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Lane Jackson Ottenbreit, September 29, 2016 (CA16127)

Criminal Law – Appeal – Conviction
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Criminal Law – Mens Rea

The appellant appealed his conviction of obstructing or attempting to obstruct justice, contrary to s. 139(2) of the Criminal Code.
HELD: The appeal was allowed and a new trial was ordered. The offence was a specific intent offence requiring the Crown to prove beyond a reasonable doubt that the appellant acted specifically to obstruct justice. The trial judge focused on the actus reus of the offence and the consequences of the appellant's actions. He did not turn his mind to the evidence, or lack thereof, of the appellant's mens rea. Knowledge alone is not sufficient to establish the requisite mens rea for the offence of obstruction of justice.

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R. v. Franc, 2016 SKCA 129

Jackson Caldwell Jackson, September 30, 2016 (CA16129)

Criminal Law – Appeal – Stay of Proceedings

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The Crown appealed the stay of proceedings entered on a trafficking in cocaine charge, contrary to s. 5(1) of the Controlled Drugs and Substances Act (CDSA). The trial judge held that the police conduct amounted to entrapment and therefore an abuse of process. The respondent asserted that the appeal should be dismissed because of the Crown's failure to ensure compliance with s. 30 of The Evidence Act (EA). Four certificates were prepared pursuant to s. 30 and the respondent said that there were deficiencies in three of them. He said one was signed by someone without authority, one was not dated or signed, and the third referred to the first two so was questionable. Two undercover officers attended at a bar and the respondent indicated that he would supply them with two grams of cocaine at the price of $100 per gram. A few minutes later, the respondent took the officers to a vehicle where another man (Mr. N.) handed them the cocaine and took the money. The respondent and Mr. N. testified that the respondent did not know Mr. N. was going to bring cocaine to the bar. The trial judge did not believe this testimony. The trial judge found that the police evidence did not establish a reasonable suspicion that this physical location was one where the activity in question was likely occurring. The issues on appeal were as follows: 1) was there a failure to comply with s. 30 of the EA and, if so, what was the effect of such non-compliance; and 2) did the trial judge err by granting a stay of proceedings.

HELD: The stay of proceedings was set aside and a conviction was entered. The issues were determined as follows: 1) the Crown replaced the certificates following the hearing of the appeal. The respondent did not request an adjournment during the appeal to deal with the certificates, nor did he point to any deficiencies in the transcripts represented by the certificates. The appeal court did not find the errors to be of any consequence because there was not a missing portion of a transcript nor did an omission deprive the respondent of a ground of appeal. The preliminary objection based on the EA was dismissed; 2) on an appeal from a stay of proceedings the Crown is not limited to appealing questions of law. The appeal court applied the questions to determine whether there was entrapment. The respondent did not personally arouse suspicion that he was already engaged in trafficking cocaine. The trial judge then had to consider whether the police were undertaking a bona fide investigation directed at an area where it was reasonably suspected that criminal activity was occurring. After considering all of the factors, the appeal court concluded that there was

sufficient evidence to ground a reasonable suspicion that drug trafficking was occurring at the bar, and it was an error of law for the trial judge to find otherwise. The trial judge seemed to assume that any finding of entrapment would result in a stay of proceedings whereas it is only the clearest of cases that results in the stay. The appeal court found that the trial judge erred by finding that the police conduct amounted to entrapment and erred in imposing a stay of proceedings as a result. A conviction was entered and the matter was remitted to the trial judge for sentencing.

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R. v. Wilton, 2016 SKCA 131

Caldwell Whitmore Ryan-Froslie, October 4, 2016 (CA16131)

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Criminal Law – Sentencing – Dangerous Offender – Determinate Sentence – Long-term Supervision Order
Criminal Law – Sentencing – Sentencing Principles

The appellant appealed his conviction for breaking and entering a dwelling and committing a sexual assault therein, contrary to s. 348(1)(b) of the Criminal Code, on the grounds that the verdict was unreasonable or unsupported by the evidence. The issue at trial was whether the appellant was the assailant. The complainant identified the appellant from line-up photographs and she made positive in-dock identifications at trial. There was also DNA evidence. The appellant had his son testify at trial that he had been the assailant. After conviction, but prior to sentencing, the appellant admitted he had broken into the complainant's home and sexually assaulted her. He also appealed his designation as a dangerous offender and subsequent imposition of a determinate sentence of eight and a half years of incarceration followed by an eight-year long-term supervision order (LTSO). The appellant argued that the predicate offence did not fit the patterns of behavior required under ss. 753(1)(a)(i) and (ii) of the Criminal Code. The trial judge had determined that it would take at least 30 months to ensure that the appellant would complete the programming

v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union

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Smithson, Re (Bankrupt)

needed before he was released into the community. The trial judge then sentenced the appellant to 45 months, noting he would be eligible for statutory release after serving two thirds of his sentence. The appellant argued that the sentencing judge erred by assuming that he would be entitled to statutory release after serving two thirds of his custodial sentence. Since 1991, the appellant had 120 convictions, 25 involved violent or threatening behavior.

HELD: The conviction appeal was dismissed and the sentence appeal was allowed. The appeal court held that the appellant failed to establish that the trial judge could not reasonably have concluded on all the evidence before him that he was guilty beyond a reasonable doubt. The trial judge concluded that the complainant and her mother were reliable and truthful witnesses. The trial judge set out eight reasons why he was satisfied beyond a reasonable doubt as to the appellant's guilt. The appellant did not show that the trial judge's findings of credibility could not be supported on any reasonable view of the evidence. The dangerous offender designation was also reasonable, but there was an error in the imposition of the determinate sentence. The determinate sentence was reduced to seven years and nine months. Section 753(1)(a)(i) is concerned with the offender's behavior when committing the offences not with the offences. The appeal court found that the predicate offence, although containing a sexual aspect for the first time, still involved a clear failure on the appellant's part to restrain his violent behaviour. With respect to s. 753(1)(a)(ii) the appellant's pattern of persistent aggressive behaviour was at issue, not the sexual nature of the predicate aggression or the degree of harm he inflicted in the predicate offence. There was no question that the predicate offence involved aggressive behaviour. The appeal court found that the designation was one that the evidence supported. The appeal court held that the sentencing judge was led to commit an error in principle in his approach to crafting a fit determinate sentence and the error had an impact on the sentence. It was not an error for the sentencing judge to focus on offender rehabilitation. The sentencing judge assumed the appellant would benefit from early release, but this ignored the appellant's dangerous offender status. The Parole Board of Canada can always deny early release and the appeal court indicated it was likely in this case given the appellant's own submissions and the findings of the trial judge regarding him being a dangerous offender. Therefore the sentence of 45 months would deprive the appellant of an additional 15 months of liberty without a principled reason. If the Parole Board determined that there was a basis for early release, they presumably would have determined that the sentencing objective of rehabilitation would have been achieved, regardless

of completion of institutional programming. The adjustment to the appellant's sentence to 45 months was not consistent with provisions (d) and (e) of s. 718.2. The LTSO was reviewable for its reasonableness. The LTSO was not considered part of the appellant's sentence.

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R. v. Lemaigre, 2016 SKCA 132

Jackson Caldwell Herauf, October 14, 2016 (CA16132)

Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Sentence
Criminal Law – Evidence – Credibility
Criminal Law – Mistrial

The appellant appealed his conviction of assault causing bodily harm, contrary to s. 267(b) of the Criminal Code, and against his designation as a dangerous offender along with the indeterminate sentence imposed on him. The appellant was designated a long-term offender prior to the offence under appeal. The alleged assault was against the appellant's former spouse, whom he was to have no contact with. The complainant testified that she went to her daughter's home and the appellant was there. She said the appellant hit her somewhere in the face knocking her unconscious. She had a small scar as a result. The Crown did not have any other evidence of the assault. The appellant did not testify but the complainant and the appellant's daughter and her boyfriend did. The daughter testified that the complainant was drunk and tripped and fell resulting in the injury. The daughter said that the appellant was not present at her home at this time. The Crown applied for a mistrial on the basis that the daughter's evidence presented an alibi defence, which was not disclosed to the Crown in advance. The trial judge indicated that there was not alibi evidence as long as the daughter's evidence only indicated the appellant was not present. The daughter's boyfriend corroborated what the daughter said about the complainant.
HELD: The conviction appeal was allowed and the matter was remitted back to the Provincial Court for a new trial. The evidence at trial that was accepted by the trial judge was capable of supporting a conviction, but the appeal court indicated that a confluence of a number of factors relating to how the trial unfolded led it to set aside the verdict as a miscarriage of justice: 1) the complainant's evidence was thin and imprecise and at one point she said "that's why I lied"; 2) the complainant was not

questioned as to whether the assault could have occurred on another day, time, or place; 3) the reliability of the complainant's evidence turned on her credibility, and therefore, so did the question of whether there was a reasonable doubt. Admission of the character evidence would not have been contrary to the collateral fact rule because it went directly to credibility and reliability; 4) the trial judge was uncertain as to the time of day that the assault had occurred and also seemed uncertain as to the place where the assault had occurred; 5) the trial judge should have addressed the boyfriend's corroborating evidence in her reasons; and 6) the Crown's application for mistrial was not directly resolved. The court also set aside the conviction on the breach.

