The Law Society of Saskatchewan Library's online newsletter
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Whitmore, September 26, 2016 (CA16123)

Municipal Law – Appeal – Leave to Appeal
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Municipal Law – Pre-hearing Disclosure

The prospective appellant city sought leave to appeal the order of a judge of the Court of Queen's Bench sitting in judicial review of a decision of the Board of Revision of the city. The respondent appealed the city's 2014 assessment of its properties. The respondent applied to the board for an order of pre-hearing disclosure of data and information used by the assessor on the basis that it was required to enable it to develop an effective argument and it was essential for procedural fairness. The board accepted the request for additional information in part. On appeal to the Saskatchewan Municipal Board (committee) it was held that it did not have jurisdiction to hear an appeal of an interim ruling of the board. The city then applied to the Court of Queen's Bench for judicial review of the direction and decisions of the board, and sought that those directions or decisions be quashed. The respondent also applied for judicial review. The Court of Queen's Bench quashed the board's decision in so far as it denied the respondent disclosure of the additional information sought. It also declared that the board had the authority to order pre-hearing disclosure of information to ensure due process and a fair hearing, and it ordered the board to hear an application to determine and decide what additional

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information was necessary to permit the respondent to prepare and present its case. The city applied for leave to appeal the decision of the Court of Queen's Bench. The issues on appeal were as follows: 1) was leave to appeal required; 2) should an extension of time to file a notice of appeal be granted; 3) would an appeal, and therefore this application, be premature; and 4) how do the issues raised in this application differ from those in the city's appeal of its 2013 assessment.
HELD: The issues were determined as follows: 1) the court determined that leave was not necessary. Applications for judicial review are final and not interlocutory in nature. The court held that the orders of the lower court were final orders because they were all under the judicial review application. It was also determined that the city met the test of merit and importance; 2) the appeal court considered the factors to be considered from Saskatoon Salvage Company Ltd. and held that an extension of time should be granted: a) the respondent would not be prejudiced if the appeal went forward; b) the city had a bona fide intention to appeal within the time limited for appeal. The city made an application for leave to appeal within 15 days of the lower court decision; c) the city showed, at least, an arguable case; and d) the city acted with reasonable diligence by applying for leave to appeal within the mandated time frame. The city was granted an extension of time of 10 days; 3) the issue did not need to be considered because leave to appeal was not required; and 4) the court concluded that the circumstances between the two cases were different and the issues being heard were distinct.

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R. v. Champion, 2016 SKCA 125

Richards Lane Ottenbreit, September 28, 2016 (CA16125)

Criminal Code – Impaired Driving – Driving over .08
Criminal Code – Jurisdiction – Jurisdiction over the Offence
Criminal Code – Jurisdiction – Jurisdiction over the Person

The chambers judge dismissed the appellant's application to set aside the arrest warrant against him and to dismiss the proceedings for want of prosecution as per s. 485(3) of the Criminal Code. The appellant claimed that the Provincial Court lost jurisdiction in the criminal proceedings. The appellant was charged with four criminal offences: refusing to provide a breath sample; impaired driving; dangerous driving; and uttering threats. He was released on an undertaking to attend Provincial

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Court. Because the return date on the undertaking was a holiday, the police prepared two new summons but did not serve them on the appellant. Therefore, a few months after the first appearance date the police obtained a public interest warrant for the arrest of the appellant. He was arrested 11 months after his initial arrest. The appellant did appear on the original date to find out the court was closed due to a holiday. The chambers judge concluded that the Provincial Court had not lost jurisdiction because the information containing the four charges had not been shown to be invalid. The appellant argued that the court lost jurisdiction over him as a person not over the offence.
HELD: The appeal was dismissed. It was necessary to appreciate the difference between jurisdiction over the offence and jurisdiction over the person. In this case, however, the distinction would not change the conclusion of the appeal court. Section 485(1) of the Criminal Code provides that jurisdiction over an offence is not lost by the failure of the court to act in the exercise of that jurisdiction at any particular time. Section 485(2) provides that if jurisdiction over an accused is lost and not regained, a judge or justice may, within three months after the loss of jurisdiction, issue a summons or warrant for the arrest of the accused. A summons was issued within three months and it did not matter that it was not served on the accused. There are many examples of the Criminal Code referring to service of documents if it is also required.

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R. v. Favel, 2016 SKPC 117

Snell, September 20, 2016 (PC16099)

Criminal Law – Intimidation of Justice System Participant

The accused was charged with robbing the victim. The victim testified at the preliminary hearing of the charge. During his testimony he became upset and a break was called. The victim reported to the police that the accused had made a threatening gesture to him while he was testifying. The accused was then charged and arrested for engaging in conduct with the intent to provoke a state of fear in the victim, a justice system participant, in order to impede the administration of criminal justice, contrary to s. 423.1(1)(b) of the Criminal Code. That evening a post was made to the accused's Facebook page which included threats made against the victim. The police had not specifically included this act as part of its charge against the accused but it

Seversen v. Leslie

Skyway Canada Ltd. v. Consumers' Co-operative Refineries Ltd.

Tataquason v. Saskatoon Board of Police Commissioners

Woodward v. Woodward

Yorkton Cooperative Association v. Retail, Wholesale Department Store Union

Zimmerman v. Saskatchewan (Ministry of Agriculture)

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was disclosed to defence counsel. At the trial, a number of police officers who had accompanied the victim at the preliminary hearing testified that the accused's demeanour changed during his testimony and one of them had observed the accused mouthing words to him and had raised his arm. The deputy sheriff also testified that he was beside the victim and facing the accused and saw the latter make a gesture to the victim. The victim testified that the accused raised his hand to his throat and made a stabbing motion. The defence argued that the evidence of all the witnesses was so contradictory that the court could not be satisfied as to what happened. The defence also argued that the accused was only charged regarding his conduct in court. HELD: The accused was found guilty. The court believed the testimony of the victim and the officers, and found that the accused had engaged in conduct that would support the charge. It also found that the accused either posted the Facebook message or directed someone else to do so and concluded that it was further conduct on the part of the accused that could be found to constitute the actus reus of the offence. The acts were intended to provoke fear on the part of the victim and the court inferred that the accused specifically intended to dissuade the victim from testifying against him.

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R. v. Johnson, 2016 SKPC 118

Kovatch, September 20, 2016 (PC16100)

Criminal Law – Assault – Assault Causing Bodily Harm

The accused was charged with assault causing bodily harm to the victim. The victim was in a relationship with the accused's stepdaughter. The accused testified that he, his wife and his stepson drove to Weyburn to talk to his stepdaughter about her drinking problem. When they arrived in Weyburn, they saw the victim and the stepdaughter walking on the street, and the stepson jumped out of the vehicle and approached them. The victim ran and the stepson chased him, and when he caught him, began hitting him. The accused tried to stop the altercation and did so successfully, at which point they got back into their vehicle and left Weyburn. The victim testified that when the accused and the other assailant jumped out of the vehicle, one was carrying a pipe and one was carrying a bat. As he ran away from them, the pipe was thrown at him but missed. When the assailants caught him, one of the assailants punched him and the other one hit his legs with the bat. When two police cruisers

pulled up, they fled. The victim identified the accused as one of the assailants. A police officer testified that she had seen three men running and one of them was carrying a bat. She followed them and found the victim on the ground and noticed the injuries to his body. She located the pipe nearby.
HELD: The accused was found guilty. Applying the test set out in R. v. W.D., the court did not believe the version of events given by the accused or his stepson. They acted in concert to assault the victim.

