting the child support in the amount of $1,500 per month or alternatively in accordance with the Guidelines with respect to ss. 3 and 7 expenses. The parties have three children. They separated in June 2013. Shortly thereafter they entered into a separation agreement that provided for a shared parenting regime on an alternating-week basis. The petitioner's income was set at $85,000 and the amount of $1,500 per month child support was to be reviewed six months later. In April 2015, the respondent applied for an order directing that the parties to have shared parenting of the children. The respondent alleged that the petitioner unilaterally refused to have the two eldest children spend time with her and blamed this on the petitioner. The petitioner responded that the two older children, particularly their eldest son, did not want to spend time with the respondent despite his best attempts to encourage them. The court ordered that the shared parenting arrangement set out in the agreement remain in effect and the matter be referred to pre-trial conference. A custody and access report was to be prepared regarding the eldest child and the issue of compensatory access was to await the pre-trial conference. The judge declined to order a provision authorizing the police to assist in enforcing the parenting plan. The issue of child support was not before the court in that application. The respondent deposed that the amount of support set out in the agreement was a number arrived at as reasonable payment and income for the petitioner and her respectively without regard to the Guidelines. The petitioner paid the amount specified until June 2014 and then reduced his payment to $816 and further reduced it in June 2015 to $720 per month. The petitioner indicated that he farms personally and has a farming corporation. His personal income, derived from his income tax return, showed that between 2012 and 2014 he earned between $39,000 and $56,000. His income was arrived at following a deduction for capital cost allowance between $139,000 and $253,000 for the same period. The evidence showed that the petitioner had made significant capital purchases in that period and they did not equal the capital cost allowances deducted.
HELD: The court ordered that it would not vary an interim parenting order in the circumstances and that it would not help to have the police enforce it on behalf of the respondent. It ordered that a custody and assessment report be conducted regarding the eldest son as soon as possible. The court refused to make an order for compensatory access.

Regarding the issue of interim child support, the court commented on the paucity of financial information before it regarding the petitioner's farming operations. Deciding against imputing income, the court preferred to include an amount of the capital cost allowance into the petitioner's income because he had not used the full depreciation and because his obligation to support his children took precedence over the need to replace equipment on a regular basis. The court added $50,000 to the petitioner's income. Because this was a shared parenting arrangement, the set-off between the parties' incomes resulted in the petitioner being required to pay the respondent $1,222 per month pursuant s. 9 of the Guidelines. The court directed the registrar to set an expedited pre-trial conference.

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Cheyne's Plumbing & Heating Ltd. v. Cheyne, 2015 SKQB 318

Turcotte, October 9, 2015 (QB15314)

Civil Procedure – Queen's Bench Rule 7-5
Civil Procedure – Summary Judgment
Civil Procedure – Queen's Bench Rule 7-1, Rule 7-6(d)

The defendant Gagnon brought an application for summary judgment pursuant to Queen's Bench rules 7-2 and 7-5. She sought declarations that the sum of $137,500, held in trust by counsel for the plaintiff as a result of its voluntary discharge of lien, was not encumbered by or charged with or otherwise standing in place of security for the lien, and that the sum of $161,300 claimed by the plaintiff was statute-barred against her and the other defendant, her spouse, on account of the expiry of limitation periods, as well as other relief. The plaintiff sought further or better disclosure from the defendant Gagnon and an adjournment of the summary judgment application. The co-defendants separated in 2012 and began proceedings for divorce and the division of family property. The defendant Cheyne and his mother are the directors and shareholders of the plaintiff plumbing and heating company. Prior to their separation, the defendants began building a new home, and the plaintiff alleged that it provided services and materials in the construction of it. The first set of services occurred in 2011 and the invoice was paid. It claimed that for services rendered from January to April 2012, though, it was not paid. The plaintiff registered a lien against the home in the amount of $161,200 in September 2013 and began this action in November 2014. During that year, the defendants decided to sell the home and took steps to prepare it for sale, which included having the plaintiff do further work, bringing the outstanding balance to $171,800. The plaintiff agreed to voluntarily discharge its lien upon payment of the sum of $137,500 into

