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Canada (Attorney General) v. Sjoquist, 2014 SKQB 66

Barrington-Foote, March 5, 2014 (QB14061)

Criminal Law – Detention of Proceeds of Crime – Restraint and Management Order

The Attorney General of Canada applied ex parte for a restraint order pursuant to s. 462.33 of the Criminal Code and a management order pursuant to s. 462.33.1(1) of the Code. The application related to residential property located in British Columbia and owned by the respondent. The application contained a number of conditions: 1) the Minister of Public Works and Government Service have the discretion to make repairs and improvements to the property to preserve it and its worth; 2) the amounts expended for those purposes were to be considered debts due and owing to the Crown; 3) the respondent maintain the property and ensure that it was adequately heated and secured against damage; 4) the respondent comply with all municipal work orders related to the property; 5) the respondent would pay all property taxes and utility charges; 6) the respondent would comply with all terms contained in registered encumbrances and keep them in good standing; and 7) the owner would pay the insurance premiums. The Attorney General also proposed an undertaking pursuant to s. 462.33(7) that provided payment of damages only if the respondent were awarded judgment on an independent cause of action.
HELD: The applications were granted at the time of the hearing but subject to the filing of a different undertaking by the Attorney General because as drafted, it had no value to the respondent. Regarding the orders, the court declined to include the listed conditions. It found that

it was beyond the jurisdiction of the court to do so, and regardless, they were not appropriate. A restraint and management order constituted a serious infringement on the respondent's common law right to dispose and deal with his property for any lawful purpose. After conducting a review of the Criminal Code provisions involved, court held that Parliament had not intended that an accused person could be ordered to spend his time or funds to enhance or maintain the value of property that may be found to be proceeds of crime. In addition, the provisions could not be interpreted so as to include conditions that if the accused failed to comply with them it would constitute an offence under s. 462.33(11) or s. 127(1) of the Code. As well, because the Attorney General withdrew its original undertaking, the court advised that the order would not issue until it filed a new undertaking.

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R. v. Sword, 2015 SKCA 116

Jackson Herauf Whitmore, November 13, 2015 (CA15116)

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

The appellant had originally been tried and acquitted by a Provincial Court judge of the charge of driving while his blood alcohol content exceeded .08 (see: 2013 SKPC 43). The Crown appealed the decision and the summary conviction appeal court judge overturned the acquittal and entered a conviction (see: 2015 SKQB 9). The appellant sought leave to appeal the decision of the appeal court judge.
HELD: The court granted leave to appeal but dismissed the appeal. It found that although the appeal court judge had made errors in his analysis, they were of no consequence to his ultimate decision. The appeal court judge had found that the trial judge had erred in using the wrong test to determine whether the police officer had the right to demand a sample of the appellant's breath in holding that the officer had to believe that an accused actually had alcohol in his body rather than having a reasonable suspicion. The trial judge had in fact identified the proper test for making an ASD demand. The court noted, though, that the trial judge had erred when he found that the officer had made the demand without knowing when the appellant had his last drink. The accused had admitted that he had been drinking, so the officer had evidence to support the demand and therefore the accused was not arbitrarily detained pursuant to s. 9 of the Charter. The appeal judge also erred in stating the test to be satisfied under s. 254(2) of the Criminal Code as set out in R. v. Yates: the test only requires that an officer have a reasonable suspicion that a driver has alcohol in his

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body. However, the appeal judge had correctly held that the demand was properly made. Finally, the appeal court judge had erred by determining the requirement to take the breath samples as soon as practicable in s. 258(1)(c) of the Code runs from the time of arrest until the taking of the samples. The time frame commences from when the offence was alleged to have been committed, the time of driving. In this case, the time of driving was so close to the time of arrest that the appeal court judge's finding that the tests were administered as soon as practicable was correct, notwithstanding his error in finding that the time frame commenced at arrest.

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R. v. Toutsaint, 2015 SKCA 117

Richards Caldwell Whitmore, November 17, 2015 (CA15117)

Criminal Law – Sentencing – Dangerous Offender – Determinate Sentence – Appeal

The Crown appealed the determinate sentence of three years imprisonment and a five-year long-term supervision order imposed by the sentencing judge on the respondent following his designation as a dangerous offender pursuant to ss. 753(1)(a)(i) and (ii) of the Criminal Code (see: 2014 SKPC 172). The Crown submitted that the sentencing judge erred in law and ignored the evidence in reaching his conclusion under s. 753(4.1) of the Code. The sentencing judge erred in law because he found that the respondent met the criteria for a dangerous offender designation but went on to assess whether the he might meet the criteria for designation as a long-term offender by relying upon repealed provisions of the Code. He ignored the evidence when he stated that there was a reasonable expectation that a lesser measure than an indeterminate sentence would adequately protect the public. HELD: The appeal was allowed and the sentence set aside. The court imposed a sentence of detention in a penitentiary for an indeterminate period. The court found that the sentencing judge erred in law because the 2008 amendments to Part XXIV of the Code removed a court's discretion to designate an offender a long-term offender if it had found that the offender met the criteria for a dangerous offender designation. The court found that the sentencing judge erred in the exercise of his discretion under s. 753(4.1) by conducting an inquiry into factors irrelevant to the determination called for by that subsection. Further, there was no evidence before the sentencing judge capable of supporting his finding that a lesser measure than an indeterminate sentence of imprisonment could adequately protect the public.

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R. v. Hahn, 2015 SKCA 118

Whitmore, November 17, 2015 (CA15118)

Criminal Law – Judicial Interim Release Pending Appeal

The appellant appealed his conviction of criminal harassment pursuant to s. 264 of the Criminal Code in relation to his harassment of a Queen's Bench judge. The appellant applied for an order for his release pending the determination of his appeal. He argued that he had no criminal record and had found accommodation near Saskatoon while continuing his work as a gas well operator in Alberta and NWT. He indicated that he wanted to be able to consult with his lawyer and prepare his defence as he did not have access to a computer in prison. The Crown objected on the ground that there was a risk that the appellant would not surrender himself into custody because he refused to sign his probation order and, after his conviction, had crossed the border into the United States carrying $1000 in US funds and notes indicating he was bound for Florida and then illegally crossed back into Canada. It was also not in the public interest to release him as he also had been warned 17 times to cease harassing the judge but yet continued and had a number of convictions for various offences committed between 1993 and 1994, although he had been pardoned. HELD: The application was dismissed. The court was satisfied that there was a risk that the appellant would not surrender himself into custody and that it was not in the public interest to release him given that he had threatened a judge because he disagreed with his decision.

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R. v. Singler, 2015 SKCA 119

Whitmore, November 17, 2015 (CA15119)

Criminal Law – Application for Court-Appointed Counsel

The appellant appealed his conviction for aggravated assault pursuant to s. 268 of the Criminal Code and was sentenced to three years in prison. He applied for court-appointed counsel pursuant to s. 684 of the Code to assist him in his appeal. He has no funds but was unable to secure representation from Legal Aid because it determined that his appeal would not be successful. He appealed on the grounds that the evidence used to identify him as the attacker was not reliable and contested certain factual findings. He had a grade nine education. HELD: The application was denied. The court found that the applicant had an arguable case and the offence and sentence were serious.

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However, it was not a complex case and the applicant was capable of presenting his issues and evidence.