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Tataquason v. Saskatoon Board of Police Commissioners, 2016 SKPC 121

Monar Enweani, September 20, 2016 (PC16102)

Statutes – Interpretation – Police Act, 1990 – Section 10(3)
Professions and Occupations – Police Officers
Torts – Negligence

The plaintiff brought an action claiming damages for personal injuries against the individuals, members of the Saskatoon Police Service (SPS) and against the Saskatoon Board of Police Commissioners (board). The plaintiff alleged that while she was sitting in her backyard with a friend, a dog entered the yard and bit her. She was taken to the hospital where she received stitches for an abdominal wound. Subsequently she suffered pain and nerve damage, panic attacks, stress and sleeplessness. She missed five days of work. The defendant officers had been contacted about a robbery at a gas station committed by a man wielding a knife. The police officers who responded learned that a man and a woman had fled on foot from the scene of the robbery. The officer had his police dog with him and used him to track the offenders. The dog located the plaintiff in her yard and bit her as he was trained to do after locating her. The plaintiff and her friend testified that the officer took quite a while before he pulled the dog from the plaintiff. The officer's version was that it was five to ten seconds. The officer testified that at the time he believed that the plaintiff and her friend were the suspects and that they had a knife. The other officers named as defendants in the action arrived shortly thereafter and arrested the plaintiff's friend. The plaintiff claimed damages from the individual defendants for negligence and for the torts of assault, battery and trespass. The plaintiff argued that the defence of good faith under s. 10(3) of The Police Act, 1990 did not apply in the circumstances. The officers alleged that they

acted in good faith in the performance of their duties and that their actions were reasonable in the circumstances. Against the board, as the owner of the dog, the plaintiff claimed damages for negligence, for the torts of assault, battery and trespass and on the basis of strict liability pursuant to the common law doctrine of scienter.
HELD: The action was dismissed. The court found that the individual defendants as members of the SPS were acting in good faith in the course of their duties and believed in the existence of facts, which if true, would have made their conduct lawful. Therefore s. 10 of the Act provided them with a full and complete defence to the claim. Pursuant to s. 3(9) of The Small Claims Act, 1997, the court did not have jurisdiction to deal with the plaintiff's claim for false imprisonment against the individual defendants. There was no evidence presented at trial that established a lack of good faith on the part of the board and s. 10(2) of The Police Act provided a full and complete defence to the plaintiff's claim. The doctrine of scienter had no application in the context of police dogs generally and specifically with regard to the facts of this case.

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Jensen v. Walters, 2016 SKQB 267

Goebel, August 17, 2016 (QB16340)

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

The parties had a nine-year-old son who had resided with the respondent mother since his birth. The parents had never been married nor resided together and their relationship had ended when the child was one year of age. The petitioner father had exercised fairly regular parenting time. Due to concerns about the child's physical and mental health and how the respondent mother was dealing with the issues, the petitioner applied for interim relief, including an order granting him primary care and with the authority to involve the child in tutoring, sports and counselling without the respondent's consent. If the primary residence of the child remained with the respondent, the petitioner sought generous access and a custody and access assessment. The respondent acknowledged that the child had special needs but argued that he was well cared for in her home and she was addressing his needs. He was currently scheduled to be assessed by a psychologist for ADHD. She brought her own application for interim relief, which sought sole custody

and an order prohibiting the petitioner from being at the child's school. She also sought interim child support.
HELD: The court granted the parties interim joint custody, which was in the best interests of the child. They were required to consult with each other on matters involving his health, education and activities and to have equal access to information from third parties involved in his life. The court was unwilling to change the primary care of the child on an interim basis but found it would be in his best interests to increase the petitioner's parenting time. For the purposes of establishing the petitioner's income, the court used the three-year average of his income, resulting in a child support payment of $364 per month. The court ordered the parties to participate in the High Conflict Parenting After Separation course and to file proof of their attendance within 90 days. The petitioner's application to dispense with the respondent's consent to involve the child in counselling, tutoring and activities was adjourned sine die following his assessment by a psychologist and any recommendations that they may have respecting the child's involvement in the activities. The court gave leave to the respondent to re-apply for an order preventing the petitioner from attending at the child's school if there was admissible evidence from the school that the petitioner's involvement at the school was negatively impacting the child.

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R. v. Bignell, 2016 SKQB 285

Schwann, September 2, 2016 (QB16292)

Criminal Law – Home Invasion – Sentencing

The accused pled guilty to a charge of breaking and entering a private dwelling house and committing aggravated assault, contrary to s. 348(1)(b) of the Criminal Code. The offences came about as a result of the accused's wife being assaulted by the victim at his house while he tried to break up a fight between her and another woman. The accused's wife went home and informed the accused what had happened. The accused and three other men decided that vengeance was required. They forced their way into the victim's house. The accused carried a stick and one of the other offenders picked up a machete. The accused hit one of the people in the house on the back of the head with the stick. The other offender struck the victim in the head with the machete. The victim suffered irreversible brain damage. The accused responsible for the machete attack was

found guilty of attempted murder and aggravated assault, contrary to s. 348(1)(b), and sentenced to seven years' imprisonment. The Crown submitted that this accused should be sentenced to nine years less credit of 1.5 for remand time in custody. The accused was a party to the offence and the second most culpable actor, participating in vigilante justice. The accused also had prior convictions for assault in 1995 and for aggravated assault in 2010, for which he received an incarceral sentence. The defence argued that an incarceral term of five years was a fit sentence since the accused responsible for the attack received a seven-year sentence. A pre-sentence report was prepared regarding the accused and described him as a 43-year-old Aboriginal man who had been abandoned by his parents at the age of five and was then raised by his grandparents who were alcoholics and abusive. The accused quit school in grade 9. He started drinking at an early age and suffers from alcoholism, but expressed a desire to address the problem. He had had steady employment as an adult and had been in a stable relationship with his spouse for 15 years. She testified that since being released from jail she had upgraded her education and had been sober for two years and would provide full support for the accused when he was released from prison. His risk of reoffending was rated at medium and the risk factors included, among other things, his peers and companions and alcohol use. A Gladue report was not prepared.
HELD: The accused was sentenced to six years in prison with credit for remand time given at the rate of 1.5 days. The court considered the aggravating factors to be that the accused committed the assault during a home invasion and for the purpose of retribution. The accused could have taken his wife to the hospital instead of choosing revenge. The victim suffered extreme injury. The accused had a criminal record although not an extensive one. The mitigating factors included that the accused had pled guilty, was employed at the time of the offence, had strong family support from his spouse and was regarded to be a loving partner and caring father, and had expressed remorse and accepted responsibility for his actions. The court also decided that the Gladue factors were present and that the accused's upbringing may have had an impact on his ability to react appropriately to conflict. To some modest extent, his level of moral culpability was reduced.

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Fuller v. Regina (City), 2016 SKQB 287

Barrington-Foote, September 12, 2016 (QB16341)

Municipal Law – Bylaws – Order – Appeal

The appellant appealed from a decision of the Regina Appeals Board that confirmed an order of the City of Regina Bylaw Standards Officer issued pursuant to s. 328 of The Cities Act and The Regina Property Maintenance Bylaw 2008-48. The order stipulated that the appellant submit a report to the Bylaw Enforcement Branch prepared by an engineer or architect regarding the structural integrity of the appellant's garage. If the report prescribed that repairs were required, it should describe in detail the methods of repairs. The appellant was to make the necessary repairs specified in the report or demolish the garage, otherwise the city would demolish it. The appellant appealed the order to the appeal board pursuant to s. 329 (1) of the Act. Minutes from the meeting of the board stated that it confirmed the order to comply. There was no transcript or other record of the proceedings and no reasons for the decision. The city had submitted photographs of the garage showing concerns as to its structural integrity. The appellant appealed that decision under s. 329(4) of the Act, which was an appeal on the record. The appellant argued that the board erred by deciding that he must effect repairs as specified in an expert report and by ordering demolition of a structurally sound building.
HELD: The appeal was allowed in part. The court found that the first part of the order requiring the appellant to obtain an expert report as to whether the garage met the structural integrity standard specified in the bylaw and the board's decision to confirm it was reasonable and could stand. The bylaw did not authorize an officer and, therefore, the board to order that the report include detailed repair plans and for the appellant to implement them. The board's decision that the appellant must provide such a report was not a reasonable outcome. Section 328 of the Act would only permit such a report to be ordered if a contravention of the Act or bylaw had been identified. In this case, there was nothing on record that indicated it had found that the garage contravened the bylaw. Similarly, the authority to order its demolition rested upon whether there had been a contravention of the obligation under the bylaw to maintain the building in a structurally sound condition. Neither the officer nor the board had found that the garage was structurally unsound. The board's decision to confirm the demolition was not a possible acceptable outcome. The order was repealed by the court under s. 329(5)(a) of the Act.