its lawyer's trust account with trust conditions specifying that the funds would be retained until further agreement or court order authorizing release of same. The trust documents were not entered into evidence. The defendant Gagnon denied that she ever authorized any work or materials to be provided to the home by the plaintiff in 2012. In her affidavit, Gagnon did not address the invoices rendered by the plaintiff in 2011 or who made the payment. The plaintiff's director stated in her affidavit that she believed that the debt would be paid when the house was sold and released the lien on that expectation. Counsel for the plaintiff argued that it could not respond to the summary judgment application until Gagnon had provided further disclosure, including documents available in the family law proceedings. The only documents disclosed by Gagnon in her affidavit of documents were all for 2014. Counsel further argued that the exchange of correspondence between her and Gagnon's lawyer together with the payment of fund in trust in consideration for the discharge of the lien raised issues of equitable estoppel, forbearance of acknowledgment of the debt claim such that Gagnon could not rely on the limitation period for debt claims under The Limitation Act.
HELD: The court dismissed the application for summary judgment pursuant to Queen's Bench rules 1-5 and 7-6 and granted the application for further and better disclosure. It was not satisfied that the factual record established by the affidavit materials filed by the parties permitted the necessary factual finding required to effect a fair and just determination on the merits. The plaintiff's application was incorrectly brought under rule 7-1 but the court found that it could hear the application under its general authority found in rule 1-5 to make any order with respect to practice and procedure to ensure that the purpose and intention of the Queen's Bench Rules under rule 1-3 was achieved as well as pursuant to rule 7-6(d). The additional disclosure would assist in identifying the real issues in dispute. The defendants were ordered to disclose all relevant documents, including those disclosed in their family law proceedings that would bear on the issue of the debt claim, as well as disclosure of any documents that related to issues of whether either of them had made acknowledgment of the debt, part payment thereof, sought forbearance of any action by the plaintiff to collect on the debt or that bore on the issue of whether the defendants may otherwise be estopped from relying on the statutory limitation period for pursuing an action for payment of the debt.

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R. v. Weeres, 2015 SKQB 319

McMurtry, October 9, 2015 (QB15315)

Criminal Law – Fraud – Sentencing
Criminal Law – Laundering Proceeds of Crime – Sentencing

The accused was convicted of fraud pursuant to s. 380(1) of the Criminal Code and laundering proceeds of crime under s. 462.31(1)(a) of the Code (see: 2015 SKQB 319). The court had found the fraud scheme was relatively simple but carefully planned and executed over a long period of time. The offender had been investigated, charged and fined in Ontario and New Brunswick by their Securities Commissions and those fines remained unpaid. In this province, more than 35 investors lost between $1,800 and $300,000 and the total loss to the victims was $650,000. One aspect of the scheme was the effort that the offender expended to distance himself from the victims, the companies and the bank accounts. Nothing was registered in his name, yet he never lost control of the monies invested by the victims. The offender purchased a hotel in British Columbia and sold it and the whereabouts of the profit from that sale was unknown. The court found that there were no mitigating factors in this case: the offender had shown no remorse and believed that the losses occurred because of his staff's failure to market and sell the product in which the victims had invested; he had not pled guilty nor cooperated; and the fraud was not motivated by any reason except greed. The accused had a lengthy criminal record but the date of the last offence was thirty years before these charges. He was assessed in the pre-sentence report as having a high risk of re-offending. The Crown sought a penitentiary sentence of four to six years on the fraud conviction and a consecutive sentence of two years on the laundering convictions. The Crown also sought an order for restitution to the victims in the amount equal to the replacement value of the lost property. The offender, representing himself, argued that he should be given credit for time on remand. HELD: The court sentenced the offender to four years imprisonment less time spent on remand, calculated at the rate of one day, resulting in 505 days credit. The offender had been arrested on a warrant issued after he contravened his summons by failing to attend court for his trial. As a result of the breach of s. 524 the court found that it could not award credit at the higher rate specified in s. 719(3.1) of the Code. The offender received a consecutive sentence of one year on the laundering charge. Pursuant to s. 738 of the Code, the court ordered that the offender make restitution in the amount of $482,690. Pursuant to s. 462.37(3) of the Code, another order was made fining the offender in the amount of $200,000 in lieu of forfeiture. In default of payment by October 2017, the offender would be sentenced to two years consecutive to any other terms that he was serving.

