The Law Society of Saskatchewan Library's online newsletter
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R. v. Yakimchuk, 2015 SKCA 110

Jackson Ottenbreit Ryan-Froslie, October 21, 2015 (CA15110)

Criminal Law – Murder – Conviction – Appeal

The appellant appealed from his conviction for committing first degree murder contrary to s. 235 of the Criminal Code. The appellant argued that the trial judge failed to instruct the jury that they had the option of convicting him of manslaughter because she erroneously interpreted the law relating to the requisite intent for that offence. The Crown consented to a new trial.
HELD: The appeal was allowed and a new trial ordered.

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Prescesky v. Prescesky, 2015 SKCA 111

Lane Jackson Whitmore, October 26, 2015 (CA15111)

Family – Child Support – Arrears – Appeal

The appellant appealed from the decision of a Queen's Bench judge ordering him to pay retroactive child support to the respondent in the amount of $21,645. The order indicated that the period in question would include support from January 2009 to August 2012 (see: 2014 SKQB 334). An original support order was issued by consent in 2006. It required that the appellant pay the respondent $1,220 per month in

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child support and that the parties would exchange their financial information yearly in order to adjust the amount of child support payable. In 2008, the appellant applied to vary the order because he had lost his position and his income was reduced to $1,500 per month. In his affidavit, he swore that his annual income would be $18,000. The application was allowed and the amount of support reduced to $769 per month based upon the judge setting the appellant's income at $55,000 and directing him to provide his financial information to the respondent each year. One month later in 2009, the appellant regained his former employment position and began earning as much as he had in 2008 but he continued to pay $769 per month without informing the respondent of the change in his circumstances. In February 2011, the respondent served a notice to disclose. The parties met and made an oral agreement that the appellant would pay $950 per month based upon the appellant's claim that he was still financially strapped and the respondent acquiesced because she was unwilling to engage in further court battles with him. The appellant's lawyer provided the respondent's lawyer with financial information that showed that the former was earning a substantially higher income. The respondent also indicated to the appellant that she would forgo about $7,200 in arrears. The terms of the agreement were submitted to the court, without the financial information or the respondent's forbearance to sue, and a variation order was issued based upon them. In July 2012, the respondent applied to vary the 2008 order and the 2011 variation order claiming arrears from January 2009. Eventually the issue of retroactive child support went to trial. The trial judge found that the appellant had not given the respondent financial information as was required and his failure to inform her of the material change in his circumstances in 2009 constituted blameworthy conduct. The appellant's income for the years 2009 through 2012 was assessed by the court and the amount of arrears established. The appellant argued that: 1) the trial judge did not have the jurisdiction to vary the 2011 variation order. He maintained that the 2011 order was final and could not be varied on an interim basis; 2) it was necessary to find a material change in circumstances before it could be varied; 3) the respondent had been advised of the change in circumstances; and 4) the trial judge had erred in failing to find unreasonable delay on the part of the respondent.
HELD: The appeal was dismissed. The court held with respect to each issue that: 1) a court can vary an interim or a final order on an interim basis for child support under the authority of ss. 15 and 17 of the Divorce Act. Although it might be necessary in some cases to determine whether an order is final or interim, it was not necessary to do so here because the nature of the terms of the orders in question and the circumstances surrounding the granting of the 2011 variation order. The trial judge had not erred in concluding that he had authority to vary it and to order the appellant to pay arrears before the agreement and compelling him to pay the Guideline amount for the period following it; 2) the terms of the 2011 order left it to a future court to

Statutes – Interpretation – Builders' Lien Act, Section 55(2)

Cases by Name

A. (K.B.) v. B. (J.G.)

Alpine Drywall and Plastering (Lloydminster) Ltd. v. Summer Capital Inc.

Anderson v. Braun

Buckley v. Buckley

Cardinal v. Laporte

Ensign Drilling Inc. v. TSO Energy Corp.

Fister v. Willow Bunch (Town)

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Kawula v. Institute of Chartered Accountants of Saskatchewan

Kumar v. Law Society of Saskatchewan

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finalize the amount of child support based upon the appellant's income. Therefore the court retained the power to vary or rescind the order without searching for a change in circumstances; 3) the trial judge's findings of fact on this point were supported by the evidence; and 4) the trial judge found that the respondent had not received disclosure and thus there had been no unreasonable delay.

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Anderson v. Braun, 2015 SKCA 112

Jackson, October 30, 2015 (CA15112)

Civil Procedure – Court of Appeal Rule 15(1)
Civil Procedure – Appeal – Stay of Execution – Application to Lift

Arising out of a complex judgment, two parties applied for orders under rule 15(1) of The Court of Appeal Rules to lift, in part, the stay of the execution of it. The plaintiffs (Braun and a series of his numbered companies) sued the defendants, Peszko and Roe, operating under the law firm name Roe & Company, for negligence arising from acts and omissions in a real estate transaction. The defendant law firm then issued a third party claim against two realtors, Thompson and Anderson, and a third person, Machula. The trial judge found that the defendants had been negligent but that the plaintiff had contributed to that negligence, and assessed damages between the parties accordingly. He also found that Thompson was liable for 25 percent of the damages ascribed to the defendants and that Anderson and Machula were jointly and severally liable for 10 percent of that amount plus 20 percent of the damages owing by the defendants (see: 2015 SKQB 64). The plaintiffs then cross-appealed to vary the judgment and Thompson appealed. The plaintiffs and the defendants subsequently applied to lift the stay of execution against enforcement of the judgment in their favour. The plaintiffs argued that the appeal by Anderson was a dispute as to whether he should be found liable for a part of the liability found against Thompson. The defendant indicated that it would pay the plaintiff the net amount of the judgment after taking into account the third party judgment it held against Thompson, which meant that it wanted the stay against its part of the judgment against Thompson lifted, claiming that it would have no further interest in the appeal by Anderson. In Anderson's appeal, he argued that he should not have been found liable to the defendants because the only party who should bear the cost of the plaintiffs' claim were the defendants.
HELD: The plaintiffs' application was granted and that of the defendants dismissed. The court found with respect to the plaintiffs' application that as the defendants had not filed a notice of appeal

R. v. Holm

R. v. M. (T.D.)

R. v. McHale

R. v. Nayneecassum

R. v. Poitras

R. v. Reynolds

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Sandoff v. Loblaw Companies Ltd.

Shellbrook (Rural Municipality No. 493) v. Muller

Skvaridlo v. Cross Country Saskatchewan Association Inc.

Sydiaha v. Saskatchewan College of Psychologists

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contesting their liability to the plaintiff, the stay could be lifted. In the case of the application to lift the stay between the defendants and Thompson, the court found that defendants' liability would be affected by the appeal by Anderson.

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Sydiaha v. Saskatchewan College of Psychologists, 2015 SKCA 113

Ottenbreit Herauf Whitmore, November 4, 2015 (CA15113)

Professions and Occupations – Psychologist – Professional Misconduct – Appeal

The appellant psychologist was found guilty of professional misconduct by the discipline committee of the respondent. He was found to contravene s. 11 of The Saskatchewan College of Psychologists Regulatory Bylaws, 2004 in two regards: 1) he failed to use the term "non-practicing" after psychologist in advertising; and 2) he held himself out to be a psychologist entitled to practice as a psychologist when advertising in the phonebook. The appellant argued that the legislative provisions did not preclude him from advertising as a psychologist without the qualifier "non-practicing". The appellant's appeal to the Court of Queen's Bench was dismissed.
HELD: The appeal was dismissed. The provisions of the Act and the bylaws must be read as a whole and effect must be given to the plain and ordinary meaning of the words used in the statute. The chambers judge used the correct approach to determine the proper interpretation. The bylaws stipulate that there are three types of membership that allow the member to use the term "psychologist". A non-practicing member is one of the three types; however, s. 11(2)(a) of the bylaws specifically conditions the use of "psychologist" with the term "non-practicing". The chambers judge did not err in interpreting the Act and bylaws and the decision was, therefore, not in error. Further, there was no error in the determination that the appellant was holding himself out as a psychologist by using only that term in advertising.

