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Subject Index

R. v. Wasilewski, 2016 SKCA 112

Caldwell Whitmore Ryan-Froslie, August 31, 2016 (CA16112)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Acquittal – Appeal
Constitutional Law – Charter of Rights, Section 8 – Appeal

The Crown appealed the acquittal of the respondent and sought a new trial. The respondent had been tried and acquitted twice in Provincial Court of the charge of possessing marijuana for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. The first trial judgment had been set aside by the Court of Appeal (see: 2014 SKCA 138).The Crown submitted that the second trial judge erred when he ruled the search of the respondent's cell phone had not been incident to her arrest and erred again by excluding the evidence obtained from that search under s. 24(2) of the Charter. The respondent was charged when police stopped the vehicle she was driving because she had driven a passenger to the residence of a drug supplier. The passenger obtained a large bag while in the house and then re-entered the vehicle. The police had been watching the passenger as part of a drug operation and they approached the vehicle. The officers arrested both the respondent, who was unknown to them at that point, and the passenger. The vehicle smelled of marijuana and after searching it, the police found the bag containing 220 grams. They seized three cell phones, one of which apparently belonged to the respondent. A cursory search of the respondent's phone was conducted at that time, and then

five days later the police reviewed its contents without a warrant. The data retrieved included several inculpatory statements. At trial, the trial judge found that the search had not been conducted for one of the valid law enforcement purposes identified in R. v. Fearon and was not incidental to arrest, therefore there had been a violation of s. 8 of the Charter. Under s. 24(2), the trial judge analysed the first branch of the Grant test. He found that the breach was serious because the police did not know the respondent and were searching for information on her cell phone to confirm that she knew that her passenger had attended at the house to obtain drugs for resale. The Crown argued that the trial judge erred in finding the breach to be serious because the police had done something that they reasonably believed was lawful. Later developments in the law showed that belief to be incorrect, but the warrantless search was an honest mistake, reasonably made. This finding led to further errors in the judge's analyses of the second and third branches HELD: The appeal was allowed. The court ordered a stay of proceedings in the interests of justice. The court found that it would not be fair to the respondent to subject her to another trial. The court held that the trial judge had erred in his assessment of the seriousness of the Charter-infringing state conduct, which led him to further err in his assessment of the impact of the breach on the respondent and in the final balancing of interests. The trial judge's finding was inconsistent with the Supreme Court's decision in R. v. Fearon, and the Court of Appeal's decision in R. v. Adeshina, cases which involved circumstances very similar to this one, wherein the court had concluded that the breach was not serious.

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Meier v. Saskatchewan Institute of Agrologists, 2016 SKCA 116

Richards Ottenbreit Ryan-Froslie, September 8, 2016 (CA16116)

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Administrative Law – Judicial Review – Discipline Hearing – Appeal
Statutes – Interpretation – Agrologist's Act, 1994, Section 26(1), Section 35

The appellant appealed the decision of a Queen's Bench judge dismissing his appeal from his conviction for professional misconduct by the discipline committee of the Saskatchewan

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Institute of Agrologists. The appellant had published photographs and commentary indicating differences in crop performance in a particular field were due to how fertilizer had been placed by two competing models of seed drills. Another member of the Institute, a manufacturer of one of the seed drills, complained, alleging that the appellant was aware that the differences occurred because of seeding depth not fertilizer placement. The committee found him guilty of failing to employ proper scientific methods and therefore guilty of professional misconduct. The appellant appealed the conviction to Queen's Bench pursuant to s. 32 of the Act. The appeal was dismissed because the judge found that the committee's decision was reasonable (see: 2014 SKQB 389). The appellant appealed on the grounds that: 1) the committee's findings of fact were not supported by the evidence; and 2) his conviction was based on a ground different than the one set out in the complaint. The committee therefore failed to comply with s. 26(10) of the Act and denied him procedural fairness by basing a conviction on something different than the allegation set out in the complaint. It had breached the audi alteram partem rule. The appellant raised the second issue for the first time on appeal.
HELD: The appeal was allowed and the decision of the committee set aside. The court found that it could base its decision on the appellant's second ground. Ordinarily, new arguments would not be heard by the court on appeal. In this case, it was not unfair to the respondent to entertain the argument because it would not be prejudiced nor would it have introduced additional evidence in the court below if it had been aware of the issue. Further, the court construed s. 35 of the Act to support the hearing of the new argument on appeal. The court found that the committee had failed to comply with s. 26(10) of the Act and denied the appellant procedural fairness because it found him guilty of a different kind of professional misconduct than what had been alleged against him.

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Swystun v. Janzen, 2016 SKCA 117

Caldwell Herauf Ryan-Froslie, September 8, 2016 (CA16117)

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Superior Construction Solutions Inc. v. Hamilton Construction Corp.

Swystun v. Janzen

Walby v. Walby

The parties met in August 2009 and they began living together in a home owned by the respondent in November 2009. Their child was born in June 2010. The trial judge found that the parties were in a common law relationship for two or more years by November 1, 2011. The parties separated in November 2012. The appellant argued that the trial judge erred: 1) by dividing the debts equally; 2) by valuing the mortgage pertaining to the house based on the amount owing on the date of application and not the date of adjudication. The trial judge concluded that it would not make sense to have the petitioner who made no contribution to the mortgage payments since the date of application to receive a windfall of half of the payments made solely by respondent; 3) in weighing the parties' appraisal reports of the family home. The appellant's appraisal was a drive-by appraisal, whereas the respondent's appraisal was prepared by an appraiser attending the residence; 4) in the treatment of the exemption claims made by the respondent. The trial judge concluded that the exempted amount for the respondent's rental property was determined by taking the application date property value and subtracting from it the debt at spousal commencement. The mortgage on the rental properties increased from the time of the commencement of the relationship to the date of application. The trial judge concluded that the debts as of the date of the application were occasioned by the respondent during the course of the relationship for the parties' mutual benefit; 5) in the calculation of the appellant's share of family property; and 6) by awarding costs against the appellant.

HELD: The appeal was allowed in part. The issues were dealt with as follows: 1) the trial judge held that the debts were occasioned by the respondent during the course of the relationship for the parties' mutual benefit and, therefore, the debts were taken into account in the property division; 2) there was only evidence of the value of the mortgage as at application not adjudication, and there was no evidence that the appellant was paying rent elsewhere after application or that either party was making child or spousal payments. The court dismissed the ground of appeal based on its unique factors; 3) the trial judge's finding that the respondent's evidence was the best evidence was a finding of fact and, therefore, could not be interfered with unless the trial judge made a palpable and overriding error. The trial judge did not make such an error; 4) the correct value of the property was the value at the commencement of the spousal relationship, not the value at the time of application. The respondent indicated that the values were the same on both dates so the appeal court determined that the trial judge could have found that the December 2012 values were equal to the November 2011 values. The onus was on the appellant to

demonstrate why allowing the full amount of the exemption would be unfair or inequitable. The trial judge's findings were entitled to deference; 5) the parties agreed that there was an error in the net value of property. The respondent also acknowledged that the trial judge erred by including $35,902.76, which was borrowed against the family home after separation, as both an asset attributable to her and as a deduction to the mortgage. The Family Property Act requires that the family home be given special statutory consideration. An equal division of the equity in the family home would have resulted in an equalization payment of $17,951.29 ($35,902.58 divided by two) to the respondent. The appeal was allowed in this respect; and 6) the main focus at the trial was the custody of the child and the respondent was successful in that aspect, which supported the cost order of the trial judge.

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R. v. Prestupa, 2016 SKCA 118

Ottenbreit Caldwell Ryan-Froslie, September 8, 2016 (CA16118)

Criminal Law – Appeal – Conviction
Criminal Law – Breathalyzer – As Soon As Practicable

The appellant appealed the decision of the conviction appeal court that set aside the decision of the Provincial Court acquitting him of driving over .08, contrary to s. 253(1)(b) of the Criminal Code. The appellant was stopped by an officer at 12:10 am after the vehicle he was driving stopped at a stop sign for several minutes despite there being no other traffic, and then it turned onto the highway and accelerated to 160 km/hr. The officer smelled alcohol on the appellant's breath and noticed that his eyes were glossy and bloodshot. The appellant failed an ASD and was arrested for impaired driving and given his rights and warnings. The officer and appellant waited at the roadside for 20 to 25 minutes for the appellant's parents to arrive and take his vehicle. The first breath sample was take at 1:45 am. The officer testified that the appellant was taken to the Saskatoon detachment rather than going to a closer one because he knew the Saskatoon detachment would be able to facilitate breath testing. There was no evidence regarding whether three closer detachments were staffed with any police officers or qualified breath technicians on that night. The issue was whether the breath samples were taken as soon as practicable as required by s. 254(3) of the Criminal Code. The summary conviction appeal court concluded that the trial judge misapprehended the test for

"as soon as practicable" by requiring the test to be done as soon as possible and thereby misapplying s. 258(1)(c). According to the appeal court the breath samples had to be taken within a reasonably prompt time under the circumstances, which was found to be done.
HELD: The appeal was dismissed. The appeal court agreed with the appellant that a determination regarding why a delay occurred is a finding of fact subject to considerable deference. The delay to the detachment in this case was unknown because there was no evidence regarding whether there was an operational machine or operator closer to Saskatoon. The trial judge's view of the evidence and what was reasonable was coloured by her focus on whether the breath samples could have been taken sooner. The requirement is not that the samples be taken as soon as possible. The summary appeal conviction appeal court judge properly found the actions of the constable to be in compliance with s. 258(1)(c) of the Criminal Code.