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Boardwalk General Partnership v. Olson, 2016 SKCA 135

Jackson Herauf Wilkinson, October 19, 2016 (CA16135)

Landlord and Tenant – Residential Tenancies Act
Statutes – Interpretation – Residential Tenancies Act, 2006, Section 8, Section 19

The appellant landlord appealed the decision of a chambers judge setting aside the decision of a hearing officer appointed under The Residential Tenancies Act, 2006 and ordered the appellant to pay compensation equivalent to one month's rent in the amount of $1,284 to the respondent tenant (see: 2015 SKQB 357). The parties had entered into a new one-year lease, and prior to the expiry of the old lease, the respondent gave the appellant notice that he would vacate the premises on a date that was one month after the new lease took effect. Pursuant to a term in the new lease, the appellant sent a notice claiming a "lease break fee", which constituted the balance of the year's rent in the amount of $15,400. This amount was reduced to one month's rent when the appellant was able to rent the premises within one month. The respondent applied under s. 70 of the Act requesting that the appellant return the fee to him, claimed as damages, because the appellant had failed to give him a signed copy of the lease as required by s. 19(2) of the Act. The hearing officer rejected the respondent's application on the basis that the respondent had not suffered economic loss as result of the appellant's breach of s. 19(2). The respondent appealed on the basis that the officer had misinterpreted s. 19(2). The chambers judge held that the appellant failed to comply with the section. The judge found that non-compliance under it could not be

saved by s. 19(6) and used s. 19(5) as the basis to grant the respondent his remedy. He ordered the appellant to pay compensation equivalent to one month's rent. The appellant appealed on the ground that although the judge held correctly in these circumstances that s. 19(6) was not applicable, he erred in granting the respondent a remedy under s. 19(5) because the decision could be interpreted as permitting a tenant not to pay previously withheld rent even after the landlord had rectified its failure to comply with s. 19(2). It requested the court to declare the meaning of s. 19(5).
HELD: The appeal was dismissed. The court found that it was satisfied in this appeal that regardless of the chambers judge's reasoning, he arrived at the correct result and it was not necessary to address the s. 19(5) jurisprudence. The court stated that the proper analytical framework was to assess the respondent's claim under s. 8(1). It reviewed the hearing officer's decision and found that he had erred in failing to find that the appellant landlord had contravened s. 19(2) and that the respondent tenant had suffered economic loss as result of the contravention. The hearing officer also erred in finding that the appellant would have provided the signed lease if the respondent had asked for it, and that under s. 8 the respondent had failed to prove loss or damages as the basis for refusing to award damages for the contravention. These errors taken together supported the chambers judge's conclusion that intervention was required. The court held that as s. 72 of the Act was silent as to the court's powers hearing an appeal, s. 12 of The Court of Appeal Act, 2000 was operative. Under it, the court decided that since the appellant had not taken issue with the amount that the chambers judge had awarded to the respondent but rather to his use of s. 19(5) of the Act to grant a remedy, it would ground the judge's result in s. 8(1) and s. 70(6) rather than s. 19(5).

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R. v. Enns, 2016 SKPC 124

Jackson, September 23, 2016 (PC16103)

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

The accused was charged with impaired driving and driving while over .08. The charges were laid after an RCMP officer stopped the accused's vehicle just after midnight. The defence

brought a Charter application on the ground that the accused's s. 10(b) Charter right was breached and a voir dire was held. The defence called no evidence on the voir dire or trial proper. The accused was the sole occupant of the vehicle and he had driven out of the parking lot of a hotel when the officer decided to perform a vehicle stop to check the accused's driver's licence, registration and sobriety. The officer smelled alcohol coming from the vehicle. The officer testified that the accused was chewing gum, which is often used as an attempt to mask the smell of alcohol, and noticed that the accused had bloodshot eyes. The officer stated that he had reasonable grounds to suspect that the accused had alcohol in his body, so asked him to come to the police cruiser. The accused admitted that he had had a drink about one hour previously and the officer noted that the accused had a dry pasty mouth, another sign of alcohol consumption. The officer made an ASD demand upon the accused. The accused failed the test. The officer then informed him of his arrest for impaired driving, his right to counsel and the police warning as well as making the formal breath demand. The accused advised that he did not want a lawyer and indicated that he understood the information given by the officer. The defence raised as issues: 1) whether the officer's subjective suspicion regarding the alcohol in the body of the accused could be objectively supported; 2) whether the officer should have provided the accused with his rights to counsel subsequent to the breath demand; and 3) whether the Crown had proven beyond a reasonable doubt that the accused was operating his vehicle when his ability to do so was impaired by alcohol. HELD: The accused was found guilty of driving while over .08 and was acquitted of impaired driving. The court held with respect to each issue that: 1) the officer's suspicion was objectively supported on the evidence as there was a smell of alcohol in the vehicle, the accused was the only occupant of the vehicle and there was no open alcohol in it; 2) the officer was not required to have repeated the right to counsel after making the formal breath demand, following the Supreme Court's decision in R. v. Schmautz; and 3) there was insufficient evidence to prove that the accused's ability to drive was impaired by alcohol.

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Madraga v. Blades, 2016 SKPC 130

Schiefner, October 6, 2016 (PC16107)

Contracts – Breach – Damages
Contracts – Breach – Faulty Workmanship – Small Claims

Contracts – Breach of Contract – Renovations – Damages
Contracts – Breach – Repudiation
Contracts – Formation – Verbal
Small Claims – Breach of Contract

The plaintiff claimed damages for breach of contract arising out of a contract of renovation. The defendant, plaintiff by counterclaim, was a contractor retained by the plaintiff to strip and resurface the ceilings on the main floor of her home, and to repair and repaint the walls. The plaintiff paid the defendant in full, but then alleged that the work was not completed properly and/or that his workmanship was substandard requiring that all the work must be completely redone. The claim was for $18,026.60. The defendant denied the claims. He counterclaimed that he had a second oral contract with the plaintiff to paint the closets on the main floor for $300. The defendant alleged that the plaintiff breached the oral contract by repudiation without notice. There were no written agreements between the parties. The plaintiff paid the defendant $9,605.90. The parties agreed that the defendant would attend the house January 27 to do the repairs and the closets. The plaintiff was not home on that date. The next fall the plaintiff received an estimate from another company to repair and repaint the main floor of the house. The court was satisfied that the contractor providing the estimate had expertise in construction, including the field of painting. The contractor confirmed that: the ceiling was not completely smooth in all areas, and those areas required the entire ceiling to be skim-coated, re-sanded, primed, and repainted; there were a number of areas on the wall surfaces that were not perfectly flat and smooth, noting that some of the dints and marks could have happened after the defendant finished painting; and there was one area where over-sprayed stipple had not been removed from a wall.
HELD: The court did not give much weight to the plaintiff's testimony as to the defects in the defendant's work because it was mostly based on the opinions of others, who did not testify. The court was not convinced that the defendant's work was wholly deficient and he substantially completed his contractual obligations. There were, however, deficiencies in the contract. There were portions of ceiling in each room that needed to be skim coated, primed, and painted. The court held that if portions of the ceilings had to be repaired, the proper procedure would be to repaint all of that ceiling. The outside wall in the master bedroom had numerous popped screws, which was more than a minor deviation from the contract specifications. The popped screws had to be repaired and the wall had to be repainted. The court was not satisfied, on a balance of probabilities, that the remaining work on the walls was in breach of the contractual obligation. There is no right of a contractor to repair defective

workmanship in Saskatchewan. The plaintiff was entitled to damages measured by the cost of making good the defects and omissions in work performed by the defendant. The court calculated the damages to be $3,583.67. The court was satisfied that the parties entered into a second contract and that the terms of that contract were that the defendant would paint the closets for $300. The plaintiff breached this contract by repudiations without notice to the defendant. The defendant was entitled to damages of $300. There was a judgment in favour of the plaintiff against the defendant for $3,283.67.