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Granitewest Developments Ltd. v. Saskatchewan, 2015 SKQB 320

Meschishnick, October 9, 2015 (QB15316)

Civil Procedure – Pleadings – Statement of Defence – Application to Amend

The defendant applied to amend its statements of defence with respect to the plaintiff's two actions against the defendant. The actions were both based on the same transactions. The plaintiff alleged that the defendant failed to comply with The Expropriation Procedures Act (EPA) when it expropriated approximately 160 acres owned by the plaintiff for the development of an intermodal transportation hub. In addition to due compensation for the value of the land, the plaintiff seeks special damages, loss of profits as well as other damages. It also alleged that the defendant and a group of appraisers conspired in appraising the land at a value that did not offer the plaintiff due compensation under s. 49 the EPA and improperly agreed to exclude certain sales transactions when completing the appraisals. Its claim in this action is based on negligence and public misfeasance, and it seeks general damages. The defendant's extensive amendments referred to the fact that Harvey Granatier is the president and shareholder of the plaintiff corporation and that Granatier had been the director of the Regina Economic Development Authority (RREDA) from 2000 to 2009. The defendant asserted that the directors and officers of RREDA assumed a fiduciary duty to the organization and the City of Regina. RREDA played an integral role in the development of an intermodal transportation park. The defendant alleged that Granatier acquired confidential information regarding the development and its proposed location as he had assumed the role of a fiduciary in his role with RREDA. As such he owed a duty of loyalty and good faith to avoid placing himself in a conflict of interest. The defendant alleged that Granatier, through another of his corporations, managed to purchase lands in the area of the proposed development for $4,000 an acre and sold the land to family members at that price, and then within nine months, they sold the lands to the plaintiff for $37,500 an acre. The defendant pled and relied upon public policy and the doctrines of ex dolo malo and ex turpi causa, and says that Granatier's breach of his fiduciary duty to RREDA, the city and to the defendant bars recovery of the plaintiff from profiting from Granatier's wrongdoing. The plaintiff opposed the amendments on the grounds that: they would prejudice or delay the trial; they were scandalous, frivolous and vexatious; and they did not disclose a reasonable defence.
HELD: The application was granted. The court concluded that it was not plain and obvious that the proposed amendments disclosed no reasonable defence to the two actions. Nor were they without merit and capable of being struck as scandalous, frivolous or vexatious. If the amendments caused injustice to the plaintiff, it could be compensated by an appropriate order of costs.

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R. v. Sanche, 2015 SKQB 321

Chicoine, October 13, 2015 (QB15317)

Criminal Law – Appeal – Conviction
Criminal Law – Defences – Charter of Rights, Section 7, Section 10(b)
Criminal Law – Disclosure
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08
Criminal Law – Stay of Proceedings

The accused was charged with operating a motor vehicle while impaired by alcohol and with driving a motor vehicle over .08, contrary to ss. 253(1)(a) and 253(1)(b) of the Criminal Code, respectively. The trial judge dismissed the accused's Charter applications and did not exclude any evidence or grant a stay of proceedings. The accused was convicted of driving while over .08 and acquitted of impaired driving. The officer noticed a vehicle make a left-hand turn through an intersection from the straight through lane at 1:05 am. He activated his emergency lights in the police vehicle, and when he did so, the audio/video recording device in the vehicle was also supposed to be automatically activated. The officer approached the accused's vehicle and noted: he had difficulty retrieving his licence from his wallet; he had dilated pupils; he had a flushed face; and there was a faint odour of alcohol coming from the vehicle. The accused acknowledged consuming alcohol. The officer asked the accused to go to the police vehicle to read him his ASD demand in a controlled environment. The ASD demand was read at 1:21 am and the accused indicated that he understood. The test resulted in a fail. The accused was arrested at 1:25 am and he was given his rights to counsel and the Breathalyzer demand. The accused immediately told the officer that he wanted to call a lawyer and asked the officer to get his cell phone because it had his lawyer's phone number. They proceeded to the detachment without the emergency lights activated on the police vehicle. At the detachment, the officer dialed the phone and handed it to the accused. The officer believed that the accused left messages for his lawyer to call him back. The officer testified that he then offered the accused additional opportunities to contact a lawyer of his choice. He gave the accused four different telephone books. The accused eventually decided to call Legal Aid at 1:42 am and the officer called Legal Aid for him. The officer re-entered the phone room at 1:47 am. The officer said that the accused told him the lawyer told him not to say anything, but he did not recall the accused indicating he was unhappy with the conversation with Legal Aid. The first sample of breath was provided at 2:10 am and the second at 2:31 am. The officer indicated that there would have been video recordings in the parking bay and hallway of the detachment. The in-car video and in-house