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Deer Lodge Hotels Ltd. v. Saskatoon (City), 2016 SKCA 119

Lane Jackson Whitmore, September 9, 2016 (CA16119)

Municipal Law – Appeal – Property Tax – Assessment

The appellant was granted leave to appeal from the decision of the Saskatchewan Municipal Board, Assessment Appeals Committee. The appellant owned a hotel property in the city and argued that the city assessor's method for calculating furniture, moveable fixtures and equipment (collectively referred to as FF&E) in relation to the property was flawed. The assessor applied a capitalization rate of 8.58 percent that was determined from the sale of two other hotel properties. The assessor deducted 15 percent from the land title transfer sale information for the FF&E. The appellant appealed to the board on the basis that the 15 percent was inadequate for one of the sales (sale property 2) because the rate should have been increased by a further 6 percent pursuant to the actual Agreement for Sale. The city responded that the 15 percent was an industry standard. The board dismissed the appellant's appeal because the agreement did not have an item-by-item value attached to the inventory lists and because the questionnaire answered by sale property 2 sellers indicated that the FF&E had a minimal value. The appellant's appeal to the committee was dismissed. The issues for the appeal court were if the committee erred in the following ways: 1) by not finding that the assessor committed an error of

law derived from a misapplication of the market valuation; 2) in its determination of the standard of proof required of an appellant in order for a secondary burden of proof to shift to the assessor to demonstrate how the assessment accorded with the facts, the law and generally accepted assessment principles; and 3) in failing to find that the appellant had led sufficient evidence to shift a secondary burden of proof to the assessor to demonstrate that the failure to adjust the sale price of the sale property 2 for the value of personal property was in accordance with the facts, the law and generally accepted assessment principles.
HELD: The appeal was dismissed. The issues were determined as follows: 1) according to the appellant the actual FF&E should have been used. The appeal court agreed with the city that nothing pointed to an error of law. The board and the committee were both aware that the actual capitalization rate was lower than 15 percent and the fact clearly played a role in their conclusions. The appellant did not convince the court that a provision of the Act or the Market Value Assessment Manual was misinterpreted; 2) and 3) the appeal court held that the appellant was attempting to convert their prior argument with respect to the interpretation of the Act and the manual into a question of law regarding who bears the onus of proof. The appellant wanted the appeal court to hold that the burden shifted to the assessor once the appellant provided evidence of the actual sale property 2 agreement. The appeal court did not find it possible to convert such an issue into an error of law.

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Anderson v. Benson Trithardt Noren LLP, 2016 SKCA 120

Richards Lane Ryan-Froslie, September 9, 2016 (CA16120)

Business Corporations Act – Remedies – Rectification
Equity – Remedies - Rectification – Queen's Bench Act, Section 29
Income Tax – Audit – Rollover – Effective Date

The individual appellant was the sole director and shareholder of the corporate appellant. The appellants sought rectification of certain contractual and corporate documents concerning their agreement to implement a tax-driven rollover transaction pursuant to s. 85 of the Income Tax Act. The rollover date was October 2011. The appellants' accountant did not realize that he failed to instruct the appellants' lawyers to prepare the necessary documentation until 2013 when CRA notified the appellants that

their 2011 tax year, including rollover election, would be audited. The lawyers then prepared the documents using an effective date of January 1, 2011. CRA reviewed the documents and determined that a proper s. 85 rollover had not been accomplished. The appellants sought equitable relief from the Court of Queen's Bench, arguing that the documents executed in 2013 did not reflect the oral agreement made in 2011. They requested that the documents be rectified and that such relief be declared to have retroactive effect to the October 2011 date. The chambers judge rectified the documents by correcting the specified effective date from January 1, 2011, to October 6, 2011, but did not declare the documents to be retroactively valid, binding and effective as of that date. The chambers judge saw the intent of the application for such a declaration as being to prevent the Tax Court of Canada from reviewing any eventual appeal of a reassessment.
HELD: The appeal was dismissed. The appeal court held that the chambers judge correctly recognized the declaration requested was an attempt to bind the CRA so as to prevent the Tax Court of Canada from reviewing any eventual appeal of a reassessment. The chambers judge correctly rectified the documents so as to resolve issues between the two appellants. The Tax Court has exclusive jurisdiction to hear appeals relating to federal income tax assessments and can consider the effect of any backdated documents. The appeal court did not find that the matter had to be resolved so as to prevent multiplicity of proceedings as directed by s. 29 of The Queen's Bench Act because the tax efficacy of the rollover was still something that had to be determined by the Tax Court. The documents were rectified and the tax effect of the rectified corporate documents would be determined by the Tax Court. Whether the rectification should have been granted as an equitable remedy or pursuant to The Business Corporations Act was of no consequence.

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Walby v. Walby, 2016 SKCA 121

Jackson Herauf Ryan-Froslie, September 6, 2016 (CA16121)

Family Law – Child Support – Determination of Income
Family Law – Child Support – Disclosure from Non-parties – Queen's Bench Rule 5-15, Rule 15-38
Family Law – Child Support – Variation

The appropriate authority of the court to order disclosure from non-parties in family law proceedings was at issue. The

chambers judge ordered the appellant's wife and his corporate employer to disclose extensive financial and income disclosure. The appellant's application was to vary the child support provisions in an order based on a reduction of his income. The respondent served a notice to disclose financial information on the appellant. The appellant was not a shareholder of the corporation, his wife and brother were the shareholders.
HELD: The appeal was allowed in part. Neither party considered the relevancy of Queen's Bench Rule 15-38. The appellant focused on rule 5-15. Because there are significant distinctions in the rules between the requirements to obtain disclosure from parties and non-parties, the appeal court determined the appropriate remedy was to allow the appeal in part and remit the matter back to Queen's Bench for a new hearing.

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Fonagy v. Hicks, 2016 SKCA 122

Jackson Herauf Ryan-Froslie, September 9, 2016 (CA16122)

Family Law – Division of Property – Lis Pendens

The appellant claimed that a condominium held in joint tenancy with right of survivorship by the respondent and her adult son was family property under The Family Property Act. He filed a lis pendens and the respondent applied to vacate it. The chambers judge accepted the respondent's argument that she held no interest in the condominium capable of division under the Act.
HELD: The appeal was allowed. It was not clear that the appellant's claim could not give him any right in the land in question. The lis pendens was to remain in force until further order of the court.

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Peter Ballentyne Cree Nation v. Canada (Attorney General), 2016 SKCA 124

Ottenbreit Herauf Whitmore, September 28, 2016 (CA16124)

Aboriginal Law – Duty to Consult
Aboriginal Law – Honour of the Crown
Aboriginal Law – Interjurisdictional Immunity
Aboriginal Law – Reserves and Real Property

Civil Procedure – Jurisdiction – Doctrine of Paramountcy
Civil Procedure – Summary Judgment
Limitation of Actions
Statutes Interpretation – Interpretation Act, Section 14.1
Torts – Negligence – Fiduciary Duty
Torts – Trespass – Continuing Trespass

