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The respondent was one of three people that pled guilty to breaking and entering a dwelling house and committing therein the indictable offence of assault causing bodily harm contrary to ss. 267(b) and 348(1)(b) of the Criminal Code. He was also convicted of using an imitation firearm while breaking and entering with intent to commit the indictable offence of assault contrary to s. 85(2)(a) of the Criminal Code. The appellant was sentenced to 12 months less one day incarceration for the break and enter and assault and a consecutive one-year sentence for the firearm charge. He also received 18 months probation and ancillary orders. One of the other co-accused had advised the appellant and the other co-accused that he had paid the victim money for a TV but never received one. They went to the victim's residence with an imitation pellet gun and a roofing hammer after a night of drinking. One of the offenders broke a window and let the others in. The victim heard the window being broken and called 911. The assault was recorded. The respondent put the pellet gun into the victim's mouth more than once and knocked out three or four of his teeth. He also accepted the responsibility for the bruises on the

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victim's head. The pre-sentence report identified the respondent as a medium risk to reoffend. His criminal record consisted of a .08 in 2008. He was employed and received his journeyman papers in the fall of 2014. The sentencing judge found the respondent to be the most culpable of the three because of the imitation firearm. After argument on sentencing but before sentencing, the respondent was charged with impaired driving causing bodily harm and breach of his undertaking. He pled guilty to those charges and received 90 days in total for those offences. The Crown raised the issues of whether the sentencing judge erred: 1) by failing to properly consider one or more of the relevant sentencing factors; 2) by imposing a sentence that was disproportionate to the gravity of the offence and the moral culpability of the offender; 3) by failing to impose a sentence that was similar to those imposed in similar situations; and 4) by imposing a sentence that was demonstrably unfit.

HELD: The appeal was allowed. The sentencing judge's understanding of Debigare caused her to err in her application of the objects of denunciation and deterrence, and the principles of proportionality, parity and her assessment of aggravating and mitigating factors. The sentencing judge either overemphasized the mitigating factors or mischaracterized them as mitigating factors. The fact that the victim had wronged one of the perpetrators did not diminish his right to be safe from criminal behaviour in his home. Also, the brevity of the incident did not diminish its seriousness. The appeal court concluded that intoxication does not lessen the seriousness of the offence. Also, the fact that the plan was developed over a short period of time did not mitigate the seriousness of the offence. The sentencing judge was found to have underemphasized the seriousness and culpability. The trial judge incorrectly stated the Crown's position on parity given the Debigare case. The sentence was found to be demonstrably unfit. The Court of Appeal determined that a fit sentence would be a total sentence of three years incarceration. The court substituted a sentence of two years for the 12 months less on day incarceration on the ss. 267(b) and 348(1)(b) Criminal Code conviction. All other sentences remained the same except for the probation order, which was set aside.

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Jackson Caldwell Herauf, November 18, 2015 (CA15121)

Statutes – Interpretation – Criminal Code, Section 258(1)(c)(iv)
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The proposed appellant applied for leave to appeal the dismissal of his

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appeal from his conviction in Provincial Court for driving with a blood alcohol level over .08 contrary to s. 258(1)(b) of the Criminal Code. The summary conviction appeal judge dismissed the appeal, including the appellant's ground that since the law had changed with respect to "evidence to the contrary" after his conviction but before his appeal was determined, a new trial should be ordered (see: 2014 SKQB 219). The change had resulted from the Supreme Court decision in R. v. St.-Onge Lamoureux that changed the requirements for rebutting the presumption with respect to evidence to the contrary. Following this decision, an accused person may simply lead evidence tending to show that a breath sample machine was malfunctioning or operated improperly. If the evidence raises a reasonable doubt as to the accuracy of the readings, the presumption of accuracy is rebutted. The Crown acknowledged that the change in the law had the potential to justify raising new issues on appeal, but argued that there must be a factual foundation for these issues to be determined. The proposed appellant submitted that there was some evidence: when he had given his first blood sample, the sample returned a reading of 180 but also gave an interferent message. The police officer checked the machine and went to the second breath sample. When the second sample was given, it gave an ambient fail message meaning that ambient conditions were interfering with the machine's ability to take a reading. The officer purged the machine and took another sample, confirming the blood alcohol reading of the first. At his summary conviction appeal, the appellant submitted that the limited defence that could have been advanced under s. 258(1)(c)(iv) of the Code was unavailable to him at trial so he had not called much evidence. The summary conviction appeal judge noted that there was no indication from the appellant what evidence he might call to show that the Intoxilyzer malfunctioned. He held that it was insufficient to assert that had the law been different at the time of the trial, the trial strategy might also have been different. The proposed appellant appealed on the ground that the summary conviction appeal judge failed to exercise his discretion judicially by declining to order a new trial on the ground that the law with respect to evidence to the contrary had changed after the trial judge had rendered her decision.

HELD: Leave to appeal was given and the appeal allowed. The court found that the issue related to s. 258(1)(c) could be raised on appeal as it was not raised at trial and that the St.-Onge decision fundamentally changed the law after trial but when the appeal was still extant. The appropriate remedy was to order a new trial at which the appellant could create a sufficient evidentiary foundation to show that the machine malfunctioned or was operated improperly and that this affected the determination of his blood alcohol content.

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Safioles v. Saskatchewan, 2015 SKCA 122

Jackson, November 17, 2015 (CA15122)

Civil Procedure – Class Actions – Certification Order – Dismissal – Leave to Appeal

The applicants applied for leave to appeal pursuant to s. 39(3) of The Class Actions Act from a decision of a Queen's Bench judge who dismissed their application for certification (see: 2015 SKQB 183). The claim was brought on behalf of all individuals who resided at the Saskatchewan Training School or Valley View Centre who suffered abuse and injury, loss or damage while residing at either residence. The proposed appeal cited numerous grounds. At the hearing, the proposed appellant raised a preliminary issue as to the proper approach to take under s. 39(3), specifically whether it is necessary to consider each ground of appeal in detail to determine individual merit. HELD: Leave to appeal was granted. The court held that the favored approach of the court in s. 39(3) applications was to address the request for leave in a global way as opposed to the individual grounds of appeal. The court applied the Rothman's test and found the proposed appeal possessed sufficient merit to warrant its hearing in that the draft notice of appeal was not destined to fail and it raised significant issues with respect to the application of s. 6(1) of the Act. The proposed appeal did not raise substantially new or unsettled law regarding this particular type of class action certification. However, the plaintiffs alleged serious misconduct and abuse on the part of a government institution, which persuaded the chambers judge to grant leave in light of the overall merit of the appeal.

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Moose Jaw (City) v. Temple Hotels Inc., 2015 SKCA 123

Ottenbreit, November 19, 2015 (CA15123)

Municipal Law – Tax Assessment – Leave to Appeal

The proposed appellant (the City of Moose Jaw as represented by the Saskatchewan Assessment Management Agency (SAMA)) applied pursuant to s. 33.1 of The Municipal Board Act, for leave to appeal the decision of the Saskatchewan Municipal Board, Assessment Appeals Committee. The decision related to the assessment of three parcels of land comprising the Heritage Inn and Temple Gardens Mineral Spa, all located in Moose Jaw. The proposed appeal related to the assessor's development of the capitalization rate (CAP rate) to be used in assessing full service primary accommodation properties in Moose Jaw. After SAMA made its assessment, the proposed respondents