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R. v. Slippery, 2016 SKPC 131

Crugnale-Reid, October 3, 2016 (PC16114)

Criminal Law – Assault Causing Bodily Harm
Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Dangerous Offender – Determinate Sentence – Long-term Supervision Order
Criminal Law – Sentencing – Remand Time

The accused was convicted of an assault causing bodily harm pursuant to s. 267(b) of the Criminal Code (predicate offence). The accused subsequently pled guilty to another charge under s. 267(b) of the Criminal Code for assaulting a fellow inmate while on remand for the first assault. An assessment pursuant to s. 752.1 of the Criminal Code was prepared. A Gladue report was also filed. The Crown argued that the accused be designated a dangerous offender and sentenced to an indeterminate period of custody. The accused did not contest the dangerous offender designation. The accused argued that a determinate jail sentence of three years with an eight- to ten-year long-term supervision order was appropriate. The accused was a 36-year-old First Nations person. His mother died when he was 11 years old, and his father had a history of struggling with alcohol. The accused witnessed family violence, and alcohol and drug abuse while growing up, and he was physically abused by his father. He was apprehended by Social Services when he was 11 and then he was shuffled between foster and group homes. He was sexually assaulted twice, once when he was seven and once at a residential school. The accused struggled with substance abuse from early in his life. He had a history of suicidal threats. The accused's first criminal conviction was when he was 12 and he had a total of 42 convictions, 16 of which were violent. From age 12 the accused spent most of his life either under court-ordered

supervision in the community or in custody due to his offending behavior. He had participated in programming, but his behavior once released did not seem to have benefitted from it. The psychiatrist that prepared the assessment, and who was qualified to give expert evidence, indicated that the accused was searching for the right path and had delayed maturation and an unsettled personal identity. The accused was diagnosed with substance abuse and dependency, and possibly Antisocial Personality Disorder. The doctor assessed the accused as being at risk for acts of violence in the foreseeable future. He was assessed as high risk for violence while intoxicated. The doctor outlined possible programming for the accused and indicated that, as a general rule, the longer the follow up, the greater the possibility of managing the risk in the community. He felt there was a realistic possibility that his risk could be reduced to the point where he could be safely managed in the community in the foreseeable future. The doctor's opinion did not change with the updated assessment after the assault while on remand.
HELD: The court was satisfied that the predicate offence was a serious personal injury offence and the Crown established the requisite pattern of behavior under each of ss. 753(a)(i) and 753(1)(a)(ii) of the Criminal Code. The criteria for a dangerous offender designation were met. The court found a determinate sentence alone to be clearly inadequate given the criminal history and evidence of ongoing need for programming and supervision. The court considered the Gladue factors present in the case. The court was satisfied that the doctor made a fair and thorough assessment of the accused's risk, treatability and prospects for management in the circumstances. The court accepted his evidence and expert opinion and gave it full weight. The court was satisfied that there was a reasonable expectation that a determinate sentence coupled with a long-term supervision order would adequately protect the public against a commission of murder or a serious personal injury offence by the accused. The court accepted the doctor's conclusion that the accused was a man in transition who appeared to have begun the process of change. A determinate sentence of eight years was imposed for the predicate offence. The accused was sentenced to a consecutive four-year sentence for the subsequent assault. The accused had been held in remand for four years, five months, and six days. The accused received a remand credit of four years and five months, which was close to 1:1 credit for time served on remand. Seven years and seven months were yet to be served. The accused was also sentenced to the maximum of 10 years long-term supervision to secure his rehabilitation once released from prison.

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R. v. Fulton, 2016 SKPC 136

Daunt, October 13, 2016 (PC16108)

Criminal Law – Breach – Failing to Report to Parole Officer
Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Long-term Supervision Order
Criminal Law – Sentencing – Remand Time

The accused pled guilty to failing to report to his parole officer as required by his long-term supervision order (LTSO), contrary to s. 753.3 of the Criminal Code. The accused evaded capture for almost a year when he was arrested on other charges. The accused's criminal record started when he was 16 and he was now 55 years old. The accused was declared a long-term offender and sentenced to four years' imprisonment in June 2007. This was the accused's fourth federal sentence. On his previous three federal sentences the accused violated mandatory supervision several times. He was released on day parole in June 2009 and transitioned to statutory release in June 2011. In April 2015 the accused was seen intoxicated in a bar and he then withdrew from supervision. The accused came from a large blended Metis family where his parents were alcoholic and violent. He was an alcoholic by age 14. He had seven children and three step-children. He married his current wife in 2009. The relationship was volatile. The accused had been previously diagnosed with alcohol dependence, psychoactive substance dependence, and anti-social personality disorder. He had a grade 9 education, but since 2007 completed grade 12 and was steadily employed or self-employed since his release in 2009. The accused was allowed to attend drinking establishments, but he was not allowed to drink. The accused's LTSO was suspended during the time he was at large. It was unclear whether the LTSO started running again the date the information was laid, July 2016. The charge was not laid earlier due to an error in communication between the parole office and the Crown.
HELD: Some of the objectives in sentencing had already been addressed by the accused's time in custody. The accused was technically only in custody for 98 days as a result of the offence in question because the information was not laid until July 2016. The court concluded that the accused should be given enhanced credit, resulting in an extra 49 days credit for a total of 147 days deemed served. The court also took into account the 101 days between March 2016 and the laying of the charge in July 2016. It was aggravating that the accused actively eluded capture for almost a year. The court found an appropriate total sentence to be 240 days.

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Robson v. Percy Hunt Travel Group Inc., 2016 SKPC 141

Kovatch, October 20, 2016 (PC16113)

Insurance – Actions on Policies – Trip Cancellation
Insurance – Agents – Duty of Care – Exclusions
Small Claims – Breach of Contract

The plaintiffs purchased an all-inclusive holiday from the defendant travel agency. They also purchased travel insurance, including cancellation insurance, from an agent employed by the travel agency. The insurance policy was underwritten by the other defendant. The plaintiffs attempted to cancel the trip, but when they were not able to do so, one of the plaintiffs and their daughter took the trip. The plaintiffs alleged that the defendant underwriter breached the contract of insurance, or alternatively, that the employee of the travel agency was negligent and misrepresented the terms of the insurance coverage. When the plaintiffs met with the travel agent, they indicated that they advised her that they had a sick friend so would need trip cancellation insurance. According to them, the travel agent advised them that the insurance purchased would cover them up until the day they left. A few days before they were to leave the plaintiffs received a call that their friend was not doing well. One of the plaintiffs went to Alberta where their friend was. The other plaintiff attended the travel agency and was advised that they could not postpone the trip and that, if anything, each plaintiff would only be covered for up to $500 and maybe not even that because the friend's condition was pre-existing. The travel agent initially indicated that the names on the package could not be changed, but they were later able to put their daughter on the trip. The plaintiffs paid $6,971.50 for the vacation package and an additional $1,508.02 to add the daughter and remove the one plaintiff from the trip. The daughter only went for one of the two weeks of the trip and some of the increased cost was to arrange her flights. The plaintiffs indicated that they did not receive the insurance booklet until after they had paid for it. They agreed that the booklet was quite clear regarding the coverage. The plaintiffs did not make any formal claim under the insurance policy, nor did they have any direct communication with the insurance underwriter. A friend getting sick was not one of the coverages under the policy and the cancellation can only be made up until seven days prior to the trip to get 75 percent coverage. If the trip is cancelled within a week of leaving only $500 per person was

covered. The travel agent testified that she had advised one of the plaintiffs on an earlier occasion that trip cancellation insurance would not provide coverage if they knew of a reason at the time of booking that they may cancel the trip. The travel agent indicated that if there had been a discussion about a sick friend she would have advised the plaintiffs that it was something they were aware of when purchasing insurance so could not be a reason for cancellation.
HELD: The insurance underwriter did not have any direct dealings with the plaintiffs. The court did not find any term in the insurance contract that was breached by the insurance underwriter. A claim was never even made to the insurance underwriter. The court also found that the travel agent did not agree to provide any coverage other than what was specifically provided in the insurance policy. The claim against the insurance underwriter was dismissed. The plaintiffs claimed negligence against the travel agency. The court concluded that the claim was not satisfied for a number of reasons. The travel agent did not deliberately misrepresent the extent of insurance coverage to the plaintiffs. The plaintiffs claimed that they should be reimbursed for the holiday that they paid for but did not receive. The court found that the plaintiffs understood and believed that the insurance policy would provide payment and reimbursement in the event that the trip was not exactly as contracted for, which the insurance policy did not do. The claim against the travel agency was also dismissed.