The appellants sought declarations and damages for flooding of the Indian Reserve land, caused by construction of dams on a river. The claims were dismissed by way of summary judgment on the basis that the claims were statute-barred. The appellant appealed, arguing that the action should not have been dismissed by summary judgment because the actions revealed a genuine issue for trial. The main dam was constructed on the river and the final licence for its operation was granted in 1943. A known consequence of the dam was the flooding of the reserve. The statement of claim of the action was filed in 2004 and no further action was taken until 2013, when an amended statement of claim was filed and the respondents applied for summary judgment. The issues were: 1) did the chambers judge err in holding that the appellant had the burden of showing that there was a genuine issue for trial; 2) was the honour of the Crown breached by a respondent failing to act honourably by not working diligently to fulfil its promise to the appellant; 3) was a duty to consult triggered; 4) did the respondents breach their fiduciary duty to the appellant; 5) was there a continuing trespass so as to defeat limitation periods; 6) was the chambers judge correct in concluding that the appellant consented to the dam project and they were therefore estopped from asserting that they were not now bound by the agreement; 7) the application of limitation periods; 8) did the operation of s. 14 of The Interpretation Act, 1995 prevent the application of the limitation legislation; 9) did the chambers judge err by not addressing the doctrine of paramountcy arguments even though they were argued at chambers; and 10) did the chambers judge err in not applying the doctrine of interjurisdictional immunity. HELD: The issues were determined as follows: 1) the appeal court held that the chambers judge erred in holding that the appellant had the initial burden of showing there was a genuine issue for trial. Even though there was an error it did not affect the eventual outcome of the case; 2) the appeal court agreed with the chambers judge that the Natural Resource Transfer Agreement (NRTA), although a constitutional document, did not explicitly create an obligation towards an Aboriginal group that invoked a special relationship with the Crown; 3) the court agreed with the appellant that a Crown corporation, one of the respondents, could owe a duty to consult the appellant. The first element of the duty to consult test was easily satisfied when the appellant alleged impact on its treaty rights to hunt, fish, and

trap. The second element, contemplated Crown conduct, was given a generous application by the appeal court so as to find it was satisfied. The third element was the possibility that the Crown conduct could affect the Aboriginal claim or right. The appeal court agreed with the chambers judge that, since its establishment, the dam had caused flooding to the same area. The appeal court held that the chambers judge did not err in concluding that there was no novel or new adverse impact on treaty rights that would give rise to the duty to consult; 4) the appeal court applied the Manitoba Metis test. The first question was whether there was a specific or cognizable Aboriginal interest. The court held that Indian Bands have sufficient interest in their reserve land to give rise to fiduciary duties. The second part of the test was met because the Crown failed to protect and preserve the appellant's interest in the reserve land from invasion and this failure could constitute a breach of the Crown's fiduciary duty. The appeal court agreed with the chambers judge that the appellant's claims were subject to the provincial limitations legislation. The appellant's right to initiate proceedings arose when the licence to flood was given in 1939. There were no changes to the licence since the original licence was granted; 5) the appeal court held that the discharge of water can interfere with possession. If the initial intrusion was a trespass, the failure to remove the water was a continued trespass. The flooding was a direct, physical, and intended consequence of the construction of the dam. The chambers judge erred by not finding a continuing trespass. Whether the appellant gave irrevocable consent to construct the dam was a question that would have to be considered at trial; 6) the chambers judge erred in his ostensible authority analysis. The appeal court did, however, find that there was sufficient evidence that a licence was given to occupy or use any land or marsh of the reserve for the dam project; 7) the appeal court agreed with the chambers judge that The Public Officer's Protection Act (POPA) is the appropriate legislation; 8) the appeal court agreed with the chambers judge's interpretation of s. 14.1; 9) the appeal court did not find any operational conflict or frustration of federal purpose; and 10) the appeal court agreed with the chambers judge that interjurisdictional immunity did not apply to the matter at hand. The continuing trespass claim was returned to the Court of Queen's Bench to determine the merits of the consent issue and damages.

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JICO Holdings Inc. v. Lynco Construction Ltd., 2016 SKCA 126

Richards Caldwell Whitmore, September 29, 2016 (CA16126)

Bankruptcy – Acts of Bankruptcy
Bankruptcy – Appeal
Bankruptcy – Order Against a Debtor
Bankruptcy – Solicitor-Client Costs

The appellant appealed the chambers order denying its application under the Bankruptcy and Insolvency Act for a bankruptcy order against the respondent. The chambers judge found that there was a bona fide dispute as to whether, and to what extent, the respondent might be indebted to the appellant. The appellant claimed that the respondent owed it $685,000 under leases and $5,000 that was wrongfully retained from the sale of property. The appellant also claimed it may be owed $32,000 as a contingent beneficiary of a security for costs order in favour of a credit union. There were also matters between the parties and their shareholders in Alberta. The principals behind the respondent created a limited partnership and the respondent agreed to transfer all of its assets to it. There were five issues on appeal: 1) did the chambers judge err in law by holding that the appellant did not have a claim provable in bankruptcy on the basis that the debt it claimed was statute-barred or that the security for costs order was not a debt; 2) did the chambers judge err in law by holding the arrears debt was uncertain by overlooking material evidence and failing to apply case law that establishes a bona fide dispute as to quantum is not fatal; 3) did the chambers judge err in law and fact by concluding the appellant had failed to prove the respondent had committed acts of bankruptcy within six months of the appellant's application; 4) did the chambers judge err by concluding the appellant had acted with an improper purpose; and 5) did the chambers judge err in awarding solicitor-client costs.
HELD: The appeal was allowed in part. The issues were analyzed as follows: 1) subsections 43(1)(a) and (b) require a creditor who seeks a bankruptcy order against a debtor to have a debt over $1,000 and the debtor must have committed an act of bankruptcy within the previous six months. The chambers judge denied the appellant's application because the security for costs order in favour of the credit union was not a debt owing to the appellant, and because the appellant's arrears claim under the leases were statute-barred. The security for costs order in the unrelated action was a contingent liability that, if crystallized, would become owing to the credit union, not the appellant. The chambers judge issued her fiat before she received supplementary submissions from the appellant regarding the findings in Alberta. The Alberta court had issued an original fiat and then another one because the first one was found to have made erroneous findings of fact. The appellant argued that the

correction of facts was relevant to the application in Saskatchewan. The appeal court, however, concluded that the chambers judge did not make her limitations finding based on a reliance on the Alberta fiat as a conclusive and binding determination of the issues that were before the chambers judge; 2) the chambers judge did not err. The chambers judge assumed the debt was a live debt owing by the respondent to the appellant, but simply preferred the respondent's evidence, which was supported by the evidence. Further, the chambers judge did not misapprehend cases establishing that a bone fide dispute as to quantum was not fatal to a bankruptcy application. She concluded that the dispute would be better resolved by a civil trial in Alberta; 3) the appellant argued that the respondent had done two categories of acts that related to fraudulent transfers or transfers intended to defeat creditors. The appellant asserted that the onus should have then shifted to the respondent to prove the bone fide nature of the transactions. The appeal court found, however, that the argument overlooked that the chambers judge was not first convinced the transactions were sufficiently impugned to shift the onus to the respondent. The chambers judge did not err in failing to shift the onus to the respondent; 4) the chambers judge identified three reasons for dismissing the application before her under s. 43(7). The appeal court determined that each of the three reasons were sufficient cause for the chambers judge to have exercised her discretion to dismiss the application under s. 43(7); and 5) the circumstances were not so rare and exceptional that solicitor-client costs should have been awarded against the appellant. The award was set aside and the ordinary costs were substituted in their place.

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R. v. Merrlles, 2016 SKCA 128

Richards Lane Ottenbreit, September 13, 2016 (CA16128)

Criminal Law – Appeal – Conviction
Criminal Law – Defence – Mistake of Age
Criminal Law – Sexual Touching – Child Victim

The appellant appealed his conviction of an offence contrary to s. 151 of the Criminal Code, sexual touching of a person under the age of 16 years. The complainant was 13 and the appellant was 37 years at the time of the offence. The appellant argued that he was denied disclosure of documents that would have demonstrated that the complainant was a prostitute. The appellant also argued the defence of mistake of age pursuant to

s. 150.1(4).
HELD: The appeal was dismissed. The age of the complainant was established so disclosure of documents alleging to show she was a prostitute were not relevant. The appellant did admit to sexual acts with the complainant. The appellant's defence of mistake as to age was rejected and the appeal court concluded that the trial judge did not make an appealable error of fact or law in reaching that decision. The appellant's arguments did not cast doubt on the essential basis of conviction.

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Superior Construction Solutions Inc. v. Hamilton Construction Corp., 2016 SKCA 130

Jackson Caldwell Whitmore, September 16, 2016 (CA16130)

Builders' Lien – Appeal
Builders' Lien – Application to Vacate
Builders' Lien – Judicial Centre

The appellant appealed the order vacating a written notice of lien and a claim of lien it had filed pursuant to The Builders' Lien Act with respect to land owned by a city. The appellant performed work on city property as a subcontractor to the respondent. The appellant served the respondent with written notice of lien and claim of lien. The appellant failed to serve its statement of claim within the 30-day period set out in s. 87. An extension of time was granted by a judge in another city. In the meantime, the respondent searched the local registry in the city, and after finding no statement of claim, applied to the chambers judge to vacate the appellant's written notice and claim of lien on the basis that no action had been commenced as required. The chambers judge allowed the application for two reasons: he found that s. 86(2) of the Act applied and was interpreted to require a lien claimant to file its statement of claim in the judicial centre nearest to the land of the claim with the transfer provisions of s. 86(3) of the Act being inapplicable; and he found it was incumbent on the claimant to provide the court with an evidentiary and legal basis for the claim to permit a determination that there was an arguable case and thus justification to maintain the extraordinary remedy of a claim of lien pending trial or other proceedings for final determination.
HELD: The appeal was allowed because it could not be sustained on either of the chambers judge's bases. The appeal court found that the chambers judge misinterpreted the effect of s. 86(2) even though it was an error for the appellant to commence its action

to enforce the claim in another city. The appeal court found that the error could be cured. The Act recognized this in ss. 22 and 86, and The Queen's Bench Act allows for transfer of actions commenced in the wrong judicial centre (s. 24), while s. 26 indicates that an action is not a nullity because it is started in the wrong judicial centre. A Queen's Bench judge has broad discretionary power to transfer any action to another judicial centre of the court. The appellant did file a claim within the required time, just in the wrong judicial centre. The appeal court concluded that the filing in the wrong judicial centre did not render its claim of lien a nullity. The chambers judge erred in law in this regard. The chambers judge's alternate ground for making the order was also erroneous. The chambers judge found that the appellant had to provide evidence to substantiate its claim, whereas the appeal court did not find any of the provisions or principles relied on supported the reversal of the onus and burden of proof. The onus was on the respondent to prove that the claim ought to be vacated. The chambers judge erred in law by effectively treating the respondent's application as an application for summary judgment rather than an application to have the claim of lien vacated on the basis of a missed limitation period.