appealed the assessment to the Board of Review (BOR), arguing that the assessor erred in using a sale price for a hotel in Yorkton when the affidavit of value that the purchaser filed with Information Services Corporation showed a lower value, and that the assessor erred in failing to attribute a value to the restaurant on the site that was vacant but being renovated. The BOR ordered SAMA to provide a CAP rate using three sales comprising the Yorkton property, and two sales that SAMA had used in developing a limited service primary accommodations CAP rate, leaving the hotel sale out of the calculation. In doing so, because it left only one sale for the full service category, it necessarily required SAMA to combine the full service and limited service groupings. That single CAP rate for both full service and limited service hotels was set at 10.9%. The city appealed to the committee. Its main argument was that the BOR had erred by disregarding the higher purchase price confirmed in the information request form. The committee found: that the evidence presented to the BOR by the assessor was inadequate to verify the sale; that the assessor made an error of law in not verifying the sale price and the BOR was correct in excluding the hotel sale based on that error; and that there was no error in the BOR decision and it was reasonable. The city's proposed grounds of appeal were that: 1) the committee erred in law and jurisdiction by holding that the SAMA board order was not properly before it because the SAMA board order did not appear on the BOR record, when, pursuant to s. 12(3) of The Assessment Management Agency Act, an order of the SAMA board has the effect of law upon publication; 2) the committee erred in law and jurisdiction by failing to find that the BOR erred in excluding the sale of the Yorkton hotel from the calculation of the CAP rate and ordering the calculation and use of a new CAP rate, when: i) there was no evidence on the record on which the BOR could conclude the hotel sale was not a valid or qualified sale; (ii) there was no demonstrated error on the part of the assessor with respect to the inclusion of the hotel sale, including with respect to the assessor's verification of such sale and adjustment of the sale price, and the BOR was required to defer to the professional judgment and discretion of the assessor and uphold the assessment; and (iii) the BOR ignored the evidence from the assessor with respect to its verification of the hotel sale in arriving at its decision to exclude such sale; and 3) the committee erred in law by failing to find that the decision of the BOR resulted in inequity, contrary to s. 165 of The Cities Act.

HELD: The application for leave was denied. The chambers judge held that the Rothman's test applied to s. 33.1 applications with modifications identified in Deer Lodge Hotels v. Saskatoon. The judge assessed the merit of the grounds of appeal and found that none of them possessed sufficient merit and therefore did not consider the test of importance.

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Saskatoon (City) v. Wal-mart Canada Corp., 2015 SKCA 125

Ottenbreit, November 25, 2015 (CA15125)

Municipal Law – Tax Assessment – Leave to Appeal

The City of Saskatoon applied pursuant to s. 33.1 of The Municipal Board Act (MBA) for leave to appeal the decision of the Saskatchewan Municipal Board, Assessment Appeals Committee regarding the disposition of appeals made by the prospective respondents against municipal tax assessments applied to their five big box retail properties in the city. The city assessed the properties for the purpose of determining 2013 taxes under The Cities Act (CA). The assessor used the non-central business district multiple regression analysis rent model to estimate market rent and developed it from 865 rents signed between 2008 and 2010 to estimate the value of retail properties outside the Central Business District (CBD) of Saskatoon as at the base date of January 2011. The prospective respondents appealed the assessment to the Board of Revision (BOR) on the basis that the size thresholds used for the rent model did not reflect market value and were inequitable and it could not be applied to the properties because of the size disparity, and that the assessor should have used rents from previous cycles in the rent model so as to include more rents from big box properties. The BOR confirmed the assessment, finding that the rent model met the requirements of equity and that the assessor had not erred in his selection of time frame. The BOR stated that the property owners' alternative method to adjust for size of tenant space had not established an assessor error. This decision was appealed by prospective respondents to the committee, arguing the same two grounds as well as arguing that the assessor's application of a size break did not reflect market behaviours and violated the equity requirements of s. 165(3) and (5) of the CA. At the committee hearing, it requested further information from the assessor regarding net rents for leases starting in January 2004. The assessor refused to do so without a clear indication of the committee's reasons for the request. The committee overturned the BOR's decision and the assessment. It determined that the BOR made a mistake regarding the issue of equity, particularly with respect to the Market Valuation Standard (MVS). It then engaged in the analysis that it alleged the BOR failed to do and determined, after applying the MVS mandated by s. 164.1 of the CA, that equity was not achieved by the assessment. The committee decided that the rental model did not meet the equity requirements of the CA for a variety of reasons, set aside the 2013 assessed values and remitted the matter back to the assessor for a new assessment. The committee also determined that it had authority pursuant to s. 20(2) of the MBA, ss. 11, 15 and 25 of The Public Inquiries Act, and s. 223(2) of the CA to require the assessor to provide additional information. In its

proposed appeal, the city raised many grounds that fell into the following categories: 1) the jurisdiction of the committee in assessment appeals; 2) the onus on an appellant of establishing error in the assessment; 3) the deference owed to the assessor's selection of methodology; and 4) the requirements of a fair hearing on the basis that the committee had not provided reasons explaining its request for new evidence from the assessor.
HELD: Leave to appeal was granted. Applying the Rothmans test as modified by Deer Lodge v. Saskatoon, the chambers judge found that the first, second and third proposed grounds of appeal possessed sufficient merit. The fourth ground was destined to fail and leave was not granted on it. The proposed grounds were also found to have sufficient importance.

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R. v. Juker, 2015 SKCA 127

Jackson Ottenbreit Ryan-Froslie, October 22, 2015 (CA15127)

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

The Crown appealed the sentence of six months' imprisonment imposed upon the respondent after his conviction of possessing cocaine for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. The Crown had asked for a sentence of 15 months' incarceration. The police had stopped a vehicle in which the respondent had been a passenger in the back seat. The respondent looked nervous, and because he was using his cell phone, the police thought that he was deleting text messages. When he left the vehicle, the officer found a pill bottle on the floor of the vehicle next to where the respondent had been. It contained nine spitball packages of cocaine. The officer arrested the respondent and the two other occupants. Afterward the officer took a number of calls made to the respondent's cell phone in which the callers asked to purchase drugs. The Pre-Sentence Report indicated that the respondent was motivated to commit crimes because of his drug addiction. He continued to offend while on bail. He suffered from a disabling degenerative hereditary condition called peroneal muscular atrophy (Charcot-Marie-Tooth disease). The Crown appealed the sentence because the sentencing judge was reluctant to sentence the respondent to a longer term as the other two occupants of the vehicle, whom he believed were all involved in drug trafficking, had either pled guilty to simple possession or had been fined.
HELD: Leave to appeal was granted and the appeal was allowed. The chambers judge found that the sentencing judge had erred in being

unduly influenced by his concern with the other men in that they were not co-accused and thus were charged and treated differently. The judge noted that the court was in receipt of information at the hearing that was not before the sentencing judge that would lead it not to impose a greater custodial sentence than six months now that the respondent had been released from custody. It imposed an 18-month probationary sentence with conditions intended to assist in the respondent's rehabilitation. The respondent's chronic illness caused him significant pain with hydrocodone and hydromorphone. The authorities decided that they could not provide the respondent with these medications during his incarceration because they were much sought after in jail. Therefore the effect of the custodial sentence had a much great impact upon the respondent than on others without a similar disability.

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R. v. Kvale, 2015 SKPC 60

Gordon, May 11, 2015 (PC15144)

Criminal Law – Driving with a Blood Alcohol Level Exceeding .08 – Approved Screening Device Demand – Forthwith
Criminal Law – Defences – Charter of Rights, Section 10(a)(b)

The accused was charged with driving while over .08 contrary to s. 253(1)(b) of the Criminal Code. The accused was the sole occupant in the vehicle, and the officer noted a smell of beverage alcohol and that he had glossy eyes. He indicated that he had likely had too much to drink when the officer asked him if he had been drinking. The accused was taken to the police vehicle no more than five minutes after the stop and given the ASD demand. He was in the police vehicle about two minutes before the demand was read. The accused was arrested when he failed the ASD. He was given his right to counsel and responded "No, I am not rich". The officer advised the accused that he could give him a list of lawyers and that there was Legal Aid for free. The accused replied "no" and said that he needed a bathroom. He was given the Intoxilyzer demand and the police warning and was taken to the detachment. The accused testified that he had four or five light beer during the evening. He also testified that he was diabetic and that when he was in the back of the police vehicle he really needed to go to the bathroom. The accused argued that: his s. 10(a) Charter rights were breached because he was not advised of the reason for his detention and the ASD demand was not made forthwith; and his s. 10(b) Charter rights were breached because there was no clear and unequivocal waiver of counsel. The accused said that his need to go to the bathroom somehow prevented or hindered him from being able to exercise his

right to counsel and there was nothing done at the police station to reconfirm his rights to counsel.
HELD: The accused was well aware of the reasons for his detention and this occurred immediately after the stop. The evidence did not support the accused's argument that there was no clear and unequivocal waiver given by the accused with respect to his desire to contact a lawyer. The accused being diabetic, nervous, and having to go to the bathroom also did not support the argument that he did not understand his right to contact a lawyer. The officer clearly gave the accused his rights to counsel. The video evidence did not establish that the accused did not understand what was going on. The accused had to be reasonably diligent in indicating his desire to exercise his right to counsel. He did not indicate that he had any interest in contacting a lawyer. His s. 10(b) rights were not breached. No evidence was excluded.