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R. v. Natewayes, 2015 SKCA 120

Richards Caldwell Whitmore, November 18, 2015 (CA15120)

Criminal Law – Manslaughter – Acquittal – Appeal

The accused was charged with manslaughter in connection with a stabbing death that occurred during the course of a home invasion. She had driven her boyfriend and four other men to the residence of a man that her passengers intended to assault. When they arrived at the house, they forcibly entered it. Although they did not succeed in their plan to assault the intended victim, another man in the house was stabbed and died. The trial judge acquitted the accused of manslaughter because she found that although the accused knew of her passengers' intention, she could not have reasonably foreseen the presence of the victim and the risk of harm to him. The trial judge did convict the accused of break and entry for the purpose of committing an indictable offence. The Crown argued that the trial judge erred in holding that the accused's liability on the manslaughter charge depended on her foreseeing a specific risk of harm to the victim. The accused appealed her conviction on the grounds that it was unreasonable and should be set aside.
HELD: The Crown's appeal was allowed and the accused's appeal was dismissed. The court set aside the break and enter verdict and directed a verdict of guilty on the manslaughter charge. The court found that the trial judge erred in her analysis of s. 21 of the Criminal Code. The liability of a party to an offence under ss. 21(1)(b) and 21(2) does not require that the harm in issue be foreseeable in relation to a specific identifiable individual. The court found that it was open to the trial judge to find that the accused knew that a home invasion was about to happen. The accused was on interim release pending the appeal and the court ordered that she surrender herself to the RCMP within two days.

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R. v. Hales, 2015 SKCA 124

Jackson Caldwell Whitmore, November 20, 2015 (CA15124)

Criminal Procedure – Appeal – Courtroom – Television Cameras

The court issued a fiat regarding a request from two television networks to place a camera in the courtroom when the court held the hearing of the appeal in this case.
HELD: The request was granted for this appeal and on a pilot basis, subject to terms, including that the leave to use a camera would not affect or relieve anyone from an obligation to comply with the legal requirements of a statutory or court-ordered publication ban in effect with respect to the proceeding. The private dialogue between the judges on the panel, between legal counsel, and between counsel and their client would not be recorded or transmitted, and that any document or its image that was not an exhibit could be shown that might allow the text or image to be read or understood. The court further stipulated the manner in which the camera could be placed and used.

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Saskatoon (City) v. Triovest Realty Advisors Inc., 2015 SKCA 126

Ottenbreit, November 27, 2015 (CA15126)

Municipal Law – Tax Assessment – Leave to Appeal

The City of Saskatoon 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, which had set aside the decision of the Board of Revision (BOR) concerning the 2013 property tax assessment of a leased movie theatre improvement property in the Central Business District (CBD) of Saskatoon occupied by the prospective respondent. The assessor had assessed the property as a freestanding theatre and considered it to be a special purpose property and used the cost approach with a market adjustment factor of .99, derived from the sales of 10 churches located outside the CBD. Two other movie theatres attached to shopping malls in the city had been assessed on the income approach using a retail rent and capitalization rate model. The prospective respondent appealed the assessment to the BOR on the ground that the assessment did not meet the requirements of the Market Valuation Standard or equity because non-comparable properties and a different method of assessment for similar properties (the mall theatres) had been used. The BOR accepted the assessor's categorization of the property and found that it was not similar to other commercial properties in the CBD assessed on the income approach and that the use of the cost approach was correct. The prospective respondent appealed this decision to the committee on the ground that the BOR erred in finding the property dissimilar to mall theatres because it was freestanding. The committee decided that the proper assessment approach was using the income approach and

found that the property operated most similarly to theatres in shopping malls. It was not a special purpose property because they were generally owner-occupied. Therefore to value similar properties using a different approach to value would be treating the properties differently, which would not be equitable. The city's proposed grounds of appeal of the committee's decision were that it erred in law: 1) by contravening the principles of natural justice through its failure to provide adequate reasons for its decision; 2) by considering irrelevant matters and misconstruing evidence, thereby arriving at conclusions amounting to errors of law in finding that the property was not a special purpose property and that it was comparable to theatres in malls; and 3) without finding a material error of law or of assessment principles and by substituting its own discretion for that of the assessor.

HELD: The application for leave was denied. Applying the Rothman's test as modified by Deer Lodge v. Saskatoon, the chambers judge found that none of the proposed grounds of appeal possessed sufficient merit. The first ground would not succeed because the committee's reasons were sufficient to permit meaningful appellate review. The second ground related to the factual conclusions made by the assessor and, with respect to the third ground, the committee was entitled to correct the error made by the BOR and to determine the comparability issues. Both of these grounds were not issues of law or jurisdiction and therefore not subject to appeal.

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R. v. Hales, 2015 SKCA 131

Jackson Caldwell Whitmore, November 23, 2015 (orally) (CA15131)

Criminal Law – Appeal – Admissibility of Statements – Mr. Big Operations

Fulltext of judgment follows: [1] We are unanimous in our verdict. As is our usual practice in preparation for today's appeal hearing we reviewed all of the material available to us that is relevant to the appeal: the extensive transcripts, the written arguments from this Court and the Court of Queen's Bench, and the exhibits, including the photographs.

Ms. Jasper, on behalf of the appellant, has put forth three grounds of appeal. We have considered those closely as represented in the appellant's factum and by virtue of your arguments today. In none of these grounds do we see a basis to intervene with th decision of Justice Allbright (R v Hales, 2014 SKQB 411). In our view, he committed no reversible errors of fact or law.

Furthermore, the verdict under s. 235 of the Criminal Code, RSC 1985,

c C-46 is not unreasonable and it is not unsupported by the evidence. Indeed, the evidence against the appellant, we find, is overwhelming. The case against the appellant is composed not solely of admissions made in the context of the "Mr. Big" operation, but rather it is supported by his actions. Among those actions we would list the fact that he took the undercover officers to the site where the body was found and he also gave a warned statement to the investigating officers in Saskatoon.
[4] Having regard for all of the arguments and the evidence, we find we must dismiss the appeal.

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Gebert v. Wilson, 2015 SKCA 139

Jackson Ottenbreit Ryan-Froslie, October 27, 2015 (CA15139)

Family Law – Custody and Access – Appeal

The appellant appealed an interim order granted by a Queen's Bench judge in chambers that provided the respondent with specified access to the parties' four-year-old daughter. The parties had lived together until November 2014 when the appellant moved with the child to another home. Since then the child's primary residence had been with the appellant while the respondent had access on alternating weekends from Friday to Sunday evening and for one hour every Tuesday. The appellant submitted that the arrangement was established by verbal agreement of the parties, but the respondent asserted that the arrangement was unilaterally imposed upon him by the appellant and that he had consistently sought more time with his daughter. In July 2015, he brought an application for specified parenting time. The respondent opposed the application on the ground that the status quo should not be changed on an interim basis. The chambers judge ordered the time as requested: Wednesday to Sunday during week one and one full day during the week two. The judge did not mention custody or primary residence and did not provide any reasons for making the access order that he did. The appellant appealed the interim order, arguing that the chambers judge erred in law by: 1) varying the status quo; and 2) failing to provide reasons for his decision. During the relationship, the respondent worked from 8:30 am to 5:30 pm. He developed a close and loving bond with his daughter during her early childhood and performed many parenting duties. Before the order was made though, he lost his job and remained unemployed at the time of the appeal. The appellant worked full-time from 8:00 am to 4:00 pm, and while she was at work, the child attended daycare or was cared for by her maternal grandparents.
HELD: The appeal was dismissed. The court found with respect to the

issues that: 1) this was not a case to which the principle of status quo was applicable. Status quo relates to that which existed during the parent's relationship not what was created as an intermediate response to the separation. As well, the respondent in this case had requested specified access only nine months after separation and had not sought custody or a change in his daughter's primary residence; and 2) the chambers judge should have set out the rationale for his decision, but it is possible from the record to determine that the order under review was in the child's best interest.