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R. v. Lafontaine, 2016 SKPC 88

Green, September 2, 2016 (PC16093)

Criminal Law – Motor Vehicles Offences – Impaired Driving – Care or Control

The accused was charged with having care or control of a vehicle while her ability to operate it was impaired by alcohol. The RCMP received four telephone calls reporting an impaired driver. The first two were made by employees of gas stations at which the accused had stopped her vehicle and the next one from a driver who had found the accused behind the wheel of a vehicle that was in the ditch off the highway. This caller had stopped to see if the accused had been hurt. He noticed that there was a half-full liquor bottle beside the accused on the front seat of the vehicle. He then drove her to a restaurant. At the restaurant the staff called in to report that the accused was intoxicated and causing problems. An RCMP officer arrived and arrested the accused for being drunk in a public place. The officer did not make a breath demand at that time because the breath technician on duty that night told the officer it would be

difficult to prove when the accused had been driving. Approximately ten weeks later, the accused was charged with impaired care or control after the officer had viewed the videos taken at one of the gas stations on the night in question. At trial the Crown called witnesses to testify first as to the condition of the accused at the second gas station and, secondly, after she had been found in her vehicle at the side of the road. Regarding the first incident, the gas station cashier testified. She said that she saw the accused drive over the curb. The accused had trouble walking into the store and then leaned on the counter during the following 10 to 15 minutes. The accused's speech was a little slurred and slow. The cashier testified that the accused said that she was drunk. The accused explained that the front of her vehicle is low and she bumped into the cement block at the front of the store. Because of arthritis and other conditions, she limped when she walked and that she had to lean on the counter because her foot problems made it painful to stand. She denied that she said she was drunk but had told the cashier that she was upset. She testified that she had just had an altercation with her sister before arriving at the store. The accused called her former spouse to testify, and he said that the accused visited him right after she had stopped at the gas station and that she did not have alcohol on her breath. The next witness to testify was the passerby. He said that when he found the accused in her vehicle in the ditch, she smelled of alcohol and was unsteady on her feet when she walked to his vehicle. The accused and her former spouse both testified that he had driven the vehicle and the accused slept in the back seat. The spouse said that the vehicle ran out of gas so he pulled over into the ditch and left the accused in the vehicle while he hitchhiked to the nearest town to get gas. The accused testified that she crawled into the front seat after he left and started drinking. The accused testified that she had no intention of driving the vehicle and it was out of gas anyway.

HELD: The accused was found not guilty. The court found that it had a reasonable doubt that the accused's ability to operate her vehicle was impaired by alcohol when she arrived at the gas station. The manner in which the accused moved could be explained by her medical ailments. There was no evidence that she smelled of alcohol while she was in the store. With respect to the question of whether the accused was in care or control of the vehicle when found in the front seat of it by the passerby, the court found that the accused had rebutted the presumption that she occupied the seat for the purpose of setting the vehicle in motion. It found that it was satisfied that there was only a remote possibility of damage to persons or property because the vehicle was off the road and out of gas. The court accepted the accused's explanation that she consumed the alcohol after the

vehicle ran out of gas.

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C. (C.), Re, 2016 SKPC 102

Green, September 2, 2016 (PC16094)

Family Law – Child in Need of Protection – Permanent Order

The Ministry of Social Services applied to the court to order that: the three children of M.C. be found to be in need of protection under s. 11(b) of The Child and Family Services Act; the oldest child, a 14-year-old boy, be committed to the custody of the Minister until he is 18 under s. 37(3) of the Act; and that the two youngest children, aged four and two respectively, be permanently committed to the Minister under s. 37(2) of the Act. M.C. admitted that the children were in need of protection but opposed the orders and requested that the children be placed in the care of the Minister for a temporary period of six months under s. 37(1)(c) of the Act. The oldest child had been placed in the care of his aunt after he had run away from two institutions. He had begun to exhibit aggression and was becoming involved in criminal activity while in the care of his mother. The two youngest children had been living with foster parents for the last 34 months. Neither the aunt nor the foster parents would be able to adopt the children. The two youngest were considered high needs children and were receiving speech therapy. The Ministry provided evidence that it had responded to 25 intakes/concerns about the care M.C. was providing to her children between 2002 and 2012. M.C. had made four parental service agreements with the Ministry. M.C. was addicted to alcohol and drugs, and found looking after her children difficult because of depression and suicidal thoughts. A social worker testified that under the last two orders, a three-month temporary order followed by a six-month supervision order, that M.C. had not performed her obligations such as working with her addictions counsellor or reducing her consumption of methadone. A psychologist who had interviewed M.C. and administered psychological tests found that she was unable to understand the short- or long-term effects of her harmful behaviour on her children. He recommended that the Ministry continue to act as guardians for them and recommended that the oldest child be placed in long-term care and that the Minister plan for the permanent care of the two younger children. A counsellor with programs designed to help First Nations individuals deal with their past suffering and establish a plan for change testified on behalf of M.C. that

she had been participating in the program and was making progress. She believed that M.C. could overcome her problems. M.C. said that she was trying to find work and to get off methadone. She advised that she had her drug and alcohol consumption under control.
HELD: The children were found to be in need of protection and granted the order requested by the Ministry. The court found that it was not satisfied that there was a reasonable plan or basis to conclude that M.C. could make the necessary changes in her life within a reasonable time whereby the children could be placed in her care. The court ordered that the oldest child be placed in the custody of the Minister and that the two youngest children be permanently committed to the Minister.

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R. v. Lehman, 2016 SKPC 104

Green, September 16, 2016 (PC16098)

Criminal Law – Evidence – Credibility
Criminal Law – Evidence – Expert Evidence – Blood Alcohol Concentration
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08

The accused was charged with three Criminal Code offences: driving while impaired, contrary to s. 253(1)(a); driving over .08, contrary to s. 153(1)(b); and with failing to stop for a police officer as soon as reasonable in order to evade that officer, contrary to s. 249.1(2)). As he was completing a traffic stop, an officer heard the accused's truck in the early morning hours. When the officer engaged his police vehicle emergency lights, the accused spun his tires, fish-tailed, and took off. The accused failed to stop at two stop signs and eventually stopped in the driveway of his house. The accused was arrested for the s. 249.1 offence and was given a breath demand after he failed an ASD. He failed the ASD between 3:01 and 3:03 and the breath samples were taken at 3:55 and 4:17. The accused admitted that he was drinking alcohol that evening, but denied being impaired. He said he was not trying to evade the officer when he failed to stop for him. He also said that alcohol he had just had was not in his system yet when he was driving, but was at the time of the breath samples. The officer indicated that the accused had glossy, watery eyes, but his walk and speech were fairly normal. The officer smelled alcohol coming from the accused, but was surprised he did not show more impairment given his driving.

The accused indicated that he had consumed six beer that day, but the officer noted more than six empty beer cans on the accused's table when he was getting his shoes. The accused indicated that he downed six or seven ounces of vodka just before driving at 2:45. An alcohol expert and the accused testified. The defence expert testified that the accused's blood alcohol concentration (BAC) at the time of driving would not have been over .08 based on the drinking the accused testified to. The issues were: 1) whether there was proof beyond a reasonable doubt that the accused's ability to drive was impaired by alcohol; 2) whether the accused's evidence raised a reasonable doubt that his blood alcohol concentration was over the legal limit at the time when he finally stopped his vehicle; and 3) whether the accused had reasonable excuse for not stopping immediately for the officer and whether his actions amounted to him evading the police officer. The accused had nine drinking and driving convictions since 1982 with the most recent in 2007.
HELD: The issues were determined as follows: 1) the Crown did not prove beyond a reasonable doubt that the accused's ability to drive was impaired; 2) section 258(1)(d.1) deals with the last drink defence. The court had to be satisfied that the accused's drinking was consistent with his BAC being not over .08 at the time of driving yet being consistent with the BAC's in the Certificate of Analysis. The court preferred the officer's evidence over the accused's, given the drinking affected his recollections. The court was not satisfied that the defence provided a credible account of the accused's alcohol consumption. Given the findings, the court was unable to apply the expert's opinions. The court did not have a reasonable doubt regarding the accused's guilt on the driving while over .08 charge; and 3) there was no doubt that the accused knew he was being pursued by the police and did not stop as soon as was reasonable in the circumstances. The court concluded that the accused did not have a reasonable excuse for not stopping. There was also no doubt that the accused attempted to get away from the officer because he was afraid of the legal consequences that he could face. The accused was found guilty of the evading charge.