video (at the detachment) were not disclosed to the accused and the officer had no explanation for what happened to them. The accused testified that it was the officer's idea for him to call Legal Aid. He said that the officer never told him that he could have more time to attempt to call his own lawyer again. He did admit that he never told the officer he was dissatisfied with the Legal Aid advice. The trial judge determined that the video evidence was not available due to unacceptable negligence but that there was no actual prejudice established. No remedy was therefore found to be required by the trial judge with respect to the videos. The trial judge also found that that the failure to produce the ASD calibration logs was irrelevant to the charge because no charge flowed from the ASD result. The failure to disclose the Intoxilyzer maintenance records was found to be a breach of the accused's s. 7 Charter rights and the trial judge ordered their disclosure after the voir dire and prior to the trial proper. The trial judge held that the accused's Charter right to counsel was not breached. The accused appealed on the grounds that: 1) the trial judge erred in not finding a breach due to the failure of the police to preserve evidence; and 2) the trial judge erred in concluding that his right to counsel was not breached.

HELD: The appeal was allowed and the .08 charge was quashed and a stay of proceedings was ordered. The appeal court dealt with the grounds of appeal as follows: 1) the trial judge was correct in determining that the loss of the in-car video was unacceptable negligence. The in-car video was highly relevant and therefore a greater degree of care for its preservation was required. The trial judge was found not to have correctly assessed the prejudice to the accused for failing to preserve the recording. The in-car video would have recorded a number of incidents of the roadside stop. The appeal court did not agree that the accused's ability to fully cross-examine the officer was a satisfactory remedy for the loss of the video. The trial judge should have concluded that the loss of the recording resulted in actual prejudice to the accused's ability to make full answer and defence. The trial judge's failure to find actual prejudice was found to amount to an injustice. The accused's s. 7 Charter right was violated and his right to a fair trial was impaired. No other remedy than a stay of proceedings would suffice. The trial judge held that the in-house video's loss did not result in any actual prejudice because the accused's motor skills were not in issue. The appeal court concluded that the accused's motor skills were in issue throughout the trial. The appeal court agreed with the trial judge that accused failed to establish the relevance of the ASD logs and the order to disclose the Intoxilyzer maintenance records before trial was appropriate; and 2) the appeal court was satisfied that there was no breach of the accused's s. 10(b) Charter rights.

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R. v. Dunford, 2015 SKQB 322

Krogan, October 13, 2015 (QB15318)

Criminal Law – Criminal Negligence in the Operation of a Motor Vehicle
Criminal Law – Operation a Motor Vehicle in a Manner Dangerous to the Public

The accused was charged with operating a motor vehicle in a manner dangerous to the public, and thereby causing the death of the victim, contrary to s. 249(4), and with criminal negligence in the operation of a motor vehicle thereby causing the death to the victim, contrary to ss. 219 and 220(b) of the Criminal Code. The victim was a highway construction worker acting as a flag person when she was struck and killed by the accused's vehicle. The collision occurred during daylight in good driving conditions and the accused's vehicle was in good working order. The highway was a single lane highway and it was straight and flat where the victim was standing. The accused had also driven through the same construction zone a few hours earlier. The accused indicated he had opened a window and his papers blew around in his vehicle. He looked down to put the papers back in their folder and when he looked up the victim was there. The accused indicated he was travelling at a speed between 90 and 100 kilometres per hour. Another driver on the highway testified that there were signs warning of upcoming construction, a flagger ahead, telling drivers to be prepared to stop, and a 60 km/hr speed limit sign. The accused testified that he did not see any of the signs, which were placed over a 13.1 km distance. The other driver indicated that the accused passed her in the construction zone. Another driver also indicated that the accused passed him in the construction zone. The victim was wearing an orange high-visibility hard hat and yellow florescent pants. The flagging station was on a northbound lane that had been stripped but not yet resurfaced. There was no sign of braking prior to the flagging station.
HELD: The court accepted that the accused's vehicle was travelling at a speed between 90 and 100 km/h. The accused did not modify his driving despite all the signage despite the fact that the two vehicles he passed were slowing down. The actus reus of the dangerous driving charge was made out because the court was satisfied beyond a reasonable doubt that the accused was, when viewed objectively, driving in a manner that was dangerous to the public. The mens rea of the offence does not require that the accused had a positive state of mind. The mens rea was not established on a subjective basis because there was no evidence of a positive state of mind. The court applied the two-question approach to determine whether there was the requisite objective mens rea. First, the court found that in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. The eight signs would have alerted a driver

