The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
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R. v. Moise, 2016 SKCA 133

Lane Jackson Ottenbreit, October 21, 2016 (CA16133)

Criminal Law – Assault – Sexual Assault – Victim under 16 – Acquittal – Appeal

The Crown appealed the acquittal of the respondent of sexual assault contrary to s. 271 of the Criminal Code. The victim was 15 years and 10 months old. She met the respondent when he gave her and her mother a ride to their home. After dropping off the mother, the victim stayed in the respondent's car. The respondent drove to a bar and the victim remained in the car. After leaving the bar, the respondent and the victim went to his home where the victim initiated a conversation with him about sex for money. After paying her, the respondent had sexual intercourse with the victim. The respondent did not testify at trial but the Crown introduced his statement to the police as part of its case. The respondent admitted to having sex with the victim. He did not comment on the victim's age or say that he believed that she was old enough to consent to sexual intercourse but described her as a little girl. The Crown submitted that the respondent had failed to take all reasonable steps to ascertain the victim's age in the circumstances. The defence argued that the defence of mistaken belief was available to the respondent. The trial judge determined that there was evidence that could have led the respondent to believe the victim was 16 or older such as that her mother allowed her to leave with respondent and she initiated the conversation of sex for

money, which someone under 16 would not normally do. As the Crown had not submitted evidence to establish that the victim appeared to be under 16 to put the respondent on notice that he should have taken all reasonable steps, the Court found that there was no apparent reason for the respondent to engage in the inquiry contemplated by s. 150.1(4) of the Code, and thus the Crown had not proven that he failed to take all reasonable steps to ascertain the victim's age.
HELD: The appeal was allowed. The court found that the trial judge had erred in law by failing to instruct himself to first consider whether there was an air of reality to the respondent's defence. There was no direct evidence that the respondent believed that the victim was 16 years of age or older. Because the trial judge's errors of law had a material bearing on the acquittal, the court found that the Crown satisfied the burden on it that the verdict would not necessarily have been the same and exercised its discretion under s. 686(4) and entered a conviction.

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Thorsteinson Estate v. Olson, 2016 SKCA 134

Jackson Caldwell Ryan-Froslie, October 25, 2016 (CA16134)

Real Property – Gift of Farmland – Fiduciary Duty
Real Property – Gift of Farmland – Independent Legal Advice
Real Property – Gift of Farmland – Right of Survivorship
Real Property – Gift of Farmland – Severance
Real Property – Gift of Farmland – Undue Influence
Real Property – Land Titles Act, 2000, Section 152

The issue on appeal was the validity of a deed of gift signed by the testator during her lifetime. The deed transferred nine parcels of farmland into the names of the testator and the respondent, as joint tenants with right of survivorship. The testator commenced an action against the respondent while she was still alive, requesting that the transfers be set aside on the basis of resulting trust, undue influence, and breach of fiduciary duty. Alternatively, she sought severance of the joint tenancy and an accounting from the respondent regarding his use and occupation of the land. The testator's estate continued the action after her death. The trial judge upheld the gift and dismissed the action. The estate appealed. The testator did not have any children and was widowed at a young age. She was the nanny to the respondent. The respondent and his father moved a mobile home onto the testator's land in 1995 after his father had a stroke. The respondent continued to live there with the testator after his father died. In 2000, the testator and respondent signed

the deed of gift with a lawyer witnessing. The testator also signed the transfers to transfer the land into joint tenancies. In September 2000, the respondent married and he and his wife moved into the farmhouse and the testator moved into a care home. A month later the lawyer that witnessed the deed of gift sent a letter to the respondent indicating that the testator wanted to move back to the farm. The issues on appeal were: 1) the nature of the transaction (gift or resulting trust); 2) undue influence; 3) necessity of independent legal advice; 4) breach of fiduciary duty; 5) severance of the joint tenancy; and 6) action for accounting.

HELD: The appeal was dismissed. The issues were dealt with as follows: 1) there was significant evidence to support the trial judge's conclusion that the transfer was gratuitous. The appeal court did not agree with the appellant that the respondent had an exceptionally heavy burden of proof or onus to rebut the presumption of resulting trust. The burden was clearly set out in Pecore as being a balance of probabilities; 2) the trial judge was correct in concluding that the relationship between the testator and respondent was not one that the courts of equity automatically applied the presumption and thus she needed to examine the relationship itself to determine whether the presumption arose. The appeal court concluded that the presumption of undue influence arose because the respondent had the potential to dominate the testator because of her age, physical condition and her reliance on the respondent. The presumption was clearly rebutted so the appeal court said the trial judge's finding that the presumption did not exist had no consequence; 3) the appeal court did not agree with the appellant's position that independent legal advice was required to rebut the presumption. The trial judge found that the lawyer was acting only for the testator and that she understood the nature of the transaction she was entering into. The lawyer did fail to discuss some details with the testator, but imperfections in the advice should not generally negatively impact the donee; 4) there was no error in the trial judge's conclusion that the respondent was not in a fiduciary relationship with the testator at the time the land was transferred; 5) the trial judge erred by concluding that s. 152 of The Land Titles Act, 2000 does not apply to joint tenants. By virtue of s. 152, on the testator's death, her personal representative stepped into her shoes and obtained all her legal rights and assumed all of her legal obligations. The trial judge should have taken the application for severance into consideration, but the trial judge's conclusion that the testator gifted the land with joint ownership with a right of survivorship determined the severance application; and 6) the appeal court found that the trial judge identified the applicable law with respect to the issue of accounting. The evidence did not support

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a finding that any exceptions existed to the common law rule that a joint tenant is not liable to his co-tenant for occupational rent.

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Bennett Jones LLP v. Frank and Ellen Remai Foundation Inc., 2016 SKCA 136

Jackson, October 27, 2016 (CA16136)

Civil Procedure – Appeal – Leave to Appeal
Civil Procedure – Stay of Action – Inherent Jurisdiction
Civil Procedure – Stay of Action – Queen's Bench Act, Section 37
Civil Procedure – Jurisdiction
Civil Procedure – Territorial Competence