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Nelson v. J.H. Enterprises (1969) Ltd., 2015 SKPC 64

Labach, April 23, 2015 (PC15049)

Torts – Occupiers Liability – Unusual Danger

The plaintiff brought an action against the defendant to recover damages in the amount of $1,095 for the repair of his vehicle in small claims court. The damage occurred when the plaintiff was driving through the defendant's warehouse to pick up some supplies. He alleged that he was met at the door by the defendant's yardman, who instructed the plaintiff to follow him. The yardman got onto a forklift truck and drove away. The plaintiff drove through the warehouse without knowing where the yardman was, and as he was turning through a narrow alley created by pallets of materials and lumber carts, a cart fell onto his truck and caused damage. The yardman testified that he had been on foot and that the plaintiff drove past him. The defendant's insurer denied liability. The plaintiff arranged to have the vehicle repaired at a cost to him of $1,095. He did not go through his insurer because it would have affected his safe driving record. The defendant argued that the plaintiff should have mitigated his damages and used his insurance.
HELD: The court awarded damages to the plaintiff in the amount of $876. The court apportioned liability to the defendant at 80 percent and to the plaintiff at 20 percent. The court held that the plaintiff was an invitee at the defendant's place of business to purchase building materials. The pallets and carts constituted an unusual danger and the defendant knew or should have known of the danger. The court preferred the evidence of the plaintiff and found that the yardman had

not guided the plaintiff through the warehouse as required. However, the plaintiff was at fault for failing to get out of his truck and check if he could drive through the alley. The plaintiff behaved reasonably in not making a claim on his insurance because he would have lost his accident-free status.

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R. v. Kvale (No. 2), 2015 SKPC 131

Gordon, October 20, 2015 (PC15145)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Conviction
Criminal Law – Disclosure
Constitutional Law – Charter of Rights, Section 7

The accused was charged with driving while his blood alcohol content exceeded .08. At trial in May 2015, the defence brought a Charter application alleging that the accused's s. 10(a) and s. 10(b) rights had been violated and thus the Certificate of Analysis should be excluded under s. 24(2). The defence and Crown had agreed at that time that all of the Crown's evidence would be entered on the voir dire with the understanding that all admissible evidence would be evidence on the trial proper. The trial judge found no violations of the Charter, admitted the Certificate and found the accused guilty (see: 2015 SKPC 60). In August 2015, defence counsel filed a Charter application, which had been served on the Crown, in which he applied pursuant to s. 7 for disclosure and production of copies of the various documents related to the designation and certification of the technician who had operated the instrument apparently used to take the breath samples of the accused.
HELD: The application was denied. The judge found that since the defence counsel had represented the accused since the commencement of proceedings and had not made any earlier applications for disclosure, he must have been presumed to have had disclosure. The defence agreed on the procedure at the outset of the voir dire, and as a result, the Crown closed its case then. The ruling was given and all the evidence was applied to the trial proper. It would be unfair to the Crown to allow the application at this stage. Aside from the issue of timing, the judge noted that the defence had not established the appropriate evidentiary basis for requesting disclosure at this stage of the proceeding.

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R. v. McMorris, 2015 SKPC 132

Gordon, October 20, 2015 (PC15146)

Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 10(b)
Criminal Law – Driving with a Blood Alcohol Level Exceeding .08 – Breath Sample – As Soon As Practicable

The accused was charged with driving while his ability to do so was impaired by drug or alcohol and with driving while over .08 contrary to ss. 253(1)(a) and 253(1)(b) of the Criminal Code, respectively. When the officers stopped the accused at 1:10 am his vehicle lurched forward as if it was not in park. The officer indicated that the accused had a strong smell of alcohol on his breath, bloodshot eyes, and a dry mouth. The accused indicated that he had nothing to drink but the three passengers indicated that they had been drinking. Upon further questioning the accused admitted that he had been drinking. The accused was given the ASD demand from memory and then from the card in the police vehicle at 1:12 am. The accused failed the ASD at 1:20 am. He was arrested at 1:21 am and provided with his rights to counsel. When the accused indicated that he did not understand, the officer explained the rights to counsel in his own words. The accused then indicated that he understood and that he did not want to call a lawyer. A call was placed to a specific lawyer for the accused at 2:10 am and another attempt was made at 2:32 am. The officer suggested Legal Aid if they could not get ahold of the specific lawyer, but the accused was adamant that the specific lawyer be called. The observation period was restarted three times when the accused burped. The accused gave samples at 3:49 am and 4:12 am. The accused argued that there was a delay at the scene from the time the demand was made to when the breath samples were taken and therefore the samples were not taken as soon as practicable as required. He argued that his ss. 8 and 9 Charter rights were therefore breached. He also argued that there was a breach of his s. 10(b) Charter rights because he was not given the Prosper warning when he changed his mind and decided to provide breath samples rather than contact a lawyer. The officer did not provide the accused with any information as to what numbers he called or whether he left a message for the lawyer.
HELD: The court found that the officer acted too quickly and failed to take the proper steps to ensure the accused knew what he was giving up. The accused's agreement to proceed with breath samples was tainted by the officer's warning about refusal. There was not a clear and unequivocal waiver. There was, on a balance of probabilities, a breach of the accused's s. 10(b) rights to counsel. Balancing the Grant factors led the court to conclude that the Certificate of Analysis and the observations of impairment that arose as a result of the Charter breach should be excluded from the evidence. The Charter breach was serious. Society has an interest in seeing that individual liberties are protected

and that the police adhere to the spirit and intent of the law. The court did not determine the s. 258(3) argument with respect to whether the breath samples were taken as soon as practicable because that should be determined at the end of the trial.

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R. v. Hanson, 2015 SKPC 133

Gordon, October 28, 2015 (PC15147)

Criminal Law – Defences – Charter of Rights, Section 10(b), Section 24(2)
Criminal Law – Driving with a Blood Alcohol Level Exceeding .08 – Impaired Driving

The accused was charged with driving over .08 and with driving while her ability to do so was impaired by alcohol, contrary to s. 253(1)(b) and 253(1)(a), respectively. The accused was stopped after an officer noticed the vehicle she was driving was wandering from the median to the right lane after leaving a drinking establishment. The accused had glossy eyes and the officer noted the smell of alcohol coming from her breath. She failed the ASD. The accused was arrested for impaired driving and read her rights to counsel. She indicated that she did not want to call a lawyer and the officer told her to let him know if that changed. When they arrived at the detachment the officer asked the accused again if she wanted to contact a lawyer and she said "not at this second". The accused then asked if she could talk to Legal Aid and the officer said she could. The accused responded that she did not know what to do. The accused was told that she could not contact her husband or father-in-law for help in deciding what to do. She testified that she definitely wanted some help. She said she just threw up her hands and gave up. She said she never had access to a phone book, list or phone. She argued that she was not given a reasonable opportunity to call her father-in-law to get the name of a lawyer or some advice as to what to do. She said she did not give an unequivocal response of not wanting to call a lawyer.
HELD: The court held that the accused's s. 10(b) Charter rights were breached. The accused never stated unequivocally that she did not want to contact counsel. The court also found that the officer was aware that the accused had not unequivocally given up her right to contact a lawyer. Further, the court concluded that any reasonable person would know why the accused wanted to make the call to her husband or father-in-law. The implementational duty required for the exercise of the right to counsel was not met. The court analyzed the Grant factors as follows: the breach was serious; the impact of the breach on the accused would be serious if the evidence was admitted

because she would be convicted; and Canadian society supports accused people being able to obtain legal advice at the early stage of a situation. The Certificate of Analysis and the results of the breath tests were excluded.