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R. v. Nayneecassum, 2015 SKCA 129

Jackson Ottenbreit Ryan-Froslie, October 20, 2015 (CA15129)

Criminal Law – Assault – Conviction – Appeal

The appellant was convicted after trial of committing common assault

contrary to s. 266 of the Criminal Code. He appealed the conviction on the grounds that the trial judge erred in assessing the reliability of the complainant's evidence and thus the verdict was unreasonable and could not be supported by the evidence. The charges arose after the appellant and the victim had been drinking. According to the complainant, the appellant punched her on the jaw and then on the cheekbone. The intoxicated state of the complainant made it difficult to understand her, but essentially she told the police officer that she had been hit in the face. An officer testified that there was no injury to the complainant's face at that time. Later when interviewed by the same officer, the complainant gave another statement. That statement was consistent with her evidence at trial but differed from what she had told the officer when the offence occurred. The trial judge accepted the complainant's evidence that the appellant had struck her.
HELD: The appeal was dismissed. The court determined that the trial judge had not erred and the verdict was one that a properly instructed jury could reasonably have rendered.

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Matovich Estate v. Matovich, 2015 SKCA 130

Jackson Ottenbreit Ryan-Froslie, October 26, 2015 (CA15130)

Real Property – Joint Property – Partition – Appeal
Real Property – Statute of Frauds – Appeal

The appellant, the executrix of the estate of Elizabeth Matovich, appealed a Queen's Bench decision following trial that found the respondent and her husband had an enforceable verbal agreement with his parents, Martin and Elizabeth Matovich, that a quarter section of land would become their property upon their deaths (see: 2013 SKQB 205). The appeal concerned whether the trial judge had erred in law by finding part performance of the agreement such that s. 4 of the Statute of Frauds did not apply.
HELD: The appeal was dismissed. The trail judge had not erred in finding that the respondent and her husband had built a home on the land and that Martin had transferred the title of it into the joint names of himself, his wife, his son and the respondent with a right of survivorship. All were acts that unequivocally pointed to part performance of an oral agreement that the land would belong to the respondent and their son upon the death of Martin and Elizabeth and that s. 4 of the Statute did not apply.

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Kumar v. Law Society of Saskatchewan, 2015 SKCA 132

Ottenbreit Caldwell Herauf, November 18, 2015 (CA15132)

Barristers and Solicitors – Discipline

The appellant was disbarred from practicing law by a discipline committee of the Law Society of Saskatchewan, prohibited from reapplying for reinstatement for five years and ordered to pay costs in the amount of $5,000. The appellant had applied for admission to the Law Society without disclosing his new legal name, under which he had been disciplined by the Washington State Bar, and by providing false or misleading information to the Law Society that he had been a member of that Bar. He appealed pursuant to s. 56 of The Legal Profession Act, 1990 on the ground that the sentence was too harsh. HELD: The appeal was dismissed. The court found that the proper ground of appeal was whether the sanction imposed by the committee was reasonable. In this case, the decision was reasonable.

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R. v. Holm, 2015 SKPC 140

Green, October 23, 2015 (PC15133)

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 care of a motor vehicle while impaired by alcohol and while over the legal limit. The accused parked his truck on the side of a grid road and fell asleep in the driver's seat. A witness noticed the accused's vehicle and called 911. An officer came to the scene and testified that he wakened the accused who seemed disoriented. The officer stated that the vehicle was running and the radio was playing very loudly. He asked the accused to come to the police cruiser and then, believing that the accused had been drinking, arrested him for impaired driving. The officer took pictures of the interior of the accused's truck, which showed an open case of beer on the front seat and a screwdriver. He used the screwdriver to turn off the engine. The officer made an ASD demand and the accused failed the test, whereupon the officer made a breath demand. The accused provided breath samples that indicated he was over .08. The officer's memory of the events was hazy and he relied on his notes. The accused testified that he had been driving home from an ATV derby where he had consumed six beer. He was not sure of the route he took to drive home, but after starting out, his truck began to overheat and he pulled

over to the side of the road. He turned off the vehicle and put it into gear. He texted a friend and asked him to come to his aid. The friend informed that he would not be able to come for a while so the accused drank a beer, took his boots off and put his screwdriver that he used to start the engine into the rear box of the truck and went to sleep because he was tired. The accused said that if his friend had not shown up, he would have probably driven home after he wakened. He was not concerned about his ability to drive. His friend testified that he had gone to find the accused but could not locate him. The issues were: 1) whether the accused had rebutted the presumption in s. 258(1)(a) of the Criminal Code that he was in care or control of his vehicle; 2) if so, was there proof beyond a reasonable doubt that he was in care or control of it; and 3) if so, was there proof that his ability to operate a vehicle was impaired by alcohol.
HELD: The accused was found not guilty of impaired driving and guilty of care or control of a vehicle when he was over .08. The court found with respect to the issues that: 1) the accused rebutted the assumption because on the balance of probabilities it was satisfied that the accused had not intended to drive his vehicle when he was found by the officer and had not occupied the seat for the purpose of setting the vehicle in motion; 2) because the accused did not know where he was and neither did his friend, there was a reasonable risk that he would abandon his plan to get a ride with the latter and would probably have driven himself home; and 3) there was no evidence of impairment provided by the officer. The officer admitted that it had been the ASD test that gave him reasonable and probable grounds for the breath demand.

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R. v. Daoust, 2015 SKPC 144

Metivier, October 20, 2015 (PC15134)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Certificate of Analysis – Statutory Presumptions

The accused was charged with operating a vehicle while his blood alcohol content exceeded the legal limit contrary to s. 253(1)(b) of the Criminal Code, relying upon the certificate and the statutory presumptions of accuracy found in s. 258(1) of the Code. The defence argued that the Crown had not established compliance under s. 258(7) of the Criminal Code, which requires that the accused be served with a true copy of the certificate as a precondition to its admissibility and that the standard of proof was beyond a reasonable doubt. Defence counsel also submitted that the Crown had not established that a proper observation period occurred before each taking of breath

samples, rebutting the statutory presumption in s. 258(1). The arresting officer testified that the breath technician provided him with the certificate and a copy of the Certificate and he compared the two documents. He served an exact copy of the certificate on the accused and completed the certificate of service on the back of it. He could not remember how the original and the copy were produced nor could he remember performing a side-by-side comparison of them, but said that it was his standard practice to do so and recorded that he did in his notebook. With regard to the second point raised by the defence, the officer testified that he personally conducted the observation periods and had not noticed anything of concern to him.
HELD: The accused was found guilty of the charge. The court held that the standard of proof regarding the burden of proof for admission of a certificate under s. 258(7) of the Code is on a balance of probabilities. The Crown had established prima facie proof of service of the certificate through the officer's testimony and the certificate of service. The Crown was not required to establish that the officer had to perform a side-by-side comparison of the documents. With respect to the defence's second argument, the court distinguished R. v. By because the officer in this case testified that he personally conducted the observation. The evidence had not raised a reasonable doubt as to the proper operation of the Breathalyzer and thus the Crown was able to rely upon the statutory presumption in s. 258(1) of the Code so that the certificate established beyond a reasonable doubt that the accused was over .08 at the time of driving.