The applicants applied for leave to appeal the Queen's Bench decision refusing to stay an action. The respondents commenced an action in Alberta and then Saskatchewan for damages for breach of contractual and professional duties. The applicants applied, in Saskatchewan, for an order staying the action pursuant to either the court's inherent jurisdiction or pursuant to s. 37 of The Queen's Bench Act, 1998 on the basis of abuse of process. Alternatively, they applied for an order striking the action on the basis that the court had no territorial competence pursuant to s. 4 of The Court Jurisdiction and Proceedings Transfer Act (CJPTA) or for an order staying the action on the basis that Saskatchewan was a forum non conveniens pursuant to s. 10 of the CJPTA and rule 3-14 of the Queen's Bench Rules. The respondents undertook to discontinue the Alberta action in favour of the Saskatchewan one. The Queen's Bench chambers judge found that the continuation of both actions would be an abuse of process. The judge stayed the Saskatchewan action but permitted the respondent to lift the stay upon proof that the Alberta action had been discontinued. The issues on appeal were as follows: 1) should leave to appeal be granted on the basis the chambers judge erred in his analysis of Englund; 2) should leave to appeal be granted on the basis the chambers judge erred by finding that Saskatchewan had territorial competence; and 3) should leave to appeal be granted on the basis the chambers judge erred by not declining to exercise territorial competence on the ground that Alberta was the more appropriate forum.
HELD: Leave to appeal was refused. The applicant submitted that the matter was interlocutory, and therefore, the appeal court found that the Rothman criteria of merit and importance had to be considered in deciding whether leave to appeal should be

granted. Englund did make the stay unconditional, but rather stayed the Saskatchewan action on the condition that it could be reactivated if the Ontario action was discontinued, or if the Saskatchewan plaintiffs were not included in the certification. The respondents did not intend to proceed in two jurisdictions. The judge's order made it impossible for there to be an abuse of process with two actions being pursued in two jurisdictions. The appeal court decided that leave should not be granted in order to clarify the law and practice in abuse of process and territorial competence issues. The applicants' counsel appropriately placed all of the issues before the Queen's Bench court, and therefore, it would not be possible for the applicant to now say that the chambers judge should not have decided the appropriateness of the forum. The appeal court also did not grant leave with respect to the jurisdictional issues. The weight given to one aspect of the evidence, or another, lies clearly within the province of the chambers judge at first instance. The applicants did not submit that the chambers judge misstated the law. The chambers judge held that the respondents claim established a real and substantial connection with Saskatchewan. The applicants were found not to have rebutted the presumption of territorial competence. The appeal court was also not convinced that leave should be granted with respect to the discretionary order regarding the forum non conveniens. The grounds of appeal were not shown to weigh decisively in favour of leave being granted.

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ADAG Corp. Canada Ltd. v. SaskEnergy Inc., 2016 SKCA 137

Whitmore, October 27, 2016 (CA16137)

Civil Procedure – Court of Appeal Rules, Rule 28

The appellant applied for leave to file a factum in excess of 40 pages to a maximum of 70 pages pursuant to Court of Appeal rule 28(2). In support of the application, the appellant submitted that there were 12 grounds of appeal, some of which were novel, relating to The Partnership Act and the Land Titles Act, 2000, and that the trial submissions had been lengthy and the appeal book would be 6,500 pages.
HELD: The application was dismissed. The court found that this was not one of the exceptional cases with unusually involved facts or that the grounds were unduly complicated.

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Pederson v. Saskatchewan (Minister of Social Services), 2016 SKCA 142

Ottenbreit Caldwell Ryan-Froslie, November 7, 2016 (CA16142)

Class Action – Certification – Appeal
Civil Procedure – Court of Appeal Rules, Rule 59

The appellants appealed the decision of a Queen's Bench judge in chambers that denied certification of their class action against the respondent (see: 2014 SKQB 416). The appellants' numerous grounds of appeal included that the chambers judge erred in the following ways: 1) by concluding there was no cause of action under s. 6(1)(a) of The Class Actions Act (CAA) because limitation periods did not bar the claims of the putative class. He also erred by determining the possibility of waiver of application deadlines for statutory compensation resulted in there being no cause of action and by failing to place significance on certain Alberta cases; 2) by assessing the merits of the claims of the representative plaintiffs to determine there was no identifiable class under s. 6(1)(b) of the CAA and by finding that the class members failed to report tortious acts; and 3) by not certifying punitive damages as a common issue because in this case punitive assessment would end up being specific to each member of the class. The appellants also applied to tender fresh evidence under Court of Appeal rule 59(1) consisting of an affidavit by an individual who averred that she was capable of being an additional representative plaintiff.
HELD: The appeal was allowed. The action was certified subject to bifurcation of the punitive damages claim and the matter of the appropriate formulation of the identifiable class being remitted to the chambers judge. The application to adduce fresh evidence was dismissed. The court noted that the hearing of certification applications does not involve a consideration of the merits of the claim. It also held that the "plain and obvious" test set out by the Supreme Court in Pro-Sys Consultants v. Microsoft applied to the determination of whether pleadings disclose a cause of action under s. 6(1)(a) of the CAA. With respect to the grounds, the court found that the chambers judge erred: 1) in his cause of action analysis. He failed to look at the whole claim and all the allegations. He failed to properly analyze the cause of action. He focused on the lack of any limitation period as underpinning the entire cause of action when it was clearly not so. He prejudged whether the abuse claims were barred by s. 16(1) of The Limitations Act. He determined incorrectly that the cause of action depended on any abuse being reported and then distinguished the Alberta cases on that basis. He misunderstood the claim for statutory compensation; 2) in his

initial determination that the causes of actions were based on the abuse having been reported. He then proceeded incorrectly to weigh the evidence of whether the specific abuse suffered by the appellants had been reported and whether the allegations could be objectively supported. He then compared their evidence to the evidence of the respondent's witnesses who disputed it, specifically whether reports had been made and then accepted the Crown's evidence; and 3) in concluding that Whiten v. Pilot Insurance prevented the determination of any aspect of punitive damages before liability and compensation to individual class members was decided. There was a prima facie entitlement to punitive damages on the basis of the allegations set out in the pleadings and could be determined on a class-wide basis as a common issue. The entitlement to them may vary because differences between actual compensatory damages to each person. This would result in a bifurcated approach where the individual trials were held first and then the individual entitlement to and quantum of punitive damages arising from the respondent's policies would be decided. The court rejected the application to adduce fresh evidence because it was an application to substitute or add a new representative plaintiff, which was a misuse of rule 59(1) in the context of appeals of class actions.

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R. v. Hendricks, 2016 SKPC 70

Gordon, June 9, 2016 (PC16131)

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, contrary to s. 253(1)(a) of the Criminal Code, and driving while his blood alcohol content exceeded .08, contrary to s. 253(1)(b). The defence made a Charter application alleging that the accused's rights under s. 10(b) of the Charter were breached and that as a result the evidence obtained by the police after the accused's detention should be excluded under s. 24(2) of the Charter. The accused failed an ASD test whereupon he was arrested for impaired driving. The officer made the breath demand and read the accused his rights to counsel. The accused said that he wanted to talk to a lawyer but did not have a specific one in mind. The accused was taken to the nearest detachment and placed in the interview room. He was given phone books and advised of his

right to contact Legal Aid and its availability. The accused declined and said that he wanted to speak to a specific lawyer. The officer located office and home numbers for this lawyer and made five different calls in attempts to reach him, and informed the accused of his efforts. Approximately one hour after the arrest, the observation period began and the officer asked the accused again if he wanted to call another lawyer and reminded him of Legal Aid. The accused said no and that he understood that the officer had not been able to contact the lawyer he wanted. The officer testified that he then read the accused the waiver of his right to counsel but said that he could not remember the exact words used. He gave the accused the option to call another lawyer or Legal Aid but the accused declined again. The officer tried to call the lawyer at a different number he found online, but without success. The first Breathalyzer sample was taken approximately 75 minutes after arrest.
HELD: The application was allowed. The court found that there had been a breach of s. 10(b) and the evidence of the Certificate of Qualified Technician was excluded pursuant to s. 24(2) of the Charter. The court found that the officer failed to meet the implementation duty by not waiting for a return call from the lawyer requested by the accused. The accused had been diligent in exercising his right to counsel and he had not equivocally waived his right to counsel. The court applied the Grant analysis and found that the breach was serious. The officer proceeded too quickly and was unable to give the substance of the waiver without a police card, showing that he did not understand his obligations once an accused person indicated that he wanted to contact specific counsel. The breach had a strong impact on the accused's Charter rights. It would bring the administration of justice into disrepute if the evidence was admitted.