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Korf Properties Ltd. v. Hirsch Construction Ltd., 2016 SKQB 318

Acton, September 27, 2016 (QB16325)

Bankruptcy – Receiver
Builders' Lien
Civil Procedure – Application to Strike Statement of Claim – Queen's Bench Rules, Rule 7-9
Civil Procedure – Summary Judgment – Queen's Bench Rules, Rule 7-2, Rule 7-5
Civil Procedure – Marshalling
Civil Procedure – Subrogation

The defendant applied pursuant to rule 7-9 of the Queen's Bench Rules for an order striking the plaintiff's statement of claim in its entirety, or alternatively for an order pursuant to rules 7-2 and 7-5 for a summary judgment dismissing the plaintiff's claim. The defendant constructed a shop for a company. The sole director, officer and shareholder of the company (Company 1) was also

the sole officer and director of the plaintiff. The defendant was instructed to issue all of its accounts to Company 1. The defendant registered a builder's lien for $1,391,372.36 when Company 1 failed to pay the balance owing. The defendant then commenced an action to recover the amount. The plaintiff then provided a loan to a second company (Company 2) that had the same director, shareholder, and officer as Company 1. The plaintiff advanced $2.65 million to Company 2 and registered a security interest in the Saskatchewan Personal Property Registry. In February 2014 a receiver and manager of Company 2 and Company 1 was appointed by the Alberta Court of Queen's Bench. In May 2014 the Alberta court approved the sale of Company 1's assets and distributed the majority of proceeds to Company 2's main creditor (Vesting Order). The defendant requested an amendment to the receiver's proposed order to allow them to make a claim for marshalling, thereby preserving its priority position vis-à-vis the unsecured creditors. The Alberta court ordered the amount of the lien be paid into trust so that Company 1 could defend the builders' lien action. At no time prior to the commencement of the action did the plaintiff assert that it had priority to any funds as against Company 1 or that it had any claims against Company 1. The issues were as follows: 1) should the plaintiff's statement of claim be struck on the basis that it was frivolous, res judicata or had no reasonable chance of success. The plaintiff claimed entitlement pursuant to the doctrine of marshalling and subrogation and the defendant argued that the doctrines did not apply; and 2) in the alternative, should the court dismiss the plaintiff's claim by way of summary judgment.

HELD: The court dealt with the issues as follows: 1) the plaintiff and defendant did not share a single debtor. The court accepted that Company 2 never had access to Company 1's fund as it was a guarantee to Company 2's debt and, therefore, the doctrine of marshalling had no application. The defendant was also clearly a third party that would be prejudiced. The court concluded that for subrogation to occur, the parties asserting the right to subrogation had to have contributed to payment of the obligation owed by the party against who the subrogation was asserted. To allow the within action would unquestionably prejudice the rights of the defendant's claim under its builder's lien. The plaintiff voluntarily loaned Company 2 funds after the defendant's action was commenced and took a general security agreement over all present and after-acquired property of Company 2. Section 7(1) of The Builders' Lien Act provides the defendant with priority in advance of the general security agreement of the plaintiff. Any objections to the builder's lien must be raised at the trial of that issue. The plaintiff could not make a claim against the funds held in trust, other than funds

remaining after the judge made a decision on the amount to be paid out pursuant to the builder's lien. The plaintiff failed to advance the claim during the receivership. The court found that the plaintiff did not come to the court with clean hands and was not entitled to the equitable relief requested. The plaintiff also did not appeal or object to the earlier Alberta orders, making the issues res judicata. The court struck the claim in its entirety pursuant to rule 7-9(1)(a); and 2) the plaintiff consented to the actions of the receiver, which included the placing of strict trust conditions on the funds set aside for the builders' lien action of the defendant. The court determined that there was no genuine issue for trial and the defendant was granted summary judgment and the plaintiff's action was struck.

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Law Society of Saskatchewan v. Abrametz, 2016 SKQB 320

Schwann, September 29, 2016 (QB16312)

Professions and Occupations – Barristers and Solicitors – Conduct – Investigation
Statutes – Interpretation – Legal Profession Act, 1990 – Section 63

The Law Society of Saskatchewan (LSS) applied for an order under s. 63 of The Legal Profession Act, 1990, authorizing its designated official to search the office, personal residence and accountant's office of the respondent, a member of the LSS, for the purpose of seizing the respondent's personal income tax returns for the 2008 to 2012 taxation years and other related documents. The LSS sought this order as a result of the Queen's Bench decision to quash a subpoena duces tecum issued by the LSS, pursuant to s. 39 of the Act (see: 2016 SKQB 134). The subpoena had been issued because the LSS was investigating the respondent for conduct unbecoming a lawyer. It believed that he had involved his clients and used his law firm's trust account in a scheme to evade the payment of income tax. The respondent had conceded that he took client fees outside of his firm's accounting system but refused to produce documents requested by the LSS. When the subpoena was quashed, the LSS sought this order. The issues were: 1) whether s. 63 of the Act authorized the LSS to demand or obtain through court order personal records unrelated to the respondent's practice. The respondent argued that the definition of "member's records" in s. 60(b) of the Act confined the scope of s. 63 to those records that relate directly to a member's professional practice. The applicant

submitted that its mandate to protect the public required a more expansive interpretation of s. 63; 2) was the investigation into whether the respondent evaded the payment of income tax and the LSS's demand for corresponding financial records a matter within its jurisdiction under the Act; and 3) whether the court should exercise its discretion to grant the application. The respondent argued that the order should not be granted, having regard to applicable criteria for search and seizure cases and basic Charter principles.

HELD: The application was granted. The court found with respect to each issue that: 1) the LSS had authority under s. 63 of the Act. Sections 3.1 and 3.2 impose a duty on the LSS to act in the public interest and protect the public by assuring the integrity of its members, in both their private and professional lives. The court found that although the term "other property" in s. 63(2)(b) is not defined in the Act, that it should be interpreted to include the records sought by the applicant. The documents were required for the applicant's investigation; 2) the applicant had not laid charges in relation to the investigation, so it was premature to inquire whether the LSS might be infringing upon federal jurisdiction with regard to the respondent's income tax; and 3) the court should exercise its discretion to make the order. The search and seizure power in this case was regulatory and administrative and not being used to gather evidence with a view to laying a criminal charge. The applicant could craft the order to be less intrusive than an open-ended search of the respondent's home or his accountant's business premises. The applicant had satisfied the court that there was nexus between the investigation of the respondent's integrity and the documents sought and that they were sought for a legitimate regulatory purpose. The purpose of the Act was to protect the public in the context of the legislative scheme for the self-governance of lawyers. Where there are reasonable and probable grounds to believe that professional misconduct has occurred, the members have a limited expectation of privacy. In this case, the applicant's search of the respondent's home was its only remaining investigatory tool.

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Antosh v. Antosh, 2016 SKQB 321

Zuk, September 29, 2016 (QB16306)

Civil Procedure – Family Law Proceedings – Costs
Civil Procedure – Queen's Bench Rules, Rule 4-26, Rule 15-25

The parties were involved in five years of litigation, ending in a trial, to resolve issues of child support, division of family property and entitlement to spousal support. At the conclusion of the trial, both parties claimed victory and entitlement to costs based upon the presumption stated in Queen's Bench rule 15-25(2). The petitioner claimed costs, including expert witness fees, in the amount of $53,900. The respondent claimed costs, including expert witness fees, in the amount of $94,800 and also argued that even where the petitioner had been successful on some issues, that she should be deprived of costs and ordered to pay his costs as a result of her alleged unreasonable conduct. He also argued that the court was entitled to review the exchange of "without prejudice" between counsel for the parties some months before trial. The respondent submitted that the correspondence could be considered as evidence that the petitioner had behaved unreasonably or in bad faith pursuant to rule 15-25(4).