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Cowessess Indian Band No. 73 v. Avramenko, 2015 SKPC 151

Green, November 16, 2015 (PC15142)

Contracts – Breach

The plaintiff claimed against the defendant for: an overpayment in the amount of $2,500 for work not done by him in cleaning up some of the plaintiff's farmland; cost of spray in the amount of $2,850 purchased by the plaintiff and given to the defendant but not used by the defendant for spraying the plaintiff's land; and costs arising from the action. The defendant argued that the action was barred by time under The Limitations Act and that he had done the work under the two contracts. At the trial, the defendant accepted that the Provincial Court had jurisdiction to try the action despite the fact he was an undischarged bankrupt and that the action was not stayed under the Bankruptcy Act. The plaintiff called three witnesses. One was its land leasing coordinator and the other two were farmers who had leased portions of the same land, which were subject to the contracts with the defendant. The coordinator testified as to the terms of the two contracts that had been entered into in March and July 2012 respectively. She had not insisted on strict compliance with the completion of the work because she believed that the defendant would do it. In July 2012, an issue arose as to the whereabouts of the spray that she had purchased for the defendant's use. On August 10, 2012, the RCMP told her that the defendant had been charged with fraud with respect to the spray. The plaintiff's counsel faxed the claim on August 1, 2014, to the court. The two farmers testified that they knew that the lands in question had not been harrowed or sprayed as per the two contracts. The defendant called two former employees who testified that they had harrowed and sprayed the land but could not state which fields had been harrowed or sprayed.
HELD: The plaintiff was granted judgment in the amounts claimed. It found that the plaintiff had commenced the action within the two-year limit prescribed by s. 5 of The Limitations Act because pursuant to s. 6, the evidence showed that the plaintiff's land coordinator discovered that the claim against the defendant for harrowing and spraying on August 10, 2012, when she was informed by the RCMP of the charge against the defendant. The court preferred the evidence of the plaintiff's witnesses regarding whether the work was done. The

plaintiff was awarded $577 in costs but the claim for its counsel's personal expenses to attend at the trial was disallowed under s. 30 of The Small Claims Act, 1997.

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R. v. Heilman, 2015 SKPC 153

Morgan, November 12, 2015 (PC15140)

Criminal Law – Notice of Charter Breach – Sufficiency
Criminal Law – Defences – Charter of Rights

The accused was charged with driving while over .08 and with driving while his ability to do so was impaired by alcohol. The Crown applied to strike the accused's Charter application, arguing that it lacked the factual background necessary to discern what the Charter issues were and also that it failed to give any type of foundation to justify the court proceeding with a voir dire. The accused gave written notices of the Charter application alleging breaches of ss. 7, 8, 9 and 10(b) on January 12, 2015.
HELD: The Sloboda case concluded that the Crown needs to know what the alleged basis for the notice is so that the appropriate evidence can be called to challenge it. The notice also has to show there is a viable Charter issue warranting a voir dire. The court held that the notice was essentially the same as in the Sloboda decision and was insufficient. There were no facts to support the alleged breach. The court does not receive a copy of the disclosure prior to trial and has to decide whether a voir dire is warranted based only on the Charter notice. Also, the Crown should not have to guess what portion of the disclosure offends the Charter. The accused was ordered to file a notice in compliance with the appropriate practice directive by December 31, 2015.

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Schmidt v. Sparks, 2015 SKPC 159

Green, November 26, 2015 (PC15149)

Small Claims – Liability in Automobile Accident
Traffic Safety Act – Yield Right of Way, Section 219(4)

The plaintiff and defendant collided leaving businesses on the opposite sides of the street. The plaintiff claimed that the accident was caused by the defendant's negligence. Each party argued that it was them that

reached the centre of the street first and stopped, waiting to turn.
HELD: The trial judge was unable to conclude who failed to yield. Section 219(4) of The Traffic Safety Act requires drivers to yield the right of way to vehicles on a highway before entering a highway. The defendant's version was as believable as the plaintiff's and therefore the action was dismissed.

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Sperling v. Duff, 2015 SKPC 160

Green, November 26, 2015 (PC15150)

Torts – Negligence

The plaintiff brought an action in negligence against the defendant. The plaintiff had been driving her vehicle on the highway in foggy conditions. From some distance away she observed a snowplow on the side of the road driving in the same direction. She was about to pass it when it pulled into the driving lane and she collided with it. The defendant denied that he had pulled out in front of the plaintiff. He testified that he was already in the driving lane with his emergency lights flashing. He had slowed to allow some vehicles to pass him before he moved forward into even denser fog.
HELD: The action was dismissed. The court found that the defendant operated his snowplow on the day in question in a reasonable manner without negligence.

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Kjargaard Heating & Cooling Ltd. v. Chakraborty, 2015 SKPC 164

Meekma, November 25, 2015 (PC15151)

Landlord and Tenant – Commercial Lease – Breach – Damages

The plaintiff landlord sued for rent for the balance of a lease remaining after the defendant vacated. The defendant counterclaimed for damages for breach of quiet enjoyment and constructive eviction as well as aggravated and punitive damages. The parties entered into a lease for a term beginning February 1, 2014, with an end date not yet specified but for up to one year upon the condition that the tenant performed as provided in the lease. The lease included a term regarding signage, which stated that during the last 90 days of the term, the landlord would have the right to post on the premises either or both a "for rent" and "for sale" sign. The tenant was to permit

prospective tenants or buyers to enter and examine the premises during this period. The termination clause provided that the landlord would provide the tenant with 90 days' notice to terminate if the landlord decided to proceed with plans to develop the property. The defendant and her husband, who were recent immigrants from India, made improvements to the space that cost them $1,594 before it was opened in February 2014 as a business selling import items and offering dance lessons to the community. The business was to provide the defendant with employment and it was considered to be quite a risk because in their culture a woman was not considered competent to operate a business. In March 2015, the plaintiff advised them that he wanted to sell the building and asked if they wanted to buy it. They were unable to obtain financing. In April 2014, the plaintiff listed the building for sale. He testified that he told his real estate agent to discuss the sign with the tenants and let them have a say, and indicated that the lease required their permission. The tenant and her husband testified that they were shocked to learn of the sale from the plaintiff's agent when he visited the premises. He advised them that as they were paying a very low rent, their lease was not strong and a new owner might ask them move out the next day and they would have no option. He told them that the building belonged to the plaintiff and they had no say in the posting of the sign. He also told the defendant and her husband that they would have to let him in during business hours to show the property. A few days later the agent returned and asked the defendant if she would let him put a 'Business Relocating' sign up as it would be for her own good. The defendant believed that she had no choice and agreed to the agent putting that notice across the top of the "For Sale" sign. The agent then showed the premises, disrupting the defendant's business. Many people in her community saw the sign and believed that her business had failed. As the defendant and her husband understood that they had to move out, they hired their own real estate agent. He testified that they told him that their building was for sale and that they were being evicted. The plaintiff never spoke to the plaintiffs, although he went to the rented premises daily to use the upstairs of the building. The defendant and her husband made a number of efforts to contact him but were unable to reach him. He was unaware that the defendant was moving out until he received her notice at the end of May 2014, effective June 30, 2014. The plaintiff immediately asserted a claim for rent to the end of the year. The building was sold in September 2014.

HELD: The court awarded judgment for the defendant and dismissed the plaintiff's claim. The court preferred the evidence of the defendant and her husband to that of the plaintiff. It was in the plaintiff's best interest that any prospective buyer not be deterred by a low rental agreement and found that he had his agent deal with the tenant to avoid her. The court found that the plaintiff was complicit in the actions of his agent. The placing of the sign, indicating that the defendant was re-locating, as well as the disruptive showing of the

premises during business hours, interfered with the defendant's enjoyment of her business for the usual purposes. The actions of the agent breached the implied covenant for quiet enjoyment, but they also breached the specific terms of the contract that provided for signage and showing of the premises only during the final three months of the lease. The parties contemplated a one-year lease that was supported by the fact that the plaintiff sued for the balance of one year's rent. The breach of quiet enjoyment constituted constructive eviction because the breach was intentional, which resulted in the termination of the defendant's obligation to pay rent and from which flowed her entitlement to damages for consequential loss. In this case, the defendant was awarded reimbursement for rent paid from April to June in the amount of $1,725 and for the repairs and renovations to the premises in the amount of $1,594. The court also awarded punitive damages to the defendant in the amount of $1,500 because the agent's conduct was high-handed, deliberate and bordered on fraudulent. The defendant was awarded aggravated damages in the amount of $1,000 for the mental suffering caused by the posting of both signs in contravention of the terms of the lease.