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R. v. Brabant, 2016 SKPC 71

Baniak, June 7, 2016 (PC16123)

Criminal Law – Firearms Offences

The accused was charged with the following: 1) careless storage of a prohibited weapon, a sawed-off Winchester shotgun, contrary to s. 86(1) of the Criminal Code; 2) having possession of the weapon for a purpose dangerous to the public peace, contrary to s. 88; 3) possession of a firearm knowing he was not the holder of a licence to possess it, contrary to s. 92(1); 4) possession of a loaded firearm with readily accessible

ammunition capable of being discharged, contrary to s. 95(a); 5) possession of a prohibited firearm knowing that it was obtained by the commission of an offence, contrary to s. 96(1); 6) possession of a firearm knowing that the serial number had been defaced, contrary to s. 108(1)(b); 7) possession of a prohibited weapon while prohibited from doing so by reason of an order made pursuant to s. 109, contrary to s. 117.01(1); and 8) possession of ammunition when prohibited from doing so pursuant to a s. 109 order, contrary to s. 117.01(1). The police received a report from a former girlfriend of the accused who told them that the accused had a shotgun in a house in which children lived. The police went to the address and found that there was a three-year-old child in the living room. The child's parents, who were tenants in the residence, arrived shortly thereafter and gave consent to a search. The police found the sawed-off shotgun and ammunition in the bedroom occupied by the accused and it was in plain view. There was ammunition in the gun. The accused's former girlfriend testified that she had seen the gun but had never seen the accused handle it. The gun was not tested for fingerprints. The tenants were shocked when they saw the gun. They testified that the accused rented a room in the suite and they never entered it.
HELD: The accused was found guilty of counts 1, 2, 3, 4, 7 and 8. The court found that the shotgun was a firearm and a prohibited weapon, that the shells and bullets were ammunition, that the firearm was stored carelessly and that it was dangerous. The accused had constructive possession of the gun and because it was in plain view in his room, he had knowledge of its presence and character. The other counts were dismissed because there was no evidence that the accused was the owner of the shotgun and therefore there was no basis that he knew that it was obtained by the commission of an offence. There was no evidence regarding how the serial number was defaced.

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R. v. Morin, 2016 SKPC 92

Robinson, July 8, 2016 (PC16124)

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

The accused was charged with impaired driving, contrary to s. 253(1)(a) of the Criminal Code, and driving while her blood alcohol content exceeded .08, contrary to s. 253(1)(b) of the Code. An RCMP officer followed the accused's vehicle after she left a

bar. The officer noted that the vehicle was speeding and was weaving between the centre line and the shoulder of the road. The officer stopped the vehicle to check licence, registration and state of sobriety. The accused at first denied having had anything to drink but then admitted she had. As the officer noted the smell of alcohol on the accused's breath and slurred speech, she asked the accused to take an ASD test in the police cruiser. The accused then advised the officer that she had had her last drink within the previous five to ten minutes so the officer waited for 11 minutes. After the accused failed the test, the officer arrested her for impaired driving and read her rights to counsel. The accused first said yes and then declined to contact counsel. The accused was then given the formal breath sample demand and taken to the detachment. Counsel for the defence argued the following: 1) that the Certificate of a Qualified Technician should not be admitted into evidence because the accused was denied her Charter right to counsel under s. 10(b) prior to her providing a breath sample into an ASD; 2) the Crown had not proven the identity of the accused beyond a reasonable doubt because the arresting officer was not asked to identify the accused in the courtroom; 3) the Crown had not shown that there was proper observation of the accused prior to taking of the breath tests at the detachment; and 4) the Certificate of Qualified Technician should not be admitted because the Crown had not proven proper notice of an intention to produce the Certificate as required by s. 258(7) of the Code.

HELD: The Certificate of a Qualified Technician was admitted into evidence and was proof that the accused's blood alcohol content was over the legal limit. The accused was found guilty of driving while her blood alcohol content exceeded .08 and not guilty of impaired driving. The Crown conceded that a videotape showed that the accused's vehicle was not weaving on the highway. The court found the following with respect to the issues raised by the defence: 1) the delay of 11 minutes before the ASD test was administered was not sufficient to trigger the application of s. 10(b) of the Charter; 2) despite the failure to ask the officer to identify the accused in court, she was properly identified because the arresting officer was a witness both to the accused's driving and responsible for charging and releasing the accused on the Promise to Appear; 3) there was no evidence that indicated the accused was not properly observed during the relevant times; and 4) the accused received the Notice of Intention to Produce Certificate because she signed it and the officer's affidavit of service of the Certificate of a Qualified Technician was sufficient to prove the requirements set out in s. 258(7) of the Code.

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Gordon, September 6, 2016 (PC16125)

Statutes – Interpretation – Traffic Safety Act, Section 259.1(4)
Statutes – Interpretation – Traffic Safety (Speed Monitoring) Regulations, Section 5

The accused was charged with exceeding the posted speed limit, contrary to s. 199(1)(b) of The Traffic Safety Act. The Crown submitted its case by way of documentation as provided for in the Act and The Traffic Safety (Speed Monitoring) Regulations. The defence argued that the affidavit required by s. 259.1(4) of the Act and s. 5 of the Regulations indicated that the affiant who signed it be tasked with monitoring the device on the day of the photograph. In this case, the affidavit supplied by the Crown was deficient. Therefore the Crown was not able to rely on the presumption in s. 259.1(4) and as a result there was no evidence before the court whether the photo radar device was being monitored by the affiant on the date of the alleged offence. HELD: The charge was dismissed. The court found that the affidavit was not admissible because it did not comply with the legislation. The legislation requires that the person responsible for the particular device be the person responsible for it on the date of the offence. The affiant had not stated that he was monitoring the device on the date of the alleged offence.