HELD: The court found that each party was equally successful and that it was appropriate that each of them bear their own costs for the trial. The court refused to take a mathematical approach to calculating costs but instead determined which party was successful regarding each major issue based upon the fact that each party took legal positions that could be supported and called credible evidence, and in some instances, expert evidence in support of their positions. The court found that the petitioner had not acted unreasonably or in bad faith so as to penalize her with costs as described in Queen's Bench rule 15-25. The petitioner delayed the proceedings because she had changed legal counsel twice but there was no evidence that she did so with the intention to delay. Although the petitioner failed to meet the deadlines in the Queen's Bench Rules in obtaining her expert reports, the court found that she had not done so with the intention of frustrating the litigation, and the court had already assessed costs at $1,500 and declined to make any further award of costs. Regarding the issue of whether the court could consider the "without prejudice" correspondence, the court held that it would not on the basis that did not fall within rule 15-25(8). It was not an offer made before the commencement of the family law proceeding, nor was it a formal offer to settle as provided for in rules 4-26 to 4-32 in Divison 5 of Part 4 of the Queen's Bench Rules. The correspondence contained no reference to the right to refer to the offer and therefore could not be considered a Calderbank offer.

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Guenther v. Guenther, 2016 SKQB 322

Dufour, September 29, 2016 (QB16310)

Family Law – Child Support – Interim – Variation
Family Law – Child Support – Determination of Income

The petitioner mother sought an order varying an interim child support order made in 2012 and for an order regarding s. 7 expenses. If successful in the variation application, she also sought arrears of child support for a period of one year prior to the application, based upon higher income to be imputed to the respondent. The parties separated in 2011. Their four children, aged 17, 13, 12 and 10, all lived with the petitioner. The respondent and his brother each owned 50 percent of two corporations. When the original interim order was made, the judge imputed income to the father of $58,163. He arrived at that figure by combining the father's $40,440 employment income from one of the corporations and $17,715, being one quarter of the pretax income of the other corporation (there were four partners at the time), resulting in monthly child support being set at the Guidelines table amount of $1,246. In 2015 the pre-tax income of the two corporations was $129,000. The respondent and his brother each received a salary of $39,000 and took $11,500 in dividends. The respondent submitted that the remaining $105,400 in retained earnings of the corporations must remain to keep them financially secure. The petitioner argued that income should be imputed to the respondent of more than $100,000 made up of his employment income, one-half of the corporation's pre-tax income and the value of the benefits he received from the corporations. The benefits included his use of a vehicle for personal reasons, a loan made to the respondent by the corporations to pay his share of the value of the family property and the rental by him and his mother of residential properties owned by the corporations. Regarding the petitioner's request for s. 7 expenses, she presented evidence that because of the mental and physical health problems experienced by three of the children, the petitioner had had to stop taking classes for her nursing degree and had no income. The children's grandmother was no longer able to help with their care because she had developed cancer. The petitioner asked that her income be imputed to be $21,800 per annum based upon minimum wage. HELD: The application was granted. The court found that the respondent's 2015 salary, dividend and personal benefit of $58,000 did not fairly reflect all of the money available to him for the payment of child support. The respondent had failed to provide clear evidence that there were legitimate business reasons for keeping most of the 2015 pre-corporate income as retained earnings. The court applied s. 18(1) of the Guidelines

and attributed to him an additional $52,700 of the corporation's pre-tax income, so that his 2015 income for the purpose of calculating child support was $109,500, resulting in s. 3 child support in the amount of $2,300 per month. The court declined to order payment of arrears based upon the increase, advising that that should be determined at trial. Due to the circumstances of the petitioner, the court agreed to impute the petitioner's income at $21,800 and the parents should pay their proportionate share of s. 7 expenses based upon their respective incomes.

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L. (S.) v. H. (A.), 2016 SKQB 323

Zuk, October 3, 2016 (QB16311)

Family Law – Custody and Access – Person of Sufficient Interest
Statutes – Interpretation – Children's Law Act, 1997, Section 6

The petitioner brought an application, pursuant to s. 6 of The Children's Law Act, 1997, to be declared a person of sufficient interest in relation to a six-year-old boy, the son of his former girlfriend, A.H. She opposed the application. The parties began dating in July 2011 and their relationship ended in January 2013. The petitioner alleged that he developed a close father/son bond with the child during the relationship and after it ended, he maintained the bond until November 2015 when A.H. prohibited him from having any further access to her son. The petitioner had not seen the child since that date. The petitioner related how he had spent as many as four days a week with the child and that he had stayed with him during Easter and Christmas breaks during and after the relationship with A.H. He attended the child's school events and sports activities. The respondent stated that the petitioner had never been a father figure to her son. She disputed the amount of time and involvement that the petitioner claimed to have had in the child's life. She characterized him as having performed a babysitting role. She did not wish to have any further contact with the petitioner and found his persistence in seeking access to be upsetting both to her and her son. The child's biological father rarely saw the child but had recently applied for reinstatement of his access to his son. He opposed the petitioner's application only on the basis that he wanted his application to be resolved first. The petitioner argued that since the father had only sporadically seen the child since 2011, it would be beneficial to the child for the petitioner to have access to him, providing him with a stable and positive influence. HELD: The application was dismissed. The court applied the

two-step analysis required by the Court of Appeal in S. (G.E.) v. C. (D.L.) and found that the petitioner had established that he was a person of sufficient interest in relation to the child. The evidence satisfied the court that the petitioner had been more like a step-parent than a babysitter. The respondent had willingly permitted the petitioner to maintain his relationship with her son after they were no longer involved. However, the court found that the petitioner had not established that ongoing contact was in the child's best interest. The respondent's views as the child's custodial parent must be taken into account. Further, because the respondent's new boyfriend and the child's biological father might both be involved in the child's life, it would be confusing for him to have the petitioner as another parental figure.

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Dembrowski v. Bayer Inc., 2016 SKQB 324

Gabrielson, October 4, 2016 (QB16313)

Civil Procedure – Class Actions – Certification Order

The plaintiff's first application for certification of a class action pursuant to The Class Actions Act (CAA) was denied because the litigation plan had not adequately addressed the statutory condition set out in s. 6(1)(e) of the CAA. The court had granted leave to the plaintiff to file a revised litigation plan to determine whether it met the requirements of the section (see: 2015 SKQB 286). The defendants objected to a number of aspects of the revised plan: 1) that documentary and oral discovery would not be subject to an implied undertaking; 2) that they would produce multiple corporate executives for the purposes of discovery; 3) that they would pay for the costs of the notice of certification; and 4) that the proposed process for issues resolution would trigger a required filing of a response by the defendants.
HELD: The motion for certification was allowed. The court found with respect to the defendants' objections the following: 1) the court would uphold the implied undertaking rule and would not approve that aspect of the litigation plan; 2) the plaintiff would have to demonstrate there was a reason to examine anyone other than the proper officer selected by the corporate defendants, in accordance with s. 19 of the CAA and Queen's Bench rule 5-19; 3) as the defendants had not admitted liability it would not be fair and reasonable to order them to fund the giving of notice; and 4) the process was accepted. The proposed resolution process was subject to the defendants agreeing to it,

and if they didn't, then the court would determine the procedures in accordance with s. 29 of the CAA.

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MacMillan v. Merck Frosst Canada & Co., 2016 SKQB 325

Elson, October 6, 2016 (QB16314)

Civil Procedure – Class Actions – Settlement – Approval

The parties brought this application for approval by the court of the proposed settlement of the certified class pursuant to s. 38 of The Class Actions Act. The claims related to drugs that were associated with an increased risk of inhibiting bone formation, which could lead to greater risk of fractures. The common issue was that the defendant was negligent in the manufacture, marketing and distribution of the drugs. There were similar actions commenced in three other provinces. Before any examinations for discovery were conducted, the parties began negotiations resulting in a settlement agreement. However, counsel for the plaintiffs had given consideration to information from experts in pharmacology and epidemiology and from various health agencies, insurers and the defendants. The defendant had not admitted liability and had been successful in the litigation in the United States regarding the same drug. Counsel for the plaintiffs in each of the jurisdictions were experienced in class actions relating to pharmaceuticals, and in their affidavits they expressed the opinion that if the settlement was not approved, litigation would be lengthy and complicated. The total settlement pool was $6,375,000 funded by the defendant. The members of the settlement class were required to meet criteria related to the use of the drug and specific consequences. No member of the settlement class had objected to the settlement before the deadline.
HELD: The application was granted and the draft order approved. The court assessed the settlement against the eight factors set out in Dreidiger v. Ashley Furniture Industries and found that it was satisfactory.