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Owens v. Post Media Network Inc., 2016 SKQB 289

Brown, September 1, 2016 (QB16342)

Human Rights – Discrimination

The complainant submitted a complaint of discrimination on the basis of religion to the Saskatchewan Human Rights Commission. The complainant had purchased advertising in the respondent's newspaper, the Regina Leader-Post (LP), between 1997 and 2012. The advertising consisted of verses from the Bible regarding homosexuality. The complainant was advised by the LP that his advertisement would not be run in 2013 as it had been flagged for refusal in 2012 after an employee of the LP made a written complaint that the advertisement was offensive to him. The LP's policy reserved the right to reject any advertisement, including when its contents were deemed offensive to its readers. The complainant then made his complaint to the SHRC. It concluded discrimination on the basis of the complainant's religion had occurred within the meaning of s. 12 of the Saskatchewan Human Rights Code (Code) and it then initiated a request for a hearing pursuant to s. 29.6 of the Code. At the hearing the respondent established that the advertisement ran counter to its core values and it was not refused because of the complainant's faith or religious affiliation. It stated that it regularly declined to run advertisements that it determined were offensive to its staff or readership. It identified the concern that this ad would be offensive to the gay and lesbian community, a traditionally disadvantaged group. The Commission and the complainant acknowledged that the ad would be considered offensive to that group and others. The issue of whether the complainant had been discriminated against by the respondent in a way that is prohibited by s. 12 of the Code would be determined first by establishing whether prima facie discrimination on the basis of the complainant's religion been made out in the respondent's refusal to place his ad.
HELD: The complaint was dismissed. The court found that the complainant had not made out a prima facie case of discrimination. He had not proved the first element of the three elements set out by the Supreme Court in Quebec v. Bombardier that differential treatment was established. It found that LP offered a service to the public in its consideration of whether to publish an advertisement based upon the content of it and whether it would offend readers. The complainant had not established that he was treated differently than other individuals who try to place an advertisement that is determined to have offending content. The parties agree that there was no intent by LP to discriminate against the

complainant on the prohibited ground. The court also found that this was not a case of adverse effect discrimination. The complainant could still communicate his beliefs regarding homosexuality so as to affect the beliefs of others without advertising in the LP.

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Zimmerman v. Saskatchewan (Ministry of Agriculture), 2016 SKQB 292

McMurtry, September 6, 2016 (QB16284)

Administrative Law – Judicial Review – Lands Appeal Board
Agriculture – Lease – Interpretation

The applicant appealed a decision of the Lands Appeals Board (LAB). The applicant was informed in writing by the Ministry of Agriculture and Food that it was cancelling his leases of three parcels of farmland pursuant to s. 71(1)(a) of The Provincial Lands Act. The notice stated that the applicant's leases were being cancelled because he was in contravention of s. 2(1)(a) of the Lease Agreement, which stipulated that the lessee shall manage and be actively involved in the farming operations on the leased lands. When the leases were cancelled 30 days later, the applicant appealed the decision to the LAB. Evidence was presented to the LAB that the Ministry had received a complaint that the lease was not being used in the summer of 2012. The applicant responded by asking for authorization to rejuvenate the lands. The request was granted on the basis that the land was to be worked or sprayed in 2013 with annual crops grown until 2015. The applicant did not work the land during that period. At the hearing, he submitted that he could not work the land due to very wet conditions in 2013 and 2014 but the applicant had not communicated his reasons for not working the land to the Ministry. In the spring of 2015, it received another complaint that the land was not being used. The LAB accepted the applicant's evidence regarding the reasons which kept him from rejuvenating the lease but found that the land was not used and that the 2012 agreement had not been carried out by the applicant. He had not contacted the Ministry to explain why rejuvenation was not carried out and he did not have its consent to allow the lands to remain fallow. The applicant argued that the LAB erred in law by concluding on the evidence that the leased lands were not used and that they could not be used due to climatic conditions. The LAB confirmed the cancellation without discussing how it interpreted s. 2(1)(a) of the lease and

whether he failed to fulfill those responsibilities.
HELD: The application was granted. The decision of the LAB was quashed and the matter remitted back to it for a new hearing and determination. The court found that the decision of the LAB was unreasonable. It had to ask itself what s. 2(1) meant "be actively involved in farming operations" in the applicant's circumstances. Although it was open to the LAB to conclude that the applicant's failure to follow the rejuvenation plan indicated that he was not actively involved in farming operations, it did not do so.

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Abouhamra v. Prairie North Regional Health Authority, 2016 SKQB 293

Danyliuk, September 7, 2016 (QB16285)

Professions and Occupations – Physicians and Surgeons – Discipline
Statutes – Interpretation – Regional Health Services Act, Section 45
Administrative Law – Judicial Review – Practitioner Staff Appeals Tribunal

The appellant, an obstetrician, appealed from a decision of the Practitioner Staff Appeals Tribunal, which had upheld the decision of the respondent Health Region's Senior Medical Officer (SMO) to temporarily suspend the appellant's hospital privileges in December 2014. The suspension occurred after the SMO had reviewed a number of patient files in which the appellant had been involved. Pursuant to s. 80 of The Regional Health Services Act, a hearing was held by the board within 14 days of the suspension. The board decided to confirm and continue the SMO's suspension of the appellant on the basis that the appellant's practice was likely to expose patients to harm. The appellant exercised his right of appeal under s. 45 of the Act to the tribunal to conduct a de novo appeal hearing. The tribunal dismissed all of the appellant's grounds of appeal and he then appealed to the Court of Queen's Bench under s. 45(4) of the Act. The appellant submitted numerous grounds of appeal, which included such issues as whether the tribunal erred in law by: 1) failing to review the evidence filed on the record anew as required by an appeal by hearing de novo, pursuant to s. 11(a) of The Practitioner Staff Appeals Regulations. The appellant pointed to the fact that the tribunal did not refer to the expert opinion provided by the appellant in its decision. The expert's opinion conflicted with that provided by the respondent; 2)

failing to provide adequate reasons for its decision.
HELD: The appeal was granted on the basis of the first two grounds as well as others. The court quashed the tribunal's decision and reinstated the appellant's hospital privileges. The court reviewed the transcript of the tribunal's hearing and its written decision. With regard to the first two issues, it found that the tribunal had erred in law in the following ways: 1) by failing to conduct a de novo hearing as required. It did not refer to the expert opinion submitted by the appellant as new evidence at the hearing; and 2) by failing to explain its decision. It did not refer to the new evidence nor did it state how it had reconciled the conflicting expert opinion evidence offered by the appellant and the respondent. It merely accepted the evidence of the SMO's experts.

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M. Thompson Holdings Ltd. v. Haztech Fire and Safety Services, 2016 SKQB 294

McMurtry, September 7, 2016 (QB16286)

Landlord and Tenant – Commercial Lease – Breach – Damages
Civil Procedure – Costs – Solicitor-Client
Civil Procedure – Queen's Bench Rules, Rule 11-1

The plaintiff applied for summary judgment of its claim for damages in the amount of $1,427,400 against the defendant for breach of a lease agreement. The amount was comprised of pre-breach, post-breach and future period time frames. In the alternative, the plaintiff sought damages for the first two periods in the amount of $612,800 and leave to return the matter to court to assess damages for the future period. The lease was signed in February 2013 for a period of 10 years. When the defendant informed the plaintiff that it was breaching the lease in September 2013, the plaintiff sent a demand for outstanding rental arrears and in October formally terminated the lease. It immediately re-listed the property with its real estate agent. It advised that it would consider all reasonable offers for lease of all or any portion of the 10,000 square feet of leased premises but it was not interested in the sale of the property. A new lease was signed for 5,000 square feet with a company in December 2015 for a 10-year period and another lease for a smaller portion was entered into March 2016. The defendant acknowledged that it had breached the lease but contested the plaintiff's calculation of damages resulting from the breach, arguing that it had not taken all reasonable steps to mitigate its loss because the plaintiff

refused to consider offers to purchase the property and turned down a potential lessee. It also filed an affidavit from a commercial realtor who deposed that the lease property and its size was a desirable one for leasing for almost any purpose. If the failure to mitigate argument was not accepted, it agreed to the pre-breach damages of $6,666 and the post-breach damages of $416,990. The plaintiff's claim for future damages was too speculative at the time of the application and might lead to double recovery.
HELD: The application for summary judgment was granted. It found that the defendant had not established that the plaintiff had failed to mitigate its damages. The court calculated and then awarded damages for the pre-breach period and the post-breach period. It dismissed the claim for damages occurring after November 15, 2015, with leave to return the matter to the court to assess damages after that date. The court awarded $25,000 for solicitor-client costs to the plaintiff because such costs were stipulated in a term of the lease but calculated them in accordance with the requirements of Queen's Bench rule 11-1(4) that they were reasonably and necessarily incurred.