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R. v. Regnier, 2016 SKPC 116

Baniak, September 30, 2016 (PC16126)

Criminal Law – Assault – Assaulting a Police Officer with a Weapon

The accused was charged with: 1) having in his possession a stolen vehicle, contrary to s. 355(b) of the Criminal Code; and 2) committing an assault referred to in s. 270 by carry, use or threaten to use a weapon or imitation of one, contrary to s. 270.01(1)(a) of the Code. The charges were laid after a series of events which commenced with a police officer pursuing a speeding vehicle through city streets at 4:00 am. Later the police learned that the vehicle had been stolen. The officer radioed in asking for additional help. He saw the vehicle collide with another vehicle and then the occupants left the vehicle and fled

in different directions. Two other officers were in the area to assist. One of them was a canine officer who had his dog with him. After he saw the collision, he and the dog followed a man and a woman who had fled the scene. He shouted the police challenge to stop or that the dog would bite but the people began running. The officer repeated the warning while he chased the couple but only the woman stopped. He then released his dog because the man was jumping over a fence. The dog bit the man and held him as he was trained to do. The officer went to assist the dog, but three dogs that were inside the yard attacked him and his dog. He heard the suspect yell "Sic him. Bite him." The accused, the officer and the dog suffered injuries. The suspect was the accused. He testified that had nothing to do with the stolen vehicle. He was working in his garage in the backyard when he heard someone trying to climb the fence into his yard. He opened the gate to the yard and someone yelled at him to stop and he ran back into the yard and a dog attacked him from behind. His dogs who had been in the garage got out and tried to help him. He denied that he gave any command to them to attack the officer or his dog. The defence argued that police conduct was unreasonable. The use of the dog amounted to excessive force as the fleeing man was not armed and the police could have arrested him without resorting to force. The Crown submitted that the officer was in lawful execution of his duty. The use of the dog was not excessive as the dog was trained to hold a person who is compliant. The accused received injuries because he continued to struggle.
HELD: The accused was found not guilty on the first count because of lack of evidence. The individuals who were in the vehicle and were arrested did not point to the accused as being one of the occupants. The accused was found guilty of the second charge. The officer was acting in the lawful execution of his duty. He believed that the accused was one of the suspects who ran from the stolen vehicle. The accused refused to stop after the officer shouted twice to stop. The court believed the officer's testimony that the accused ordered his dogs to attack him. Under s. 270.01(1), the accused's dogs were a weapon in this case.

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R. v. Primeau, 2016 SKPC 134

Harradence, October 19, 2016 (PC16110)

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

Constitutional Law – Charter of Rights, Section 8, Section 9

The accused was charged with possession of cocaine for the purpose of trafficking and pled not guilty. The defence brought a Charter application alleging that the accused's ss. 8 and 9 rights had been breached and that the evidence of the cocaine should be excluded. A voir dire was held. After receiving a dispatch that a Chevy Impala was being a driven by a man violating parole, a police officer stopped a Chevy Impala driven by the accused. Although the accused provided his name and date of birth, he did not have any identification. The officer detained the accused and required him to sit in the back of the police vehicle. As part of the detention, he searched the accused and found 18 packages of cocaine in the accused's pants pocket. The officer explained that he took these actions because there was risk of flight if the accused was a parole violator. After detaining the accused, the officer conducted a computer search that informed him the accused was not the parole violator. The officer admitted that the dispatch provided the licence plate of the vehicle, that the suspect driver was 42 years old and that a female passenger was in the vehicle. The accused was 21 years old, his vehicle had a different licence plate number and his passenger was male. HELD: The application to exclude the evidence was granted. The court found that the accused's s. 9 Charter right was violated when he was detained. The officer properly stopped the vehicle for the purpose of investigating whether he was the suspect but then detained and searched him rather than investigating by checking the details of the dispatch. The search incident to the detention was contrary to s. 8 of the Charter. The court found that under the Grant analysis the seriousness of the breach was increased due to the officer's rapid detention and search combined with his failure to consider all of the circumstances. The impact upon the accused was serious and the evidence could not have been obtained legally. The breach could have been avoided if the officer had done further investigation. The admission of the evidence would bring the administration into disrepute.

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R. v. Park, 2016 SKPC 137

Martinez, October 17, 2016 (PC16111)

Criminal Law – Defences – Delay
Criminal Law – Failure to Attend Court
Criminal Law – Impaired Driving

The accused applied for a judicial stay of proceedings pursuant s. 24(2) of the Charter because he had not been tried within a reasonable time, contrary to s. 11(b). The trial date was set for November 17, 2016. The information alleging criminal drinking and driving charges were sworn on February 23, 2015, and the information pertaining to a failure to attend court was sworn on June 1, 2015. The time between the first charges and the trial was 20 months and 26 days, and the time between the second charge was 17 months and 17 days. The accused appeared twice before June 1, 2015, and requested adjournments to obtain counsel. On June 1, 2015, the accused did not appear and the second charge resulted. On June 29, 2015, he appeared with counsel and a trial date of November 19, 2015, was set. The trial was adjourned at the Crown's request to May 12, 2016. The trial did not proceed in May because the court ran out of time that day, so it was set for November 17, 2016.

HELD: The court made their decision after considering the Jordan decision of the Supreme Court of Canada. The Jordan decision made it clear that the prejudice suffered by the accused is a factor that judges must no longer consider. Nor must society's interests be balanced against the interest of the defendant. The delay is presumed to be unreasonable if the delay between the date of the charge to the end of trial exceeds 18 months, after deducting any period of delay the accused is responsible for. The only delay that the accused was responsible for was that waived by the accused and that solely caused by the accused's conduct. The defendant did not waive any periods. Delay solely caused by the accused include defence tactics intended to cause delay and the unavailability of defence counsel when both the court and the Crown are ready to proceed. The period between the drinking and driving charges and the first appearance was outside of the accused's control. The officer chose the date. The period between the first and second appearance was not deducted from the delay because adjournments requested by accused people for legitimate reasons do not amount to defence delay. Therefore, the only period that the court considered to be defence delay was from June 1 to June 29, 2015. Therefore, the delay was 19 months and 29 days. The delay was thus presumed unreasonable unless the Crown established that exceptional circumstances justified some of that delay. There are two categories of exceptional circumstances: discrete events and particularly complex cases. The Crown conceded that there was nothing particularly complex. Therefore, the two possible discrete exceptional circumstances were the unavailability of a Crown witness on the first trial date and the lack of court time on the second trial date. The Crown did not rely on the witness's unavailability as an exceptional circumstance. In May 2016 the court was

overbooked. The court determined that the Crown was nonetheless responsible for the overbooking even though the judge not the Crown controls the docket. The overbooking of trial days was not an exceptional circumstance justifying delay of the trial. The court also considered whether an exceptional circumstance existed because the parties reasonably relied on the law as it previously existed. The court held that the presumptive ceiling was 18 months and nothing more. The 18 months ceiling became the law from the date the Jordan decision was released. The charges on the first information were stayed by the court. The delay on the second information was below the ceiling so the accused bore the burden of convincing the court that the delay was unreasonable by establishing that he took meaningful and sustained steps to expedite proceedings, and that the case took markedly longer than it reasonably should have. The accused's application was dismissed with respect to the charge on the second information.