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Eichelberg Estate v. Eichelberg, 2016 SKQB 326

Megaw, October 6, 2016 (QB16315)

Civil Procedure – Minutes of Settlement – Enforcement

The petitioners brought an application against the respondent to obtain judgment based upon minutes of settlement entered into in 2014. The respondent agreed in the minutes to offer a certain parcel of land to be sold for any offer received in excess of $140,000. The sale was to be made within six months of the settlement. Although qualifying offers were received in 2014, the respondent did not complete the sales.
HELD: The court granted judgment in favour of the petitioners. It found that the minutes of settlement were an enforceable contract and the court could enforce the settlement pursuant to s. 29 of The Queen's Bench Act, 1998. The petitioners were entitled to list the land for sale for a price of $155,000 for a period of six months and were authorized to accept any offer for not less than $140,000. If an offer was made that was lower than that amount or the listing expired, the parties could return the matter to the judge who remained seized of the matter.

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Babich v. Babich, 2016 SKQB 327

Tholl, October 6, 2016 (QB16316)

Barristers and Solicitors – Confidentiality – Conflict of Interest – Application for Removal

The parties were involved in family law proceedings that began in 2014. After numerous applications (see: 2015 SKQB 22, 2015 SKQB 187, and 2015 SKQB 352), the respondent changed counsel and retained a new lawyer, Bradley Hunter. The petitioner objected to Mr. Hunter acting for the respondent because he had previously spoken to a lawyer working in Mr. Hunter's law firm and had provided confidential information to her during a 20-minute telephone conversation. At the time of the conversation, the petitioner was himself thinking of changing counsel. The petitioner applied for an order that Mr. Hunter's law firm be removed as the respondent's counsel. In his affidavit, the petitioner deposed as to name of the lawyer to whom he spoke and the detailed information he gave to her and asked for her opinion on how to proceed considering his income and division of family property. He also divulged his positions and the outcomes he wished to achieve in the pending litigation of the family law issues. In his affidavit, Mr. Hunter stated that he had performed a conflict of interest check at his law firm when the respondent contacted him and found no conflict. The lawyer named in the petitioner's affidavit swore in her affidavit that she

had not spoken to him and wasn't in the office at the time of the conversation. In response, the petitioner filed an affidavit from another lawyer who advised that it was her with whom the petitioner had spoken. Although her usual practice was to take notes, she advised that she could not find any. At the time of the conversation, this lawyer was about to leave the law firm and the practice of law. Mr. Hunter deposed that the lawyer who was leaving the firm had not communicated any information to him about the petitioner. The lawyer's general file was found in storage and reviewed, but no notes regarding the conversation were found.
HELD: The application was granted. The court ordered that the law firm was disqualified from acting as counsel for the respondent. The court found that a solicitor-client relationship formed between the lawyer and the petitioner during the conversation and confidential information was disclosed by him. In the absence of a firewall, there was a possibility that all the lawyers in the law firm had access to the confidential information. Although the lawyer left the law firm eight months before the respondent retained Mr. Hunter, there was some possibility that the lawyer communicated with the other lawyers in the firm during the two weeks that she remained in it and that her notes might exist and be found in it. The court concluded that an informed member of the public would perceive there was a reasonable possibility the confidential information given to the lawyer could cause prejudice to the petitioner's interests in the litigation.

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Banford v. Mitchelson, 2016 SKQB 328

Megaw, October 7, 2016 (QB16317)

Torts – Negligence – Personal Injury – Damages

The plaintiff wife was injured in a boating accident that occurred in 2005. They alleged that the defendant was the operator of the boat that caused the injuries. The plaintiff and her husband, their two children and two friends were seated in the boat watching fireworks on the night of July 1. Another boat came from behind them and drove over the back of the plaintiffs' boat. The plaintiff was knocked to the floor of the boat and suffered soft tissue injuries to her left shoulder. The driver of the other boat stopped and spoke to the plaintiff husband. Although it was dark, the plaintiff husband was later able to find the boat on the lake and identify the defendant as the driver of it on the night in question.

The plaintiff husband then contacted the RCMP with the information and they charged the defendant with a violation of the Canada Shipping Act, 2001. The defendant appeared in Provincial Court and entered a guilty plea to dangerous operation of a boat. The defendant paid the fine imposed by the court. Months later the plaintiffs commenced this action.
HELD: The plaintiff wife was awarded non-pecuniary damages in the amount of $75,000. The court found that the defendant entered a guilty plea due to his economic circumstances and as no evidence was tendered in the Provincial Court, the defendant was allowed to dispute responsibility for the accident. However, the plaintiffs satisfied the burden of proof that the defendant was the operator of the boat. The court found that the plaintiff wife suffered moderate to moderately severe pain from the soft tissue injuries for approximately two years. Her claim for damages for her loss of homemaking capacity was allowed in the amount of $5,000 as was her claim for physiotherapy expenses. The court dismissed the plaintiff husband's claim for the costs of paying another person to perform work done by his wife because he had not submitted any evidence of such payments. The claim for pre-judgment interest was allowed only up to 2008 because the plaintiffs took 10 years to bring the matter to trial.

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Burland v. Burland, 2016 SKQB 329

Smith, October 11, 2016 (QB16322)

Family Law – Division of Family Property – Exemptions

The petitioner and the respondent separated in November 2014 after three years of marriage and having lived together since early 2010. At the time they began cohabiting, the petitioner owned her home with a mortgage against it in the amount of $100,000. The respondent owned his home free and clear of all encumbrances. The respondent contributed labour and money to improvements made to the petitioner's house. After the respondent incurred $90,000 in credit card debt, he applied in June 2014 for a mortgage against his home. The petitioner agreed to consent to the mortgage if her name was added to the title. After transferring title into their joint names, the parties each received a line of credit mortgage totaling $200,000. The respondent paid off his credit card debt and the petitioner used some of her share to pay down $12,000 of the mortgage on her home. The petitioner argued that the value of her house should be calculated to be $45,000 as the difference between its value at

the time of the petition and the time of the marriage, and that amount was available for purposes of division of family property. The respondent submitted that use of the usual exemption analysis in The Family Property Act (FPA) would be unfair and unjust. Section 23(1)(c) should be viewed in light of s. 23(4) and (5). His house, now valued at $500,000, was encumbered by the mortgage and credit card debt incurred by both parties whereas the petitioner's house had been enhanced through their joint efforts and the petitioner had been able to pay down her mortgage with the funds received from the mortgage on his property.
HELD: The court found that to exempt the full equity of the petitioner's house would result in an injustice and exercised its discretion under s. 23(4) and (5) of the FPA to include the full amount of equity in the family property. Taking into account the net value of property available for distribution, the court calculated that the respondent should make an equalization payment to the petitioner in the amount of $37,000. The court stated that the petitioner could register the judgment immediately but that no enforcement action could be taken for 120 days because of the respondent's economic circumstances. He should be given a reasonable opportunity to generate the funds required to settle the family property debt.

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R. v. Rhode, 2016 SKQB 330

Smith, October 13, 2016 (QB16330)

Criminal Law – Child Pornography – Possessing – Sentencing – Long-term Offender
Constitutional Law – Charter of Rights, Section 11(b)

The accused was convicted of possession of child pornography, contrary to s. 163.1(4) of the Criminal Code, accessing child pornography, contrary to s. 163.1(4.2) of the Code, and making child pornography, contrary to s. 163.1(2) of the Code. The accused had been convicted twice before on charges of possession of child pornography. The Crown requested an order remanding the accused for an assessment conducted for use in a proceeding under Part XXIV of the Code. After receiving the assessment from a psychiatrist, the Crown made an application for a long-term offender designation as part of the accused's sentencing. The accused argued that his pedophilia did not involve sexual offending. In his assessment of the accused, the expert witness stated that the accused would likely continue to

view child pornography if given the opportunity. At the conclusion of the sentencing hearing, the accused made an application for a judicial stay of proceedings, alleging that his s. 11(b) Charter rights had been violated because 41 months had elapsed since the charges were laid, which was in excess of the period of delay of 30 months established by R. v. Jordan.
HELD: The Charter application was dismissed. The court found that it had been established during the proceedings that the majority of the delay in bringing the case to trial had been caused by the accused and the court had earlier attributed it to him at the time that his first counsel withdrew until the accused retained new counsel. Furthermore, the calculation of delay stopped at the conclusion of the accused's trial and Part XXIV proceedings were not part of the calculation in determining whether there had been a violation of s. 11(b). Therefore the time limit dictated by Jordan had not been exceeded. Regarding the Crown's application, the court found that the accused to be a long-term offender under ss. 753.1(1) and (2). Under s. 753.1(1)(c), there was a reasonable possibility of eventual control of the risk presented by the accused in the community because the accused knew that if he reoffended that it would harm his wife and child. The court sentenced the accused to six years' imprisonment on each of the three counts to be served concurrently and gave him credit for 31.5 months for 21 months of pre-trial detention at a 1.5:1 ratio. The accused would be subject to a 10-year long-term supervision order as well as ancillary orders under the Sex Offender Information Registration Act and s. 151 of the Code.