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Skyway Canada Ltd. v. Consumers' Co-operative Refineries Ltd., 2016 SKQB 295

Barrington-Foote, September 8, 2016 (QB16287)

Statutes – Interpretation – Environmental Management and Protection Act, 2002, Section 15
Civil Procedure – Queen's Bench Rules, Rule 3-72, Rule 7-9
Civil Procedure – Pleadings – Statement of Claim – Amendment

The plaintiff brought an action in negligence and breach of contract and claimed damages against the defendant. There was an explosion at the refinery operated by the defendant that damaged scaffolding owned and erected by the plaintiff. The plaintiff applied for leave to amend its statement of claim, pursuant to Queen's Bench rule 3-72, and to extend the time for it to file its reply, pursuant to rule 13-7. The defendant took issue only with the proposed amendments that included a claim for damages under s. 15 of The Environmental Management and Protection Act, 2002 (EMPA). The plaintiff's proposed amendment stated that the explosion released hydrogen, hydrogen sulfide and hydrocarbons that were a discharge of a substance into the natural environment, with adverse effect, causing loss or damage for which discharge the defendant was

responsible, giving the plaintiff a statutory right to compensation for its loss or damage. The parties agreed that leave to amend to add the EMPA amendments could be granted unless those amendments could be struck pursuant to subrules 7-9(1) and (2). The issue was whether the EMPA amendments could be struck as disclosing no reasonable claim, being the ground specified in subrule 7-9(2)(a).
HELD: The application to extend time to file the reply and to amend the statement of claim was granted, except in relation to the EMPA amendments. Regarding them, the plaintiff was given leave to file a second amended claim within 30 days of this judgment. The parties could apply to the registrar to bring the file to the judge to determine whether the amendments disclosed an arguable claim. The court found that the amendments as proposed had not met the standard set in Boart. The pleadings alleged that substances had been discharged into the environment and that there was "an adverse effect", being harm to human health, but failed to plead the facts necessary to support the claim that there was an adverse effect. However, the court held it was entitled under rule 3-72 to grant the application on the condition that the plaintiff cured the defect. It found that the decision in Boart required that pleadings must allege that the discharge "caused or may cause" an adverse effect to the environment or human health. Thus a claim could arise pursuant to s. 15 of EMPA even if no adverse effect had occurred at all, but a plaintiff suffered damage as the result of events that are sufficiently connected to a discharge.

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Yorkton Cooperative Association v. Retail, Wholesale Department Store Union, 2016 SKQB 296

Kalmakoff, September 7, 2016 (QB16288)

Labour Law – Arbitration Board – Judicial Review
Administrative Law – Judicial Review – Standard of Review – Reasonableness

The applicant applied for judicial review of the decision of an arbitration board appointed in accordance with a term in the collective agreement between it and the respondent union. The applicant had dismissed an employee from her employment as a supervisor at one of its gas station/convenience stores because she had committed "time theft" by intentionally falsifying time sheets, and claiming pay for time she had not worked. The grievor denied that she had closed the store early or had advised

another employee to leave early too. Both employees had filed time sheets that indicated they had completed their shifts. The union filed a grievance on the grievor's behalf. The board held a hearing, after which it overturned the dismissal and reinstated the grievor, subject to a four-month suspension without pay. At the hearing, the grievor continued to deny the infraction but eventually admitted that she had breached the policies of the applicant and had lied. The applicant argued since arbitral consensus dictates that because the presumptive penalty for theft of time is dismissal, the board was bound to follow it once it found that the grievor had committed the theft, unless there were mitigating facts that would justify a departure. The applicant argued that because the board had not found any mitigating facts, its decision to substitute a penalty other than dismissal was unreasonable. The respondent submitted that the board's decision was reasonable, because it was clear, intelligible and transparent, and it fell within a range of possible, acceptable outcomes that were defensible in fact and law and was entitled to deference.
HELD: The application was granted and the board's decision quashed. The standard of review was reasonableness. The court found that deciding against arbitral consensus without adequate explanation was a factor that spoke against reasonableness. The court held that the board's decision was not reasonable because it found on the facts that there were no mitigating factors.

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G. (H.J.) v. N. (D.M.), 2016 SKQB 297

Scherman, September 8, 2016 (QB16299)

Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Equal Parenting
Family Law – Custody and Access – Interim
Family Law – Custody and Access – Joint Custody
Family Law – Custody and Access – Nesting Arrangement
Family Law – Division of Family Property – Exclusive Possession of Family Home

The petitioner sought orders that she have exclusive possession of the family home, her home be the primary residence of the parties' two daughters, and the respondent have only supervised access of the children. The petitioner alleged that the respondent had anger management problems, a pornography addiction, and a masturbation addiction, making it in the children's best interests to reside with her and only have supervised access with the respondent. The petitioner initially

received a without notice order granting her exclusive possession of the home and she sought to extend the order. The respondent alleged that his anger management was under control through counselling and prescription medication he took for his attention deficit disorder (ADD). The parties began cohabiting in 2007, had their first child and then married in 2009, after which they had their second daughter. The respondent lost his job in 2010 and commenced being a stay-at-home parent. He was significantly involved in the parenting of the children until he left the home in August 2016 pursuant to the court order. The respondent did obtain employment in July 2016.
HELD: The court found that both parties were significantly involved in the day-to-day parenting of the children such that a conclusion that one parent or the other was the primary caregiver could not be made. The court also found that the respondent responded positively and appropriately to the petitioner's concerns regarding masturbation and pornography. The respondent indicated that he had not watched pornography since December 2014 and that software on his cell phone and computer provide assurances that he had not watched pornography to the petitioner. The petitioner did not dispute that evidence. The court could not reasonably give weight to the petitioner's opinion evidence regarding the respondent's alleged addictions. The court listed numerous problems with the petitioner's evidence of addiction. The court was unable to conclude that there was a risk of harm to the children caused by the respondent. With respect to the petitioner's allegation of the respondent's anger management problem, most of the incidents were dated. The respondent had since taken anger management counselling, accepted that he suffers from ADD, and began taking medication for ADD. The court held that it was in the best interests of the children to continue to reside in the family home and that it would not be in their best interests for one parent to be classified as or be the primary parent. It was also in the children's best interests that their parenting be shared on an equal basis. A nesting arrangement was found to be in the best interests of the children. The court ordered that the parties would have joint custody of the children and each party had exclusive possession of the family home when they were enjoying their assigned periods of parenting. The parents would alternate weeks living in the family home with the children.

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R. v. Natewayes, 2016 SKQB 298

Labach, September 8, 2016 (QB16293)

Criminal Law – Sentencing – Conditional Sentence Order – Breach

The Crown appealed from a sentencing disposition imposed upon the accused by a Provincial Court judge following her admission that she had breached her conditional sentence by being out past her curfew. The accused had pled guilty in May 2015 to assaulting her common law spouse by stabbing him, contrary to s. 267 of the Criminal Code. The accused was sentenced to a nine-month conditional sentence order (CSO). In addition to the compulsory conditions prescribed in s. 743.1 of the Code, the judge imposed additional optional conditions that included observing a curfew, refraining from the consumption of alcohol, participating in assessments and completing programming for addictions. After the accused breached the optional terms three times, with various consequences imposed by judges, the accused was charged with a fourth breach that she admitted to. The Crown opposed her release and argued that her CSO be terminated, and that she be ordered to spend the remainder of the order in custody based upon her previous criminal record for breaching orders and the repeated breaches of her CSO. The defence argued that it would be unduly harsh to terminate the CSO and that the accused had been the victim of domestic abuse that resulted in an alcohol problem. The accused's reason for failing to observe her curfew in this breach was that she was confused about the time. The Provincial Court judge found that the accused was incapable of living up to her conditions in the community and that if the order was terminated, the accused would spend more time in custody that if she received a straight jail sentence. The judge suspended the CSO for 45 days rather than terminating it and deleted all the optional conditions from it so that when the accused was re-released back into the community to spend the rest of the time of the CSO she would only be subject to the compulsory conditions. The Crown argued, among other grounds of appeal, that the sentence imposed was demonstrably unfit.
HELD: The appeal was allowed and the sentence set aside. The court held that the sentence was demonstrably unfit and the appropriate sentence was to terminate the accused's CSO and order that she serve the remainder of it in custody. The judge had found that the accused could not meet the conditions of her CSO in the community and her explanation of the breach had not rebutted the presumption that she should be incarcerated after breaching her CSO. There were no other reasonable alternatives to termination of the CSO in this case.