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R. v. M. (T.D.), 2015 SKPC 147

Anand, October 19, 2015 (PC15131)

Criminal Law – Youth Criminal Justice Act – Sentence – Carrying a Concealed Weapon
Criminal Law – Youth Criminal Justice Act – Custodial Sentence – Deferred Custody with Supervision Order
Criminal Law – Youth Criminal Justice Act – Sentence – Possession of Prohibited Firearm

The young person accused pled guilty to carrying a concealed weapon, a sawed-off rifle, contrary to s. 90 of the Criminal Code, and to possessing a prohibited firearm with ammunition capable of being discharged, contrary to s. 95 of the Criminal Code. The accused was arrested when he indicated there was a rifle in his backpack. The rifle was not loaded but there were three rounds of ammunition in the accused's clothing and on his person. The accused was 16 and homeless at the time. He indicated that he was being paid by an adult to transport the firearm and ammunition. He had not received a

previous youth sentence. He served 19 days in pre-sentence custody on the charges and thereafter relocated to live with his father. He joined a hockey team and obtained casual work. The pre-sentence report outlined the following concerns: alcohol and crystal methamphetamine use at the time of the offence; poor school attendance; and anger management. The Crown argued that a deferred custody sentence with a supervision order was appropriate. The accused argued that probation was appropriate.
HELD: A deferred sentence with a supervision order can only be ordered if a custodial sentence is otherwise justified pursuant to ss. 38 and 39 of the Youth Criminal Justice Act. The court rejected the accused's argument that the court must consider his impecunious state as a mitigating factor. The court indicated that a mitigating factor would have been considered if the offence was directed solely at providing himself with the necessities of life. The court determined that the appropriate sentence was a deferred custody and supervision order of one month followed by an 11 month probation order. The court also imposed numerous optional conditions on all of the sentence, including a residence clause, a curfew clause, and prohibition from alcohol and drugs.

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Veikle v. Westman, 2015 SKQB 325

Scherman, October 15, 2015 (QB15323)

Civil Procedure – Queen's Bench Rules – Rule 3-10, Rule 10-3(5)
Civil Procedure – Pleadings – Statement of Claim – Service – Extension of Time

The plaintiffs had been given an order extending time for service of their statement of claim on the defendant Westman for an additional six months pursuant to an ex parte or without notice application under rule 3-10 of the Queen's Bench Rules. The defendant was then served, some three years after the statement of claim was issued. The defendant applied pursuant to rule 10-3(5) to set aside the ex parte order on the grounds that the limitation period for a claim to be brought against her had long expired or the reasonable extension of time and that the order made would cause her to suffer inordinate prejudice. The plaintiffs had suffered loss caused by a fire in the property that the defendant and her then husband, Sommerfeld, were renting. The fire had apparently been started by something left unattended on a stove in the property. The extent of the damage was approximately $43,000. SGI had carriage of the action by virtue as insurer for the plaintiffs. In August 2010, SGI wrote a letter to the defendant addressed to her at her then current address, stating that it

was giving her formal notice that it would be looking to her for recovery of the loss sustained in the fire and asking her to contact the writer, which she did not. In November 2011, the statement of claim was issued and SGI attempted to locate the defendant. From their searches they establish that she resided in Edmonton and made numerous attempts to serve her there. Messages were attached to the door asking her to contact the process server, but there was no response. In January 2012 and April 2012, SGI attempted unsuccessfully to serve the defendant again. It did not bring the without notice application until April 2015. The defendant deposed that the fire occurred while she was away from the rental property and did not recall if she left combustible materials on the stove. She began taking notes on events leading up to and following the fire but destroyed her records in 2012 believing the limitation period had expired. She claimed no memory of receiving the letter from SGI in 2010 and had never seen or found the notices from a process server posted to her door in Edmonton. She stated that while living at that address she received many notices from SGI, four of which pertained to the fire. As she disputed the allegations in the notices, she had not responded to them. She argued that SGI had a positive obligation to serve her and for more than two years during the period in question SGI made no effort to serve the claim. The defendant claimed prejudice if the claim continued because she could not recall specific details of the incident and that she had disposed of her notes. She had concluded a divorce and property settlement with Sommerfeld in 2012 without regard to potential liability arising from the fire and had lost the potential to claim contribution from him.

HELD: The application was denied. The court found that the non-service of the claim from May 2012 to April 2015 was due to inaction on the part of SGI. However, the prejudice to the plaintiffs would be significant financially if service of the claim was not extended. The court found that it was improbable that the defendant had not received the SGI letter or the notices of the process server, and with the knowledge that the plaintiffs were trying to serve her, chose to destroy her records. She also knew of the attempted service when she divorced and made her property settlement. The court found that the defendant's alleged prejudices did not outweigh the clear prejudice suffered by the plaintiff.

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A. (K.B.) v. B. (J.G.), 2015 SKQB 328

Sandomirsky, October 21, 2015 (QB15325)

Family Law – Custody and Access – Variation

The parties were divorced in 2010 and corollary relief ordered that they would have joint custody of the two children of the marriage. Their sons were born in 2006 and 2007 respectively and their primary residence was with the petitioner mother. They had sporadic contact with the respondent, which was due to a number of factors: he had moved to Edmonton in 2008 and then to Spruce Grove and the children resided in Regina, and because the petitioner denied him access for various reasons at various times. The relationship between the parties was acrimonious, and their custody and access issues had been before the court for over five years. Each of them had defied interim court orders governing the respondent's access to his sons. Both claimed that the other had abused the children. Most recently, the respondent had applied for access, which resulted in the parties signing a consent judgment in March 2015 whereby the respondent was given parenting time on designated days. The petitioner was to drive the children to North Battleford to meet the respondent at a certain location. The petitioner disobeyed the order saying that she would not drive without police supervision and that the respondent had not paid her any support since October 2014, so she would not give him access. She advised that the children were afraid of the respondent and she would not allow him to be with them without supervision. In addition, the petitioner took the children and left the province and would not disclose their whereabouts. It was later revealed that she had moved to the Ottawa area and was living with her parents. She indicated that the children were in school and were doing well. The respondent applied to the court to vary the custody order so that the boys' primary residence would be with him and his second wife in Alberta and provided evidence of the stability of his employment, the nearness of schools and his family there.

HELD: The court found no reason to disturb the original joint custody and primary residence order. The children had always lived with the petitioner and she had had sole care of them for most of their lives. It was in their best interests to remain with her, not on the basis of the status quo but because of the length of her involvement with them versus the respondent's occasional access. The court ordered that the respondent would parent the children for five weeks during the summer vacation, for periods of time at Christmas and Easter, with the respondent being responsible for the payment of the airfare. In addition, the respondent was given telephone or FaceTime communication with the children every week. If the petitioner breached the provisions of the judgment, custody of the boys would go to the respondent immediately. If the respondent breached the provisions of child support, his access to the boys would cease. The court determined that the respondent's income was $52,000 and therefore the table amount of support was $737 per month. However, due to the high expenses related to exercising access, the court reduced the amount to $437 per month. The respondent was ordered to pay arrears at the rate of $200 per month until the outstanding amount of

$5,600 was paid.

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R. v. Brown, 2015 SKQB 331

Popescul, October 22, 2015 (QB15355)

Criminal Law – Forfeiture
Statutes – Interpretation – Criminal Code, Section 462, Section 490

The applicant was charged with eight counts of stolen property in 2009. His common law spouse was also charged with the same counts and she pled guilty to the eighth count and the other charges against her were withdrawn. She acknowledged through an agreed statement of facts that the property seized by the police had been knowingly acquired by illegal means. The applicant's spouse then requested the return of several seized items she identified as hers and then agreed that the remainder of the items be forfeited to the Crown, which was then authorized in the Order of Forfeiture made by the Provincial Court judge. The applicant's trial followed at which he was found guilty and convicted of counts one to seven. At the sentencing hearing, the Crown sought a forfeiture order regarding the same items listed in the Order of Forfeiture made in connection with his co-accused spouse. The Provincial Court judge declined to grant the Crown's request because the items pertained to the eighth count, of which the applicant had been found not guilty. In November 2009, the applicant initiated a request to the police for the return of the some of the items identified in the list, alleging that they belonged to him. The police refused the request and in July 2012, all the property in the list was auctioned and the applicant's representative notified that the items had been sold. In June 2014, the applicant brought an application in Provincial Court pursuant to s. 490(9)(c), claiming return of that portion of the forfeited property in the list allegedly belonging to him. The Provincial Court judge decided that he did not have jurisdiction to hear an appeal from a decision of another Provincial Court judge regarding the original Order of Forfeiture.
HELD: The application was dismissed. The court found that the first judge properly made the original Order of Forfeiture without stating whether it was pursuant to s. 462.37 or s. 490.1 of the Code. The second judge correctly declined to grant the Crown's request because the property was not the subject matter of the convictions relating to the charges against the applicant. In his application to the third judge, the applicant incorrectly presumed that the order was made under s. 490. However, that section had no application to the circumstances of this case as it deals with the continued detention, return or forfeiture of property seized by the police but for which no criminal proceedings

have been initiated. The applicant should have brought an application for relief from forfeiture under ss. 462.42(1) and 490.5(1) of the Code. Once a forfeiture order is made pursuant to ss. 462.37 or 490.1, an innocent party may make an application to a superior court judge within 30 days of the order being made. In concluding he had no jurisdiction to hear the application, the third judge was correct. However, he erred only in failing to decline to the relief requested because the application was made on the wrong basis.