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R. v. Cullen, 2015 SKCA 142

Jackson Ottenbreit Ryan-Froslie, October 23, 2015 (CA15142)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Acquittal – Summary Conviction Appeal – Appeal Constitutional Law – Charter of Rights, Section 10(b) – Appeal

The appellant was acquitted by a Provincial Court judge after his trial on charges of impaired driving and driving in excess of the legal blood alcohol limit because the Certificate of Analysis was excluded on the basis that the appellant's right to counsel under s. 10(b) of the Charter had been breached. The Crown appealed the acquittal. The summary conviction appeal judge took a different view of the law and the evidence than had the trial judge and found that the appellant's s. 10(b) rights had been not violated. He set aside the acquittal and entered a conviction. The appellant then appealed. At trial, both the arresting officer and the appellant had testified, but in addition to their evidence, the judge reviewed the electronic record of the officer's conversations with the appellant in the police cruiser and at the police station. The respondent had been arrested for being over .08 after he had failed an ASD test. The trial judge noted that in the recording taken in the cruiser that, although the officer informed the appellant of his right to counsel at that point, the recording indicated that the appellant was confused and told the officer that he was nervous. The officer referred to the availability of Legal Aid but did not clarify with the appellant what he meant nor did he advise the appellant that he could call any lawyer. At the station, the trial judge noted again that the recording showed that the officer had not clearly explained his options to the appellant. The appellant said that he did not have a lawyer and the officer said that he could call Legal Aid, available 24 hours a day. The appellant showed no sign of enthusiasm for calling Legal Aid or didn't understand what it was. Again, the trial judge found that the officer had not explained what it was or that the appellant could call a lawyer of his choice. At no time was the appellant given a telephone book.

There was a list of lawyers taped to the wall but not drawn to the attention of the appellant. Just before the breath test was to be administered, another constable raised whether the appellant wanted to call a lawyer and the appellant then called Legal Aid. The trial judge reviewed the testimony of the officer and the appellant and interpreted the video evidence. On that basis he made the following findings: 1) no telephone book had been made available to the appellant; 2) the posted pages were not an adequate device to alert him as to available counsel; 3) the appellant appeared confused as to his rights; and 4) the officer had presented the availability of Legal Aid as his only option. Therefore, the court concluded the right to counsel had not been given. The summary conviction appeal judge found that the trial judge had erred in law in reaching that conclusion, based upon the decisions in Edgington and Rice following the Supreme Court's decisions in Willier and McCrimmon.
HELD: The appeal was allowed and the appellant's acquittal restored. It found that the summary conviction appeal judge had erred in taking a different view of the evidence in the absence of him first finding a palpable and overriding error of fact in the trial judge's decision. The court held that on the facts as found by the trial judge and confirmed by the video evidence, it was impossible to do so in this case. The court concluded that there was no basis on which to interfere with the trial judge's decision that the appellant's s. 10(b) rights had been infringed. Regarding the question as to whether the trial judge had erred in excluding the Certificate of Analysis pursuant to s. 24(2), the court found that his reasons with respect to weighing the factors were not sufficiently detailed, but that he had not erred in the result.

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R. v. Katschke, 2015 SKPC 96

Morgan, June 22, 2015 (PC15074)

Criminal Law – Assault – Uttering Death Threats
Criminal Law – Assault – Uttering Threats to Cause Bodily Harm

The accused was charged with: 1) one count of threatening to cause bodily harm to the complainant; and 2) one count of threatening to kill the complainant. The first charge arose as a result of the accused writing an official complaint letter to the authorities in the Regional Psychiatric Centre (RPC) where he was an inmate. He stated that the complainant, one of his assigned guards, had treated him improperly after the accused has set a fire in his cell and then described in his letter the kind of bodily harm he would inflict on the complainant had he not been in control of his anger problems. The letter seemed to suggest that the complainant should receive justice. The second charge arose as a

result of the accused being moved from his cell to another one. He kicked at a door when the guards handcuffed him. After he was returned to his cell, he posted a sign on the observation window of it that said in effect that the complainant was a dead man. When asked by another guard whether it was a threat, the accused answered that he didn't make threats, he made promises. Later the accused said to the complainant that he would see him on the streets soon, as the accused's release from the RPC was imminent.
HELD: The accused was found not guilty of the first charge and guilty of the second. With respect to the first charge, the court found that it had a reasonable doubt regarding whether the actus reus of the offence had been made out, using the reasonable person test. It had a reasonable doubt of the mens rea of the accused based upon his evidence. With respect to the second charge, the court found that the actus reus was made out because the plain meaning of the words written on the sign conveyed a threat as did the accused's later statement to the complainant that reinforced the meaning of the sign. The court did not accept the accused's evidence regarding his state of mind and found that he possessed the mens rea necessary.

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R. v. Veikle, 2015 SKPC 137

Toth, November 4, 2015 (PC15139)

Criminal Law – Blood Alcohol Level Exceeding .08 – Approved Screening Device – Forthwith
Criminal Law – Blood Alcohol Level Exceeding .08 – Approved Screening Device – Expired
Criminal Law – Defences – Charter of Rights, Section 8, Section 10

The accused was charged with driving while his ability to do so was impaired by alcohol and with driving over .08, contrary to ss. 253(1)(a) and 253(1)(b), respectively. A voir dire was held to determine if the accused's Charter rights had been violated. The accused was driving in an erratic fashion at 2:00 am. The accused was stopped at 2:10 am and the officer noticed he had bloodshot eyes and there was an odour of alcohol coming from the vehicle. He advised the officer he was coming from a bar and had consumed a couple of drinks. The accused was taken to the police vehicle and given the ASD demand. At 2:18 the accused failed the ASD. The officer then gave the accused an opportunity to blow into a second ASD, which he also failed. He was arrested and given the breath demand and right to counsel. The accused was transported to the detachment at 2:47 am. The accused was given the opportunity to contact the counsel of his choice, but he was not available so a message was left. He then called Legal Aid and

talked to duty counsel. After six failed attempts the accused provided a valid breath sample at 4:05 am. The issues were: 1) was the ASD demand made forthwith pursuant to s. 254(2) of the Criminal Code; 2) was the first ASD used at the roadside expired; 3) should the accused have been provided with the opportunity to call a lawyer at the roadside, using his cell phone; 4) was the taking of a second ASD breath sample an unreasonable seizure pursuant to s. 8 of the Charter; and 5) was the accused's right to counsel of his choice violated by offering him Legal Aid services following his unsuccessful attempt to reach his lawyer of choice.
HELD: The issues were determined as follows: 1) the officer did not give the accused the formal ASD demand until he was in the back of the police vehicle, which would not have been forthwith pursuant to s. 254(2) of the Criminal Code, if the officer had not advised the accused that he was being asked to step out of his vehicle to administer a roadside device. The court believed the officer in this regard, even though the officer did not make notes about advising the accused why he was being asked to accompany her to the police vehicle. Also, the court determined that even if the officer did not advise the accused why he was being asked to go to the police vehicle he would have known given all of the circumstances of the stop; 2) the accused did not convince the court, on a balance of probabilities, that the first ASD was defective. Also, there was no evidence to conclude that the ASD had exceeded the limited number of tests allowed; 3) the officer testified that she asked the accused if he wanted to call a lawyer at the roadside and he indicated he would at the police station. The court concluded that the accused declined to call his lawyer at the roadside; 4) the officer gave the accused the choice as to whether he wanted to perform a second ASD. The accused consented to the second ASD. The second ASD was not an unreasonable seizure; 5) the court concluded that the officer only reminded the accused that he could contact Legal Aid when he could not reach his lawyer of choice, she did not say that was his only option. The accused voluntarily chose to call Legal Aid. The officer was not under any obligation to allow the accused to call another private lawyer. The accused's Charter rights were not breached.