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R. v. Bigsky, 2016 SKPC 106

Kovatch, August 31, 2016 (PC16090)

Criminal Law – Assault – Acquittal
Constitutional Law – Charter of Rights, Section 8

The accused was charged with committing assault contrary to s. 266 of the Criminal Code. The complainant was a child protection worker employed by the Saskatchewan Ministry of Social Services. The charge arose after the complainant enlisted the assistance of a police officer so that she could enter the accused's home to investigate whether the accused's three children were in need of protection and, if necessary, to apprehend them. The children had been apprehended before because their father had assaulted the accused in their presence. The children were returned to the accused on the basis that she had executed a Parental Services Agreement whereby she gave permission to officers of the Ministry to enter her home. The Agreement did not specify that the father was not to be in the home. The accused had been released on bail on the date in question. One of his bail conditions was that he have no contact with the accused. The Ministry learned that he was in the accused's home. The complainant discussed the matter with her superiors and it was decided that she should go to the accused's apartment to investigate. If the father was there, she would have him arrested. When she and the officer approached the building, she saw the father on the balcony of the accused's suite and called to him. He went inside and the complainant and the officer approached the patio door of the suite. They could see the accused but she refused to let them in. In her testimony, the accused said that the officer told her that she had to let them in and if she didn't, he would force his way in. She allowed them to enter and they searched for the father but he was not in the suite. The complainant told the accused that she was apprehending the children. The accused became upset and hit the complainant on the shoulder. The officer intervened and then the accused kicked the complainant in the leg. She suffered no injuries. The defence filed a Charter notice that the accused was subjected to an illegal search and seizure that breached her s. 8 Charter rights and requested that the evidence obtained following the unlawful entry be excluded. The accused also submitted that her actions were justified as defence of property under the common law and the Criminal Code.

HELD: The accused was found not guilty. The court found that the accused's s. 8 Charter rights were breached. Pursuant to a Grant analysis, the court excluded the evidence obtained after the illegal entry of the accused's home. The court found that the accused had not consented to the entry by the officer and the complainant and it was therefore a warrantless search. The officer did not have the lawful authority to enter the home on the basis of arresting the father as he was not in hot pursuit. The complainant had not obtained a warrant under s. 13.1 of The Child and Family Services Act to enter the accused's home and therefore had no lawful authority to enter the home. There were

no exigent circumstances to justify the search such as preventing the destruction of evidence as they already established that the person they sought was not in the house. The unlawful entry and search of the accused's home was a severe breach of the accused's Charter rights. The impact upon her was severe as the complainant gathered evidence and apprehended her children. The accused's assault on the complainant was minor in nature and although not excusable, her offence was a reaction to a significant breach of her rights. The administration of justice was served by excluding the evidence.

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JMP Plumbing and Heating Ltd. v. Marjoram, 2016 SKPC 110

Whelan, August 29, 2016 (PC16092)

Civil Procedure – Limitation Period – Discoverability Principle

The corporate plaintiff claimed that the defendant, its employee, owed it the amount of $24,200, which was owed for accounting for preparation of personal tax returns, an invoice for the legal work associated with restructuring the corporation, corporate assets in the possession of the defendant and overhead for side jobs performed by the defendant. The defendant denied the claim with the exception of the invoice for legal fees in the sum of $936. The parties were self-represented litigants. The major issue in the dispute was whether the limitation period of two years applied to another apparent aspect of the plaintiff's claim regarding the defendant's liability for a share of the corporate debt and when the claim was discoverable. The plaintiff argued that the limitation period should run from the date of the defendant's resignation in February 2015 rather than on the dates when the debt was incurred. The plaintiff corporation was allegedly formed by the defendant. He did not become a shareholder so that he could prevent his former spouse from having access to corporate records and to hide income from her. The corporation had two shareholders, one of whom was the common law partner of the defendant during the period in question. She and the other shareholder claimed that they ran the business in accordance with instructions given by the defendant. The plaintiff incurred debts in 2014 and 2015. The shareholders believed that they discovered the loss on the date when the defendant refused to become a shareholder in February 2015. The plaintiff submitted that the defendant would then have become responsible for the corporate debt and it would not have known of his refusal to assume it until his

resignation.
HELD: The claim was dismissed but for an award in the amount of $1,580 for the cost of legal fees and some specific items proven by the plaintiff. The plaintiff's argument that the limitation period commenced when it discovered that the defendant resigned because it then became apparent that he would not assume a share of the corporate debt was dismissed because it misunderstood the law. The date of the defendant's resignation and refusal to become a shareholder was irrelevant to the plaintiff's discoverability of its loss. The court found that there was nothing to prevent the plaintiff from pursuing a cause of action against the defendant at any time that the necessary facts of the loss were known to the corporation. The defendant was not responsible for the corporate debt on the basis that he was an "acting owner". The shareholders/directors could not avoid their responsibilities under The Business Corporations Act and the court found that they were aware of and participated in any fraudulent business practices committed by the defendant.

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R. v. McNab, 2016 SKPC 115

Hinds, September 2, 2016 (PC16101)

Criminal Law – Assault
Criminal Law – Breach of Undertaking
Criminal Law – Evidence – Witness – Expert

The accused was charged with assaulting his infant son and breaching a condition of his undertaking to not be at the residence he was, contrary to ss. 266 and 145(5.1) of the Criminal Code, respectively. A voir dire was held regarding the Crown witness doctor's qualifications to be qualified as a witness capable of identifying and treating injuries and ailments in children. The court permitted the Crown to amend its application to seek to also qualify the doctor to enable her to provide her opinion as to whether the injuries were consistent with certain factual scenarios. The sole issue was whether or not the Crown satisfied its burden on a balance of probabilities to show that the doctor was a properly qualified expert in the areas they sought to elicit opinion evidence.
HELD: The court listed a non-exhaustive list of factors from case law that assisted in determining whether a tendered expert witness was qualified. The doctor's qualifications and training were reviewed. The court was satisfied that the doctor's evidence met the factors set out in Mohan: 1) the doctor examined the

infant and therefore her evidence was relevant; 2) the doctor's evidence was necessary to assist the court in determining the potential underlying reason for the bruises on the infant; 3) there was no exclusionary rule that had application; 4) the expert was qualified to express an opinion as to the underlying reasons for the bruises on the infant; 5) the doctor was able to be impartial and to provide an objective assessment respecting the infant, based on her independent judgment; and 6) after hearing the evidence of the doctor the court was satisfied that she was willing to fulfill her duty to the court. The Crown satisfied the threshold requirement and the court did not have any concerns regarding the doctor's independence or impartiality. The doctor was qualified to give her opinion on the identification and treatment of injuries and ailments in children. She was also qualified to give her opinion respecting the injuries she observed on the infant and the potential underlying reasons for them.

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R. v. Evoy, 2016 SKPC 119

Baniak, September 7, 2016 (PC16104)

Criminal Law – Blood Alcohol Level Exceeding .08 – Breath Demand – Reasonable and Probable Grounds
Criminal Law – Care and Control – Presumption
Criminal Law – Defences – Charter of Rights, Section 9, Section 10(b)
Criminal Law – Impaired Driving – Blood Alcohol Exceeding .08

The accused was charged with impaired driving and driving over .08, contrary to ss. 253(1)(a) and 253(1)(b) of the Criminal Code, respectively. An officer received a call of a truck parked in a private rural driveway with a rifle. The truck had left before the officer arrived but the complainant gave him a licence plate number. The complainant also noted his concern that the man had been drinking and had a gun. Later in the evening, the officer stopped a vehicle parked at the side of the road because he thought it may have been related to the earlier complaint even though this vehicle was a minivan. The officer ran the licence plate of the minivan and it came back registered to an older van and to the same surname as the registration to the truck parked in the rural driveway earlier. The officer noted the driver, the accused, had glossy eyes, an odour of alcohol coming from his breath, slurred speech, bloodshot eyes, and slow movement. The accused was arrested, read his rights, and transported to the detachment. The officer indicated that he had not turned his mind to a possible ASD test prior to making the breath demand.