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R. v. Pelletier, 2015 SKPC 165

Martinez, September 22, 2015 (PC15152)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08

The accused was charged with impaired driving contrary to s. 253(1)(a) of the Criminal Code and with driving while her blood alcohol content exceeded .08 contrary to s. 253(1)(b) of the Code. The accused argued that the charges against her should be dismissed because: 1) the Crown had not proven beyond a reasonable doubt that she was the driver of the vehicle; 2) samples of her breath were not taken as soon as practicable; 3) the Crown had not proven that her blood alcohol content exceeded .08 at the time of the accident; and 4) the Crown had not proven that her ability to drive was impaired by alcohol. The charges arose after the accused and her husband were in a vehicle collision with a moose. Other motorists stopped to help the accused and her husband shortly after 6:00 pm. They testified that it was the accused who left the driver's seat. RCMP officers arrived at the scene approximately 15 minutes afterward, according to the witnesses. One officer testified that he put the accused in the police cruiser until an ambulance arrived and he could smell alcohol on her breath, that her speech was slurred and that her eyes were glossy and red. She said that she had had a lot to drink. She also mentioned that she had had a

couple of swigs after the accident. The police found a bottle of liqueur on the floor of the vehicle and a cup containing some of it beside the driver's seat. The breath samples were taken after the two-hour period. The Crown called as an expert witness a pharmacist who gave evidence regarding the calculation and analysis of blood alcohol concentration in the body and the physiology of alcohol with respect to the absorption and elimination of alcohol. In her opinion, anyone who had 158 milligrams of alcohol per 100 millilitres of blood could not operate a vehicle safely.
HELD: The accused was found guilty of both charges. The court dealt with the arguments of the accused, finding with respect to each: 1) the Crown had proven beyond a reasonable doubt that the accused was the driver; 2) that it did not have to decide whether the breath samples were taken as soon as practicable as the Crown did not rely upon the statutory presumption under s. 258(1)(c) of the Code because the samples were not taken within two hours after the alleged offence; 3) that the Crown had proven that the concentration of alcohol in the accused's blood exceeded the legal limit when she drove. The expert witness's evidence, based upon the second breath sample taken two hours and 47 minutes after the time of driving, was that the accused's blood alcohol concentration would have been 10 to 20 milligrams higher at the time of the offence based upon the rate of elimination. The second breath sample was taken at 8:47 pm and the result was 130 milligrams of alcohol. The accused had not called evidence regarding her post-offence alcohol consumption so that the court could not consider whether it raised a reasonable doubt regarding the amount of alcohol in in her blood at the time of the collision; and 4) the officer's observations would only support a conclusion of slight impairment but the court was convinced that the accused was impaired because of the expert witness's opinion that everyone is impaired when their blood alcohol concentration is 158 milligrams in 100 millilitres of blood.

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R. v. E. (K.), 2015 SKQB 342

Smith, November 3, 2015 (QB15356)

Evidence – Documentary Evidence – Privilege – Solicitor-Client

The RCMP seized numerous files in November 2014 from a law firm pursuant to a warrant based on s. 487 of the Criminal Code. They had done so after investigating a complaint received in 2013 regarding a lawyer who worked in the law firm and who was allegedly operating a scheme to defraud the Government of Canada by submitting false applications under the Common Experience Payment Program (CEP), a component of the Indian Residential Schools Settlement Agreement.

The claims for payment were allegedly submitted to the CEP relating to a school that had burned down and thus there were no attendance records. These documents were required as part of the process. The RCMP created an information to obtain a search warrant (ITO) under s. 487 of the Code, which set out the information acquired through the investigation, identifying the things it anticipated would afford evidence of the alleged offences committed contrary to s. 380(1)(a) to defraud the Government. The things identified were: all paper and electronic records for the Indian Residential School clients named in an attached list unless otherwise indicated. The Crown was aware of the issue of protecting solicitor-client privilege and appointed a lawyer to act as referee. She was asked to be present at the time of the search, review the seized files and identify all parties whose privilege might have been affected by the search and seizure. The files were taken into custody, sealed and stored in the sheriff's office. Because of the volume of files and individuals identified by the RCMP in the ITO material, eighty people were interviewed and some made statements that were referred to in the ITO. Counsel for all of the parties agreed that the 80 files should be reviewed to determine whether the Crown had made out a case to lift privilege and make the files available to the RCMP and the Crown prosecutor for the purposes of continuing the investigation. HELD: The court requested the referees to first review the 80 files to identify any portions that they believed were clearly not involved with the alleged crimes, but were nonetheless solicitor-client communication. The judge would then review them and if in agreement, direct those portions of the file be returned to the client as the person who holds the solicitor-client privilege.

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R. v. Gunner Industires Ltd., 2015 SKQB 349

Kalmakoff, November 4, 2015 (QB15341)

Criminal Law – Excise Tax – Wilfully Evading
Criminal Law – Income Tax – Wilfully Evading

The appellants consisted of a corporation, GIL, and two individuals, K. and M., who were convicted of offences occurring between 1992 and 1998 under the Income Tax Act (ITA) and the Excise Tax Act (ETA). Specifically, GIL was convicted of wilfully evading the payment of $24,492.21 in income tax contrary to s. 239(1)(d) of the ITA by failing to report $147,421.13 in income, and with wilfully evading payment of tax under the ETA in the amount of $84,261.41 contrary to ss. 327(1)(c). K. was convicted of wilfully evading the payment of $42,893.79 in income tax by failing to report $162,502.54 in income contrary to s. 239(1)(d) of the ITA. M. was convicted of one count of wilfully evading compliance

with the ITA by reporting her marital status as single on her tax returns and claiming equivalent spouse credits contrary to s. 239(1)(d) of the ITA. All three parties appealed their convictions. K. was the principal shareholder of GIL, holding 90 percent of the company's shares. M. held the remaining 10 percent of the shares and did not have voting rights. GIL was in the construction business and received cash for various work performed. The cash transactions were not reported to CRA. M. and K. lived together since the mid-1970s and had four children together but never married. The trial judge concluded that M. ad K. were living as common law spouses and that M. wilfully misrepresented her status. The issues on appeal were: 1) did the trial judge err in ruling that the Crown met its disclosure obligations, or in the procedure used to deal with the accused's applications regarding disclosure; 2) did the trial judge err in determining that the evidence gathered by CRA was not obtained in a manner that violated the rights of the accused under ss. 7 and 8 of the Charter. The trial judge concluded that the information was obtained while CRA was still performing the audit and not the investigation; 3) was the trial judge's decision unreasonable and not supported by the evidence; and 4) did the trial judge err in determining that M. wilfully misrepresented her marital status in order to evade or attempt to evade compliance with the ITA or payment of taxes. Only the last issue involved M.
HELD: The appeals were dismissed. The issues were dealt with as follows: 1) the disclosure items were: the Tax Operations manual (TOM), the Audit Information Management System manual (AIMS), the T-133A forms, the time sheets, and the material relating to the informant leads. The TOM was an operational manual, a policy guideline, used by CRA auditors and investigators. The AIMS was a guide to policies and procedures relating to use and input of data on the AIMS system. The TOM and AIMS were not provided to the appellant prior to the voir dire; the appellants obtained them through an Access to Information Act application. The manuals became first party disclosure records under the deemed indivisibility principles. However, the Crown did not breach the disclosure duty because the manuals were not requested until the trial was underway and it was not clear at that time that they would be first party records. The McNeil decision was not released until after the trial was underway. The T-133A was clearly a relevant document subject to first party disclosure. The court determined that the appellants had ample opportunity to assess the significance of the T-133A form given the length of time the matter spanned, even though it was only disclosed a short time before the voir dire began. The destruction of the time sheets did not impair the appellants' right to make full answer and defence. The appellants did not pursue the necessary Leipert procedure to establish that the disclosure of the informant's identity in the informant's leads was necessary to demonstrate the innocence of the appellants; 2) the appeal court found that the trial judge's conclusions with respect to the seven factors in Jarvis were supported by the evidence; 3) the trial judge's

reasons were found to demonstrate that he carefully reviewed the relevant evidence, and made very clear findings of fact and credibility; and 4) the trial judge rejected M.'s evidence and concluded that the evidence that M. and K. were spouses was "overwhelming and indisputable". The trial judge applied the correct legal test.