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R. v. Gilchrist, 2015 SKPC 155

Morgan, November 12, 2015 (PC15141)

Criminal Law – Blood Alcohol Exceeding .08 – Approved Screening Device – Demand
Criminal Law – Defences – Charter of Rights, Section 7, Section 8, Section 9, Section 10(b)

Criminal Law – Stay of Proceedings – Lost Evidence

The accused was charged with operating a vehicle while his ability to do so was impaired by alcohol and with driving while over .08. A stay of proceedings was entered at the first trial in 2011. The Crown's appeal was allowed and a new trial was ordered. The Crown's application that the accused's Charter notice was insufficient was not successful. The accused argued on voir dire that: 1) his s. 9 Charter rights had been breached because the police did not have a justifiable reason to stop the accused's vehicle. The accused's vehicle was stopped around 2:00 am when it was observed leaving a drinking establishment. The officer testified that the initial reason for the stop was to check the accused's licence and registration. He also indicated that he saw the accused's vehicle fishtail prior to coming to a stop sign; 2) his s. 8 Charter rights were breached because the officer did not have a reasonable suspicion of the accused having alcohol in his body at the time of making the ASD demand. The officer indicated that he immediately detected alcohol coming from the accused's breath and the accused said he had four drinks when asked how much he'd had to drink. The officer also said that the accused had reddish cheeks and glossy eyes. On cross-examination the officer admitted that he read the ASD demand prior to asking when the last drink was consumed; 3) his s. 10(b) Charter rights were breached. The accused was arrested for impaired driving, read his rights to counsel, and then given the breath demand. When the accused was asked if he wanted to contact a lawyer, he indicated "not at this time". The accused argued that the rights to counsel should have been given again after the breath demand and also that the answer "not at this time" did not mean that he never wanted to contact a lawyer. He also argued that the officer should have stopped at a closer detachment to let the accused contact a lawyer. At the detachment the breath technician asked the accused if he wanted to speak to a lawyer and he said "I don't think so". He argued that the Crown did not establish that a "clear and unequivocal waiver" was given by the accused; and 4) a stay of proceedings should be granted because of the loss of video evidence.
HELD: The court determined the issues as follows: 1) the court concluded that the stop was made pursuant to s. 209.1 of The Traffic Safety Act and was therefore lawful; 2) the court was satisfied that the officer immediately detected the odour of alcohol on the accused's breath and that the accused advised him he had consumed four beer. The officer therefore had a subjective suspicion that the accused had alcohol in his body. The court found the subjective belief to be objectively reasonable; 3) the court found that the accused understood his jeopardy. The accused's response "not at this time" was not an unequivocal waiver of his rights to counsel. The accused's response "I don't think so" that was given to the breath technician was found to be an unequivocal waiver in the circumstances. The accused did not state the he wished to contact a lawyer. Further, the court did not find that the officer should have stopped at a closer detachment to afford the

accused the opportunity to contact a lawyer when he had not indicated he wanted to do so; and 4) the court concluded that it would be premature to decide whether a stay should be ordered based on lost evidence when the trial proper had not yet occurred.

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R. v. Landry, 2015 SKPC 156

Singer, November 20, 2015 (PC15143)

Criminal Law – Criminal Negligence
Criminal Law – Assault – Assault with a Weapon

The accused was charged with criminal negligence contrary to s. 221 of the Criminal Code and with assault with a weapon. The accused and friends were drinking at a party. The victim and her boyfriend had gone into a bedroom and the others followed them to try to convince them to continue drinking. A knife owned by the boyfriend was in the bedroom and the accused pick it up and then began opening and closing it. He made poking motions and apparently touched the knife to the victim's knee. Later the accused was chased around the room by the others. He slipped and fell onto the victim and stabbed the victim. The victim, her boyfriend and the accused all testified that it was an accident.
HELD: The accused was found not guilty of either charge. In the case of the charge of criminal negligence, none of the people at the party stated that they thought it was dangerous for the accused to have opened the knife or asked him to put it down. No one foresaw that the accused would fall on the victim. The accused was only pretending to act tough when he poked the blanket and cut the victim's knee. It was an accident and therefore the accused had not had the mens rea to commit an assault.

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Bezo v. Soerensen, 2015 SKQB 132

Barrington-Foote, May 12, 2015 (QB15150)

Landlord and Tenant – Residential Tenancies Act – Removal of Property – Damages
Statutes – Interpretation – Residential Tenancies Act, 2006, Section 12

The appellant landlord appealed the decision of hearing officer of the Office of Residential Tenancies that awarded $10,000 in damages to the

respondent tenants as a result of her finding that the appellant had improperly seized and disposed of the tenants' goods. The appellant had obtained a writ of possession for the rental property. The tenants' appeal of that decision was dismissed and the appellant then applied for an order authorizing removal of the tenants' goods from the premises pursuant to s. 85 of The Residential Tenancies Act, 2006. The appellant advised the hearing officer on that application that he would permit the tenants to remove their property only if they used a bondable moving company and in the presence of security personnel. As a result of the appellant's refusal to permit the tenants access, the application was refused. The appellant then had the goods taken to the garbage dump. The tenants applied for compensation in the amount of $32,800 for the loss. At the hearing, the officer found that the landlord breached s. 12 and s. 85 of the Act. The tenants submitted a list of over 50 items and testified as to the nature, age and value of the goods taken while the landlord provided photographs taken at the date of eviction. The officer listed the items and reviewed each of them, considering such things as the age, life expectancy, value as estimated by the tenants. She examined the photographs. In most cases, the officer reduced the amount awarded from what was claimed by using a depreciation factor based on the age of the items and estimate of its useful life. The total amount was calculated at $14,600 but the officer reduced the award to $10,000 being the maximum amount that could be awarded at the time the tenancy was terminated. She accordingly applied a general discount of 31 percent to the amounts she would otherwise have awarded. The appellant's grounds of appeal were that the hearing officer erred: 1) in finding that he had had breached s. 12(1) because he had an order of possession that authorized the removal of the tenants' property; and 2) in applying the law of valuation and depreciation of personal property. The appellant argued that there had been no evidence of the value of the items and that the hearing officer also disregarded the photographs. The award amount should have been nominal.

HELD: The appeal was dismissed. The court held with respect to each ground that: 1) the hearing officer was correct in finding that the appellant breached s. 12 of the Act. A possession order granted pursuant to s. 70 of the Act does not authorize a landlord to seize or remove the tenant's property. The appellant's application under s. 85 was refused. The tenants had not abandoned their property but were prevented from moving it by the appellant; 2) the hearing officer's decision was based on the respondents' testimony and their list of property. The officer explained how she established the value of the items and referred to the photographs in her reasons.

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Basso v. Reesor (Basso), 2015 SKQB 329

Sandomirsky, October 21, 2015 (QB15326)

Family Law – Child Support – Interim – Variation

The court issued an addendum to a judgment rendered in October 2015 (see: 2015 SKQB 316). The petitioner father had brought an application to vary child support. At that time, one of the children was residing with his maternal aunt in Alberta and the respondent was paying $500 per month to her sister to assist with the arrangement. Based upon the affidavit evidence before the court, the judge had invoked s. 8 of the Federal Child Support Guidelines to reflect a split custody arrangement. The parties then filed supplemental affidavits advising that the child had returned to Saskatchewan and was in the care of his parents, moving between their two households erratically. The petitioner deposed that the child lived with him 70 percent of the time and the respondent averred that he lived with her 50 percent of the time. The situation had not been in place for an entire calendar year and there was insufficient evidence of which percentage was more accurate, and the estimates were probably motivated in order to come under either ss. 3 or 9 of the Guidelines.