to the requirement to reduce their speed and also to stop their vehicle. He or she would have also foreseen the risk created when driving on a highway where construction workers were situated and not following the signs. Second, the accused's failure to foresee the risk and take steps to avoid it was a marked departure from the standard of care expected of a reasonable person. All of the circumstances were considered, including the accused's state of mind, to make the determination. The accused did not slow his vehicle nor was he prepared to slow his vehicle despite all of the signs. The signs were not placed in contravention of The Highway Worker Identification Regulations. Also, the accused did not testify that he was confused or fatigued by the signs placed over a span of 13.1 kilometers. He testified that he was not paying attention. The court also reviewed exculpatory defences and whether a reasonably held mistake of fact may provide a complete defence. The court concluded the wind catching the accused's papers just prior to the collision did not create a situation where a risk was unavoidably created, and the mistake-of-fact defence failed because it was difficult to conclude the accused's belief that the construction workers were further ahead on the highway was a reasonable perception especially since he did not just make one momentary mistake but missed all eight signs. The court held that the Crown proved beyond a reasonable doubt that the accused possessed the necessary mens rea for the offence of dangerous operation of a motor vehicle causing death. The actus reus of the criminal negligence charge was not established because the court could not conclude that the accused's conduct met, beyond a reasonable doubt, the very high standard of wanton or reckless disregard for the lives or safety of the other person. The court also held that the mens rea was not established because the court was not satisfied beyond a reasonable doubt that the accused's conduct was a marked and substantial departure from the conduct of a reasonably prudent driver in the circumstances that the accused gave no thought to the risk caused by his manner of driving.

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Grimsrud v. Grimsrud, 2015 SKQB 324

Goebel, October 15, 2015 (QB15320)

Family Law – Child Support – Adult Child
Family Law – Child Support – Imputing Income
Family Law – Child Support – Payments to Children
Family Law – Child Support – Retroactive
Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Wishes of the Child
Family Law – Spousal Support – Interim
Family Law – Spousal Support – Retroactive

Family Law – Spousal Support – Spousal Support Advisory Guidelines

The parties married in 1995 and separated in 2010. They had three children, ages 18, 17 and 13. A separation agreement contemplated a review of support in March 2011, but the petitioner claimed that never happened because the respondent failed to provide the requisite income information. The petitioner applied for a final order fixing the respondent's retroactive support obligation as well an interim order setting his obligation for ongoing support obligations. The petitioner also asked the court to make an order specifying the parenting schedule for the two youngest children who primarily resided with her. The petitioner suggested parenting time for the respondent every other weekend with the children's wishes being taken into account, while the respondent argued that he should have access every weekend. The parties did not live in the same town. The separation agreement gave the respondent parenting time a minimum of two weekends per month. The respondent opposed the retroactive order because he made financial contributions of $271,500 to the petitioner's household in the previous four years. None of those payments were tax deductible to the respondent because they were not apportioned between spousal support, child support, and s. 7 expenses. He also opposed any child support order for the oldest child. The issues were: 1) parenting; 2) child support; 3) spousal support; 4) retroactive support; and 5) costs.