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Babich v. Babich, 2015 SKQB 352

Megaw, November 5, 2015 (QB15344)

Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Interim – Variation
Family Law – Divorce
Family Law – Evidence – Affidavit

The parties were in a high-conflict situation and brought five interim applications with various requests. They had three children, the youngest being born five days before a previous application. At the initial application the respondent mother was living in the family home and the petitioner was living at the family cottage and expected to move into the new home when it was ready. The petitioner did move into the home, which was a few blocks from the family home. The youngest child was almost a year old and the petitioner was having increased parenting time with him. The parties agreed to have a custody and access report prepared. The issues were: 1) divorce; 2) registration of the middle child in Montessori school. The respondent opposed the child attending the school because he was not yet potty trained. The petitioner advised that the school was okay with the child not being potty trained; 3) to take the child to a speech therapist. The parties ended up resolving the issue before chambers; 4) varying the existing parenting arrangements. There was an interim order from January 2015 made shortly after the third child was born. The respondent had since hired a full-time nanny. The respondent did not necessarily oppose the petitioner spending more time with the youngest child, but she wanted to be the one to control the developing of that time. The petitioner wanted the child Wednesday afternoon to evening and Sunday from 11:00 am to 4:00 pm. He also wanted increased time with the two older children so that he could get them to their necessary activities and so that they could continue to develop their bond with him; 5) arrears of child and spousal support; 6) the respondent's request to return the 2005 vehicle. The vehicle had been at the parties' farm and was damaged beyond repair without insurance. The petitioner then towed the vehicle to the respondent's home; 7) objections to one of the petitioner's affidavits; and 8) costs.
HELD: The issues were decided as follows: 1) the divorce was granted

because the parties had been separated in excess of a year and no satisfactory reasons were argued for not allowing it; 2) the court held that it would be appropriate for the child to be enrolled in the Montessori school. The cost of the program was ordered to be paid by the petitioner. The parties were to agree on the child's transportation to the school and if they could not agree the petitioner would transport him; 3) the court kept the issue under its jurisdiction so that either party could bring the matter back upon two days' notice; 4) the pre-trial conference was months away and the court did not find it appropriate to have the matter of increased parenting time proceed to a pre-trial conference, as a stand-alone issue. The court found that it was in the best interests of all the children to have further time with the petitioner as he requested. The court also dealt with transportation for the hockey and the middle child's skating; 5) counsel agreed that the issue of arrears due under the support provisions would await further discussion at the pre-trial conference with either party having leave to bring the matter back on two days' notice; 6) the matter was adjourned sine die on two days' notice; 7) the complaints were not generally well-founded; and 8) the petitioner was entitled to costs of $1,000 in any event of the cause. The respondent was entitled to costs of $200 in any event of the cause. The court declined to send the matter to the high-conflict mediation program.

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Flegel v. Pike, 2015 SKQB 355

Gunn, November 6, 2015 (QB15359)

Wills and Estates – Estate Administration – Executor Removal
Power of Attorney – Accounting

The applicants sought relief against the respondent including her removal as executrix for the estate of M.C. The three applicants and the respondent were M.C.'s children. In 1997 M.C. named the respondent and one of the applicants as her power of attorney. There was little evidence regarding M.C.'s capacity after she executed the power of attorney and to the point of her death. The applicant power of attorney indicated that she did not have access to M.C.'s assets and did not act in concert with the respondent. The respondent took money from M.C. to assist her children in building houses, and she indicated the money had been repaid but was unable to produce any documentation. The respondent took over $58,000 from M.C.'s accounts, but she asserted that they were repaid in full.
HELD: All of the parties treated M.C.'s assets as their own prior to her death on the basis that they were aware of their status as a beneficiary. The application to remove the respondent as executrix was found to be

premature until accounting was provided. Therefore the court ordered that the respondent provide an accounting respecting her actions under M.C.'s power of attorney from the date of her appointment until M.C.'s death. The accounting was to include details and supporting documents in relation to any monies from M.C.'s accounts used for any of the loans earlier referenced. The remaining applications were adjourned sine die with seven days' notice after receiving the accounting.

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Olson v. Boardwalk General Partnership, 2015 SKQB 357

Smith, November 9, 2015 (QB15360)

Landlord and Tenant – Residential Tenancies – Appeal
Residential Tenancies Act, Section 19(2) and 19(6) – Appeal
Statutes – Interpretation – Residential Tenancies Act, 2006, Section 19(2), Section 19(6)

The appellant sought to overturn the hearing officer's denial of his claim for payment of $1,284 from the respondent landlord pursuant to s. 70 of The Residential Tenancies Act, 2006. The appellant gave written notice of his intention to vacate on January 6, 2015, and vacated on February 28, 2015. The appellant argued that the landlord did not comply with his obligation under s. 19(2) because a copy of the lease was not provided to him within 20 days, but was provided the day of the hearing. The landlord argued that the appellant suffered no prejudice as a result. The appellant argued that the hearing officer's analysis was not in accordance with ss. 19(5) and 19(6).
HELD: The court found that the saving provision of s. 19(6) of the Act was not engaged because the appellant was not provided with any sort of a copy of the lease. There was a complete failure to comply with s. 19(2). The appeal court concluded that the issue of prejudice is only relevant if an incomplete copy of the lease is provided. A failure to provide a copy of the lease cannot be saved by s. 19(6). Non-compliance by the landlord was found to be serious. The hearing officer erred at law and the decision was set aside. The landlord was ordered to reimburse the appellant within 15 days.

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Lapchuk v. Saskatchewan (Department of Highways), 2015 SKQB 358

Ball, November 10, 2015 (QB15346)

Civil Procedure – Application to Strike Statement of Claim
Civil Procedure – Jurisdiction of the Court
Civil Procedure – Queen's Bench Rule 1-6, Rule 3-14

The plaintiff brought an action against his employer, two of his managers, two co-workers, his union, and his former union relations officer. The employer, managers and co-workers (collectively "government defendants") applied for an order pursuant to rule 3-14 of The Queen's Bench Rules dismissing the plaintiff's statement of claim except for the detinue, conversion and trespass to property claims, arguing that the court did not have jurisdiction to hear and determine the claim. The union also applied pursuant to rule 3-14 to strike out the whole of the plaintiff's statement of claim, arguing that the court had no jurisdiction to hear the matter. The plaintiff and the two co-workers were at a service station when there was an altercation between an employee of the service station and the plaintiff. The plaintiff said he suffered physical and psychological injuries as a result and that the employees failed to protect him and conspired to create confrontation and knew or ought to have known that the plaintiff would be injured. He claimed that the government should have provided him with self-defence training. He requested and was denied the training upon his return to work. The plaintiff also asserted that special ergonomic equipment purchased for him by the employer was removed from his office when he did not move offices as required by the employer. The employee was terminated from his employment. He also claimed that the managers and co-workers were negligent in not helping serve subpoenas for the assault trial of the person that assaulted the plaintiff at the service station. The plaintiff also asserted that the union defendants failed to represent him adequately, failed to protect his employment rights, failed to represent him against abuses committed by his employer with respect to WCB, and aided and abetted the other defendants in their actions. The union defendants had not filed their statement of defence, whereas, the government defendants had. The plaintiff had also made claims in other forums, including the Worker's Compensation Board, Human Rights, and Occupational Health and Safety.