The accused indicated that he did not want to speak to a lawyer at the roadside, but he was not told he could speak to a lawyer at the detachment and he was not given an opportunity to speak to counsel at the detachment. The issues were: 1) did the police officer have reasonable grounds to make a breath demand; 2) was the accused arbitrarily detained; and 3) were the accused's right to counsel violated.
HELD: The issues were determined as follows: 1) the trial judge concluded that the officer had a subjective belief that the accused was impaired. He further found that the officer articulated sufficient observations to sustain his belief on an objective basis. The officer had reasonable grounds to make the breath demand pursuant to s. 254(3) of the Criminal Code; 2) the trial judge found that it would have been highly improper to ignore the vehicle parked on the side of the road for numerous reasons. The accused was not arbitrarily detained; and 3) the accused understood his rights to counsel, but there was no evidence that he invoked those rights. The police were, therefore, not required to ask again, or to provide the accused with a second or subsequent opportunity to consult with counsel. A subsequent opportunity would have only been required if there was a change in circumstances, which there was not. The trial judge concluded that the officer had complied with the informational component of s. 10(b) and that the accused understood his rights. Because the accused did not invoke his rights to counsel the implemenational component of s. 10(b) of the Charter was not triggered. The presumption of care and control applied because the accused was in the driver's seat of a running, operational vehicle. The presumption was not rebutted and the accused was found guilty of driving over .08 and a conditional stay was entered with respect to the impaired charge.

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Edmison v. Wawanesa Mutual Insurance Co., 2016 SKPC 120

Metivier, September 20, 2016 (PC16105)

Insurance – Contract – Interpretation
Small Claims – Insurance Contract

The defendant issued a personal insurance policy to the plaintiff and his wife. The wife was the victim of a fraudulent employment scam that resulted in a monetary loss of $10,727.85. The fraudster had the wife deposit cheques into her account and then act as a mystery shopper purchasing gift cards and transferring money back to the fraudster. The deposited cheques

were returned as counterfeit after she had already transferred the money. The policy contained payment for "credit or debit cards, forgery and counterfeit currency", but excluded payment for "loss or damage resulting from a change in ownership of property that is agreed to, even if the change was brought about by trickery or fraud". The issues were: 1) did the loss fall within the insurance coverage provided under the policy; 2) if so, was coverage excluded by application of the "trickery or fraud" exclusion clause; and 3) did the defendant breach its duty of good faith.
HELD: The issues were determined as follows: 1) the court did not find any ambiguity in the coverage provision. That coverage was limited to losses incurred as a result of forgery or alteration of cheques on the insured's account was not supported by the policy wording. The court concluded that the ordinary and plain meaning of the word "forgery" included a counterfeit cheque. The plaintiff's loss was caused by forged cheques and, therefore, fell within the coverage provided by the policy; 2) the court did not accept the plaintiff's submission that the money and/or gift cards never belonged to the plaintiff or his wife, but were merely held on behalf of the fraudster and his agent. The fraudster never had any money or property. The court held that the wording of the "trickery or fraud" exclusion was unambiguous and applied to the circumstances of the case; and 3) the court held that the plaintiff failed to establish any facts that may have suggested bad faith on the part of the defendant. The plaintiff's claim was dismissed.

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R. v. W. (B.R.), 2016 SKPC 138

Martinez, September 7, 2016 (PC16112)

Criminal Law – Arrest – Reasonable and Probable Grounds
Criminal Law – Blood Alcohol Level Exceeding .08 – Breath Demand – Reasonable and Probable Grounds
Criminal Law – Defences – Charter of Rights, Section 8, Section 9

The accused was charged with impaired driving and driving over .08. He argued that the Certificate of Qualified Technician should be excluded because the arresting officer did not have reasonable grounds to demand a breath sample thereby breaching his ss. 8 and 9 Charter rights. An officer received public complaints about ATVs in the community. The officer saw a red ATV drive away and evade being stopped by other

officers. The officer was later told that the red ATV may be stolen. The officer located what looked like the ATV at the school parking lot. The officer did not engage the police truck emergency lights but instead turned his high beam lights on and drove towards the vehicles and people in the parking lot. There were two occupants on the red ATV and it brushed the bumper of the police truck as it attempted to escape. It drove directly into a nearby chain link fence. The officer told the occupants to stop and when it looked like the driver, the accused, was trying to get away he pulled him to the ground. The accused was immediately advised that he was under arrest for theft of the ATV and then also arrested for impaired driving when the officer smelled alcohol on his breath. The accused was placed in the police truck and the officer called for backup. When the officer returned to the police truck, there was a very strong odour of alcohol. The officer reiterated that the accused was under arrest for impaired driving and was given a breath demand and taken to the detachment. The ATV was not stolen. HELD: The court concluded that the officer's belief that the defendant might be in possession of a stolen vehicle was objectively reasonable and amply supported by the evidence. There were grounds for the arrest pursuant to s. 495(1)(a) of the Criminal Code. The court noted that even if the accused had not been arrested he could have been detained under the officer's common law power to detain suspects for investigative purposes. Whether or not the officer also had grounds to initially arrest the accused for impaired driving was moot. The officer indicated his reasons for the breath demand included: the accused fumbling with the ATV controls when the officer approached; the accused was unable to control the ATV; and the odour of alcohol coming from the accused during his initial arrest and then becoming stronger when he was placed in the police truck. The court held that a reasonable person, looking at things from the officer's perspective, would say that his honest belief that the accused's ability to drive was impaired by alcohol was objectively reasonable. The accused was not successful on the voir dire and the certificate was allowed to be used as evidence in the trial.

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Schneider v. Royal Crown Gold Reserve Inc., 2016 SKQB 278

Popescul, August 29, 2016 (QB16268)

Civil Procedure – Application Without Notice
Civil Procedure – Class Action – Litigation and Indemnity

Agreement
Class Action – Costs Jurisdiction – Litigation and Indemnity Agreement

The plaintiff brought an application without notice requesting the approval of a litigation financing and indemnity agreement (LFA). He also sought a confidentiality order sealing the documents pertaining to the application. The plaintiff certified a class action against the defendant and the action was scheduled for trial. After certification, The Class Actions Act in Saskatchewan was changed from a "no costs jurisdiction" to a "costs jurisdiction", meaning the plaintiff could then face substantial liabilities for costs if his action was dismissed. The plaintiff then sought approval of the LFA with the third party. HELD: The court found it had jurisdiction to approve LFAs of the nature proposed, and they have been approved in other jurisdictions. The court found that all of the criteria set out in a New Brunswick case had been met. The court found it would be appropriate to grant the plaintiff's request for judicial approval of the LFA. The application and material were also ordered to be subject to a confidentiality order. The information would allow the defendants or third parties to gain an unfair glimpse into the litigation plans of the plaintiff. The court also determined that it was not necessary for the plaintiff to make the application on notice. Neither the defendants nor third parties had any interest in the motion. The order was, however, ordered to be served on the other parties. The usual wording of an order made without notice was included in the order so that if there was a basis to challenge it, the defendants and third parties could do so.

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Robin Hood Management Ltd. v. Gelmich, 2016 SKQB 279

Barrignton-Foote, August 29, 2016 (QB16269)

Civil Procedure – Application to Strike Statement of Claim
Civil Procedure – Costs – Self-represented Litigant
Civil Procedure – Queen's Bench Rules, Rule 7-9

A defendant filed a sexual harassment complaint with the Saskatchewan Human Rights Commission pursuant to s. 27(1) of The Saskatchewan Human Rights Code. The plaintiff argued that the complaint contained false allegations, and that the defendant committed several torts by filing and pursuing the complaint. The plaintiff originally claimed against the commission and one of its employees, but the court ordered those claims to be struck, leaving the one individual defendant.

The defendant now applied to strike pursuant to Queen's Bench subrules 7-9(1), 7-9(2)(a), (b), and (e), alleging that the claim disclosed no reasonable cause of action, or alternatively was scandalous, frivolous or vexatious, or was an abuse of process. The Chief Commissioner concluded that the defendant's evidence established on a balance of probabilities that the defendant was the subject of sexually inappropriate comments in the workplace, but that a court would likely find the complainant unable to establish a prima facie case of harassment in the workplace. The conclusion was based on the defendant's reaction to and participation in the allegedly offensive behavior. The chief also found that there was no reasonable likelihood that the complainant would be able to establish a link between the alleged harassment and the decision to end her employment. The complaint was dismissed pursuant to s. 27.1(2)(b) of the Code. HELD: The court reviewed each cause of action alleged in the statement of claim. The complaint to the commission could not reasonably be characterized as a representation to any of the plaintiffs as would be required to prove negligent misrepresentation. The representation was to the commission. There was also no allegation that any of the plaintiffs relied on any of the allegations in the complaint. The pleadings did not disclose any reasonable cause of action in negligent misrepresentation. The claim based on deceit or fraudulent misrepresentation also failed for lacking a reasonable cause of action; the claim indicated that there was intimidation because the plaintiff filed a false claim with the purpose of extortion or to damage the plaintiffs. The plaintiffs, however, did not allege that any of the plaintiffs did anything as a result of the threat. The intimidation claim also lacked a reasonable cause of action. With respect to the defamation claim the court concluded that the writing and filing of a complaint was a step taken in the course of quasi-judicial proceedings, so as to give rise to a claim of absolute privilege. Because the process is quasi-judicial, the defendant was protected by absolute privilege and could not be sued in defamation for the words written or spoken to make the complaint. The claim also alleged that the allegations had been distributed to outside parties. The allegations did not include any details and therefore did not constitute proper pleadings in relation to defamation. The allegations did not need to include the defamatory statements verbatim but some details were required. The defamation allegation was struck for failing to disclose a reasonable cause of action. The court found, however, that this case was an appropriate case to allow the plaintiffs to amend their statement of claim with respect to the defamation claim. The plaintiffs were given leave to amend their statement of claim within 21 days. The court would then determine whether the amendments disclosed a claim in defamation

against the defendant as a result of publication to the outside parties. Costs of $750 plus disbursements were awarded to the defendant even though she was self-represented.