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Saskatchewan Gaming Corp. Casino Moose Jaw v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, 2016 SKQB 331

Zarzeczny, October 11, 2016 (QB16318)

Labour Law – Arbitration Award – Judicial Review

The applicant employer applied for judicial review of an award rendered by an arbitration board. The board's decision was to sustain a grievance filed by the grievor and the union. The grievor had been employed by the applicant for two years. During the course of her employment, she suffered migraine headaches that caused her to miss work. The applicant managed employee absenteeism under its Attendance Support Program (ASP). The ASP involved a non-disciplinary counselling

program to attempt to assist employees who failed on a consistent basis to meet the applicant's acceptable absenteeism threshold. The ASP contained the provision that the employment relationship would be terminated if it was determined that the absences were excessive, that there was no likelihood of improvement in the future and the duty to accommodate had been exhausted. In this case the grievor participated in the program for more than one and a half years. During this period, the grievor had been informed that she could lose her position, but the issue had not been broached in the applicant's reviews with the grievor, which occurred every three months after commencing the ASP. The applicant then terminated the grievor's employment on the basis that her participation in ASP had proved unsuccessful in improving her absenteeism. During the arbitration hearing, the grievor testified that she was not informed at the last ASP meeting that she attended that her position was in jeopardy. The board found that the grievor was never told, let alone "clearly informed" or provided with an ultimatum, to improve attendance or she would be terminated. In addressing this point, the board relied upon the second criterion set out in the arbitral decision in Public Service Alliance of Canada v. Saskatchewan Gaming Corp. that also involved an employee's innocent absenteeism from her job with the same employer.
HELD: The application was dismissed. The court applied the reasonableness standard to the board's decision and found that it fell within the range of reasonable conclusions that were available to it.

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Saskatchewan (Director under The Seizure of Criminal Property Act, 2009) v. Nagy, 2016 SKQB 332

Brown, October 11, 2016 (QB16319)

Criminal Law – Drug Offences – Forfeiture
Statutes – Interpretation – Seizure of Criminal Property Act, Section 7(1)
Statutes – Interpretation – Criminal Code, Section 490

The director under The Seizure of Criminal Property Act, 2009 applied for an order of forfeiture pursuant to ss. 3 and 7 of the Act relating to $11,900 in cash. The moneys had been seized by the RCMP after a search of the defendant's residence. As a result of the search, the defendant had been charged and convicted of possession of a controlled substance and possessing proceeds of

crime. He was sentenced to a six-month period of incarceration. In March 2015, the director brought an administrative forfeiture proceeding under Part II.1 of the Act to have the cash forfeited. The defendant completed a notice of dispute regarding the cash, and in April 2015 the Provincial Court issued a consent order directing that the cash, less the amount of $1,350 subtracted under s. 16 of the Controlled Drugs and Substances Act (CSDA) and other items, be returned to him. In May 2015 the director made this application. The defendant objected to the application on various grounds, including: 1) whether evidence supported forfeiture; 2) the paramountcy of federal over provincial legislation; 3) res judicata; 4) the chilling effect on plea bargains if forfeiture occurred in this case; and 5) s. 16 of the CSDA.
HELD: The application was granted. The court found regarding the issues that: 1) on the balance of probabilities, the cash was the proceeds of unlawful activity contrary to s. 5 of the CDSA. The court did not accept the defendant's explanation that the money had been received by him from his employer in compensation for the use and damage to his truck because of insufficient evidence to support the claim; 2) there was nothing in this case that made it different from the cases in which it had been found that the criminal and civil forfeiture regimes have different purposes and their effects are not in conflict; 3) the Provincial Court made its order pursuant to s. 490 of the Criminal Code. The matter before the Provincial Court and this court were different and involved different parties, so res judicata was not involved; 4) there was no evidence or authority submitted to establish that some plea bargains might be jeopardized in circumstances similar to this case; and 5) the Provincial Court order indicated that s. 16 of the CDSA only applied to the $1,350 that was forfeited. The remaining assets were dealt with as part of s. 490(9)(c) of the Code that allows property to be returned after the investigation has been completed.

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R. v. McNab, 2016 SKQB 333

McMurtry, October 12, 2016 (QB16320)

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

The accused was charged on July 15, 2014, with carrying a weapon for a purpose dangerous to the public peace, contrary to s. 88 of the Criminal Code, and committing aggravated assault, contrary to s. 268(1) of the Code. The accused sought a stay of

proceedings on the grounds that his right to a trial within a reasonable time under s. 11(b) of the Charter had been violated. He argued that 27 months and 13 days had elapsed between the time the charges were laid against him and his scheduled trial date of October 25 to 28, 2016. The defence acknowledged that it bore the onus of establishing unreasonable delays as it was under the presumptive ceiling of 30 months for a trial in a superior court established in R. v. Jordan. The defence submitted that it was a fact-driven case and the Crown intended to call nine witnesses. A tenth witness, a DNA expert, added complexity to it, but it was not a complicated case. The three periods of delay occurred when: 1) the preliminary hearing set for December 10, 2014, was adjourned to December 18, 2014, due to the unavailability of Crown witnesses; 2) after defence counsel withdrew on January 23, 2015, and the accused's effort to obtain Legal Aid counsel took from February 27 to March 1, 2015, when his appeal of its refusal to represent him was dismissed. It took until June 26 for the appointment of his new counsel; and 3) the original trial date of May 2, 2016, was adjourned to October 25, due to the unavailability of the Crown's expert witness. The accused argued that he moved expeditiously in setting dates for the preliminary hearing and trial and securing new counsel. The Crown was at fault in not being ready to proceed on the May trial date due to the unavailability of its DNA expert because it had known since October 2015 that it had to make arrangements with her.

HELD: The application for a stay was dismissed. The court applied the analysis set out in R. v. Jordan on the case in light of the fact that the charges were laid prior to that decision, during the R. v. Morin period. The court found that there were 27 and a half months between the laying of the charges and the last date of the scheduled trial. The defence was held responsible for one month of it, representing the time between the denial of Legal Aid services and the appointment of new counsel. The court regarded the period between June 2015 and May 2016 devoted to pre-trial conferences to be institutional delay that was reasonably acceptable in Saskatchewan under the Morin framework. The Crown caused the delay of the trial in May 2016 as it knew from the pre-trial conferences held during the previous fall and winter that it would need to have an expert available. After attributing these two delays, the court found that the total delay to trial was 26 month and a half months. Although the charges were not complex, the court was not satisfied that the delay was clearly unreasonable.

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Smithson, Re (Bankrupt), 2016 SKQB 334

Thompson, October 12, 2016 (QB16321)

Bankruptcy and Insolvency – Conditional Discharge – Avoidance of Judgment Debt

The bankrupt applied for an absolute discharge. She had assigned in bankruptcy in 2015. The discharge was opposed by a creditor and by the Trustee. The bankrupt was 36 years of age and had three children. She was unemployed and her husband supported the family. The family's total monthly income was $4,400 and an expense statement confirmed that there was no dispensable income at the time of the assignment. The bankrupt had few exempt assets and her only non-exempt asset was worth $200. The bankrupt explained that she had suffered financial losses because of divorce expenses she incurred in 2010. She had postponed making her assignment until she and her husband had difficulty finding money for food for their children. In 2012, the Court of Queen's Bench had awarded damages in the amount of $50,000 to a child who had been bitten by a dog owned by the bankrupt. The bankrupt had not paid any of the judgment. The debt formed 67 percent of the unsecured claims in the bankruptcy. The litigation guardian for the child objected to the discharge based upon grounds, if established, constituted facts under s. 173 of the Bankruptcy and Insolvency Act in that the assets of the bankrupt were not of a value equal to 50 cents on the dollar and the unsecured liabilities had arisen from circumstances for which the bankrupt must be held responsible. The trustee also opposed the discharge because a s. 173 fact had been established as described above.
HELD: The bankrupt was granted a discharge on the condition that she pay $5,400 to the trustee on behalf of the bankruptcy estate over the next three years of her discharge. The court found the bankrupt to be an unfortunate debtor and noted that bankrupt had no reasonable ability to pay any of her debt while she provided sustenance for herself and her family. Although a large portion of her debt resulted from the damage award, there was no evidence that she had acted dishonestly or made an assignment solely to avoid the judgment for her personal convenience.