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Madraga v. Gatin, 2016 SKQB 299

Gabrielson, September 12, 2016 (QB16294)

Civil Procedure – Queen's Bench Rules, Rule 7-9
Civil Procedure – Judgments and Orders – Res Judicata

The plaintiff applied for summary judgment pursuant to Queen's Bench rule 7-2, and the defendant applied that the plaintiff's claim be struck pursuant to Queen's Bench rule 7-9 on the basis that it was scandalous, frivolous and vexatious, or an abuse of process. The parties had purchased a house together while they were in a common law relationship. When the relationship ended the plaintiff moved out. He offered to purchase the defendant's equity in the property. The defendant agreed and moved out, and the plaintiff moved into the house but then repudiated the offer. The defendant commenced an action in 2008 for partition and sale of the property. The court ordered that the defendant be reimbursed for all mortgage and insurance payments and the net proceeds of sale be released to the parties. The amount paid out to the plaintiff was confirmed as correct by him through his counsel. In 2011 the defendant in the first action commenced this action against his former spouse, alleging that she had made withdrawals from the mortgage account in 2008 without his consent and used them for her own purposes. He alleged that she made misrepresentations about the 'prepayments' in the 2008 action. As a result of her withdrawal and misrepresentations, he suffered a monetary loss and claimed judgment against the defendant in the amount of $50,000. He argued that there was a new issue in the case. The defendant pled res judicata and collateral estoppel and that the issues had previously been adjudicated, and on that basis made the application for the action to be dismissed. In her affidavit, the defendant specifically stated that the withdrawals made from the mortgage account were a direct result of pre-payments made by her during the course of owning the property and that she specifically denied that the pre-payments were made with money the plaintiff provided. The plaintiff filed nothing in response to defendant's application except a copy of the computer printout he had obtained from the bank as to the payout on the mortgage. He filed no evidence to corroborate the statement that he had paid $21,000 to the defendant in cash, which he alleged ought to have been paid by her to the bank, nor did he file any material in support of his assertion that she made unauthorized withdrawals from the mortgage account. HELD: The plaintiff's application for summary judgment was dismissed and the defendant's application for the claim to be dismissed on the basis that it was frivolous and vexatious was

granted. With regard to the defendant's application, the court found that the plaintiff was attempting to re-litigate the issue of the net sale proceeds and he should have raised his concerns in the 2008 action. The evidence filed by the plaintiff did not explain why he had not obtained the bank's mortgage statement prior to consenting to the payout. The plaintiff's application for summary judgment would have been denied in any case because the plaintiff's affidavit evidence was denied by the defendant's affidavit and thus a trial would have been required.

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CTV v. Stonne, 2016 SKQB 300

Acton, September 13, 2016 (QB16289)

Criminal Law – Publication Ban – Certiorari

The applicant, CTV, applied for an order of certiorari quashing the order made by a Provincial Court judge that prohibited publication of any information that might identify the deceased victim of the offence for which the respondent accused was charged. The applicants alleged that the judge erred in granting the publication ban for the following reasons: 1) under s. 486.4(2.1) of the Criminal Code, only the prosecution or the victim may make the application but not the accused; 2) it was not granted by a court of competent jurisdiction; 3) the judge failed to follow the Provincial Court's Practice Directive XII, because the accused had not provided three days' notice of the hearing of the application; and 4) he failed to mention, consider or apply the Dagenais/Mentuck test.
HELD: The application was granted and the publication ban set aside. The court found that the judge erred in law in the following ways: 1) the accused did not have standing under s. 486.4 to seek the publication ban on the name and identity of the victim; 2) under the common law the accused could seek the order if the application was made to the highest level of court that could hear the trial, the Court of Queen's Bench. Therefore, the Provincial Court did not have jurisdiction to grant the application; 3) he failed to follow Practice Directive XII and did not mention it during the application; and 4) there was no evidence in the transcript that he mentioned or applied the Dagenais/Mentuck test.

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Woodward v. Woodward, 2016 SKQB 301

Turcotte, September 16, 2016 (QB16295)

Family Law – Child Support –Determination of Income
Family Law – Division of Family Property – Exemptions

The petitioner and the respondent were married in 2001 and separated in 2011. There was one child of the marriage, a son aged 15 whose primary residence was with the petitioner by agreement of the parties. The petitioner was farming when he met the respondent and she was a hairstylist when their relationship began. During the marriage the petitioner operated the farm and the respondent was responsible for child care and domestic duties. After their separation and before this trial, they had settled a number of matters. The issues remaining were the issues of child support, division of family property and their divorce. Regarding child support, the parties disagreed on the amount of income to be attributed to each of them for child support purposes although the petitioner's income was only relevant to calculating his share of any s. 7 expenses due to their parenting agreement. The respondent had worked part-time since the separation as a waitress, teaching assistant and hairstylist. Her 2014 income tax disclosed income at $14,700. The petitioner argued that income should be imputed to her at $30,000 because she was capable of earning that amount but she hadn't made sufficient effort to obtain full-time employment. The respondent agreed to imputing income of $20,000 per year based upon working full-time at minimum wage. The respondent took the position that income should be imputed to the petitioner from farming and his tub-grinding business. Regarding the division of family property, the parties had submitted an agreed statement of facts that had identified the assets and their value. The primary areas of dispute were the following: 1) the pre-marital exemptions and their value that the petitioner made under s. 23 of The Family Property Act for his land, his cattle herd and farm equipment. The respondent accepted the petitioner's claim for land in the amount of $275,000 but argued that the value of the other assets have significantly decreased, either through depreciation or use, since the date of marriage, such that it would be inequitable to allow an exemption; and 2) the disposition of the lands held by both parties. The petitioner wanted to continue farming with all of the assets comprising the parties' family property and therefore not to immediately dispose of the farming assets. He hoped for an order that would allow him to pay the respondent's share of the family property to her over time. The respondent rejected that plan and indicated that she was willing to take on the land and corresponding debt to effect a division of family property.

She suggested she could arrange for financing within a short time frame following judgment. She presented no evidence as to the tax consequences relating to a division of the family property based on her retaining the land and corresponding debt. The petitioner's accountant gave his opinion that the income tax payable by the petitioner, assuming a disposition of all assets as at the date of application, was $148,210 or $118,996, based on a disposition of the livestock and farm machinery excluding the land.
HELD: The court granted the petition for divorce. It found with respect to the issues that income should be imputed to the respondent commensurate with working full-time at minimum wage, which would be $21,800. It determined the petitioner's income for child support purposes at $60,000 after taking into account the discretionary adjustments made to his income in respect of capital cost allowance claims, optional inventory adjustments and salary paid in the tub-grinding business. The amount could be reviewed upon the petitioner filing his complete income tax returns for the relevant three-year period prior to review. The respondent was ordered to pay child support to the respondent in the amount of $168 together with 27 percent of any s. 7 expenses incurred. Regarding the division of family property: 1) the court allowed the petitioner's claim for exemptions under s. 23 of The Family Property Act because it was not inequitable or unfair to do so but reduced the amounts claimed because the evidence presented by the petitioner had not supported them; and 2) the court found that the respondent would have to transfer land to the petitioner that was held jointly by them in order to complete the division of their family property. The court suggested that the parties cooperate to complete the transfers in a tax efficient manner to minimize income payable by filing appropriate elections and declarations under the Income Tax Act, including capital gains exemptions available to the parties upon the disposition of the land. The court determined that the appropriate contingency for the petitioner's income tax liability to be $50,000, which was less than one-half of the contingent liability calculated by his accountant based on a disposition of farming assets other than the farmland.