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R. v. Reynolds, 2015 SKQB 332

Acton, October 23, 2015 (QB15328)

Criminal Law – Dangerous Driving Causing Death

The accused was charged with two counts of dangerous driving causing death contrary to s. 249(4) of the Criminal Code. The 36-year-old accused was driving on a foggy highway behind a gravel semi-truck. As he was passing the gravel semi-truck, a vehicle came in the oncoming lane and the accused and the two vehicles collided head-on. The two occupants of the oncoming vehicle were killed instantly. Various drivers on the highway at the time of the incident testified as to the decreased visibility on the highway at the time of the accident. The driver of the gravel semi-truck that had been passed by the accused and was behind him before the accident radioed to the semi-truck ahead of the accused to watch out and pull to the right. That driver also testified that no one other than the accused had attempted to pass him in the 10 or more miles of milk fog. The driver of the semi that was passed by the accused when the collision occurred also testified that it was not safe to pass because of the thick fog. RCMP officers driving to the scene testified that the fog was heavy and vehicles could only be seen a couple of metres away. The accused testified that he was travelling at approximately 80 km/hr until he commenced passing when he accelerated to 100 km/hr. He said the fog lifted momentarily and he could see 500 feet ahead. The black box in the accused's vehicle indicated he was travelling at 103 km/hr just before braking. The accused's vehicle was travelling at 68 km/hr right before impact and the oncoming vehicle was travelling at 77 km/hr. The co-worker of the accused testified that the accused called the office and said he should not have passed. The accused denied saying that. HELD: The court did not accept the accused's testimony that the fog lifted momentarily so that he could see 500 feet away when he pulled out to pass. The court preferred the testimony of all the other drivers, including the RCMP officers, which indicated that there was heavy fog and very reduced visibility. The court also accepted the testimony of

the accused's co-worker regarding the call to the office. The court concluded that, when viewed objectively, the accused's actions in passing the first gravel truck with virtually no visibility and then attempting to pass the second gravel truck were both acts of driving in a manner dangerous to the public having regard to the intense fog, narrow highway, and expected oncoming traffic. The mens rea of the offences were also made out because attempting to pass the second gravel truck was a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. The accused had a reasonable option; he could have slowed down and not passed until the conditions improved. The accused was found guilty of both counts.

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R. v. Bentley, 2015 SKQB 335

Rothery, October 23, 2015 (QB15335)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Conviction
Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Application for Stay of Driving Prohibition

The appellant appealed his conviction of driving while his blood alcohol content exceeded .08, contrary to s. 253(1)(b) and s. 255 of the Criminal Code. He sought an order, pursuant to s. 261(1) of the Code and s. 143(1) of The Traffic Safety Act, that the order revoking his driving privileges be suspended for a period of 90 days or until the appeal was heard. The Crown argued that the appellant's grounds of appeal were frivolous and that the appellant's driver's license was not necessary for his employment.
HELD: The application was granted. The driving prohibition was stayed for 90 days or until the appeal was determined. The appellant's employment in the far north of the province required that he be able to drive from his home to an airport. The appellant had no criminal record and the conviction was for his first offence. The Crown could not argue that the grounds of his appeal were frivolous. The grounds were whether the trial judge had erred in finding that a valid demand had been made upon the appellant pursuant to s. 254 and whether his s. 10(b) Charter right to counsel had been breached. It was up to the appeal court to assess whether the evidence supported the trial judge's conclusions.

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Alpine Drywall and Plastering (Lloydminster) Ltd. v. Summer Capital Inc., 2015 SKQB 337

Scherman, October 28, 2015 (QB15331)

Civil Procedure – Contempt
Civil Procedure – Disclosure of Documents
Civil Procedure – Queen's Bench Rule 11-26

The applicants applied to have the respondent found in civil contempt on various grounds. The relief they sought included prohibiting the respondent from enforcing various mortgages, wherein an applicant was the mortgagee, and ordering the respondent to pay solicitor-client costs. The respondent did not take any position with the application or relief sought; however, the assignee to some of the mortgages indicated that it was affected by the application and maintained it had standing to oppose the application. The assignee acknowledged the contempt of the respondent with respect to the non-compliance of the order of July 8, 2015. Otherwise, the assignee argued that contempt had not been proven beyond a reasonable doubt. The respondent was the mortgagee on the property that it became the legal owner of. The builders' lien claimants on the title at the time the respondent became owner argued that the respondent's mortgage debts merged into its title and were therefore extinguished and did not have priority over the builders' lien claims. They argued alternatively that their builders' liens had priority because any advances under the mortgages were made subsequent to the claims of lien originating. As early as December 2012 the court made it clear that the builders' lien claimants had not received and were entitled to know the facts behind the transfer of title, assignments of mortgages, and the particulars of mortgage advances. A common case management judge was appointed and the assignee renewed its application for a final order of foreclosure. On June 15, 2015, the court heard an application by the applicants for various relief on the grounds that a representative of the respondent had failed to answer all proper questions put to him, failed to produce all producible documents, failed to comply with undertakings given by him, failed to property inform himself of matters relevant to the actions, and claimed privilege over documents not privileged. The court found that the respondent failed to comply with their production obligation and failed to answer proper questions. The respondent was ordered to comply by August 10, 2015. The respondent only partially complied with the order. The respondent acknowledged that an affidavit as to documents as ordered had not been provided and they also acknowledged that a loan agreement and option agreement between the respondent and assignee existed. The respondent and assignee entered into a loan agreement and option to purchase agreement on October 10, 2012.
HELD: The elements of contempt of court were proven beyond a reasonable doubt: the terms of the orders were clear and unambiguous; there was proper notice of the orders and their application; the

respondent clearly did not comply with the orders; and the respondent knowingly failed to comply. The respondent failed to file and serve an affidavit as to documents, failed in its ongoing obligation to produce all relevant documents, and failed to comply with specific production orders. There were concerted efforts on the part of the respondent to avoid disclosing documents. Also, the answers given in cross-examination were found to be clear attempts to avoid providing information the examinees were obliged to provide. The transaction between the respondent and assignee was a subterfuge and the respondent acted to prevent the parties and the court from knowing what the facts were. Part of the objective of the loan and option transactions was an attempt to avoid the potential impact of the builders' lien claimants' position that the respondent's mortgage merged with the title upon registration. The court determined that the penalty and relief granted would be limited in its effect to the respondent and any decision as to whether the impact of that relief might flow through and impact the rights of the assignee would have to be decided with further evidence and submissions. The court ordered that: 1) the respondent was in contempt of orders of the court; 2) the respondent's claims and defences with respect to the builder's lien claimants or its foreclosure proceedings were struck out; 3) any claims and/or defences the assignee sought to advance for and on behalf of the respondent were struck out; and 4) the costs of the applicants to enforce the respondent's obligations were payable on a solicitor-client basis.