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Consumers' Co-operative Refineries Ltd. v. Regina (City), 2016 SKQB 335

Keene, October 13, 2016 November 3, 2016 (corrigendum) (QB16323)

Privacy – Access to Information
Statutes – Interpretation – Freedom of Information and Protection of Privacy Act
Statutes – Interpretation – Local Authority Freedom of Information and Protection of Privacy Act

The applicant appealed pursuant to s. 46 of The Local Authority Freedom of Information and Protection of Privacy Act (LAFOIP) regarding a decision of the city granting a request to provide access to a confidential draft of a Major Hazards Risk Assessment Report (MHRA) dated January 2012. The applicant also appealed pursuant to s. 57 of The Freedom of Information and Protection of Privacy Act (FOIP) regarding a decision of the Ministry of Environment granting access to the MHRA dated July 2012. The reports were similar with the latest just being more finalized. They were treated as the same by the court. The MHRA were provided to the city and the ministry on a confidential basis. In 2015, a journalist applied pursuant to the acts for access to the MHRA. The city and the ministry followed the recommendations of the Information and Privacy Commission that the MHRA be provided with some parts redacted. The applicant appealed. The sections in the LAFOIP and FOIP provide for an appeal de novo. The parties disagreed on what was meant by a de novo appeal. The issues were: 1) did ss. 18(1)(a) of LAFOIP and ss. 19(1)(a) of FOIP apply to the MHRA; and 2) did ss. 18(1)(b) of the LAFOIP and ss. 19(1)(b) of the FOIP apply to the MHRA.
HELD: The court agreed with the applicant that a de novo appeal allowed it to look at all of the available evidence and independently assess the case without deference to the commissioner's recommendations. The issues were determined as follows: 1) the applicant did not strenuously argue that the trade secret exception applied so the court did not concern itself with it; 2) the applicants argued that the MHRA was subject to the exemption in the subsections. The court found the following: a) the MHRA contained financial and commercial information and the court accepted the commissioner's definition of technical information and found that the MHRA contained it; b) the MHRA was provided by a third party; and c) it was supplied in confidence. The court said that the city and the ministry should have refused access to the MHRA at that juncture. However, an exemption was built into the legislation. The issue for the court was whether the public interest clearly outweighed the elements of potential financial loss or prejudice to the competitive position of the applicant. The court determined that that the public interest did not clearly outweigh the importance to avoid

causing the applicant potential financial loss or prejudice to competitive position. The court was persuaded by the applicant's argument that revealing too much of the contents of the MHRA could result in a catastrophic event at its facility. The court held that s. 18(3) of the LAFOIP and s. 19(3) of the FOIP applied in favour of the applicant. The court found the applicant's suggested disclosure to be reasonable and so ordered.
CORRIGENDUM dated November 3, 2016: [1] The third sentence in para. 40 shall be amended to read as follows: >>>>>Accordingly, I order pursuant to s. 8 of the LAFOIP and the FOIP, that the heads of the City and MOE shall provide the local journalist referenced to in para. 8 (i.e. "Requesting Applicant") with a severed copy of the July 2012 report.

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Saskatchewan (Ministry of Environment) v. Saskatchewan Government and General Employees' Union, 2016 SKQB 336

Currie, October 14, 2016 (QB16331)

Labour Law – Arbitration – Judicial Review

The Government of Saskatchewan applied for judicial review of an arbitrator's decision regarding a dispute between it and the respondent union (see: 2015 CanLII 85340 (SKLA)). The applicant employed wildland fire fighters, members of the union. In 2012 the applicant implemented a new fitness test, the WFX-Fit test without negotiating with the union. Prior to implementation, fire fighters had been required to pass a fitness test known as the "arduous test". A group of fire fighters who had been hired prior to 1999 had been subject to a letter of understanding between the applicant and the respondent that "grandfathered" the group as not being required to pass the arduous test. The new test ,though, was to apply to all fire fighters. The respondent filed a number of grievances, such as whether the WFX-Fit test was discriminatory against older employees and female employees and whether the applicant's failure to exempt the group of fire fighters breached the terms of the letter of understanding. The arbitrator ruled that the test was discriminatory against the older and female fire fighters and that the applicant had breached the terms of the letter. It was against those findings that the applicant sought judicial review.
HELD: The arbitrator's decision declaring the WFX-Fit test discriminatory was quashed and the court substituted the decision that it was not discriminatory against older and female

employees and the matter returned to the arbitrator. The court found that the arbitrator applied the incorrect test for determining whether a workplace requirement was prima facie discriminatory. The application to quash the arbitrator's decision that the applicant breached the terms of the letter of understanding was dismissed. The court found the arbitrator's conclusion was logical, intelligible and supported by the evidence.

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Dixon (McMullen) v. McMullin, 2016 SKQB 337

Ball, October 17, 2016 (QB16324)

Family Law – Child Support – Adult Child – Adult Student
Family Law – Child Support – Retroactive
Family Law – Child Support – Variation – Adult Student

The respondent applied for variation of a child support order relating to the parties' 21-year-old daughter, who was attending university and living on her own. The respondent argued that the child was no longer a child of the marriage. The respondent's child support obligations were $731.43 per month for the child as well as a younger sibling. The amount was based on the respondent's 2014 annual income of $54,105. The child had not resided with the petitioner since she started post-secondary school in September 2013. She resided in residence during her first year of university and resided with the respondent in the school year commencing 2014. The child resided with the respondent for one month at the start of the 2015 school year and then moved in with friends off campus. The child never lived with either party during summer break even though her employment was close enough that she could have. The respondent requested that his obligation to pay for the child ceased October 2015 when she moved out with friends. The respondent's 2015 income was $52,640. The petitioner's line 150 income was $23,242, but her expenses were much higher than her income. The issues were: 1) was there a material change in circumstances justifying a variation of the child support order as it related to the child; 2) did the child remain a child of the marriage; 3) if no support was payable for the child, on what date should it have ceased; and 4) if ongoing support was payable, what was the appropriate amount.
HELD: The issues were determined as follows: 1) the court was satisfied that there was a material change in the circumstances since the order was made. The child was over the age of majority

and was attending full-time university; 2) all of the circumstances had to be considered to determine if the child remained under the charge of her parents. The court found that the child was no longer under the charge of her parents for the purposes of s. 2(1) of the Divorce Act and s. 4(2) of The Family Maintenance Act, 1997. The respondent was no longer required to pay child support on behalf of the child; 3) the child did not withdraw from her parents' charge the day she moved in with friends. The respondent indicated that he first asked the petitioner to agree to cancel the child support payments in April 2016. The court exercised its discretion and ordered that the respondent's obligation to pay child support for the child ceased on November 1, 2016; and 4) the respondent was ordered to pay ongoing child support for the remaining child of the marriage in the Guideline amount of $424.89, effective November 1, 2016.

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R. v. L'Herault, 2016 SKQB 343

Danyliuk, October 20, 2016 (QB16334)

Evidence – Unsavoury Witnesses – Vetrovec Warning

The accused was convicted of manslaughter after trial by jury. During the trial, counsel disagreed as to whether the jury charge should include a Vetrovec caution as to a particular witness. The accused had originally been charged with second degree murder. The accused had visited a house known as a place where drugs could be purchased and consumed. The owners and occupants were all serious drug addicts. Among the occupants were the victim and the witness. The accused, the victim and the accused were alone in the basement when the victim was attacked by the accused. The witness testified on behalf of the Crown and described the accused kicking and stomping the victim on the floor. The victim suffered brain damage and later died in hospital. At the time of the offence the witness was serving a conditional sentence for theft. He continued to steal and was arrested and remanded in the Correctional Centre. He testified that he wanted to get out and initiated contact with a police officer. He asked her if she could help him get out of jail and she said that she would see what she could do. He provided her with a statement that there had been another man involved in the attack on the victim. The witness was released a few days later and provided the police with a warned videotaped statement indicating that another man had been present during the attack. At trial, the witness

acknowledged that what he said on the video was untrue.
HELD: The jury received a Vetrovec warning regarding the evidence of the witness. The court found that the combination of circumstances in this case justified the warning. The witness was facing charges for breaching his community service order. He admitted that he wanted to get out of jail, probably in order to use drugs. He admitted that his warned statement was untrue. The witness was trying to obtain a personal benefit and get out of jail.

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