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Bazin, October 27, 2016 (PC16115)

Municipal Law – Offences – Dogs Attacking People – Sentencing

The accused was found guilty of two charges of owning dogs that attacked people, contrary to s. 376(4) of The Municipalities Act. The accused's five Labrador dogs attacked three youth walking down the street. One of the youth had a bike and was able to lure the dogs away with his bike. He rode his bike to a friend's house and ran in. The dogs bit him on the thigh as he ran into the house. The dogs then returned to the other two youth and attacked one of them when she stepped back. The dogs were attacking as a group. The Crown requested a $1,000 fine and an order that the dogs be destroyed. The accused agreed that one of the dogs was a biter and should be put down, but he argued that the other dogs should not be put down. The issue for the court was whether or not the public could be protected from the five dogs either through conditions of care for the dogs, destruction of the dogs, or by a combination of the alternatives. HELD: The court considered the guideline considerations: 1) the one dog had a history of biting and had bitten someone in Calgary when the accused lived there. According to the accused, the other dogs were good, gentle dogs; 2) the attacks and injuries were serious. One girl had numerous bites and bruises on her upper and lower thigh, calf, and knee areas. She had numerous

scars and had to miss out on many high school activities. There was also a psychological effect on the victims; 3) there were no unusual contributing circumstances to justify the dogs' actions in the matter; 4) there was no evidence at trial or in sentencing submissions that would provide any level of confidence that a similar attack would not occur if the dogs escaped. The dogs escaped due to a missing hinge on a gate; the accused knew that the hinge was missing; 5) the dogs had the physical potential to inflict serious harm, which they did. The accused downplayed the harm and said they could do a lot more harm. The court found that the dogs could easily inflict injuries that would result in the death of a person; 6) the court found that there were few precautions taken by the owner to prevent a similar attack in the future; and 7) the accused lacked insight into the seriousness of the attack on the teens. The court had little confidence that the accused would be responsible in the long-term to ensure that his dogs did not harm another person. The court was not satisfied that an order for the dogs' care and control would reasonably be able to prevent a further attack on a person, and, as such, the public could not be reasonably protected from the dogs. The court ordered that: 1) the RCMP take immediate possession of the five dogs and impound them for eight clear days, thereafter arranging to have the dogs euthanized; 2) the accused paid the costs of impounding and euthanizing; 3) the accused was fined to $500; and 4) the dogs would remain impounded pending any appeal.

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R. v. Garvie, 2016 SKPC 142

Agnew, October 25, 2016 (PC16116)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Marijuana
Criminal Law – Defences – Charter of Rights, Section 7, Section 8, Section 9

The accused was charged with possessing less than three kilograms of marijuana for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. The officers noted a strong smell of marihuana billowing from the accused's vehicle when he rolled down the window when he was stopped. The officer said that he smelled raw marijuana and he could see raw marijuana buds on virtually every flat surface of the interior. The officer advised the accused and other occupants of the vehicle that they were being detained for a drug investigation. A

search of the vehicle revealed nine bags of marijuana with a total weight of 936 grams. Other items indicative of trafficking were also found. The accused was the driver and was charged with the trafficking offence. Two officers spoke with the accused at the detachment in an attempt to persuade him to become an informant. They did not record the interview or take notes because that could compromise the accused's confidentiality if he decided to become an informant. Unknown to the officers, the interview was video recorded without any audio. The accused chose not to become an informant. The accused argued that there were three Charter breaches: 1) his s. 8 rights were breached when his vehicle was searched incident to his unlawful detention and also when his vehicle was searched without reasonable grounds; 2) his s. 7 right was violated when the police interviewed him extensively after his arrest without audio or written record of the interview; and 3) his s. 9 right was violated because there was no lawful ground to stop his vehicle. The accused sought a stay of proceedings for the s. 7 breach and exclusion of all evidence after the vehicle was stopped for the ss. 8 and 9 breaches. A voir dire was held to determine the Charter issues.

HELD: The issues were determined as follows: 1) the officer was unshaken in his testimony that he smelled raw not burned marijuana and he also saw buds in the vehicle's interior. The trial judge even noted the strong odour the evidence produced in the courtroom. The court concluded that either the smell or observation of the buds may have been enough to justify the search of the vehicle so the two combined satisfied the court that there was no s. 8 breach in that regard; 2) the accused relied on the La case, but the court found that for the case to apply the accused had to show that the lack of the evidence caused actual prejudice to his ability to make full answer and defence. None of the evidence from the officers or accused suggested that the interview had any probative value in the case. The court did not find any prejudice to the accused's ability to make full answer and defence. The court reviewed case law and concluded that matters unrelated to the investigation did not have to be recorded. There was nothing in the evidence to suggest the discussion related to the investigation of the charges faced by the accused. The officers, therefore, did not have an obligation to make notes; 3) the officer indicated that when he passed the accused's vehicle, the back end was much lower than the front end so he stopped the vehicle to see if there was a rear suspension problem. The accused argued that was not the real reason for the stop, and therefore, it was not authorized pursuant to The Traffic Safety Act. There did not appear to be any other motive for the stop. The accused was found not to have met his burden, on a balance of probabilities, of showing

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that he was arbitrarily detained. All of the Crown's evidence was admitted to trial and the accused was found guilty as charged.

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Akhtar v. Bear, 2016 SKPC 151

Morgan, November 5, 2016 (PC16118)

Small Claims – Motor Vehicle Accident – Compensation for Business Interruption
Torts – Motor Vehicle Accident – Damages

The plaintiff's cab was being driven by another individual when it was involved in a motor vehicle accident with another driver, the defendant. The plaintiff also named the defendant's insurer as a defendant, but the court dismissed the claim against the insurer. The plaintiff had to buy a replacement vehicle. He claimed $2,770.50 to compensate him for the interruption of his business. The facts were undisputed. The insurer did pay downtime respecting loss of use of the vehicle because the accident was not the plaintiff's fault. The plaintiff provided income substantiation and the claim for downtime was paid at the rate of $532/day. There were different stages for the loss according to the insurer. The second stage dealt with the loss of use while the cab owner replaced the vehicle and, by policy of the insurer, was limited to 15 days of pay. The plaintiff was paid $10,189 for loss of use, but he argued he was entitled to five more days for a total of $2,660. The plaintiff found a replacement vehicle that had to be painted white for the cab company he drove for.
HELD: The court agreed with the plaintiff that the overall question was whether the plaintiff had been adequately compensated not whether the internal policies in favour of the insurer had been followed. The court was satisfied that the plaintiff's agent told the plaintiff that he needed to purchase a vehicle right away, which the plaintiff did. It may have been prudent for the plaintiff to look a little longer and find a vehicle that was white already. The court found that there was a lack of detail in the evidence presented by the plaintiff. There was an extra cost in having the replacement vehicle prepped for painting by the plaintiff's agent through his shop. The time spent painting and prepping the vehicle was excessive for two reasons: one five-day work week would have been more than sufficient to prepare and paint the car; and the masking and prepping that was done on the replacement vehicle was far more extensive and detailed than what had been done originally on the vehicle that

was a total loss. The plaintiff testified and the court found that he offered no reliable evidence of his loss. The $532/day was a figure determined by the insurer and the plaintiff's agent, the court did not accept it as an accurate representation of the actual loss to the plaintiff. The plaintiff seemed to feel an obligation to compensate the drivers he hired, although that was not necessarily compensation due from the defendant and, in any event, there was no evidence to quantify it. The plaintiff's claim was dismissed because he failed to establish his claim on a balance of probabilities.