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Buckley v. Buckley, 2015 SKQB 338

Gunn, October 28, 2015 (QB15332)

Power of Attorney – Capacity
Power of Attorney – Revocation
Statutes – Interpretation – Powers of Attorney Act, 2002

H.B. and her husband put their bank accounts into joint names with one of their daughters, the applicant. They also executed a trust outlining that the applicant had not given any consideration for the transfer to joint names and she just held the accounts in trust for her parents and/or the beneficiaries of their estates. H.B. and her husband added their other daughter, one of the respondents, as joint owner of their house. The respondent also entered into a similar trust agreement. The parents also executed a property power of attorney in 2005 in favour of their daughters. The father passed away in 2006. In 2009 H.B. appointed the applicant as her enduring property and personal power of attorney that would not take effect until H.B. directed or lost

capacity. In 2015 two doctors signed a letter indicating that H.B. had moderately advanced dementia and the power of attorney was released to the applicant. The other daughter's husband took H.B. to the bank to cancel her credit cards. H.B. also signed a revocation of power of attorney that same day witnessed by the other daughter's husband. The legal department of the bank did not accept the revocation. The daughter's husband then arranged for a lawyer to attend upon H.B. at her seniors' home. At a second meeting H.B. appointed the respondent daughter and her grandson, another respondent, as personal attorney, and another grandson, another respondent, as her property attorney. When she signed the enduring power of attorney H.B. first signed her maiden name of 57 years earlier and crossed it out to write her married name. The seniors' home would not accept validity of the new powers of attorney unless presented with a geriatric reassessment with two doctors confirming H.B.'s capacity to execute the documents. H.B.'s son attended upon her and she did not recall signing a new power of attorney. The issues were: 1) jurisdiction; 2) the test for determining capacity to make or to revoke a power of attorney pursuant to The Powers of Attorney Act, 2002; 3) procedure; and 4) whether H.B. possessed the capacity within the meaning of the Act to revoke her power of attorney in 2015 and execute a new one.

HELD: The issues were discussed as follows: 1) the court had jurisdiction to deal with the matters pursuant to Queen's Bench rule 3-49(3); 2) the relevant time to asses capacity was at the time the document was executed; 3) if the evidence presented on the issue of capacity was conflicting, a trial would be necessary; and 4) the physicians' report was dated 29 days prior to the revocation. The court found that the report was strengthened by the fact that it was not the first time the physicians assessed H.B. The assessment done upon entry into the seniors home, the same month as the revocation, indicated that H.B. had cognitive disabilities. The assessment of family members was conflicting. The court held that a trial of the issue was necessary because of the conflicting evidence.

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Cardinal v. Laporte, 2015 SKQB 339

McIntyre, October 28, 2015 (QB15333)

Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Children Born Outside of Marriage
Family Law – Custody and Access – Children's Law Act
Family Law – Custody and Access – Jurisdiction

The petitioner father sought an order for interim custody of the child,

born February 2015. The respondent was living in Ontario with the child and argued that Saskatchewan should decline jurisdiction. In March 2015 there was an altercation between the parties and each of their versions of the events differed significantly. After the incident the respondent went to Ontario to visit the petitioner's parents. She then moved to another location in Ontario. The petitioner was charged with uttering threats to the respondent and there was a warrant for his arrest in Ontario. The respondent was employed and had health coverage for the child and could also arrange daycare.
HELD: The court determined that there was no clear and cogent evidence of any implied consent or acquiescence on the petitioner's part to the respondent remaining in Ontario and, therefore, the child was habitually resident in Saskatchewan at the commencement of the application. Pursuant to s. 16 of The Children's Law Act, 1997 the Saskatchewan court had jurisdiction unless it was of the opinion that Ontario was the more appropriate jurisdiction. The court weighed the factors and concluded that it was clear that Ontario was the more appropriate jurisdiction. The court noted the following factors: the respondent was represented by Legal Aid and had limited means to attend court in Saskatchewan, whereas, the petitioner has the means to travel to Ontario; the best interests tests would be the same whether the trial took place in Saskatchewan or Ontario; the petitioner had family support in Ontario and the respondent also had extended family there; the connection to Saskatchewan was tenuous; neither party had a support network in Saskatchewan; and the respondent would also have to return to Saskatchewan if the child was ordered to be returned and she would have no support in Saskatchewan.

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Toronto-Dominion Bank v. Dean, 2015 SKQB 340

Elson, October 28, 2015 (QB15334)

Foreclosure – Ex Parte Order
Foreclosure – Leave to Commence
Foreclosure – Procedure

The proposed plaintiff, a bank, sought leave to commence an action for foreclosure pursuant to s. 3 of The Land Contracts (Actions) Act. An appointment was issued but the proposed defendant had not been served by the return date despite two attempts to do so. The proposed plaintiff argued that the court should deal with the matter on an ex parte basis and grant leave pursuant to s. 3(4) of the Act. They argued that there was sufficient evidence to conclude that the property had been abandoned. The property was a residential property in a small town and there was no evidence that the registered owner ever lived

there or that the property was abandoned. The address of the first service attempt was occupied by someone else who told the process server that the proposed defendant no longer lived there. The second attempt was at the mortgaged property and the process server indicated that it appeared vacant and neighbours indicated the proposed defendant had not lived there for some time.
HELD: The court determined that the court did not have jurisdiction to exercise its discretion as suggested by the proposed plaintiff. Section 3(4) only allows the court to dispose of the matter on an ex parte basis in three circumstances. The court did not find that any of the circumstances applied.

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R. v. Poitras, 2015 SKQB 341

Layh, October 29, 2015 (QB15337)

Criminal Law – Assault – Assault Using a Weapon
Criminal Law – Assault – Assault Causing Bodily Harm

The accused was charged with one count of committing an assault on the complainant using a weapon, contrary to s. 267(a) of the Criminal Code, and one count of committing an assault on her and causing bodily harm, contrary to s. 276(b) of the Code. The accused admitted that he had assaulted the complainant but maintained that he had not used a weapon and that he had not caused bodily harm to the complainant. The complainant testified that the accused and she had a heated argument and then the accused hit her across the head, grabbed her by her arms and shook her, pulled her hair and ultimately held a knife across her throat. She said that she had not fought back. Soon after the alleged assault, the complainant called the RCMP detachment and officers attended at the accused's house. The complainant took a few of her belongings and went to the detachment where she provided a videotaped statement and photographs were taken of various parts of her body. Multiple large bruises on the complainant's shoulders and arms were evident. None of the photographs showed a cut to the complainant's neck. When the officer testified, he stated that the complainant had not informed him of the cut and could not locate any cut shown on the photographs. The accused's testimony confirmed that the parties had argued but he stated that he had left to sit in his bedroom when the complainant came in and confronted him. She blocked his intended exit from the room and it was then he lost control and grabbed her by the arms and pushed her. They exchanged slaps and she tried to kick him. He pushed her and she fell backwards into the hall. The accused stood over six feet tall and weighed 240 pounds and the complainant weighed 120 pounds.

HELD: The accused was acquitted of the first charge and found guilty of the second. The court noted that since neither party had been drinking, reliability was not in issue. With respect to credibility, the court reviewed all of the various components of evidence presented by the complainant and accepted her version of the assault. The court did not believe the evidence of the accused, but there was a reasonable doubt regarding his use of a weapon because of the conflicting evidence that the complainant presented about the cut to her neck. The court found that the injuries inflicted by the accused upon the complainant interfered with her comfort and were not of a trifling or transient nature and therefore caused her bodily harm.