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Schwitzer v. Schwitzer, 2016 SKQB 302

Megaw, September 13, 2016 (QB16290)

Civil Procedure – Contempt

The petitioner applied to have the respondent cited for contempt as a result of his failure to comply with an order made in December 2015 by a Queen's Bench judge that required the respondent to make certain documentary disclosure. The order was both specific and extensive and was made because the respondent had failed to comply with a notice to disclose. The order also directed the respondent to provide an affidavit supplying information regarding employees and properties related to his business. The respondent submitted that he had given authorizations to his accountant and his lawyer to provide information in response to the order. However, the accountant did not respond to the petitioner's counsel, and the lawyer advised that he had not been counsel for the respondent in the sale of his business. There was no evidence regarding why, other than giving the authorizations, the respondent had not complied or why the petitioner's counsel had not attempted to find out why the accountant had not responded or not pursued the matter further with the respondent before making this application.
HELD: The application was adjourned sine die. Before making an application for contempt, it was incumbent on parties and counsel to fully investigate alternative means to obtaining what is required to move the litigation forward, and it was not done in this case. The court ordered that before the application was brought back, the parties should exchange the authorizations and attempt to obtain the documentary disclosure. The court found the petitioner was entitled to costs for the application in the amount of $1,000.

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A. (C.M.) v. E. (J.), 2016 SKQB 303

Dawson, September 14, 2016 (QB16291)

Family Law – Custody and Access – Interim
Family Law – Child Support – Interim

The petitioner mother applied for an order for interim sole custody and ongoing child support. She also sought an order for retroactive s. 3 and s. 7 child support. The application was to be heard in July 2016 but was adjourned as the respondent demanded DNA testing. The respondent was found to be the father of the child, and he then brought an application for interim joint custody and interim shared parenting. The parties, each married to someone else, had had an affair and the petitioner became pregnant. The child was born in 2012 and the

petitioner's husband was named as father on the child's birth certificate. Although he became aware of the affair in December 2015, the petitioner and the child continued to live together with him. The respondent saw the child at social events and was treated as an uncle. The petitioner's income was set at $58,700 and the respondent's at $49,600
HELD: The petitioner's application was granted. The court found that the best interests of the child in an interim application was to maintain the status quo, which in this case meant that the child should continue to live with the petitioner as she had since her birth. Although there was currently no bond between them, the court acknowledged that the respondent should have access and granted him three hours per week. The respondent was ordered to pay child support of $407 per month based upon the Guidelines table amount, commencing as at July 2016 when the application was originally scheduled, and to pay his proportionate share of childcare costs. The issue of retroactive child support prior to that time was reserved to the trial judge.

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Canadian Trade International Inc. v. Klein, 2016 SKQB 304

Danyliuk, September 15, 2016 (QB16296)

Civil Procedure – Queen's Bench Rules, Rule 3-71, Rule 5-6
Civil Procedure – Disclosure of Documents

The plaintiff contractor brought an action against the defendants for monies owing under a cost plus contract regarding the construction of the defendant's home. The plaintiff registered a lien against the property. The defendants disputed the claim and said that they did not owe the plaintiff any money, alleging that the plaintiff breached the contract and caused them loss and damage. They argued that the builders' lien was invalid and applied to vacate the lien, but the application was dismissed. They filed their statement of defence and a counterclaim. The plaintiff served its affidavit of documents and the defendants regarded it as inadequate disclosure. They made a request for particulars pursuant to Queen's Bench rule 3-71 and then filed their affidavit of documents, followed by service of a notice to produce documents on the plaintiff pursuant to rule 5-6. The defendants refused to provide dates for questioning because they were unwilling to proceed because of the plaintiff's refusal to provide proper disclosure. Some months later the defendants acknowledged receipt of some documents and provided

plaintiff's counsel with an amended notice to produce documents and amended request for particulars, with some requests having been deleted from both original documents. The defendants brought an appearance day notice to order production of documents and response to the particulars requested. At the hearing, counsel for the plaintiffs admitted that it had only searched its own documents and had not made any inquiries into or requests for documents in the possession of third parties. Regarding the request for particulars, the plaintiff argued that it should not be ordered since the pleadings were closed.
HELD: The application was allowed. The court ordered that the plaintiff and the defendants, by counterclaim, produce new affidavits of documents that fully comply with the Queen's Bench Rules. It held that the plaintiff was under an affirmative obligation to produce all materially relevant documents. The court found that the plaintiff had not made reasonable efforts to obtain same. The court reviewed the range of documents that should be disclosed in this case, such as the original contract, and advised that the plaintiff could not simply state that the defendant already had a copy of it. Further, s. 98 of The Builders' Lien Act must be considered, as it imposes separate legislative requirements on contractors and subcontractors regarding retention of records. Regarding the request for particulars, the court found that it could order them after pleadings had been closed and listed in its order the specific particulars that the plaintiff should provide to the defendant. The defendant was also entitled under s. 82(2) of The Builder's Lien Act to make a written request for certain information.

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Golden Opportunities Fund Inc. v. Phenomenome Discoveries Inc., 2016 SKQB 306

Rothery, September 16, 2016 (QB16297)

Debtor and Creditor – Receiver – Approval of Sale
Bankruptcy and Insolvency – Receiver – Claims Process – Dispute Over Ownership of Assets

FTI Consulting Canada Inc., the applicant and court-appointed receiver of the respondents, together with the debtors, Phenomenome Discoveries Inc. (PDI) and Phenomenome Laboratory Services Inc. (PLSI), applied for court approval of the sale of the debtors' assets as defined in FTI's agreement with the purchaser, Med-Life Discoveries (Med-Life). The receiver also

sought an order vesting the debtors' assets in Med-Life free and clear of encumbrances except for those permitted by the agreement, and provided that the net proceeds of sale replace the assets for the purpose of determining third parties' claim. The debtors were developing technology to design therapies to treat causes of disease. This research was founded upon an invention of Dr. D. Goodenowe, now protected by patent. The receiver described PDI as an entity in the pre-commercial stage, and while certain assets were considered valuable and/or marketable, PDI has no significant revenue. It was the insolvency of the debtors that led to a creditor's insolvency application. The only objection to the various forms of relief sought by the receiver was by counsel for Yol Bolsum Canada Inc. (YBCI) pertaining to the breadth of the draft vesting order. YBCI asserted that its proprietary interest provided by a Licence Agreement between it as the licensor and PDI as the licensee would be extinguished by the vesting order. YBCI requested an order staying the application for court approval of the agreement and staying the vesting order pending a determination by the court of YBCI's interest in the property of PDI that the receiver seeks to sell. The founder, president and controlling shareholder of YBCI, Dr. Goodenowe, who also incorporated PDI as a wholly owned subsidiary of YBCI, provided an affidavit that PDI was created to be a contract research company to exploit his invention with PLIS supplying laboratory services. Dr. Goodenowe licenced his invention to YBCI. Counsel for YBCI submitted that the court must consider the interests of all the parties in deciding whether the proposed sale by a receiver should be approved. In his affidavit, Dr. Goodenowe described the time and money he had invested in building YBCI and PDI since his invention. He argued that since Med-Life had known throughout that the intellectual property of PDI was subjective to the 99-year non-exclusive licence to YBCI, it would be unfair now to permit those rights to be extinguished. The receiver filed an affidavit sworn by PDI's former Chief Operating Officer that PDI and Goodenowe had executed a non-competition and intellectual property agreement in 2003. The issue was what rights of YBCI survived the sale approval within the context of this application brought by the receiver.

HELD: The application was granted and the approval and vesting order were issued. The court found that FTI had acted properly in selling the assets of PDI. It was entitled to sell the assets of PDI free and clear of any claim by YBCI pursuant to its licence with PDI. YBCI had no property right in the assets of PDI. The court found that Dr. Goodenowe had agreed in 2003 that all intellectual property, including any improvements in his discovery belonged to PDI. YBCI's right was a contractual one

and if it was entitled to any claim, it was against the net sale proceeds.