HELD: Because the union defendants had not filed their statement of defence, they were explicitly entitled to object to the jurisdiction of the court pursuant to rule 3-14(1). The government defendants had filed their statement of defence and therefore asked the court to hear their application by applying the curative provisions of rule 1-6(4)(d). The court waived the non-compliance because it was in the overall interests of justice to hear the application by the government defendants on its merits. The court found that the plaintiff's case was of marginal assistance with respect to assisting in defining the issues to be tried. The essential character of most of the plaintiff's dispute with the government defendants related to the interpretation and application of the collective agreement, which meant that they fell within the exclusive jurisdiction of an arbitrator acting under the collective

agreement. For the remaining issues between the plaintiff and the government defendants, the question of forum was not between arbitration and the court, but between arbitration and adjudicatory forums available under Occupation Health and Safety provisions and/or the Human Rights Code. The plaintiff's suspension grievance, termination grievance, OHS complaint and Human Rights Code complaint all raised the same issues as those raised in his statement of claim. The court does not have concurrent original jurisdiction. The essential character of the plaintiff's dispute with the union defendants was that they failed to fairly and adequately represent him. The complaints raised issues of fair representation. The matters were within the sole and exclusive jurisdiction of the Saskatchewan Labour Relations Board (SLRB). The plaintiff's claim that all of the defendants conspired did nothing to alter the essential character of his disputes with any of the defendants. The SLRB will assess the conduct. The plaintiff's claims or detinue, conversion and trespass to property were not dismissed because there was no application to strike them.

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Ross v. Ross, 2015 SKQB 359

Barrington-Foote, November 10, 2015 (QB15347)

Family Law – Child Support – Variation

The parties divorced on March 19, 2015, and after a pre-trial conference held the next day, they signed minutes of settlement, which apparently settled all outstanding issues between them. The applicant respondent agreed to pay child support of $1,808 per month for the two children of the marriage pursuant to s. 3 of the Guidelines, and a Queen's Bench judge granted a consent child support judgment accordingly. At that time, the respondent knew that he was not the biological parent of one of the children and knew the biological father's identity. In June 2015, he successfully applied to add the biological father as a respondent and to have him submit to a DNA test. The test confirmed that the added party was the biological father. The respondent then applied to have the added respondent provide financial disclosure required by the Guidelines and that the child support payable by the applicant be varied so that the added respondent pay child support to the petitioner in accordance with the Guidelines. The petitioner had not sought support from the child's biological father.
HELD: The court denied the application. It found that the only issue was whether financial disclosure should be ordered and it declined to do so. The applicant knew that s. 5 of the Divorce Act was in play prior to the pre-trial conference. If the parties had not settled child support and the court had been obliged to decide that issue, it would have

required satisfactory evidence related to the biological father's legal duty to support his child regardless of the fact that a child support order could not be made against him pursuant to s. 15.1 of the Divorce Act as he was never a spouse within the meaning of the Act. Therefore, the court would not order disclosure as the applicant was not entitled to the other relief sought. The court that granted the consent judgment was not called upon to decide the matter because of the agreement between the parties. It was incorporated into the judgment and could not be varied unless the condition specified in s. 17(4) of the Act had been met. There was no evidence of a material change in the circumstances to justify an application to vary as the applicant knew the truth of the child's paternity before the pre-trial conference.

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Smith v. Smith, 2015 SKQB 360

Goebel, November 10, 2015 (QB15361)

Family Law – Division of Family Property – Interim Distribution
Family Law – Exclusive Possession of Family Home – Interim

The parties married in 2010 and separated in 2015 but continued to reside together. The petitioner sought unequal division of property and by interim motion requested exclusive possession of the family home. The respondent opposed the application for interim exclusive possession of the home because he did not have the financial means to set up alternate accommodation. The respondent was a 60-year-old self-employed consultant in the oil and gas industry. He indicated that his income dropped significantly in the past months and that he had health issues limiting him from alternate employment. The petitioner was employed full-time and earned over $69,000 per year and had no significant health issues. The respondent sought an interim distribution of $75,000 if the court ordered him to vacate the home. The home was not encumbered by a mortgage, and the respondent indicated it was worth $400,000 while the petitioner indicated it was worth $300,000. There were no children in the care of either party. There was tension in the house but both parties acknowledged that they did not meet the definition of "warring spouses".
HELD: The court reviewed the factors set out in s. 7 of The Family Property Act: there were no children; no information on alternative accommodation was provided; and the financial position of the respondent was controverted. The parties were equally entitled to remain in the family home in the interim. The petitioner's application was dismissed.

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HCI Ventures Ltd. v. S.O.L. Acres, 2015 SKQB 363

Megaw, November 12, 2015 (QB15351)

Civil Procedure – Pleadings – Third Party Claim – Application to Strike
Civil Procedure – Queen's Bench Rule 3-31(b)
Civil Procedure – Parties – Third Party Claim

The plaintiff applied to strike the third party claim from an action that it had commenced against the defendant corporation and the individual defendants, guarantors of the corporation's performance under an agreement between the plaintiff and the corporation, which sought to recover money in the amount of $455,000 on a farm lease agreement. The plaintiff alleged that the defendant breached the terms of their agreement by failing to pay the rent and taxes. The defendants' defence was that equipment manufactured by the third party, SeedMaster, was not reasonably fit for purpose for which it was intended to be used. The defendants were unable to seed the land and harvest a crop due to the failure of the equipment, and the defendants were unable to pay the amounts due under the agreement. The defendants commenced third party proceedings against SeedMaster. The defendants argued that the third party claim was causally connected to the allegations in the statement of claim pursuant to Queen's Bench rule 3-31(b).
HELD: The application was granted. The court found the defendants' contention that if the equipment had worked properly, they would have had the money from the crop and have had been able to pay the amount due to the plaintiff under the agreement was not proof of a causal connection as required by the rule. The court held that the third party claim was a completely separate action not connected to the plaintiff's claim and was struck.

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G. (M.J.) v. B. (P.R.), 2015 SKQB 365

Turcotte, November 13, 2015 (QB15362)

Family Law – Custody and Access – Children's Law Act
Family Law – Custody and Access – Jurisdiction – Habitually Resident

The petitioner mother applied for a declaration that the Court of Queen's Bench for Saskatchewan had jurisdiction respecting the custody of her child with the respondent. The respondent argued that even if Saskatchewan had jurisdiction it should be declined in favour of the court in Ontario. The petitioner removed the child from Ontario in September 2015 without the respondent's consent. He obtained an

order without notice providing for police assistance to locate the child and deliver her to the respondent. The petitioner's family lived primarily in Saskatchewan and the respondent had family in Saskatchewan and Ontario but his other child lived in Ontario. He had regular access with his son and he was seeking to be his primary caregiver. The child was born with clubfeet and her specialist and pediatrician were both in Ontario. The petitioner argued that she made numerous trips back to Saskatchewan, totaling four to five months per year with the child, and therefore the ties to her family were maintained. The respondent agreed that the parties planned to return to Saskatchewan once he obtained custody of his son. The issues were: 1) whether the court had jurisdiction to determine the custody of the child; and 2) even if the court had jurisdiction, should the court decline that jurisdiction in the circumstances.
HELD: The issues were determined as follows: 1) the parties were never married and, thus, jurisdiction in Saskatchewan was determined according to ss. 14 to 16 of The Children's Law Act. The child's ordinary residence was Ontario for her whole life. The court found that s. 15(2)(a) applied because the child last resided in Ontario with both parents and that was her habitual residence. The respondent did not consent or acquiesce to the child's removal from Ontario and there was no undue delay on his part to bring the proceedings in Ontario to seek the child's return. The petitioner's attempts to make the child's habitual residence in Saskatchewan did not change the determination. Neither the petitioner's frequent visits to Saskatchewan nor that she only intended to move to Ontario temporarily assisted her. The child's most substantial connection was with Ontario; and 2) the court indicated that even if the conclusion regarding jurisdiction was incorrect, the jurisdiction would have been declined in favour of Ontario pursuant to s. 16. The court reviewed factors from the Pichler case: the parties had a settled intention in August 2012 to move to Ontario; a significant number of potential witnesses were in Ontario; there were no contracts between the parties; court proceedings were ongoing in Ontario; the governing principle in both provinces was the best interests of the child; geographical factors did not favour either province; other than the availability of witnesses, there was limited juridical advantage to either jurisdiction; the balance of convenience was with Ontario because all matters between the parties, including property division, could be dealt with there; legislation existed in both provinces to enforce the other's orders; and the petitioner wrongfully removed the child from Ontario. The court concluded that neither of the exceptions in s. 17(2) existed to prevent the court from enforcing the Ontario order.