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Ensign Drilling Inc. v. TSO Energy Corp., 2015 SKQB 343

Ball, October 29, 2015 (QB15338)

Statutes – Interpretation – Builders' Lien Act, Section 55(2)

The plaintiff commenced an action in June 2013 that sought to realize on builders' liens registered against certain mineral interests held by the defendant Carcajou. Pursuant to s. 55(1) of The Builders' Lien Act, the lien expired because the action was not set down for trial within two years of the date of the commencement of the action. It then applied under s. 55(2) of the Act for an order extending the time to be set down for trial. Carcajou applied for an order pursuant to s. 55(3) of the Act, declaring that the lien had expired and dismissing the plaintiff's action. Carcajou had acquired petroleum and natural gas leases from the Crown in 2010 for a term of five years. It entered into a Farm-Out and Option Agreement in 2011 with the defendant TSO, pursuant to which TSO agreed to drill wells included in the Crown lease. TSO entered into an agreement with the plaintiff for it to provide drilling services, which the plaintiff performed in 2012. TSO failed to pay the plaintiff, and it then registered its liens against Carcajou's interests in the mines and minerals and commenced its claim. Carcajou informed the plaintiff that the liens filed were invalid and they were impairing its ability to deal with parties who might be interested in purchasing the Crown leases. In September 2012 Carcajou delivered its statement of defence denying that it owed any money to the plaintiff. It counterclaimed for damages caused by the registration of the invalid liens. In the following two years, counsel for Carcajou contacted the plaintiff regularly demanding at various times that it file its statement of defence and set a date for mediation. The requests were not acknowledged. The plaintiff informed Carcajou that it was negotiating a settlement with TSO. In exchange for agreeing to set aside the order noting the plaintiff for default, Carcajou asked for copies of any

settlement documents and that mediation dates be agreed upon in February 2014. Again, the plaintiffs failed to respond. In June 2014, the plaintiff sent copies of unsigned settlement documents to Carcajou, which required TSO to transfer common shares and make a cash payment by August 2014. TSO failed to make the payment but the plaintiff did not inform Carcajou until January 2015 and indicated then it wanted to proceed to mediation. The session occurred in July 2015 but no settlement was reached. Both parties then filed their applications under s. 55 of the Act.
HELD: The plaintiff's application was denied and Carcajou's was granted. The court found that the plaintiff had failed the first arm of the test set out in Terramax to extend the time period because it had not established that its delay in setting its claim down for trial was reasonable and justified. It had not diligently pursued its claim against Carcajou despite the latter's multiple efforts to move the litigation forward.

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R. v. McHale, 2015 SKQB 344

Dawson, October 30, 2015 (QB15357)

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

The accused pled guilty to having care or control of a motor vehicle when his blood alcohol content exceeded .08 contrary to s. 255(1) and s. 253(2)(b). The accused had had a life-long problem with alcohol abuse and, as a result, had seven prior convictions for driving while impaired. The Crown requested a greater punishment because of the accused's previous convictions and submitted that a sentence of 15 to 18 month's incarceration followed by 18 months' probation would be appropriate. The defence conceded that some period of incarceration might be warranted but that it should be for 90 days or less because of the gap principle as the accused had not had a conviction in 12 years.
HELD: The accused was sentenced to 12 months incarceration followed by probation for 18 months with specific conditions such as the accused was required to report to a probation officer, participate in an addictions assessment and programming, and to desist from purchasing alcohol or attending any place where alcohol was sold. The mitigating factors considered by the court were that the accused pled guilty, had not had any convictions for a serious period and indicated that he took responsibility for his conduct.

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Sandoff v. Loblaw Companies Ltd., 2015 SKQB 345

Keene, October 30, 2015 (QB15339)

Civil Procedure – Queen's Bench Rule 7-5
Civil Procedure – Class Action – Certification – Summary Judgment

The plaintiffs issued their claim under The Class Actions Act and sought certification. They sought damages against the defendant companies. The plaintiffs alleged in their affidavits that they had purchased a product made by the defendants under their brand "PC" labelled "low sodium" and that the label was deceptive and misleading in that it implied a healthier reduced amount of sodium, and that the defendants' other similar products were not so labelled but contained the same amount of sodium. The plaintiffs made claims of negligence, breach of warranty, violations of the Competition Act, violations of the Consumer Packaging and Labelling Act, the Food and Drugs Act and various provincial consumer protection legislation and claimed exemplary and punitive damages. The defendants served its statement of defence and application for summary judgment. They denied any liability to the plaintiffs or any member of the proposed class on the basis that the low sodium label was factually correct and that no reasonable person would have assumed that it meant the products were lower in sodium than other alternate products. In response, the plaintiffs amended their statement of claim and admitted that the products did in fact have minimal sodium content. The issues before the court were whether the court should decide the certification application before the application for summary judgment and whether this was an appropriate case for summary judgment.
HELD: The court granted summary judgment for the defendants. It held that it could determine the defendants' application prior to the plaintiffs' application for certification. The court found that the facts were not in dispute and there was no evidence that the plaintiffs or any members of the proposed class had suffered any damages. The plaintiffs' argument that it was misleading to label identical products differently was not supported by their pleadings or any affidavit evidence. There was no genuine issue requiring a trial. The court reviewed the various alleged breaches of statute and dismissed them. It was not necessary to decide the application for certification.

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Shellbrook (Rural Municipality No. 493) v. Muller, 2015 SKQB 346

Currie, November 2, 2015 (QB15340)

Municipal Law – Council Members – Disqualification – Conflict of

Interest – Pecuniary Interest

The rural municipality requested, pursuant to ss. 141 to 151 of The Municipalities Act, that the respondent, an elected council member, be declared disqualified from council and that his position be vacated. The respondent sued the applicant in relation to the installation of a culvert he opposed. The applicant argued there were three occasions where the respondent should have declared his interest and excused himself: 1) the applicant was discussing whether to refer the respondent's matter to legal counsel and the applicant remained in the room and voted; 2) a council meeting was closed to the public to discuss the possible litigation. The respondent did not declare a pecuniary interest in the matter and he did not absent himself from the discussions; and 3) the council members received copies of a statement of claim at a meeting and it was announced that it would be discussed. The respondent did declare a pecuniary interest but stayed in the room.

HELD: The court reviewed each of the three instances as follows: 1) there was a prospective financial benefit to the respondent in the discussions because if the matter was not referred to legal counsel his chances of success would be better. The respondent contravened s. 144 of the Act. The court also concluded that the respondent was a reasonably well-informed person and that his actions were not within s. 149; his actions were not through inadvertence or by reason of an honest mistake; 2) the respondent had a pecuniary interest in the possible litigation that was discussed and how council addressed the topics could benefit the respondent financially. The onus was on the respondent to leave the room. He contravened s. 144; and 3) the respondent's interest in the court action did not give him the right to be heard under s. 144(4). The respondent contravened s. 144. The court discussed the effect of each contravention and concluded that the first and second contravention had little effect because all of the other councilors knew about the respondent's pecuniary interest; no one was misled and no financial benefit or loss resulted. The last contravention also had the effect of interfering with council conducting its business but it did not result in anyone being misled or any financial benefit or loss being realized. The court concluded that a duly elected councilor should not be removed from council for relatively minor infractions that had almost no consequence.