HELD: The judge found that he had to correct the basis of the order made in the October judgment as s. 8 of the Guidelines would no longer apply to the new facts. The parties could not agree how much time the child actually spent in each of their houses. Although the judge preferred to use the economy of scale approach over the two-step analysis, the latter was easier to apply and less costly. He reviewed the potential scenarios, dependent upon whether the evidence established that each parent cared for the child 40 percent of the total time. The petitioner's income was $34,000 and the respondent's was $37,000. Their low incomes, the lack of evidence regarding the time spent at each residence and the fact that a full calendar year had not elapsed made it impossible for the judge to establish child support. In light of the cost of legal proceedings, the judge recommended the parties should resolve the matter privately. Leave was given to the parties to reargue child support on an ongoing basis with new evidence required.

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R. v. Schlamp, 2015 SKQB 348

McMurtry, November 4, 2015 (QB15358)

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

Section 24(2)

The accused was arrested for impaired driving at 9:35 pm, but the breath demand was not made until 25 minutes later. He argued that the delay caused violations of ss. 8 and 9 of the Charter. The Crown conceded that the officer did not make the breath demand as soon as practicable and therefore did not comply with s. 254(3) of the Criminal Code. The Crown argued the exclusion of evidence was not warranted though because the violation was minor. Two officers located the accused's vehicle as the one possibly called in by an anonymous caller regarding a possible impaired driver. The vehicle was at a standstill, but the tires were spinning. When the accused rolled down the window the officer noted a strong smell of alcohol and the accused's eyes appeared bloodshot. He indicated that he had had one and a half beer. The accused was arrested after failing the ASD. He was given his rights to counsel and declined to speak to a lawyer. The accused was taken to the detachment and the officer realized in the Breathalyzer room that the breath demand had not been given. After the demand the accused was given his rights to counsel again and he said he did want a lawyer. He couldn't remember the name of the lawyer he wanted to call so the officer suggested he call Legal Aid. He indicated he was satisfied with his call and that he had lied earlier because he had a lot more to drink. There were 35 minutes between the accused's arrest and the first breath sample.
HELD: The accused established a breach of s. 9 of the Charter because the officer was required to give the breath demand upon arrest. The evidence was clear that the breath demand was given before the accused spoke to counsel. The Crown conceded that a breach of s. 8 of the Charter occurred because the breath demand was not made as soon as practicable within the meaning of s. 254(3). The Grant factors were analyzed as follows: 1) the breach was serious because the accused was unlawfully and arbitrarily detained for 25 minutes after his arrest; 2) the impact on the accused was minimal because there was no further intrusion into the accused's privacy, bodily integrity, or dignity. Also, the accused was advised of the reason for his arrest and his right to counsel was not breached. The breath test evidence was reliable and relatively non-intrusive; and 3) the admission of breath results would not bring the administration of justice into disrepute. The application on the voir dire was dismissed.

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R. v. Rhode, 2015 SKQB 353

Smith, November 13, 2015 (QB15371)

Criminal Law – Child Pornography – Making

Criminal Law – Child Pornography – Possessing
Criminal Law – Assault – Sexual Assault
Criminal Law – Sexual Touching – Child Victim

The accused was charged with: 1) possession of child pornography contrary to s. 163.1(4) of the Criminal Code; 2) accessing child pornography contrary to s. 163.1(4.2) of the Criminal Code; 3) making child pornography contrary to s. 163.1(2) of the Code; 4) touching a child under the age of 16 for a sexual purpose contrary to s. 151 of the Code; and 5) committing a sexual assault contrary to s. 271 of the Code. The first counts arose out of the circumstances of the fifth and sixth charges. The accused was a member of a Bible study group that met in the home of the victim's father. The accused had informed the group of his sexual proclivity to children and to pornography. After one meeting, the six-year-old victim was hugged by the accused and her father observed that he put his arm around the child's waist and with his other hand, held her buttocks. The father reported the incident to the police. The child did not remember the episode but the accused acknowledged it. The police obtained a search warrant and effected various seizures of two laptops, external hard drives and thumb drives. After conducting a forensic examination of the items, evidence of child pornography was retrieved, which formed the basis of the first charges of possession and accessing. With respect to the charge of making child pornography, the Crown alleged that the evidence showed three distinct images: in the first case it showed the accused masturbating while watching pornography on his laptop; the second image was one where he photoshopped a picture of himself with a photo of a young girl in front him; and the third case was a picture of the accused naked and apparently masturbating while looking at an image of a little girl in a dress.
HELD: The accused was found guilty of possessing and accessing child pornography based upon the evidence of the images recovered from his computers. With regard to making child pornography, the court found that the accused was guilty as he had created child pornography designed for a sexual purpose and intending to cause sexual stimulation to some viewers. Regarding the charges of touching and sexual assault, the accused was found not guilty.

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R. v. Larocque, 2015 SKQB 354

Elson, November 6, 2015 (QB15345)

Criminal Law – Defences – Charter of Rights, Section 10(b)
Criminal Law – Driving with a Blood Alcohol Level Exceeding .08
Criminal Law – Evidence – Admissibility – Record of Past Recollection

The appellant was convicted of driving over .08 contrary to s. 253(1)(b) of the Criminal Code. The voir dire focused on the admissibility of the Certificate of Analysis because the appellant argued his s. 10(b) Charter rights were violated because he had not waived his right to counsel. The trial judge concluded that there had not been a waiver of the right to counsel but that it was not engaged because the appellant declined his right on two separate occasions. The appellant and his friend went to a restaurant at 7:30 am and were rude, obnoxious and smelled of alcohol. When they were leaving, the server offered to call them a cab and they declined saying they were going to walk to a nearby restaurant where their vehicle was parked. A plain clothes officer in the restaurant called another officer who saw the appellant and his friend leave the restaurant. The officer activated the emergency lights on the police vehicle when the appellant was in the driver's seat and he saw exhaust from the tailpipe of the vehicle. The officer noted signs of impairment when the appellant opened the vehicle door. The appellant failed the roadside ASD and was arrested and given his rights to counsel. The appellant responded "not right now, no" to the rights to counsel. The officer indicated that his report noted that the appellant declined counsel again at the booking in station but the officer could not recall the exact conversation and his notes did not recall the words used. The issues were: 1) was the evidence of the second warning properly admitted; and 2) waiver of the right to counsel.
HELD: The appeal was dismissed. The court dealt with the issues as follows: 1) the sole basis for admitting the second warning was a record of a past recollection no longer remembered. The court determined that none of the four requirements necessary for the admission of the second warning, as part of past recollection recorded, were met. There was no express evidence presented as to the reliability of the officer's report or the report's probable accuracy. The officer was also not asked to state his understanding as to whether the report properly represented his knowledge and recollection at the time it was prepared. Also, there was no evidence as to whether the officer reviewed an original or a copy of the report; and 2) the trial judge found as facts that the officer read the appellant his Charter rights and also that the appellant had signified his understanding of those rights. The only remaining issue was whether the appellant had invoked, or attempted to invoke, his right to counsel. The burden was with the appellant. The exclusion of the evidence regarding the second warning would not change the end result. The appeal court concluded that it was clear the trial judge would have found it was not shown that the appellant sought to invoke his right to counsel.