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R. v. H. (P.A.), 2016 SKPC 158

Baniak, October 19, 2016 (PC16129)

Criminal Law – Assault – Sexual Assault

The accused was charged with committing a sexual assault, contrary to s. 271 of the Criminal Code. At the time of the alleged assault the accused was 17 and the complainant was 15. The complainant provided an audio-video statement to the police shortly after the alleged offence. The complainant adopted the contents of the video at trial. She testified that she and a friend were residents of a girls' group home in Saskatoon. The accused was the complainant's friend's boyfriend at the time. On the night in question they went to the accused's home where they drank until the complainant said that she was inebriated. The complainant said that the accused and his girlfriend held her down while the accused assaulted her. Afterward, the accused and his girlfriend had sex. The next day the accused sent the complainant a text message saying that he was sorry and pleading with her not to tell anyone as he didn't want to get into trouble. The accused denied that he had had sexual intercourse with the complainant. He said that his girlfriend had suggested a threesome and the complainant agreed but then changed her mind. He explained that he had sent the message that he was sorry because he had gotten the accused drunk and had had sex with his girlfriend in her presence.
HELD: The accused was found guilty. The court preferred the evidence of the complainant and did not believe the accused and his testimony had not convinced beyond a reasonable doubt under the test in R. v. W.(D.).

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Grose v. Grose, 2016 SKQB 339

Megaw, October 19, 2016 (QB16326)

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

The parties separated in 2013. Since October 2015 their only child, a five-year-old daughter, lived one week with the petitioner and one week with the respondent. The petitioner applied for an order giving her sole custody of the child and to have the respondent's parenting time restricted to every second weekend and for an order for child support from the respondent. The petitioner argued that the respondent's access should be reduced for a number of reasons, including his use of marijuana and because he had threatened to remove the child from her daycare and from her kindergarten. Evidence was submitted of the respondent's poor communication skills in the form of abusive and vulgar text messages that he had sent to the petitioner. The issue was whether the respondent's behaviour toward the petitioner had been such as to disentitle him to a shared parenting role.
HELD: The petitioner's application was dismissed. Although the court was concerned with the respondent's attitude toward the petitioner as expressed in his text messages, the court found that there was no compelling reason to change the status quo custody arrangement. There was no evidence that the child was at risk or that there were any issues with the respondent's parenting skills. The court ordered that the parties would have joint custody and that the child's primary residence would be with the petitioner. The current parenting arrangement would continue. The court ordered the respondent to refrain from the use of alcohol and drugs during his time with the child. He was also to refrain from the use of inappropriate language in his communications with the petitioner. The court determined the respondent's income to be $75,000 and that of the petitioner to be $43,600. The amount of support owed by each party under s. 3 of the Guidelines was set off, resulting in the respondent paying $281 per month under s. 9 of the Guidelines and for 63 percent of s. 7 expenses. There was no explanation as to why the respondent had not been paying child support and the court ordered him to pay retroactively, the same monthly sum from January through September 2016.

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Tatchell v. Cote, 2016 SKQB 341

Danyliuk, October 19, 2016 (QB16333)

Civil Procedure – Queen's Bench Rules, Rule 4-13(1)
Civil Procedure – Pre-Trial Conference – Requirements

The parties were involved in a division of their family property. At the request of counsel, the pre-trial conference was moved from December 2015 to October 19, 2016. Counsel for each party was required by Queen's Bench rule 4-13 and Family Practice Directive #1 to file pre-trial briefs not later than 10 days before the conference. The respondent's lawyer filed a substandard brief five days before the conference and the petitioner's lawyer filed his document two days before the conference. In addition to this, both counsel had signed a joint request form pursuant to rule 4-11(1)(a)(ii) in March 2016 certifying that they were ready for pre-trial conference. The court file showed that they were not in fact prepared to proceed in March nor in October. The lawyers also failed to comply with Queen's Bench rule 15-37 that they file updated property statements at least 10 days before a pre-trial conference.
HELD: The court adjourned the pre-trial conference sine die. It ordered that no new date would be set until the parties completed full disclosure of all documents to be relied upon at trial, the filing of updated property statements, and supplementary briefs that complied with The Queen's Bench Rules.

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Lycan v. Winterton, 2016 SKQB 342

Goebel, October 20, 2016 (QB16343)

Family Law – Custody and Access – Interim – Mobility Rights

The petitioner and the respondent had two children, six and four years of age. Since their separation in 2014, the parties continued to live near Flin Flon and the children had their primary residence with the petitioner. According to an agreement that took into account the respondent's work schedule and shift work, the children spent four days with each parent. In February 2016 the petitioner commenced a proceeding in Prince Albert for divorce and support under provincial legislation. In June 2016, the petitioner, who had been a stay-at-home parent with occasional employment at low level positions, was accepted into a four-year program that would allow her to obtain her education degree under full bursary. In addition, she would be provided with a three-bedroom apartment in La Ronge. In order

to take advantage of this opportunity the petitioner would have to relocate from Flin Flon to La Ronge. The petitioner requested permission to move the children. She suggested that the respondent have access on alternate weekends and the majority of school holidays. Although he had been served with the petition, the respondent had commenced a separate proceeding in Melfort in August wherein he sought and obtained an ex parte order restraining the petitioner from moving the children from Flin Flon. This application was made without the knowledge of his lawyer and he deliberately misled the court as to the existence of the other proceeding. His counsel then adjourned the Melfort application and filed a similar application in Prince Albert. In it, the respondent opposed the move and sought an order restricting either parent from moving without the consent of the other.

HELD: The court found that it was not prepared to allow an interim relocation of the children because the respondent had been consistently involved in the care of the children and to move them would significantly impact his ability to remain involved in a substantial way. An interim order was granted that gave the parties joint legal custody of the children. If the petitioner decided to relocate to La Ronge, she was to notify the respondent within 21 days and thereafter the children would be placed in the primary care of the respondent in Flin Flon and the petitioner was to have access every weekend to be exercised equally between Flin Flon and La Ronge and designated times during school holidays. If the petitioner chose not to relocate to La Ronge, the children would remain in her primary care and the respondent would have parenting time in accordance with his days off. The court instructed the registrar to set down the matter for an expedited pre-trial conference. Costs were assessed against the respondent in the amount of $1,000 regarding the Melfort proceeding. The court dismissed it and struck the petition because the respondent had committed an abuse of process for commencing it when he knew that the petitioner had commenced a proceeding raising the same legal issues in another judicial centre.

See also Supplementary Reasons in 2016 SKQB 361.