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Kawula v. Institute of Chartered Accountants of Saskatchewan, 2015 SKQB 350

Currie, November 4, 2015 (QB15342)

Professions and Occupations – Accountants
Administrative Law – Judicial Review – Discipline Hearing – Accountant

The appellant appealed from a decision of the council (council) of the Institute of Chartered Accountants that had dismissed her appeal from two decisions of the Institute's discipline committee (DC). The DC had found her guilty of breaching The Chartered Accountants Act, 1986, the legislation then in force, and had imposed a penalty and costs. The appellant and her husband were principals of a chartered accounting firm. As auditors, the firm reviewed the financial statements of Wahpeton Dakota Nation (WDN) for the years 2003, 2004 and 2005, and for each of the financial statements the firm issued an audit report. In the 2004 financial statements, the firm concluded that there was a shortfall in education funding received by WDN from Indian and Norther Affairs Canada (INAC) for the period 1997 to 2004. They wrote a management letter to WDN in 2004 setting the conclusion with a calculation of the amount owing, and WDN then issued invoices to INAC for that amount with interest: $2,121,102. INAC asked for further information from WDN, upon which the firm issued another management letter to WDN indicating its view that INAC's response was inadequate and suggested that WDN include the funding shortfall in its financial statements. Shortly thereafter, the appellant and her husband met with the acting district director of INAC, Korchinski, who informed them that the money was not owing and "he was not going to take out his chequebook". In its 2004 financial statement, WDN included the amount receivable owed to it by INAC. The firm then issued an unqualified audit report on those financial statements. INAC wrote to WDN contesting the inclusion of the receivable. WDN again included the amount owing to it by INAC in its 2005 financial statements, for which the firm again issued an unqualified audit report on the statements. In October 2004, INAC sent a letter, signed by Korchinski, to the Institute, expressing its concern about the inclusion of the receivable in the 2004 audited financial statements and asked for an investigation into the conduct of the firm. In January 2005, the Institute's professional conduct (PCC) gave the appellant's husband written notice that it had received a complaint against him for possible violation of the Institute's bylaws 205 and 206 regarding the audit of the WDN's 2004 financial statements. The investigators called the firm to arrange a meeting and spoke with the appellant who indicated that that letter should have been sent to her as she was the person responsible for the audit file. They then sent her a letter reiterating the complaint and the investigation of the matter. In August 2007, the PCC advised the appellant that it recommended that the DC hear the complaint regarding the conduct of the appellant relating to the 2004 audit, which had breached bylaws 201.4, 204.1, 205 and 206.1. In December 2008 the PCC sent the appellant a letter advising of a complaint and notice of hearing regarding both the 2004 and 2005 audited financial statements. The hearing date before the DC, originally set for January 2009 was adjourned numerous times,

primarily at the request of the appellant for various reasons, including the appellant's appeals for judicial review. The Court of Appeal dismissed her appeal in June 2011. During this period, the DC lost quorum a number of times and new committees were constituted. In January 2012, the lawyer acting as prosecutor for the DC recused herself due to a conflict of interest. The new prosecutor served the appellant with notice of intention to call an expert witness and provided a copy of the expert's report to her. The DC hearing proceeded in September 2012 regarding two counts of alleged violations of s. 15 of the Act, resulting in breaches by the appellant of concomitant Institute bylaws. The DC found that the appellant had failed to qualify the inclusion of the receivable in the financial statement to alert the reader about the uncertainty of the collectability of it without sufficient information to be confident it was owing and would be paid especially because she knew that it had been denied by INAC. The appellant had generated the idea of including the receivable in the financial statements and provided an audit report regarding them which constituted advocacy and lack of independence. The appellant's appeal from two DC decisions to the council was dismissed in November 2013. Pursuant to s. 29 of the Act, the appellant appealed the council's decision as per a judicial review and provided 32 grounds of appeal. One group of grounds related to arguments that the initial complainant, INAC, was not a person within the meaning of s. 20(1) of the Act and various other misidentification issues. Multiple grounds raised issues regarding disclosure and production of the complaint, the allegations, particulars thereof and documents. A number of grounds questioned the authority of the Institute to expand the charges to the second count and to include the 2005 audit report and further, to hold multiple hearings. The appellant also argued that there was reasonable apprehension of bias with respect to members of the DC who had been appointed twice because the committee had lost quorum and with respect to the former prosecutor. A number of grounds related to evidence, particularly: 1) the qualification of the expert and his opinion; 2) the reliance upon the letters written by Korchinski; and 3) the DC's failure to draw an adverse inference because the prosecution had not called Korchinski as a witness. Another ground raised was that the doctrine of laches should have been applied because eight years had elapsed between the time of the complaint and the commencement of the DC hearing. Another set of grounds dealt with the manner in which the DC decided that INAC had discretion not to pay the receivable as well as various determinations made by it regarding accounting.

HELD: The court granted the appeal with respect to one ground: that the DC had acted without jurisdiction in proceeding with respect to the 2005 audit report in the absence of a recommendation from the PCC as required by s. 20(2) and s. 22 of the Act. The Council was incorrect in adopting that ruling and convictions relating to that report were quashed. The court set aside the penalty and costs decision of the DC.

As it could not determine whether the DC's view of the appropriate penalty would be the same if it were assessing a penalty only with respect to the 2004 audit report, it remitted the matter to the DC and directed that the original committee be reassembled and if not, then an entirely new committee should consider the matter. The court reviewed each ground of appeal, examined the evidence presented at the hearing, the decisions of the DC and the council and assessed the applicable standard of judicial review. Each ground was dismissed. The court noted that the appellant's actions had been based upon her conclusion that since the WDN's entitlement to INAC funding had been met, INAC was obliged by law to pay, without discretion. For this reason then, she believed it was 100 percent likely that receivable would be paid. In her appeal, the appellant stated that the DC had erred in finding that INAC did not have the discretion to pay. The court found that DC had not made that finding but rather had found that the appellant did not have reason to conclude that it must and would pay.

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North Ridge Development Corp. v. Saskatoon (City), 2015 SKQB 351

Zuk, November 5, 2015 (QB15343)

Arbitration – Enforcement
Civil Procedure – Judgments and Orders – Enforcement of Money Judgments
Civil Procedure – Judgments and Orders – Enforcement – Queen's Bench Act
Statutes – Interpretation – Arbitration Act

The respondent city paid all but $700,900 of the amount set by the arbitrator for the purchase of land from the applicant. The applicant agreed to purchase property from a board that was not required to pay property taxes. The agreement included clauses that the board would remain legal owner holding the property in trust for the applicant until no later than December 31, 2008, and that the parties would withhold disclosure of the sale. Before the title was transferred, the respondent determined that it required a portion of the subject lands for road development. The board advised the respondent that the applicant was the one to negotiate the terms of the purchase with. The applicant and respondent could not agree on a price, so they turned to arbitration resulting in the arbitration award that was the subject of the application. The respondent demanded payment of taxes for the property from 2005 to 2009, arguing that the sale agreement removed it from being exempt from taxes. The respondent commenced an action for $577,561.11 against the applicant for back taxes. The applicant argued that it had advised the respondent numerous times that it had

purchased the property. The applicant successfully appealed the tax amounts for the years 2011, 2012 and 2013, and therefore argued that the taxes owing for 2005 to 2009 should have only been $7,500. The respondent argued that the time to appeal for those years had expired. The issues were: 1) whether the arbitration award was a judgment that could be enforced under The Enforcement of Money Judgments Act (EMJA); 2) if not a judgment pursuant to issue 1, was the applicant entitled to a declaration pursuant to ss. 9 and 11 of The Queen's Bench Act (QBA); 3) was the respondent entitled to a declaration that the respondent was not entitled to set-off amounts. The respondent paid the arbitration amount minus the amount owed for taxes and penalty; and 4) if any amounts were owing was the applicant entitled to interest at the rate of 5 percent per annum.
HELD: The issues were determined as follows: 1) section 52(3) of The Arbitration Act (AA) prevented the applicant from enforcing its arbitral award as a judgment pursuant to that Act because it was awarded more than two years before the application. The court did not accept the applicant's argument that monetary arbitration awards should be treated differently than non-monetary awards. The EMJA lists specific judgments in its definition of judgment. An arbitration award is not included in the definition. The court held that the proper interpretation was that for the EMJA to apply there had to be a judgment of the court. For an arbitral award to become a judgment of the court a successful application pursuant to s. 50 of the AA must be made within two years of the award; 2) the court concluded that by using the QBA the applicant was trying to revive an arbitration award that could not be enforced pursuant to the EMJA. Further, the court held that it would be improper to grant a declaration of rights in favour of the applicant when the legislature prescribed a time limit within the AA; 3) the court determined that the time had passed for the applicant to question the respondent's set-off. The applicant knew that the respondent was claiming set-off in July 2012; and 4) section 57(2) of the AA provides that interest is payable on an arbitration award similar to post-judgment interest payable on a judgment pursuant to s. 113 of the EMJA.