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Deren v. SaskPower, 2015 SKQB 366

Elson, November 16, 2015 (QB15372)

Civil Procedure – Queen's Bench Rule 7-2

The applicant defendants applied pursuant to Queen's Bench rule 7-5 for summary judgment to dismiss the plaintiffs' action against them. The plaintiffs, landowners in the Souris River Basin, brought an action against the defendants for damages caused by flooding of their properties in June 2011. They alleged that their losses would probably have been avoided if two control structures in the basin, the Rafferty and Boundary Dams, had been operated by the defendants in a way that maximized their flood protection capacities. Canada and the United States had entered into an agreement in 1989 for water supply and flood control in the Souris River Basin. The agreement obliged Canada to provide the United States with a certain minimum level of flood control storage by completing the construction of the Rafferty and Alameda Dams. Canada designated the Government of Saskatchewan as the entity responsible for the construction and operation of the improvements. The defendants denied liability in all respects and specifically relied upon the defence of good faith immunity found in s. 95 of The Watershed Authority Act. They argued that the matter of good faith, or its absence, is a question of fact and the burden of proving bad faith rests upon the plaintiffs. The defendants contended that the plaintiffs had not presented any evidence of bad faith that would commend it as a genuine issue requiring trial. The plaintiffs submitted that this was not an appropriate case for summary judgment because the factual issues were complex and it would be difficult to understand the data without oral testimony and opinion evidence. They conceded at the time of the application, though, that the evidence of bad faith available was by inference only but argued that more persuasive evidence would arise after the record was complete and the proper officers for the defendants were questioned beyond what was possible through cross-examination of the affiants.
HELD: The application was allowed and the defendants were given leave to enter judgment dismissing the action. On the record of evidence presented pursuant to rule 7-5(1)(a), the court determined that there was no genuine issue requiring a trial with respect to either defendant. The evidence presented by the Saskatchewan Watershed Authority (SWA) showed the reasons and the purpose behind the actions it took after flood operations began. There was no evidence that it had mismanaged the water elevations in the reservoirs or the dams or carried out their duties in bad faith. There was no evidence that the defendants' acts or omissions during the period in question were so inconsistent with s. 95 of the Act that it would be reasonably open for a court to conclude that there was an absence of good faith. The plaintiffs' chief complaint was that SWA should have ignored the 1989 agreement and operating plan. However, it was the agreement that helped create the Rafferty Dam and regulated the flow of the Souris River, without which there would have been no flood protection at all.

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M. (C.), Re, 2015 SKQB 367

Dufour, November 17, 2015 (QB15353)

Family Law – Child in Need of Protection – Permanent Order

The Ministry of Social Services applied to have a 10-year-old Aboriginal boy, C.M., committed to their care until the age of 18. The issue was whether he was in need in of protection pursuant to s. 11 of The Child and Family Services Act. In 2006, C.M. was apprehended from his biological parents. In 2007, the C.M.'s great-aunt Mary was designated as a person of sufficient interest (PSI) and he began living with her. In 2011, the Ministry began receiving anonymous phone calls that Mary was using drugs and allowing violent people with criminal records into her house. The Ministry's Mobile Crisis Unit was sent to Mary's house frequently afterwards and demanded drug screens. Mary was slow to comply but when the screens showed that she had drugs in her system, she explained that she had used pain medication and smoked marijuana for back pain. The Ministry did not believe that Mary was involved with substance abuse but was concerned that she had not provided drug screens when they had been demanded. Their primary concern though was that the caseworker would find one of the unsafe men visiting or living there when they visited the home. In August 2013, the Ministry apprehended C.M. when one of the unsafe men was found in the house and C.M. was placed with his cousin. Following that, the Ministry and Mary entered into two consent orders in 2013 and 2014 that C.M. was in need of protection, and he was placed in the Minister's care with the conditions of the order specifying that the unsafe men were not to be allowed in Mary's home. Social Services found they continued to be present. After his apprehension, C.M. had been placed in a number of different homes and at the time of the application he was residing in a foster home. The Ministry permitted Mary to have supervised access every two weeks and she had missed only two scheduled visits for good reasons during the two years of C.M.'s apprehension. Mary had provided drug screens since the apprehension and they were clean. Mary had taken the Parenting After Separation course before appearing at this application. She testified that the men who visited her were family members, and although she had had difficulty preventing them from visiting her during the time that C.M. lived with her, she would not allow it to happen again as it would jeopardize her ability to have C.M. returned to her care. During the time that C.M. lived with her, the evidence showed that she had taken good care of him physically and emotionally. She took him to Aboriginal gatherings, which had not happened while he lived in foster homes. The Social Services Assessment of C.M. that he was a

well-behaved happy child and was developing normally.
HELD: The court found that C.M. was not in need of protection and ordered that he be returned to Mary's care immediately. Under s. 11(b) the Ministry had failed to show that there was no adult able and willing to provide for the child's needs and that physical or emotional harm had or was likely to occur to C.M. The court defined "likely" as "probable". The evidence showed that C.M. was well-adjusted and the court found that he was not vulnerable or fragile and had not been harmed by the unsafe men and was satisfied that Mary would keep them out of her home in the future so that she could raise C.M.

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Pollon v. Pollon, 2015 SKQB 368

Megaw, November 17, 2015 (QB15354)

Family Law – Distribution of Family Property
Family Law – Family Property – Division – Dissipation

The petitioner sought a divorce and division of family property. The parties had been married in 1976 and separated in November 2013. The family property was limited to a house and some furnishings, the respondent's pension, and two investment accounts totaling approximately $166,000. The court was presented with evidence of both parties having trouble with gambling, which the petitioner denied participating in but the respondent admitted. Further complicating the determination of the family property was that the petitioner's memory was poor and the respondent could not account for her financial decisions and actions. The petitioner worked as a plumber and owned his own business. He suffered a workplace injury in 1995 and was awarded damages in the amount of $174,000 in 2010. In 2005 he developed multiple sclerosis. In 2011 he became a resident of a nursing home and was unable to pay his fees there without the assistance of his brother. His memory was very poor because of neurological degeneration and testified that he had no knowledge of his financial affairs or what became of funds. From 2011 to the date of the hearing, the respondent had the sole control of their money. At the time of the hearing, the respondent had retired and lived on pension income of $2,869 per month. When the petitioner received the funds from his damages award in 2010, he directed the respondent to invest them in her name to protect them from creditors. The respondent invested $120,000 but was unable to account for the remaining $54,000. Other later investments and financial decisions made by the respondent were noted in evidence. The respondent could not explain why she withdrew large amounts from these investments. The parties owned a house that had an appraised value or $133,000. In 2009, the parties had

mortgaged it for $153,000. The funds acquired from the mortgage were used by the respondent to pay down debts acquired by the parties in previous years. The mortgage payments were now made by a mortgage insurance company and $101,390 remained outstanding on the mortgage. There was approximately $30,000 in writs of execution registered against the title.

HELD: The court held that the appropriate date to determine the value of the property to be the date of application in November 2013. The court concluded that the debts of the parties in their own names accrued prior to 2011 would not be considered family property and they would each be considered responsible for their own debts and jointly responsible for joint debt regarding the mortgage and outstanding municipal taxes. With respect to the issue of dissipation of family property, the court limited its consideration to the two-year period between November 2011 and 2013 pursuant to s. 28 of The Family Property Act because of the petitioner's incapacitation from 2011 on. The court found that the respondent had dissipated funds during that period due to her gambling addiction. The court estimated the amount to be $65,800, which it added to the value of family property in her possession. The court ordered that the family home should be sold and if there was any equity remaining after payment of the of encumbrances, the funds would be divided equally between the parties but the respondent would owe her net equity to the petitioner based upon the court's conclusion that the respondent owed funds to the petitioner on the final division of family property. The court determined that the petitioner possessed family property in the value of approximately $2,000 and the respondent held family property in the value of $240,479. Each party was entitled to $136,500, and the petitioner was entitled to an exemption in the amount of $30,000 received for pain and suffering in his personal injury damages award pursuant to s. 23(3) of the Act. The petitioner received judgment against the respondent for the amount of $134,469. The petitioner was entitled to half of the respondent's pension. The court awarded double costs to the petitioner because he was put to considerable effort and expense to find out what became of the funds and where they were located, and the respondent would not offer any assistance in tracking the funds.