HELD: The court determined the issues as follows: 1) the court was not prepared to specify the respondent's parenting time with the 17-year-old child, noting that arrangements could be made directly with the child by the respondent. The court took into account the youngest child's best interests and the law respecting the maximum contact principle to conclude that she shall be in the respondent's care three weekends per calendar month and half of all school holidays, with some being alternated each year; 2) the respondent's income was $238,200 for 2014. He was ordered to pay the table amount for two children commencing August 1, 2015. The petitioner argued that she should only be imputed an income of $21,016 per year based on minimum wage. She had training in hairstyling but was not employed in that regard; she was a full-time barista earning minimum wage. One of the owners of the coffee shop where the petitioner worked was her common law spouse. The respondent argued that the court should impute an income of $73,200 to the petitioner, which was an amount outlined in a letter used by the petitioner to secure a vehicle loan. Section 19 of the Guidelines provides for the imputing of income to a party. The petitioner did not satisfy the court that any of the exceptions set out in s. 19(1)(a) applied. The court was satisfied that it was appropriate to impute income to the petitioner in the amount $40,000 per year. The oldest child was found to remain a child of the marriage because she was 100 percent reliant on her parents for any expenses that were not covered by her university scholarship. The oldest child did not reside with either parent. The court declined to make any

further order with respect to the oldest child on an interim basis because the respondent indicated that he was prepared to continue to cover the child's additional expenses and would do so by dealing directly with the child. The parties were ordered to share proportionally the costs of the s. 7 expenses for the two minor children; 3) the petitioner demonstrated an entitlement to interim spousal support. The imputed income did not address the significant disparity in income between the parties nor did it take into account the long-term marriage where the mother was primarily responsible for the care of the home and children. The Spousal Support Advisory Guidelines (SSAG) suggested a range of spousal support between $3,716 and $4,985 per month. The respondent had significant hard costs to generate the dividend income that he did, when, if taken into account reduced the SSAG range to between $1,200 and $2,000 per month. Spousal support in the amount of $1,750 per month was ordered in the interim; 4) the petitioner claimed over $190,000 in retroactive support. The court did not make a final order respecting a retroactive adjustment because of the large amount requested and other evidentiary concerns. The court found that it would be necessary for the matter to proceed to pretrial conference; and 5) costs were left to be determined at trial.

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Greenough v. Dahl, 2015 SKQB 327

Smith, October 21, 2015 (QB15324)

Civil Procedure – Pleadings – Statement of Claim – Striking Out

The defendants applied pursuant to rule 4-44 of the Queen's Bench Rules to strike the plaintiff's statement of claim because of the plaintiff's delay in pursuing the action. The defendants argued that the delay had been inordinate and inexcusable and it was not in the interests of justice that it be allowed to proceed. The claim was issued in 2002 and the statement of defence filed in 2003. The file had remained dormant since 2008 until this application was brought. The plaintiff explained that the delay was caused by the fact that both of her lawyers had withdrawn and she had been unable to acquire new counsel. She believed that lawyers were reluctant to take her case because it was against the medical and pharmaceutical establishments. Her poor health had limited her ability to pursue the claim, which had asserted that the defendants' medical treatment of her had been negligent, particularly with regard to their prescribing the drug Parlodel (also known as Bromocriptine).
HELD: The application was allowed. The court found that the delay was inordinate and the plaintiff's claims were dismissed for failure to

prosecute in a timely fashion.

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Holmes v. Boreen, 2015 SKQB 333

Schwann, October 23, 2015 (QB15329)

Statutes – Interpretation – Pension Benefits Act, 1992, Section 2(1)(f), Section 33
Wills and Estates – Pension – Spouse – Common Law Spouse – Designated Beneficiary