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Skvaridlo v. Cross Country Saskatchewan Association Inc., 2015 SKQB 356

McMurtry, November 6, 2015 (QB15348)

Civil Procedure – Queen's Bench Rule 7-1
Civil Procedure – Mandatory Mediation – Exemption Application

The applicant plaintiffs contracted with the defendant to provide high-

performance coaching services. The contract was for a two-year period commencing June 1, 2013, and a term of it allowed for termination at an earlier date without cause by providing notice of termination between February 1 and March 31. The defendant purported to terminate the contract without cause by sending a letter to the applicants dated January 13, 2014. The applicants did not accept that the notice was provided within the terms of the contract and demanded payment for the balance of the contract as damages for breach in the amount owed to them for the remainder of the term in the amount of $55,000. The applicants applied under Queen's Bench rule 7-1 for a determination of the proper interpretation of the termination clause and sought a declaration that mediation was not required prior to the rule 7-1 application. The applicants sought to be exempted pursuant to s. 42 of The Queen's Bench Act, 1998 from attending mediation for reasons of cost. The applicant Skvaridlo was resident in Quebec and they argued that since discussions in a mediation session would deal with the legal interpretation of the termination clause that the cost to the applicant would outweigh any benefit gained by his attendance. They argued that the determination of the legal issue would resolve all the issues, thus eliminating the requirement for a trial. The respondent argued that the issue regarding the date of the notice was relevant to the question of whether the contract was breached and if breached, the measure of damages. Therefore, the application under rule 7-1 could not resolve the litigation. Further the cost of the applicants had not provided evidence of the cost of Skvaridlo's attendance at mediation and thus had not established that it would be unduly burdensome or wasteful.
HELD: The application was dismissed and the application under rule 7-1 was adjourned sine die. The applicants had not persuaded the court that they should be exempted from mediation because it was not clear the costs of attending the mediation would outweigh the benefits to be gained at an early stage in the proceedings.

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Regina Qu'Appelle Health Region (Mental Health Inpatient Services) v. B. (A.), 2015 SKQB 361

Schwann, November 12, 2015 (QB15349)

Mental Health – Patient Detention

The director of Mental Health Inpatient Services for the Health Region applied for an order pursuant to s. 24.1(1) of The Mental Health Services Act directing that the respondent be detained at the Saskatchewan Hospital for a period of one year for the purposes of obtaining treatment. The respondent opposed the application and was

represented by counsel pursuant to s. 10 of the Act. The respondent had suffered two brain injuries during his life. These injuries affected his ability to control impulsive behaviours and typically presented with seizures, anger management issues and a short attention span. He demonstrated problems with medications compliance and required 100 percent assistance with respect to administration of them. He suffered from substance abuse, particularly in using marijuana. He had attempted suicide and had been diagnosed with psychosis. His psychiatrist said that the respondent was deeply troubled and needed long-term care. The respondent wanted to live alone in his apartment, go to school and get a job. He believed that if he had surgery through his nose, it would suck out the disturbing thoughts that he had. HELD: The application was granted. The court ordered that the respondent be detained in an in-patient facility for a period not to exceed one year for the purpose of obtaining treatment. The respondent could seek review of this order.

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Fister v. Willow Bunch (Town), 2015 SKQB 362

Barrington-Foote, November 12, 2015 (QB15350)

Municipal Law - Bylaw – Nuisance – Order – Judicial Review
Administrative Law – Judicial Review – Municipal Bylaws

The applicants reside in and own property in the respondent town. They had a license to operate an auction and consignment business on the land. The respondent town wanted the applicants to store consignment items inside a building. Pursuant to s. 364 of The Municipalities Act and s. 24 of the respondent's Nuisance Abatement Bylaw, the respondent's designated officer issued an order to remedy declaring the applicants' land a nuisance and ordered that the applicants remedy the nuisance by permanently removing certain property, including "all vehicles" from the land and to move it outside the town limits. The applicants failed to comply with the order, and pursuant to s. 24 of the bylaw, the respondent enforced the order by seizing both junked and registered vehicles and other personal property. The applicants applied for judicial review of the respondent's decision to issue the order and the action taken to enforce it. They argued that the respondent lacked authority to issue the order and seized property not within the scope of the order. At the hearing, the respondent conceded that the order was too broadly cast with respect to "all vehicles" and was not authorized by the bylaw or the Act but that the defect was valid in relation to property that was subject to seizure and that the defect was cured by the fact that the respondent had not seized all the property referred to in the order.

HELD: The application was granted. The court set aside the order and directed the respondent to return the seized property to the applicants. It found that the review should be conducted on the standard of reasonableness. It examined s. 364 of the Act and the pertinent section of the bylaw against the order drafted by the respondent's designated officer to remedy the contravention of the bylaw and the actions taken. The respondent's order was beyond the authority of the respondent and its designated officer. The order was not a possible acceptable outcome of the exercise of the designated officer's and the respondent's authority under the bylaw and the Act and was not defensible regarding the facts and the law. The court noted that the order described property outside the scope of the bylaw and directed that property could not be returned to the town limits, which was beyond the bylaw's requirement that the applicants should do what was necessary to remedy any contravention of the bylaw. The court rejected the respondent's position because there was no part of the order that could be severed to protect some portion of it.

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Hunt Estate v. Moody, 2015 SKQB 364

Rothery, November 13, 2015 (QB15352)

Real Property – Recovery of Possession of Land
Real Property – Joint Tenancy – Severance – Circumstances
Civil Procedure – Queen's Bench Rule 3-49

The applicants Hunt and Wiwcharuk, executors of the estate of Robert Hunt, applied for an order pursuant to s. 3 of The Recovery of Possession of Land Act, requiring the respondent Moody to vacate a residence that she inhabited. The applicant Moody, as administratrix of the estate of her late common law husband, Douglas Hunt, filed an originating application pursuant to Queen's Bench rule 3-49 that sought a declaration that a miscellaneous interest registered against the same land on which the residence in question was situated. In this she claimed an interest, pursuant to The Family Property Act, that entitled the estate of Douglas Hunt to one-half interest in the residence. The dispute over the residence arose from the terms of the 2010 will of Robert Hunt, which included a bequest to transfer the title of the residence to his two sons, Richard Hunt and Douglas Hunt, as joint tenants. At the time of the making of the will, Douglas Hunt and Moody resided in the house in a common law relationship. The testator died on April 7, 2014. On April 19, 2014, Douglas Hunt died and Moody stayed in the residence. The applicants, as executors of Robert Hunt's estate, held title to the residence and wished to transfer title to the surviving joint tenant, Richard, but Moody refused to leave,

claiming an interest in one-half of the residence as a spouse under The Family Property Act, as a non-owning spouse under The Homesteads Act, 1989 and as administratrix of Douglas's estate to Douglas's one-half interest in the residence. Moody argued that although the bequest specified joint tenancy, because the recipients lacked the unities of interest and possession immediately after Robert's death, Douglas and Richard inherited the residence as tenants in common and therefore Douglas's one-half interest passed to his estate.

HELD: The court granted the applicant executors' application and directed the Registrar of Land Titles to discharge the miscellaneous interest from the title to the residence and ordered Moody to vacate the residence within 30 days. The personal representatives were granted an order of possession of the residence. The court found that if the title had passed to Richard before his death, he would have been entitled under s. 156 of The Land Titles Act, 2000 to commence an action against Richard for the partition and sale of the residence. Moody, as Douglas's personal representative, was not included under s. 156(b) of the Act as a joint tenant. Since Douglas died before title passed, his interest was extinguished and it accrued to Richard as the joint surviving tenant. The executors of Richard's estate were entitled to pass title to Richard alone. The court found that Moody's interest as a spouse under The Family Property Act was not sustainable. She could invoke her rights under s. 4 and s. 5 against Douglas but not against Robert, his personal representatives or Richard as the surviving joint tenant. The court found that Moody could not rely upon The Homesteads Act, 1989 either as it had no application. Therefore Moody's miscellaneous interest registration could not stand.

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