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Longley v. McFadden, 2015 SKQB 370

Megaw, November 19, 2015 (QB15364)

Family Law – Child Support – Arrears
Family Law – Custody and Access – Mobility Rights – Interim Application – Best Interests of the Child

Family Law – Custody and Access – Grandfather – Person of Sufficient Interest
Family Law – Division of Family Property – Interim Sale and Distribution

The matter was back before the court two times after interim orders were made regarding the child custody, spousal and child support and operation of the parties business. The petitioner then applied for further variation. The petitioner wanted to move to Calgary with the four children and she wanted some real property sold with proceeds against the support orders as an interim distribution of property to her. The respondent opposed the sale of real property. Also, the paternal grandfather renewed his application to be declared a person of sufficient interest in the children. In December 2014 the respondent broke into the petitioner's house and assaulted her and attempted to murder her friend while all of the children were home. The respondent pled guilty to attempted murder, break and enter therein committing assault, and being at large on his recognizance. He was sentenced to eight years in prison. The application was more fall-out from that incident. The proposed respondent applied for an adjournment of the matter as did the respondent. The parties began living together in 2008 and separated in 2014. The parties operated a bar during their relationship. The respondent's telephone access with the children was suspended in August 2015 pending receipt of and review of an access assessment to determine the extent of telephone access by the respondent to the children. The assessment was not yet completed. The respondent was in considerable arrears of his support obligations. The bar was being operated by the proposed respondent after the incident and it appeared that it was in a precarious financial state. The support was not being paid and the respondent was not paying the mortgage on the family home as ordered. The respondent indicated that the payments were not being made because he was not working at his previous employment and his only source of income was from the bar. The weekly profit/loss summaries ordered by the court were also not provided to the petitioner.
HELD: The court denied the request for an adjournment because: the date was set some time ago; the proposed respondent was seeking, at most, some access to the children; there was some urgency to having the matter proceed because the petitioner was pregnant. The first step in determining whether a relocation would be granted was to examine whether there was a sufficient change in the circumstances. A substantial change in circumstances from the initial interim order and from the order made shortly after the incident was found. The material filed led the court to conclude that the petitioner was largely isolated from the community in Saskatchewan. The respondent's family was not a support network for the petitioner and the children. The petitioner and children had some potential support in Calgary. A move would have limited effect on the respondent's ability to exercise access to the children. The petitioner also indicated she would do whatever

was required to facilitate access. The petitioner's partner was her and the children's source of financial support. The petitioner's ability to access her sole financial support was in the best interests of the children. The court found compelling circumstances to allow the move. The court ordered that all four pieces of real property owned by the parties be listed for sale and sold at the highest possible price pursuant to s. 26 of The Family Property Act. The court had to approve any sale and the net proceeds of sale were to be paid into court. The petitioner could then apply for a distribution of sale proceeds. The court reiterated the existing order requiring weekly income/expense statements for the bar.

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Grams v. Grams Estate, 2015 SKQB 374

Meschishnick, November 25, 2015 (QB15366)

Wills and Estates – Proof of Will in Solemn Form
Wills and Estates – Testamentary Capacity
Civil Procedure – Queen's Bench Rule 16-46, Rule 16-47

The applicant applied for an order under Queen's Bench rules 16-46 and 16-47(1) and (2), requiring that the will of his deceased father be proven in solemn form and for the executors to show cause why the letters probate should not be revoked. In the chambers application, the applicant challenged the validity of the will on three grounds: 1) because the deceased did not have the requisite testamentary capacity at the time of making the will; 2) because the deceased was unduly influenced by third parties when making the will; and 3) for reasons of public policy in that the applicant alleged that the deceased excluded him from the will because of his sexual orientation. The testator was estranged from his family and had specifically stated in the will that they were not to benefit from it and the reasons for their exclusion, such as the applicant being gay. The testator left his estate to be divided between people who had worked for him and become his friends. They also provided care to him as his physical health worsened before his death. As required by the two-stage process set out in Dieno Estate v. Dieno Estate, the applicant filed affidavits sworn by himself, his father's sister and his brother's widow deposing that the deceased did not have testamentary capacity at the time that he executed his will on February 4, 2014, because he did not remember that he had a son (the applicant). A number of the affiants mentioned that the beneficiaries under the will were present when they visited the testator before his death and felt that they were trying to intimidate them. The deceased's sister stated that she overheard two of the beneficiaries discussing a deal between them and the deceased that

they would care for him. The lawyer for the applicant also provided an affidavit recording that he had received 21 pages of notes and instructions from the deceased's lawyer regarding the numerous wills executed by the deceased between 2012 and 2014. The executors presented their affidavits and those from the deceased's lawyer, doctor, friends and some of the beneficiaries regarding their belief that the deceased was lucid at the time of making the will.
HELD: The application was granted. The matter should proceed to trial for the will to be proven in solemn form and for it to be determined whether the deceased had the requisite testamentary capacity and whether the will was brought about through undue influence or if it should be set aside on the ground of being against public policy. The court found that the applicant had successfully met the test on the three grounds and that the executors had not answered the challenges with uncontradicted or unconditional evidence.

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Kruse v. Santer, 2015 SKQB 376

Layh, November 25, 2015 (QB15368)

Statutes – Interpretation – Municipalities Act, Section 143, Section 144, Section 148, Section 149
Municipal Law – Council Members – Disqualification

The applicant applied pursuant to s. 148(2) of The Municipalities Act to have the defendants, three members of the municipal council of Welwyn, disqualified from acting as members based on allegations that each of the contravened s. 144 of the Act for failing to disclose and deal with their pecuniary interests. Welwyn is a village with a population of 100 people. The defendants constituted the entire council. With respect to the defendant Overholt, the applicant alleged that she had received three payments (two in 2012 for $160 and $120, and one for $264 in January 2014) from the village for working at its recycling bins at an hourly rate of $12. In her affidavit, Overholt replied that under a contract with Lorass Disposal, the village was required to open recycling bins. Overholt undertook to provide the service when the student hired to perform it was unavailable. The village administrator deposed in her affidavit that the village paid Overholt when she had filled in shifts and then received reimbursement from Loraas. With respect to the defendant Bowey, the applicant alleged that when her husband was appointed by council to operate the sewer works at an hourly rate of $15, there was a handwritten notation on the council minutes that Bowey had left the meeting during the discussion but there was no indication of when she had left or returned to the meeting. The amount paid to Bowey's husband was $4,800. Bowey

deposed in the affidavit that she left the meeting during the discussion and vote concerning her spouse's position. The village administrator's affidavit confirmed Bowey's version. Regarding the defendant Santer, the mayor of Welwyn, the applicant alleged that the Council awarded the snow tender to him and another person, but the minutes of the meeting did not record that Santer left it during the discussion and vote. Additionally, the minutes of meetings held during 2013 and 2014 in which payments to Santer for snow removal, loader and foundation work were authorized, Santer voted to approve these payments. Santer replied in his affidavit that he believed that when his bid for snow removal was before council, he left the meeting, but there was no record of that in the minutes. He stated that he tendered for the contract when other interested parties wished to participate. In most years though, there was no one to do the work. The hourly rate of $60 paid to him did not cover his wages and there was little profit made by him because of the cost of the fuel, repairs, maintenance and insurance. Santer said that he never intentionally or knowingly breached any provision of the Act. The village administrator's affidavit confirmed that Santer left the meeting, but she had failed to record it in the minutes. She explained that the tendering of the snow removal contract was limited to asking a few individuals with equipment whether they wanted to do it.