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Seversen v. Leslie, 2016 SKQB 309

Schwann, September 20, 2016 (QB16298)

Statutes – Interpretation – Personal Property Security Act, 1993, Section 10, Section 30
Statutes – Interpretation – Personal Property Security Act, 1993 – Personal Property Security Regulations, Section 13

The applicant brought an application for an order declaring that the respondent did not hold a security interest in a truck that he purchased, granting him ownership and possession of it and discharging the respondent's security interest. In 2010 the respondent entered into a share purchase agreement for the shares in the respondent's company. The purchaser paid part of the price in cash and the rest owing was secured by a promissory note and general security agreement (GSA) over specified collateral, which included a 1995 Peterbilt truck. In the GSA, one of the numbers in the serial number was incorrect. The applicant registered a security interest in the truck shortly thereafter. The description in the Personal Property Registry (PPR) included the year, make, model number and correct serial number of the vehicle. Sometime after being registered, the purchaser sold the truck to Redhead Equipment unbeknownst to the respondent. In 2010, Redhead sold the truck to Waxy's Bobcat. The sale agreement described the truck with its serial number. Redhead did not advise this purchaser of any prior registered security and the owner of Waxy's had earlier relied on Redhead as a commercial dealer. Waxy's sold the truck to the applicant in 2011. There was no reference to the model number on the bill of sale but the same serial number on the Redhead bill of sale was given and as in the original PPR registration. The applicant did not search PPR but discovered some documents in the truck that indicated that the respondent had owned it earlier. The applicant contacted the respondent, who informed him that he had a security interest in the truck. The applicant searched the PPR and discovered the registration of the respondent's security interest. In April 2012, the respondent's security interest lapsed. In April 2015, he re-registered it using the correct serial number but the incorrect model number. In February 2016 the respondent directed a bailiff to seize the truck. The issues were: 1) whether the respondent had a valid

security interest in the truck at the time the applicant purchased it from Waxy's; 2) if so, which party had priority; 3) whether the incorrect model number in the second PPR registration was seriously misleading, so as to affect the outcome of this application; 4) whether the respondent's priority was affected by the subsequent lapsing of the PPR registration; and 5) what was the effect, if any, of the respondent's failure to serve notice under Part V of The Personal Property Security Act (PPSA).
HELD: The application was dismissed. The court found with respect to each issue that: 1) the evidentiary requirements under s. 10 of the PPSA to describe collateral in a GSA are low. To the extent any ambiguity arose from the error in the serial number in this GSA was rectified by the respondent when he registered his interest in the truck in the PPR using the correct number. Any ambiguity created by the mistake had not misled the applicant anyway because he had not checked the PPR. The security agreement attached and was valid against the applicant at the time he purchased the truck; 2) the respondent had priority. The applicant could not rely on s. 30 because he did not purchase the truck from an ordinary course seller. Regardless of the question of Waxy's status, the applicant was not protected by s. 30(6) of the PPSA because the truck's serial number was recorded in the PPR; 3) the evidence at trial regarding the accurate model number was insufficient. Regardless, the PPR registration in effect at the time of the applicant's purchase referred to the collateral and the model number may have been incorrect. However, The Personal Property Security Regulations requires that collateral be registered by serial number and include the type of collateral. The model number is optional under s. 13 of the Regulations. Thus, the information given for registration purposes was correct and was not misleading; 4) although the respondent's security interest subsequently lapsed, the event was not relevant for purposes of determining priority. At the date of the transaction, the respondent had a perfected security interest; and 5) it did not have information about the service of the PPSA notice. This matter and the issue of whether the applicant might be eligible for a discretionary equitable order should be left to another application.

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R. v. Pewapisconias, 2016 SKQB 310

Scherman, September 20, 2016 (QB16301)

Criminal Law – Assault – Sexual Assault
Criminal Law – Fail to Appear

Criminal Law – Trial – Jury Trial – Forfeited Right to Jury Trial

The accused applied for an order that he was entitled to trial by judge and jury. The issue was whether an accused person forfeited his right to trial by judge and jury by failing to appear on the date previously scheduled for his trial. The accused was committed to stand trial on a charge of sexual assault. He elected to be tried by judge and jury. The accused failed to attend an appearance and when arrested was released on terms that included he appear as required and participate in the electronic monitoring program. The trial dates in April 2015 were set. In January 2015 the accused sawed off his electronic monitor. An arrest warrant from the Provincial Court was issued. Because the accused was at large, the judge directed that the trial scheduled in April 2015 be vacated and the matter would be spoken to later in April 2015. The accused was arrested and placed in custody in May 2016. The Crown argued that the accused had forfeited his right to trial by jury. The issues were: 1) was the accused a person to whom s. 597(1) of the Criminal Code applied and thus s. 598(1) could not apply; and 2) can the accused be said to have failed to attend when the dates for trial by jury were vacated.
HELD: Case law made it clear that s. 598 of the Criminal Code was constitutional. The issues were determined as follows: 1) the accused was a person to whom s. 597(1) applied for the purpose of s. 598(1). The accused's interpretation would require the Crown to arrange for the accused to be arrested and brought before the court to have a second arrest warrant issued under s. 597. The court concluded that could not have been intended by Parliament; and 2) s. 598 does not allow for legitimate excuses for non-attendance. The court did not find the accused's interpretation to be appropriate. It was clear that the accused did not intend to appear on his trial date and it was proper and appropriate for the court to vacate his jury trial. The accused had a continuing obligation to attend before the court on the jury trial date, only the trial was vacated, not the requirement that the accused attend. The accused did not attend, so he failed to appear. The court ordered the trial to proceed before a judge alone because the accused had forfeited his right to a jury trial.

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R. v. Drysdale, 2016 SKQB 312

Zarzeczny, September 21, 2016 (QB16302)

Criminal Law – Sentencing – Aboriginal Offender

Criminal Law – Sentencing – Assault – Assault with a Weapon
Criminal Law – Sentencing – Hearing

The accused was convicted of assault, threatening to use a weapon, contrary to s. 267(a) of the Criminal Code. The accused was homeless and panhandling. He had too much to drink and he waived a large kitchen butcher knife at a security officer when he was rude, disrespectful, and threatening. The accused followed the security officer to his vehicle, with the knife still in hand. He stabbed the tire of the vehicle and then ran away. He was a status Indian, 35 years old and diagnosed with Fetal Alcohol Spectrum Disorder (FASD), Reactive Attachment Disorder and Attention Deficit Hyperactivity Disorder (ADHD). He was addicted to and abused the use of alcohol and drugs. A Gladue report was prepared. The accused was apprehended by Social Services as a child and lived in 23 foster homes by the time he was 21 months old. He was adopted at age four and he stayed with his adoptive parents until he was 13. Both of his paternal grandparents attended residential school. The accused's parents lived as members of the tent village people in Manitoba. The accused had developmental delays and functioned at a grade five level. He had an extensive incarceral history. The accused had 22 criminal convictions as a youth and 38 offences as an adult. He was a high risk to reoffend. Crown witnesses from federal and provincial institutions testified as to their programming. The accused's adoptive father testified about their recent reconnecting and his observation that the accused had made some progress developmentally. Some community support providers, such as FASD clinic employees, testified about their services. The Crown sought a two-year federal incarceral sentence followed by a three-year probation order. The accused had been on remand for one year, four months and four days and the accused argued he should be given 1.5 times credit, making his remand time the equivalent of two years' imprisonment. The accused sought a sentence of no more than two years less a day in a provincial institution. HELD: The court concluded that a needs-based sentence as opposed to retributive sentence was appropriate for the accused. The aggravating circumstances were that the accused carried a large knife in a threatening manner that frightened the victim and the accused had a lengthy criminal record. The mitigating circumstances were the accused's Gladue factors, the cognitive and physical impairments that he suffered as a First Nations individual having FASD, as well as other disorders. The court indicated that an offender with an FASD diagnosis should not be punished more harshly than an offender with normal capacities. An offender with FASD and Gladue impact has a reduced moral and legal responsibility when assessing the parity principle. The court was satisfied that the accused did not

intend to hurt the victim but wanted to stand up for himself. The court was satisfied that community resources existed to continue to address the accused's needs and life-long management of his risk in the community. The community resources were found to give the accused the best chance of reducing his risk to reoffend. The accused was sentenced to two years less a day and he was given remand credit of two years less a day. The accused also pled guilty to a charge of mischief for damaging the victim's tire, contrary to s. 430(4) of the Criminal Code. The accused was sentenced to 30 days concurrent to the assault sentence. He also pled guilty to breaching his undertaking, contrary to s. 145(5.1) of the Criminal Code, for consuming alcohol. The accused was sentenced to 45 days to be served consecutively to the assault sentence. The consecutive sentence was imposed to allow the community resources to be put in place for the accused's release. The accused was also sentenced to a three-year period of probation to follow his incarceration.