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Henderson v. Henderson, 2016 SKQB 282

Danyliuk, August 31, 2016 (QB16280)

Family Law – Division of Family Property – Cohabitation Agreement
Family Law – Division of Family Property – Interim
Family Law – Division of Family Property – Pets

The application involved interim possession of two dogs owned by the parties. The parties married in 2000 and a cohabitation agreement was signed prior to the marriage outlining all existing and future property. They had no children. The parties disagreed regarding the acquisition and care of the dogs during the marriage. The petitioner argued that an order should be made on an interim basis, based on possession of property and factors governing such decisions in accordance with The Family Property Act. The respondent's position was more like an interim custody disposition. The issues were: 1) was this an appropriate case to make an order for exclusive interim possession of one or both of these dogs; 2) if so, on what terms; and 3) what was the appropriate disposition of the costs of the application.
HELD: At law a dog is property, so it enjoys no familial rights. Case law and legislation such as s. 10 of The Animal Protection Act, 1999 make it clear that dogs are property. The court indicated that this sort of application should never be brought to court. The court was not prepared to make an interim order of any description. A determination at trial as to whether the dogs were acquired jointly by the parties would be necessary to apply the terms of the cohabitation agreement. The court was not prepared to disrupt the interim arrangements the parties had already had in place since they separated.

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R. v. Lalonde, 2016 SKQB 283

Turcotte, August 31, 2016 (QB16281)

Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Sentence
Criminal Law – Breach of Undertaking
Criminal Law – Resisting Arrest
Criminal Law – Sentencing – Conditional Discharge
Criminal Law – Sentencing – Probation – Terms

The charges against the accused were on three separate informations, but all stemmed from related incidents between the accused and his neighbours. After trial, the accused was acquitted on charges of assault and uttering threats. He was found guilty of resisting arrest and breaching an undertaking, contrary to ss. 129(a) and 145(5.1) of the Criminal Code, respectively. Another breach of undertaking charge was dismissed. The trial judge did not convict the accused of the two charges he was found guilty of, but he was instead granted a conditional discharge with a six-month probation order. The probation terms included the following: not to contact the police unless it was an emergency; not to put up signs accusing his neighbours of committing crimes; not to have security cameras to take pictures of the neighbours house or outbuildings; allowing police to enter to check cameras; and following the commands of his psychologist. The accused appealed the findings of guilt and the conditions imposed under the probation order. The accused and his neighbours had a long-standing conflict. There was an altercation between the accused and his female neighbour when the neighbour went onto his property to remove a sign he had posted about the neighbours. An assault charge resulted. The accused was arrested some time later for breaching his conditions of release by having contact with his neighbours. When the police attempted to arrest the accused he went into his house and attempted to shut the door on the officers. The issues on appeal were: 1) what was the appropriate standard of review; 2) did the trial judge err in determining that the accused was guilty of the offences of resisting arrest and breach of undertaking; and 3) did the learned trial judge err in granting the accused a conditional discharge under the terms of a six-month probation order.
HELD: The appeal was dismissed. The issues were analyzed as follows: 1) the Supreme Court of Canada has held that as long as the sentence is within the acceptable range, it is not the function of the appellate court to interfere, or to impose a result that may be considered more fit or appropriate in all the circumstances; 2) the findings of the trial judge were reasonable and were supported by the uncontroverted evidence of the two officers that testified; and 3) the court did not find any basis upon which to interfere with the trial judge's decision to grant the sentences imposed. The trial judge had jurisdiction, pursuant to s. 732.1(3)(h) of the Criminal Code, to impose the probation term of only

allowing the accused to contact the police in emergencies. The focus of the conditions of the probation order were intended to avoid having to impose a no contact order on the accused with respect to the neighbours and to direct his future conduct away from the neighbours. The conditions imposed were found to be reasonable, taking into consideration the accused's age, character, nature of the offences and the circumstances surrounding their commission.

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M. (S.D.) v. M. (K.M.), 2016 SKQB 286

Krogan, September 1, 2016 (QB16272)

Family Law – Child Support – Section 7 Expenses
Family Law – Child Support – Shared Parenting
Family Law – Custody and Access – Best Interests of the Child
Family Law – Custody and Access – Joint Custody
Family Law – Custody and Access – Shared Parenting

The parties were married in 2005 and separated in 2009. Their child was born in 2006 and the petitioner father filed a petitioner seeking custody of the child with access to the respondent mother. The petitioner did not request child support if his application was successful. The respondent proposed shared parenting, with the child spending alternating weeks with each party. The petitioner was 43 and lived a mile north of the town where the child attended school. He was in a common law relationship with a woman he began living with in 2011. They have one daughter who was born in 2013. The petitioner had two brothers that he saw every two months. The petitioner's parents lived 14 kilometers away and the child saw them a few times each month. He was an accounts manager working during the week from 8:00 am to 3:30 or 4:00 pm. He earned $130,096.85 in 2014 and his estimated earnings in 2015 were $140,195.10. The respondent lived 14 kilometers from the petitioner and also had another child, in 2015. Her sisters and parents lived in British Columbia, but she had aunts and uncles in the town she lived in. The respondent was on maternity leave earning $23,136 in 2016. The petitioner alleged that the respondent had a bad temper and had on occasion beat their child, her child from a previous relationship, and him. He had contacted the Ministry of Social Services and the police on occasion. The original separation agreement stated that the child was to primarily reside with the respondent. In August 2013 the parties agreed that the child would primarily reside with the petitioner so he could attend

extracurricular activities that the respondent could not afford. The respondent said that this arrangement was only to take place for one year after which the child would return to her residence. In August 2014, the court imposed a schedule giving the respondent parenting time every alternate weekend after school Thursday until Monday morning with holidays being shared. She also had access Thursday evenings on the weeks she did not have the child for the whole weekend. The child's teachers testified that he did have some behavior difficulties in school, but the school was familiar with those behavioural patterns and had committed to working with the child. The parties did not communicate well in the past, but it was getting a little better. The issues were: 1) what the parenting arrangement should be; 2) what child support was payable; and 3) what s. 7 support was payable.

HELD: The issues were determined as follows: 1) the court determined that it was in the child's best interests that the parties have joint custody with a shared parenting regime being implemented. The court did not find anything in the evidence that would lead to a conclusion that either of the parties currently suffered with anger issues in the nature described by the other party. The court was, however, concerned with the petitioner's allegation that the child's daycare provider had sexually abused the child when he had a rash from diarrhea. The court noted how the petitioner could have inquired with the care provider rather than rushing to call the authorities. Once the truth was discovered, the petitioner never apologized. It was in the child's best interests to have equal access to each parent. The court found that there was a risk that the petitioner would not fully support the child's relationship with the respondent if he was the child's sole custodian and primary resident parent. The poor communication in the past between the parties was not found to be a bar to shared parenting. The court also ordered that the child should continue to attend at the same school, near the petitioner's home, because the school was aware of the child's difficulties and were working with him and his parents. The child should also participate in extracurricular sports in that town, if possible; 2) the set-off amount for child support based on 2015 was $680 per month payable to the respondent. The set-off amount would be even greater for 2016 because the respondent was on maternity leave. The court was not prepared to move from a straight set-off amount based on the ss. 9(b) considerations because the parties did not lead any evidence to determine whether additional costs would be incurred as a result of a shared parenting arrangement. The petitioner always paid for the extracurricular activities and the court assumed that would continue because he had not expressed a concern about doing so. The petitioner was ordered to pay a monthly sum of

$680 per month to the respondent; and 3) if the petitioner is no longer willing to pay for extracurricular activities the parties would each be responsible for their portion on a pro-rata basis in accordance with their annual incomes. The court gave the respondent taxable costs because the main issue was decided in her favour.