HELD: The application was dismissed. The court reviewed ss. 143, 144, 147, 148 and 149 as relevant to the application. It found that each of the defendants had a pecuniary interest under s. 143 of the Act. In the case of Overholt, the court found that the payments were insignificant pursuant to s. 143(2)(j) and dismissed the application against her. The court considered that the payments to Bowey's spouse and Santer were significant. In Bowey's case, the court found that she complied with the requirements of s. 144 and dismissed the application against her on that basis. Regarding the case of Santer, the court also dismissed the application with respect to each allegation and, alternatively, was of the opinion that he may have made an honest mistake pursuant to s. 149. In conclusion, the court stated that even if it had found the allegations against the defendants had been proven, it would have exercised its discretion under s. 148(6) of the Act to permit each of them to remain council members.

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Zhao v. 2055190 Ontario Ltd., 2015 SKQB 377

Rothery, November 27, 2015 (QB15380)

Civil Procedure – Queen's Bench Rule 4-11
Civil Procedure – Queen's Bench Rule 7-9

The plaintiffs brought an application for an order to set their action for a pre-trial conference in accordance with rule 4-11 of The Queen's Bench Rules. The defendant refused to sign the joint request for it because it alleged that two of the plaintiff's undertakings from the examination for discovery had not been fulfilled. With respect to the first undertaking, the plaintiff asserted that it had provided the defendant with the appropriate information. In the case of the other undertaking, the plaintiff had claimed solicitor privilege. The third party refused as well to sign the joint request for other reasons and brought an application pursuant to Queen's Bench rule 7-9 to strike the defendant's third party claim against it on the basis that it disclosed no cause of action.
HELD: The application for a pre-trial conference was denied as premature because the court found that the second undertaking by the plaintiff remained outstanding. The plaintiff had waived its solicitor client privilege by giving the specific undertaking in the examination for discovery. In order to invoke the privilege now the plaintiff would have to seek an order of the court to be relieved of the undertaking. The court denied the third party's application to strike the defendant's claim because it was not a plain and obvious case.

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Matlock v. Matlock, 2015 SKQB 378

Elson, November 27, 2015 (QB15374)

Wills and Estates – Wills – Formalities
Statutes – Interpretation – Wills Act, Section 11, Section 37

The applicant executor applied to have the last will and testament of his mother admitted to probate. The original will was made in 2001 leaving her estate to 11 beneficiaries, including her five children. The testatrix died in 2014 and the executor filed his application for probate. The value of the estate was approximately $90,000. The judge noted a number of deficiencies in the materials, and in her fiat granted leave to file the proper material. One of the deficiencies related to the plight and condition of the will in that a number of handwritten alterations had been made to the will. The name of one of the testatrix's surviving children, Stanley, had been stroked out in black ink but the name was still visible and legible. The signature and the date of January 2011 was written in the margin with the words printed "witnessed by" and the signature of another person. Pursuant to the fiat, the applicant then filed an affidavit sworn by him and two sisters that they had reviewed their mother's will with her following the death of their father. They deposed that Stanley had been estranged from the family for many years and their mother decided that she no longer wanted him to be a

beneficiary. As they were unaware of the legal requirements for wills, they made the changes to the existing will, including the testatrix's signature as described and asked the spouse of one of the grandchildren to witness the signature. In the witness's affidavit, he attested to being present when the testatrix made the change and authorized it by signing in the margin. Upon receipt of these affidavits, the judge instructed the applicant to find and serve Stanley with the application for probate. After locating his brother, the applicant served him with a notice of the probate proceeding and filed a supplementary affidavit indicating that all the named beneficiaries consented to a court order naming him as the executor and waiving notice of the application. Stanley contested the application on the grounds that he believed that the will was improperly altered. He deposed in his affidavit that he was never estranged from his parents, only from his siblings, and at the time that the alterations were made to her will, the testatrix was distraught, and he believed that his siblings pressured her to make the changes when she was vulnerable. His affidavit contained no substantive facts to support these beliefs. The issues raised by the application were: 1) did the alteration fall within s. 11 of The Wills Act; 2) if not, did the alteration embody the testamentary intention of the testatrix, permitting the will in its altered form to be admitted to probate; and 3) if the altered will could be admitted to probate pursuant to either s. 11 or s. 37 of the Act, was this an appropriate case for the court to exercise its discretion pursuant to Queen's Bench rule 16-19 to require proof in solemn form.
HELD: The altered will was admitted to probate. The court held with respect to each issue that: 1) as it found that the alteration may not have been made by the testatrix (by stroking out the name herself), the alteration was not wholly in the testatrix's hand and therefore s. 11(3) of the Act did not apply; 2) s. 37 of the Act applied; and 3) proof in solemn form was not required. The respondent had not presented evidence of any specific facts that would support his belief that there was undue influence but neither had the applicant provided any evidence as to the testatrix's state of mind. Because of the size of the estate, a trial in solemn form would reduce its value significantly and thus it was not an appropriate case to direct proof in solemn form.

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MFI AG Services Ltd. v. Farm Credit Canada, 2015 SKQB 379

McMurtry, November 27, 2015 (QB15369)

Statutes – Interpretation – Saskatchewan Farm Security Act, Section 51, Section 53
Relief from Forfeiture

The respondent Farm Credit Canada (FCC) entered into a loan agreement with MFI Ag Services (MFI) in 2006 in exchange for which MFI agreed to grant FCC a security interest in the farm machinery. FCC had worked with MFI since 2010 to address defaults under all its outstanding loans. MFI had not made a payment since May 2014. FCC gave notice to MFI of its intention to take possession of certain farm implements. MFI applied for a hearing under s. 51 of The Saskatchewan Farm Security Act to contest FCC's notice. It sought to postpone any order to deliver up possession of the property until mid-December under s. 53(2)(b)(i) of the Act to allow it to pay its outstanding indebtedness and to use the property during harvest. It also pointed to an action that it had commenced, set down for trial in January, as having taken all its resources.

HELD: The application by FMI was dismissed and it was ordered to deliver up the property to FCC. The court found that at the time of the hearing, the harvesting had been done so the need for temporary relief from forfeiture on that ground was no longer a reason. MFI had not provided any reasons why it would be able to pay in December and since the lawsuit would not be heard until January, the court did not find it relevant either to MFI's ability to pay by December.

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R. v. Nguyen, 2015 SKQB 382

McMurtry, November 27, 2015 (QB15370)

Criminal Law – Trial Procedure – Witness Testimony – Videoconference

The accused was charged with sexual assault and sexual touching. The Crown sought an order pursuant to s. 714.2 of the Criminal Code permitting the complainant and her mother to testify by videoconference from the Federal Court building in Montana where they reside. The Crown sought the order because the 15-year-old complainant suffered from anxiety and depression and did not wish to return to Canada. The Crown sought to spare the witnesses the time and expense of travel. The defence opposed the application and argued that testifying by witnesses by videoconferencing would interfere with the ability to make full answer and defence because his ability to cross-examine the witnesses would be hampered. During this application, the defence noted that the quality of the technology was poor as the image of the witness was distorted when she moved and there was a delay between the posing of answers and their reception by the witness.

HELD: The application was granted. The court found that the defence had not satisfied it that the reception of testimony by videoconferencing would be contrary to the principles of natural justice as required by s. 714.2 of the Code. If the technology at trial

proved to be inadequate to the task, the defence application could be re-visited.

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