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Kessler Estate v. Kessler, 2015 SKQB 369

Schwann, November 18, 2015 (QB15363)

Power of Attorney – Fiduciary Duty
Trusts – Constructive Trust
Trusts – Resulting Trust
Wills and Estates

The deceased granted a power of attorney over his property to his daughter, one of the defendants, in 1993. He passed away penniless in 2011. The plaintiff was the executor of the estate and the attorney's brother. The plaintiff asserted that the attorney wrongfully and habitually breached the fiduciary duty she owed to the deceased as his power of attorney by misappropriating his funds for her own use. The deceased suffered a stroke in 1992 and was forced to retire, leaving only a modest pension, CPP, and OAS as his income sources. The deceased moved in with the attorney and her common law spouse, the other defendant, in 2004. The attorney charged the deceased rent. He moved into a nursing home in 2009 and was certified incompetent in 2010. The Public Guardian and Trustee (PGT) took over as the deceased's property guardian at that time. The plaintiff had not seen the deceased for ten years until his visit in 2004 when he was living with the defendants. The plaintiff never visited again before the deceased passed away. The only asset the deceased had was one bank account. In February 2004 the deceased had $146,989 in his bank account. In 2010 when the PGT took over the balance was $509.45 and he owed the care home $16,945.75. The defendants gave evidence in the examination for discovery that: the deceased did not use tanning services but these were gifts or reimbursement; the deceased went out with them frequently; purchases were made with the deceased's consent; the Jeep purchase for $15,981 was repayment of accumulated unpaid rent; the $30,000 vehicle purchase was for reimbursement of prior out-of-pocket expenses; etc. The attorney did admit that she borrowed from the deceased when she was dealing with depression and anxiety and had no income. She also indicated that she paid $18,000 from her own funds to reimburse the care home. The issues were: 1) did the attorney owe a fiduciary duty to the deceased as his power of attorney; 2) did the attorney breach her fiduciary duty? Did the deceased make valid inter vivos gifts to the attorney and/or his granddaughters; 3) was the attorney's common law spouse jointly liable; and 4) if a breach of fiduciary duty was demonstrated by the evidence, what remedy, if any, should be granted?
HELD: The issues were determined as follows: 1) a power of attorney is, by its very nature, a relationship imbued with fiduciary obligations and duties to the grantor; 2) the court concluded that the attorney did not rebut the presumption of a resulting trust because: the magnitude of the transactions; the nature of the transactions; the lack of any form of documentation evidencing the deceased's intention to gift his

property; and insufficient evidence to rebut the presumption. The pattern of excess withdrawals began in 2005. The court did not accept child care fees, parking, or gas to be connected with the attorney's duties as power of attorney. Legal fees and a one-time grocery purchase were legitimate and reasonable. The court found the attorney's monthly charge while the deceased lived with her to be reasonable as were the birthday and Christmas gifts. The court determined that the attorney should be credited with a total of $246,043. The attorney argued that the court should hold her to a standard of care commensurate with her limited experience and expertise and that any shortcoming was merely technical in nature. The court did not find any merit to that argument because a standard of care commensurate with the attorney's education and expertise did not excuse obvious self-dealing or profiteering; 3) there was no evidence that the common law spouse knowingly assisted in dishonest and fraudulent design perpetrated by the attorney; and 4) a constructive trust was appropriate and was imposed over the deceased's assets that were misapplied, misappropriated, or converted by the attorney. The attorney was credited with $246,043 and the total of the deceased's assets for the period she was attorney should have been $328,917, which left damages of $82,874. The court declared that the judgment arose by reason of the attorney having committed a fraudulent act while acting in a fiduciary capacity.

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Shivak v. Shivak Estate, 2015 SKQB 371

Brown, November 19, 2015 (QB15365)

Real Property – Sale of Land – Oral Contract – Part Performance

The plaintiff brought an action in her capacity as executrix of the estate of her late husband, Stanley, against the defendant, the administratrix of the estate of Frank Shivak, Stanley's father. Frank owned four parcels of farmland and two mineral titles to which there were six separate titles. Parcels 5 and 6 were the mineral titles from parcels 1 and 2. Frank transferred titles 1, 2 and 3 in April 1966 to Stanley, reserving the mineral titles from 1 and 2 in his name. Title to parcel 4 was transferred to Frank in 1977. Frank died in 1977 but his will was not submitted for probate until 2014. Stanley died in 2003 and his wife, the plaintiff, became his executrix under the terms of this will. In 2014 she brought this action based on an alleged agreement for sale between Frank and Stanley of parcels 5 and 6. The actions included a request for a declaration that the mineral titles were subject to a trust in favour of Stanley's estate and the proceeds of the sale of the mineral titles in the amount of $80,248 should be paid to her as his sole beneficiary. In her

affidavit the plaintiff attested to being told by Stanley of a verbal agreement between him and Frank. She also heard a conversation between Frank and his parents in the late 1950s regarding that agreement, which indicated that Stanley was to receive as a gift parcels 1 and 2. Later she heard a conversation between Frank and Stanley in 1966 that seemed to be a review of the earlier verbal agreement that involved Stanley purchasing parcels 4, 5 and 6 under a verbal agreement for sale based on yearly payments in cash of $400 or $500 per year for 10 years. Upon completion of those payments, the parcels would be transferred to Stanley. The plaintiff deposed that the payments were made as Frank advised her of same each fall during the period in question. When Frank died, the plaintiff and Stanley expected to be notified as to the contents of Frank's will, but it was not probated during Stanley's lifetime. Stanley took no subsequent action before his death in 2003. The documents regarding the payments from Stanley to Frank had been destroyed.
HELD: The action was dismissed. The plaintiff was unable to establish the existence of an enforceable agreement between Frank and Stanley for the purchase and sale of parcels 5 and 6. There was no admissible evidence respecting the payment by Stanley to Frank for those parcels. The plaintiff's hearsay evidence was not admissible to prove part performance as the parties were dead and had not left sworn statements. The key events were very dated and the plaintiff had a significant interest in having her evidence accepted. The corroborative evidence of payments had been destroyed. The other evidence regarding the transfer of lands to Stanley, such as reserving the mineral titles in 1966, indicated no such agreement.

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Regina Qu'Appelle Health Region (Mental Health Inpatient Services) v. M. (R.), 2015 SKQB 375

Krogan, November 25, 2015 (QB15367)

Mental Health – Patient Detention
Mental Health Services Act – Certification – In-patient Detention

The applicant, the regional director of Mental Health Inpatient Services for the Regina Qu'Appelle Health Region, applied for an order pursuant to s. 24.1(1) of The Mental Health Services Act directing that the respondent, R.M., be detained at the Saskatchewan Hospital for a period of one year for treatment or supervision. At the time of the application, R.M. had been in the hospital for 83 days. Evidence on behalf of the applicant was presented through the documentary record of R.M.'s psychiatric medical history and by R.M.'s attending psychiatrist and his community mental health nurse. They testified that

R.M. suffered from schizoaffective disorder with severe persisting psychosis and mood fluctuations. He demonstrated aggressive and threatening behaviours. As he had attacked other patients, his psychiatrist was of the opinion that he was a risk to himself and others. Whenever he left the hospital, R.M. relapsed. He was reluctant to take his antipsychotic medications and used marijuana, which exacerbated his psychotic symptoms. R.M. was opposed to the application and to the order sought.

HELD: The application was granted. R.M.'s psychiatric history demonstrated that he was suffering from a severely disabling and continuing mental disorder that was likely to persist for more than 21 days and thus the requirements of s. 24.1(1) were met.

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