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Flynn v. Poole Estate, 2016 SKQB 288

Barrington-Foote, September 1, 2016 (QB16273)

Civil Procedure – Summary Judgment – Queen's BenchRules, Rule 7-5
Torts – Conversion
Torts – Unjust Enrichment

The plaintiff, in her capacity as administrator of the estate, claimed conversion or unjust enrichment against the defendant in the amount $23,304.70, alleging that she converted funds in a joint bank account and jewelry and other small personal items owned by the testatrix to her own use. The defendant applied for summary judgment. In January 2011, the testatrix and the defendant opened a joint bank account and the testatrix deposited $49,338.67 into it. The plaintiff indicated the testatrix told her the account was opened to facilitate payments by the defendant and for no other purposes. The defendant indicated that the account was set up to enable the defendant to make payments on an $18,600 loan from the testatrix, and to assist the testatrix with purchases and bill payments. The defendant withdrew funds from the joint bank account, including funds that she used for her own benefit. The plaintiff's evidence that the testatrix repeatedly asked the defendant questions about transactions in the joint account, and that in response, the defendant indicated that she deserved something in life.
HELD: The application for summary judgment was dismissed. The small amount at stake was a relevant consideration, but the court still had to ensure just adjudication of the dispute. There were not the necessary facts to fairly resolve the dispute because the case principally turned on credibility. There was therefore a genuine issue requiring a trial and better evidence would be available at trial. There was no evidence tendered as to the basis of the claim regarding the jewelry and other chattels. The plaintiff claimed the items were missing and the defendant denied having them. The court, therefore, held that no better evidence would be available at trial so the defendant was given

judgment in regard to the claim for conversion of those items.

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R. v. Regnier, 2016 SKQB 290

Labach, September 2, 2016 (QB16282)

Municipal Law – Dangerous Animals Bylaw – Appeal

A justice of the peace acquitted the appellant of owning two dogs that without provocation attacked a police service dog and a police officer, contrary to ss. 9(4) and 9.1 of The Dangerous Animals Bylaw. He convicted the appellant of failing to comply with a court order directing confinement of a dangerous dog, contrary to ss. 9(3) and 9.1 of the bylaw. The appellant was sentenced to a $1,500 fine, a $600 victim fine surcharge and an order was made that the dog be destroyed. The appellant appealed the order that his dog be destroyed, and the Crown appealed the acquittals of the appellant. The officer and service dog were called to assist in locating suspects fleeing from a stolen vehicle. The appellant was asked to stop but continued to run away so the officer released his service dog. The service dog grabbed the appellant's leg as he was trying to open the back gate to his home. A friend, in the appellant's garage, heard the commotion and opened the garage door. The appellant's three dogs ran out and the officer and service dog were both bitten. Two of the dogs, in relation to the attacking charges, had never run afoul the law before, but the other dog was the subject of a 2007 order. The issues on appeal were: 1) did the justice of the peace err in law by holding that the Crown had not proven that the two dogs attacked the officer and service dog; 2) did the justice of the peace err in determining that the defence of due diligence was made out; 3) did the justice of the peace err in law by failing to make any findings of credibility; 4) did the justice of the peace fail to consider the rule in Browne; and 5) was the sentence imposed on the appellant excessive or unreasonable. HELD: The issues were determined as follows: 1) the justice of the peace was satisfied that all three dogs attacked the officer and service dog, but did not convict the appellant because the Crown did not prove what each dog did. The justice of the peace erred by requiring the Crown to prove what each dog did in order to meet the definition of "attack". The definition of "attack" in the bylaw does not require that the victim be bitten or injured. The attack was made out when all three dogs ran towards and entered the altercation; 2) section 9(4) creates a strict liability offence and, therefore, the defence of due diligence was

available to the appellant. The justice of the peace was satisfied that the defence of due diligence had been made out with respect to the two dogs subject to the attacking charges. There was evidence presented in the case that supported the justice of the peace's decision and a properly instructed jury, acting reasonably, could have reached the same conclusion; 3) the justice of the peace did not have to quote the principles in R. v. W.(D.) for them to be applied. It could not be said that the justice of the peace did not have regard for the principle underlying the R. v. W.(D.) test or the issue of credibility and reasonable doubt; 4) the court concluded that the justice of the peace was correct that a voir dire would be required to determine if the evidence of conversations the officer had with other persons after the altercation ended was admissible. His reasons for requiring a voir dire, however, were misplaced. A voir dire to assess voluntariness was not required because the conversations were not with the appellant. The admissibility of the statements would be subject to determination on voir dire because the statements were hearsay; 5) the justice of the peace's reasoning as to why the dog should be destroyed was flawed. He focused on the appellant's attitude rather than on what the dog did. Since the conviction in 2007 all of the convictions relating to the dog were for minor, technical matters that involved the appellant not doing something. There were no new convictions for the dog being menacing or vicious toward anyone or attacking anyone. The court noted that there did not appear to be any opportunity to restrain the dog. There was also no evidence that this dog did the biting. There was no other evidence of the dog's physical potential for inflicting harm. Denunciation and deterrence were the main principles to be considered and the court held that the mandatory minimum fine and surcharge were punishment enough. The destruction order was excessive and not reasonable. The appellant's appeal against the sentence was allowed.

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Alliance Pulse Processors Inc. v. Hudson Bay Port Company, 2016 SKQB 307

Barrington-Foote, September 20, 2016 October 21, 2016 (corrigendum) (QB16300)

Enforcement of Money Judgments – Preservation Order

The plaintiff applied for an ex parte preservation order pursuant to s. 5 of The Enforcement of Money Judgments Act for the third time.

HELD: The material filed was inadequate to justify the relief sought. The three conditions specified in ss. 5(5) have to be met for the court to order a preservation order. The first condition was not met even though the action would, if successful, result in a judgment to pay money against one or more of the three defendants named in the draft order. The plaintiff did not meet the minimum evidentiary requirements to satisfy the court that the claim was not groundless. The second condition requires that the court be satisfied a preservation order is necessary to prevent a disposition or other dealings with property that would render enforcement of the judgment or order likely to be partially or wholly ineffective. There were dealings between the defendants and another relating to a potential sale of assets owned by the three defendants, but the mere fact assets may be sold does not mean that a judgment is likely to be wholly or partially ineffective. There was insufficient evidence that a disposition was likely to occur. Further, the application was made on an ex parte basis so the court required that there be evidence that there was likely to be an imminent disposition of assets; there was no evidence. The third condition was proved, as there was evidence that the plaintiff would prosecute the claim without delay. Only one condition was met so the order was not granted. The court also noted shortcomings with the draft order filed by the plaintiff.
CORRIGENDUM dated October 21, 2016: [1] The second sentence in para. 7 shall be amended to read as follows: >>>>… The September 13, 2016 press report is from a credible source, and, read in light of the statement of claim filed by certain of the defendants in Manitoba, and other material previously filed, supports that conclusion. …

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Cameron v. Saskatchewan Institute of Agrologists, 2016 SKQB 313

Danyliuk, September 22, 2016 (QB16303)

Administrative Law – Appeal – Stay of Proceedings
Administrative Law – Judicial Review
Professions and Occupations – Agrologist

The appellant applied for a stay of proceedings pending his appeal against the respondent's finding against him in a ruling of a discipline body of the respondent. The appellant faced disciplinary proceedings under The Agrologists Act, 1994. He argued that some of the members of the discipline committee

were biased and unsuccessfully applied to have those members removed. The appellant was found guilty of professional misconduct after a hearing. The appellant was penalized as follows: a reprimand; a fine of $2,000; a 30-day suspension; completing the professional ethics course within 90 days; cost of $15,000; and he would be suspended until all costs and fines were paid if they were not paid within six months. The appellant appealed pursuant to s. 32 of the Act outside of the 30 days required by statue. The appellant then applied for a stay of proceedings on all of the committee's penalties, except the suspension that had already been served. The respondent appeared to agree to the stay with the conditions that the appellant would expeditiously prosecute his appeal, and if he failed to do so, the stay would be lifted on seven days' notice to him. The appellant asserted that the respondent's counsel was threatening him. The appellant would not even serve his documents on the respondent's counsel, but instead attempted to serve them on the respondent.

HELD: The stay was granted with conditions attached. The court ignored the late filing of the appeal because there was an understanding between the appellant and the committee that the appeal period did not start until the penalty decision was effected. There was no evidence that the respondent's counsel was threatening; counsel was being reasonable and accommodating to the appellant. The court urged the appellant to obtain legal counsel for the appeal. The court found it had authority to stay the proceedings pending appeal pursuant to the Act and also pursuant to the general statutory jurisdiction found in s. 37 of The Queen's Bench Act. Attaching conditions to a stay of proceedings pending appeal did not amount to threats or coercion as suggested by the appellant. The court found the respondent's conditions to be reasonable. The court considered a two-fold test to decide if the stay should be granted: 1) prejudice to the respondent. The respondent properly acknowledged that there would be no real prejudice to it; and 2) weighing the overall equities and competing interests. The court concluded that the interests of equity and justice would best be served by granting the stay. The stay of proceedings pending appeal was ordered with the following conditions: 1) the appellant had to serve all documents pertaining to the appeal to the office of the respondent's solicitors and not on the respondent directly; 2) the outstanding penalties imposed against the respondent were stayed until final disposition of the appeal; and 3) the court outlined timelines for the parties to file appeal documents, failing which either party could apply to the court to lift the stay or strike the appeal, or both, on fourteen days' written notice.

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