The applicant applied for an order that she was solely entitled to the deceased's pension benefits. The deceased and she had been separated for over a decade when he died, but they were still lawfully married. They never entered into a separation agreement. The respondent was the deceased's common law spouse and one of the named beneficiaries to his pension policy at the time of his death. The respondent and the deceased began living together in 2003 and the deceased died in 2014. On July 16, 2013, the deceased executed a declaration of spousal status for his employer's pension plan. He indicated that the respondent was his spouse. The deceased also completed the section of the form to be completed if a person did not have a spouse. He named the respondent and his children as his beneficiaries to the pension in that spot. The deceased executed a last will and testament several months before he died and in it he gifted his work pension equally to the applicant, the respondent and his children. The applicant filed an affidavit of an employee at the deceased's work place who indicated that he explained to the deceased that he would have to get the applicant to waive her rights to his pension since they were still legally married. HELD: Sections 2(1)(f) and 33 of The Pensions Benefits Act, 1992 dealt with the definition of spouse and what happens to the pension on death. A previous case involving a legal marriage and a common law spouse was directed to a trial to determine if s. 33 of the Act could be justified under s. 1 of the Charter, but the trial never occurred because the matter was resolved out of court. The respondent argued that a trial of the issue should be heard regarding the constitutionality of s. 33 that prefers a legal marriage over a subsequent common law marriage. The court distinguished this case from the former on a number of bases: the deceased was aware that the applicant had rights to his pension unless she waived them or they got a divorce; the deceased prepared a will shortly before his death giving his pension to the applicant, the respondent and his two children; and the applicant and respondent were married for 25 years and the common law relationship was for 11 years. The respondent also did not bring a Charter challenge as was done in Linder so the court was not prepared

to rule on the constitutionality and Charter implications of the Act. Also, the court concluded that ss. 2(1)(f) and 33 of the Act were not ambiguous on their face and did not give rise to equally plausible interpretations, and thus Charter values were not invoked as an interpretive aid. The court determined that the legislative intent was clear and unambiguous; the respondent could only be a spouse within the meaning of the Act if the deceased was not married to the applicant at the time of his death. The court also held that the applicant had priority to the pension even though the deceased had designated the respondent as a beneficiary. A spouse has priority over a designated beneficiary. The applicant was entitled to the full amount of the deceased's pension.

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Campbell Estate, Re (Bankrupt), 2015 SKQB 334

Thompson, October 23, 2015 (QB15330)

Bankruptcy – Deceased – Administration of Estate – Solicitor Fees
Bankruptcy – Trustee – Fees – Taxation
Wills and Estates – Bankruptcy

A creditor objected to the disbursement the trustee allowed for a solicitor's fee for services concerning the administration of the estate and the quantum of the trustee's fees in the deceased bankruptcy. The issues were: 1) was the payment for the estate solicitor's fee a proper disbursement of the bankruptcy estate. The creditor claimed that the fee was not a testamentary expense and, therefore, it should have been treated the same as the other proven unsecured claims. She also argued that the fees were not proper in any event because the solicitor applied for letters of administration even though there was an agreement between the deceased and the administratrix wherein they agreed not to apply for letters of administration in the event of the others death; and 2) should the trustee's fee be reduced. A judge granting the leave application had capped the trustee's fees and, therefore, the creditor argued that the trustee should have applied for increased fees prior to the taxation stage of the bankruptcy. The trustee argued that the fee estimate provided was only for a summary bankruptcy administration; however, the bankruptcy was significantly more intensive than a summary bankruptcy proceeding. Further, the trustee argued that she was only able to ascertain the extent of the work required to complete the bankruptcy administration after receiving the creditor's instructions at the creditors meeting, which took place after the leave application was granted. Further, the creditors agreed to determine the fees upon taxation at the close of the bankruptcy administration. HELD: The issues were decided as follows: 1) the Bankruptcy and

Insolvency Act (BIA) contains provisions to ensure that payment for proper funerary and testamentary expenses are prioritized when the deceased's estate is administered in bankruptcy. The case law includes solicitor's fees as testamentary expenses relating to the administration of a deceased's estate. The court concluded that estate solicitor's fees were services that were required to administer the estate and the claim was, therefore, a proper claim for testamentary expenses within the meaning of s. 136 of the BIA. The judge dealing with the application for administration acknowledged that the agreement regarding administration should have been produced with the application; however, he also determined that the solicitor was entitled to fees of $12,500 plus taxes and disbursements. The fee was to be paid in priority to the claims of the other unsecured creditors, in accordance with the scheme of distribution set out in s. 136 of the BIA; 2) the trustee's fees were found to be reasonable and would have been allowed in a normal taxation. Based on case law the court determined that the prospective fee limit in an appointment order had the effect of binding the fees in the estate so that the trustee could not apply after the fact of the administration for an increase. The trustee's fee was limited to $8,000.

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