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R. v. Boyer, 2016 SKQB 314

Meschishnick, September 22, 2016 (QB16304)

Regulatory Offence – Wildlife Act – Conviction – Appeal
Criminal Procedure – Self-represented Litigant

The appellant appealed from his convictions on two charges laid under The Wildlife Act, 1998 and two charges under The Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act. The appellant owned and operated a domestic game farm on which he offered hunting for elk and white-tailed deer. In 2013, a client of the appellant killed an elk outside the fence of the farm. The elk did not have an ear tag. The Crown alleged that the appellant chose the animal and permitted the hunter to shoot it. The appellant had the animal dragged under the fence onto the game farm and then arranged to have the elk dressed, skinned and processed at his facilities. The appellant prepared a bill of sale for the elk that related to another animal killed by the client. The client who killed the elk pled guilty and testified for the Crown as did other men who had been hunting with him and the appellant on that day. The trial judge accepted the evidence of the Crown's witnesses over that of the appellant. The appellant's grounds were that the trial judge erred: 1) in assessing credibility and failed to consider all of the evidence; 2) in failing to apply the doctrine of reasonable doubt, placing the onus on the appellant to prove his innocence;

3) failed to consider the defence of officially induced error. On this ground, the appellant submitted that he operated his game farm in accordance with instructions received from officials in the Ministry who told him that a bill of sale would be the equivalent of an export permit and no unique identifier number was required; and 4) in not granting the appellant's request for an adjournment to call an additional defence witness.
HELD: The appeal was dismissed. The court found with respect to the first and second ground that the trial judge had thoroughly reviewed the evidence and it was reasonably capable of supporting his conclusions, including those of credibility. The verdict was reasonable and supported by the evidence. Regarding the third ground, the court found that the trial judge had not specifically referred to the defence. However, the court found that his conclusions were correct. The appellant had not established that the elk shot was one of his game farm animals, and even if it was, the Domestic Game Farm Regulations did not permit harvesting of it outside the boundaries of the farm. The appellant could not rely on the exemption from obtaining the permit required by The Wildlife Act to export the carcass to another province. With respect to the fourth ground, the court found that the trial judge had adequately assisted the appellant as a self-represented litigant regarding the conduct of his defence. The judge correctly denied the appellant an adjournment on the basis of Browne v. Dunn because the appellant had already declined to cross-examine the Crown's witness on the same matter.

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R. v. Pollock, 2016 SKQB 315

Meschishnick, September 22, 2016 (QB16305)

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

The appellant was convicted after trial in Provincial Court of driving while his blood alcohol content exceeded .08, contrary to s. 253(1)(b) of the Criminal Code (see: 2015 SKPC 113). The appellant had been stopped by an RCMP officer. Although the appellant's driving was unremarkable and his speech was clear, the officer noticed beer cartons on the floor of the appellant's vehicle and that he had glassy eyes, a flushed face and smelled of alcohol. When the appellant informed the officer that he had consumed alcohol, the officer told him that he was being

detained to provide a roadside breath sample. The appellant told the officer that he had had his last drink not less than five minutes before being stopped. The officer then waited 10 minutes to allow mouth alcohol to dissipate. The trial judge found that more than 15 minutes had elapsed before the demand and the taking of the sample. After failing the test, the appellant was arrested for impaired driving and over .08. He was read the Intoxilyzer demand and his rights to counsel. The appellant indicated that he understood. When asked if he wished to call a lawyer, the appellant replied no. While at the station the appellant was placed in a room with a telephone, telephone books and a notice advising of the right to counsel. The officer did not ask the appellant again if wanted to talk to a lawyer. At trial, the appellant said that he had not asked any questions and thought there would be no point in trying to reach a lawyer late at night. He did not understand what Legal Aid was and he assumed that when he had said no to the question of obtaining counsel that it meant no, and he wanted to be cooperative. The appeal was based upon the following grounds: 1) the arresting officer did not have reasonable and probable grounds as required by ss. 8 and 9 of the Charter to make a demand for a breath sample as he had relied on the results of an ASD that were unreliable because the trial judge erred in finding that the officer waited for the appropriate period before taking the sample; and 2) the appellant had not unequivocally waived his right to counsel when arrested because his rights were not made clear to him then and his s. 10(b) right was breached. If the appeal was successful, the appellant submitted that the certificate of analyses should be excluded from the evidence pursuant to s. 24 of the Charter and an acquittal entered.

HELD: The appeal was dismissed. The court found with respect to each ground that: 1) the trial judge had not made any palpable or overriding error in making his findings regarding the roadside test. They were capable of supporting the conclusion that the officer waited more than 15 minutes between the time of his last drink and the taking of the sample; and 2) the failure to advise an accused a second time of his right to counsel at the police station does not necessarily constitute a breach of s. 10(b). The trial judge did not accept the appellant's evidence in this case that he was misled into thinking that he could only contact a lawyer at the time of his arrest when the warning was given. He gave no indication to the officer that he misunderstood or was confused so that the officer would have to have done something more to satisfy the informational component of s. 10(b).

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Figley v. Figley Estate, 2016 SKQB 317

Mills, September 26, 2016 (QB16308)

Wills and Estates – Dependants' Relief – Maintenance

The applicant brought an application for interim relief under s. 6 of The Dependants' Relief Act. Under the terms of his deceased father's will, the applicant was entitled to a one-third share of the estate. The will was challenged in 2007 by four of the applicant's seven siblings. The matter had not yet been set down for trial. If the will was found to be invalid and the estate fell to intestacy, the applicant would receive a one-seventh share of the estate. The value of the estate was not yet known but the Public Trustee and Guardian who was administering it advised that there was approximately $200,000 in cash in the estate account and a real property with a minimum value of $300,000. The applicant sought a minimum of $15,000 and no more than $100,000 for maintenance under s. 6. The applicant was unable to work due to a mental disability. He alleged he was a dependant as defined in s. 2(1)(c) of the Act.
HELD: The application was granted. The court made an interim distribution under the Act in the amount of $19,000 to be paid by the Public Trustee and Guardian. The applicant had established need. If after trial, the trial judge determined that no entitlement under the Act existed for the applicant, the funds could be recovered from the applicant through his entitlement to a portion of the residue of the estate.

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R. v. Keller, 2016 SKQB 319

Layh, September 28, 2016 (QB16309)

Constitutional Law – Charter of Rights, Section 11(b)

The Crown appealed the decision of Provincial Court judge that stayed proceedings against the accused on the basis that his s. 11(b) Charter rights had been breached. The judge found that because the trial was delayed for 18.5 months, the prejudice to him outweighed the public interest in adjudicating the case against him (see: 2015 SKPC 157). The Crown argued that the trial judge erred by failing to conduct the analysis required by R. v. Morin and by staying the charge without properly attributing the time periods involved. It was conceded that the trial judge

was mistaken and the delay was 17.5 months. After the hearing of the appeal but before the appeal court judge rendered his decision, the Supreme Court released its judgment in R. v. Jordan, which changed the law respecting Charter delay. As a result, the appeal court judge re-considered the appeal regarding the following: 1) whether the transitional rules set out in Jordan applied to an appeal of a staying order given beforehand. If not, the only issue was whether the trial judge correctly applied Morin in allocating delay and finding prejudice to the accused in ordering a stay; and 2) if the transitional rules applied to this appeal, was there a breach of the accused's s. 11(b) Charter rights. At trial, the Crown conceded that the defence had not caused delay nor waived it, but on appeal the Crown argued that the concession was offered in error and that the appeal court was not bound by it, relying upon the decisions in Tran and Lahiry.
HELD: The appeal was dismissed. The court found with respect to each issue that: 1) the transitional rules established in Jordan applied to this appeal as it was a case currently in the system; and 2) in applying the transitional rules in Jordan, the delay of 17.5 months was below the ceiling of 18 months for a Provincial Court trial, and therefore, the burden was on the defence to show that the delay was unreasonable. Based upon the Crown's original ground that the trial judge failed to find that the accused's conduct amounted to a waiver of delay, the appeal court reviewed the findings of the trial judge with respect to the periods of delay that the Crown now sought to attribute to the defence and have subtracted from the total delay of 17.5 months. The court distinguished this case from Tran and Lahiry as no amicus had been appointed and no intervenor had argued contrary to the Crown's concession. Additionally, neither of those cases gave licence to the Crown to change its position on appeal. The court found that the trial judge had not erred in his findings of fact regarding those periods and declined to subtract the time from the total delay. As the next step in the transitional rules, the court determined that the defence had taken meaningful steps to demonstrate its effort to expedite the proceedings and the case took longer than it reasonably should have. The court affirmed the trial judge's conclusion, regardless of whether it was based on the Morin or the Jordan analysis, that the accused had repeatedly attempted to have his case heard or the charges stayed, thus meeting the criteria for transitional exceptional circumstances set out in Jordan.

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