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R. v. L'Herault, 2016 SKQB 344

Danyliuk, October 20, 2016 (QB16335)

Criminal Law – Conduct of Trial – Jury – Guilty Plea – Cross-Examination

The accused was charged with second degree murder. During an adjournment in the trial, the defence informed the court that it would not call evidence and that the accused wished to maintain his not guilty plea to second degree murder but wished to enter a plea of guilty to the lesser included offence of manslaughter. The Crown advised it was unwilling to accept the plea as tendered. The accused then decided to take the witness stand and give evidence. The Crown proceeded to cross-examine the accused. In the absence of the jury, the Crown indicated to the trial judge that it wanted to cross-examine him on the tendered plea on the basis that it amounted to an admission. The defence opposed the Crown's intention. The issue before the court was whether the Crown could cross-examine the accused on his plea of guilty to a lesser included offence (manslaughter) when that plea was tendered in the absence of the jury and was rejected by the Crown. ;HELD: The Crown was not allowed to cross-examine the accused on the tendered plea. As the plea was made in the absence of the jury, it was outside the realm of an admission. To allow cross-examination on this point would cast a pall on plea negotiations and the pre-trial process in criminal matters.

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Law Society of Saskatchewan v. Siekawitch, 2016 SKQB 345

Barrington-Foote, October 21, 2016 (QB16328)

Statutes – Interpretation – Legal Profession Act, Section 30, Section 32, Section 82
Barristers and Solicitors – False Pretences – Injunction
Professions and Occupations – Lawyers – Unauthorized Practice – Injunction

The applicant applied for a permanent injunction pursuant to s. 82 of The Legal Profession Act, 1990 to restrain the respondent from doing any of the things prohibited by ss. 30 and 32 of the Act. Notice of the application was served on the respondent but he did not appear. The applicant provided two affidavits as evidence. The complaints counsel provided an affidavit in which she related various statements and social media postings purportedly made by the respondent, including descriptions of his work as a pro bono lawyer and community volunteer legal professional on his Facebook and LinkedIn pages. Another exhibit provided showed statements of claim written by the respondent. The other affidavit was sworn by an accounts manager for Commercial Credit Adjusters, who deposed that the

respondent had contacted her and identified himself as a lawyer. When she advised him that she would call the Law Society of Saskatchewan to verify his status, he said that he was entitled to practice in Saskatchewan but was not a member of the Law Society but of the Bar Association of the United States.
HELD: The application was granted. The court ordered pursuant to s. 82 of the Act that the respondent be restrained from performing legal functions or describing himself as a lawyer or using designations of such status. Based on the evidence, the court was satisfied that the respondent was the person who contacted the accounts manager and that the Facebook and LinkedIn pages were the respondent's. The court found that the respondent was contravening and was likely to continue to contravene the Act. He had violated s. 32(1)(a) of the Act by holding himself out as a lawyer and had published descriptions and titles that were intended to lead to the belief that he was a lawyer contrary to s. 32(1)(b) and had made statements regarding his provision of legal services contrary to ss. 30(1)(a), (c) or (d).

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Poitras v. Khan, 2016 SKQB 346

Smith, October 21, 2016 (QB16344)

Statutes – Interpretation – Indian Act, Section 46
Wills and Estates – Wills – Validity
Aboriginal Law – Status Indians – Wills and Estates

The applicant applied for letters probate pursuant to Queen's Bench rule 16-16. The will was executed by the applicant's mother in 2004 and appointed him the executor and one of the estate's beneficiaries along with his two siblings. The testator married the respondent in 2006. The couple began residing at the testator's home on the Peepeekisis First Nation reserve. The testator died in 2014. The applicant attempted to arrange for the Department of Aboriginal Affairs and Northern Development (AANDC) to manage the estate following the ordinary practice for estates of status Indians on reserve. AANDC determined that it would decline jurisdiction and transferred the dispute to the Court of Queen's Bench under s. 44 of the Indian Act. Because the testator was a status Indian living on reserve, s. 17(1)(a) of The Wills Act would not apply so that her marriage to the respondent would have revoked her will. The respondent argued that the will was invalid as it was executed before his marriage to the testator and that the concept in s. 17 of The Wills

Act should be adopted. This point was recognized under s. 46(1)(f) of the Indian Act. As well, under s. 46(1)(c) of the Indian Act, the Minister could declare the will to be void because the terms of it would impose hardship on him as a person for whom the testator was responsible to provide. Section 48 also permitted the Minister to award shares of the estate to him and the testator's children because its value exceeded $75,000, if the will was declared void.
HELD: The application was granted. The court found that the will was valid and ordered that letters probate should issue. The court suggested that the respondent could make an application as a spouse of the deceased pursuant to s. 30 of The Family Property Act and possibly under The Dependants' Relief Act, 1996.

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T. (L.) v. U. (R.), 2016 SKQB 347

Schwann, October 21, 2016 (QB16345)

Family Law – Custody and Access – Primary Residence
Family Law – Child Support

The petitioner applied for joint custody, primary residence and child support for the three-year-old child who was born during her common law relationship with the respondent. The respondent sought to have the child's primary residence be with him. At the time of the application the parties, parenting arrangements were governed by an interim order made in May 2015, which granted interim joint custody to them, that the petitioner was the primary resident parent and the respondent was to be given reasonable parenting time. For the purposes of child support, the court imputed income to the respondent of $70,000 per annum and the petitioner's income was fixed at $14,000, resulting in the respondent being required to pay $581 per month for s. 3 support and $368 per month for s. 7 childcare expenses. The respondent had failed to make the payments and arrears accumulated. The parties applied to vary that order six months later when the respondent relocated to Manitoba from Regina to commence work with a new employer. The respondent sought shared parenting. The court found that it was not appropriate due to the distance between the homes of the parties and the effect on the child of so much travel. The respondent was granted specified parenting time on alternating weekends at his home in Manitoba. On the other weekends, the respondent could parent the child for six hours in Regina. In

support of this application the petitioner testified that the child was happy and well-adjusted. Her aunt looked after her when the petitioner was at work. Their residence was in a neighbourhood with lots of children and close to parks and recreation facilities. A number of witnesses testified on behalf of the petitioner's excellent parenting skills and the great relationship she enjoyed with her daughter. The petitioner acknowledged that her business as a self-employed hair stylist had not grown as fast as she had hoped. The respondent argued that the child would have a better lifestyle living with him because of his higher income and because his home was at a lake and near a national park although there were no children in the immediate vicinity and it was a 15-minute bus ride to the closest school. The respondent did not have family residing nearby. The respondent alleged, without providing evidence, that the child was at risk living with the petitioner because she suffered from depression and alcoholism. The petitioner denied the allegations. He also argued that the petitioner was intentionally underemployed and that income should be imputed to her. HELD: The court made an order granting joint custody of the child to the parties and determined that it was in her best interests to reside primarily with the petitioner in Regina. The child would benefit from the continuity of care and routine that she had known for the past three years. The court was concerned that living with the respondent was not as beneficial because of the isolation of his home and absence of other children and the rupturing of the close bond between the child and the petitioner. The court noted that the decision was not strictly an endorsement of the status quo but based on an assessment of all relevant factors under s. 8 of The Children's Law Act. The court increased the respondent's parenting time to include another day on alternate weeks. The court determined child support owed by the respondent in accordance with s. 3 of the Guidelines as they applied to the Act. Based upon his gross income of $88,500 for the year to date and the petitioner's income at $13,600, the respondent was ordered to pay $743 in s. 3 child support and $430 in s. 7 expenses per month.

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KNC Holdings Ltd. v. FTI Consulting Canada Inc., 2016 SKQB 349

Labach, October 21, 2016 (QB16346)

Statutes – Interpretation – Builders' Lien Act, Section 22(2)
Statutes – Interpretation – Mechanics' Lien Act, Section 12

Creditor and Debtor – Priorities

The National Bank provided various loans to an oil and gas company, Coast Resources (Coast), through a series of loan agreements. As security, Coast granted certain security to the National Bank. The bank registered its security against Coast's personal property at the Personal Property Registry. It also registered its interest against certain of Coast's oil and gas interests at the Saskatchewan Ministry of the Economy and at the Information Services Corporation in February 2014. At that time, the National Bank sought the appointment of a receiver and manager over all the assets, undertakings and property of Coast. The loan agreements specified that the parties attorn to the jurisdiction of the Alberta court. In March 2014, the Court of Queen's Bench there appointed FTI Consulting Canada Inc. as a receiver. FTI discovered that several builders' liens were registered against the interests of Coast in a heavy oil property in Saskatchewan and, at its request, all of the lien claimants filed a claim of lien pursuant to s. 50(3) of The Builders' Lien Act. Subsequent to FTI selling the Saskatchewan property, an Alberta judge ordered FTI to retain the amount of $490,000 on account of the lien claims pending a determination of the priority between the National Bank and the lien claimants and found that the proper jurisdiction to determine the priority issue was the Saskatchewan Court of Queen's Bench. The applicant, one of the lien holders, applied for an order determining the priority between the National Bank's security and the liens held by the applicant and other lien holders with respect to disputed holdback funds. The lienholders took the position that the priority should be determined in accordance with the Court of Appeal's decision in Canada Trust v. Cenex. It had held that a lien registered under s. 12(2) of The Mechanics' Lien Act was a special type of lien giving a lienholder priority over all other security. As s. 12(2) was replaced by an identical provision in s. 22 of the BLA, their liens took priority, regardless of the fact that the National Bank security was registered before their liens. The liens took priority in respect of the Saskatchewan properties in situ oil, the extracted oil still in Coast's possession as at the date of appointment of the receiver and/or any proceeds arising therefrom pursuant to s. 22(2) of the BLA. National Bank argued as their security interests were registered well before the lienholders registered theirs, they were a first priority secured creditor. Cenex had been wrongly decided.
HELD: The application was granted and the sum held in trust by FTI was ordered to be paid out to the lienholders. The court found that no Saskatchewan decision had overruled Cenex. Therefore, s. 22(2) of the BLA gave the lienholders priority over the National Bank security.

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R. v. J. (K.D.), 2016 SKQB 350

Gabrielson, October 25, 2016 (QB16347)

Criminal Law – Murder – First Degree
Criminal Law – Defences – Mental Disorder
Criminal Law – Psychological Assessment – Not Criminally Responsible

The accused was charged with the first degree murder of her son, contrary to s. 235(1) of the Criminal Code. She pled not guilty and submitted that she was not criminally responsible for the death under s. 16 of the Code because she suffered from a mental disorder. She was subject to a delusion that a woman was trying to kill her and when she was dead, her son would be endangered, and she had to kill him to protect him. Three experts in psychiatry and psychology testified that the accused was hallucinating at the time she committed the offence. Two of them concluded that the accused would not have known that her actions were morally wrong whereas the third expert said that she did understand the moral implications of her actions.
HELD: The accused was found to have committed the act causing the death of the victim but was not criminally responsible on account of a mental disorder. She was remanded into the custody of the Saskatchewan Review Board.

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Bank of Nova Scotia v. Herman, 2016 SKQB 351

Megaw, October 24, 2016 (QB16336)

Mortgages – Foreclosure
Civil Procedure – Queen's Bench Rules, Rule 6-41
Civil Procedure – Applications – Applications without Notice
Civil Procedure – Preservation of Property – Injunction

The plaintiff commenced foreclosure proceedings in May 2014 as a result of the non-payment of the mortgage. The order nisi for judicial sale was granted in March 2015. An ex parte order was granted authorizing the plaintiff to serve the defendants substitutionally. The defendants were registered owners of the house in question, subject to the plaintiff's mortgage. The defendant Waldner alleged in her affidavit that she had been the

victim of a fraud by the defendant Herman. She stated that she had not been served with any of the materials in the action and that Herman was trying to hide the foreclosure from her. She made an application without notice for an orderforbidding the sale of a house until the application to set aside substituted service of amended order nisi was determined, and that the co-defendant be served substitutionally by sending all matters to his email address.

HELD: The defendant's application for forbidding the sale of the house was dismissed, but substitutional service on the defendant was granted. The court dismissed the application for an injunction because the applicant had not met the requirements of an ex parte application. The court found that the applicant was aware of these proceedings and had not informed the court that she had sought alternative financing to pay out the mortgage nor that she had commenced family law proceedings. The applicant relied upon Queen's Bench rule 6-41 but provided no authority that would justify an order prohibiting the plaintiff from completing another order of the court that was validly made and validly served. The applicant failed to review the existing order nisi for judicial sale. It provided that the court would confirm any sale and therefore the defendant could not argue that an injunction was necessary to prevent prejudice to her. She also failed to file a proper draft order that described the relief sought or to include an endorsement required by Queen's Bench rule 10-3(5).

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R. v. Boyer, 2016 SKQB 352

Kalmakoff, October 25, 2016 (QB16337)

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

The accused appealed his sentence. He had pled guilty to driving while his blood alcohol content exceeded .08, contrary to s. 253(1)(b) of the Criminal Code. The accused had driven down the wrong side of the Trans-Canada Highway for 22 kilometres before being stopped and his blood alcohol reading was over twice the legal limit. As the accused had been convicted of similar offences in 2007 and 2011, the Crown tendered a notice of intention to seek greater penalty, pursuant to s. 727(1) of the Code, and proceed by way of second conviction. The Crown and the accused's lawyer made a joint submission for a sentence of 34 days' imprisonment to be served at the Saskatchewan Impaired

Driver Treatment Program (IDTP) followed by six months' probation and a driving prohibition for three years. The Provincial Court judge rejected the joint submission and sentenced the accused to 180 days' imprisonment, followed by one year of probation and a driving prohibition for two years and six months. The sentencing judge found that the joint submission would result in the accused serving the same sentence of 30 days that he received for his 2011 conviction, and refused to accept it because it was unfit, contrary to the public interest and did not address the sentencing objectives of deterrence and denunciation.
HELD: The appeal was allowed. The court found that the Supreme Court decision in R. v. Anthony-Cook, which was released after the sentencing judge rejected the joint submission, made the test for rejecting such submissions more stringent in order to promote certainty in resolution discussions. The court concluded that the joint submission was not one that would bring the administration of justice into disrepute or was contrary to the public interest. The court varied the sentence. The accused had already served his term of imprisonment while awaiting his release on bail pending appeal. He was placed on probation for a period of six months with multiple conditions, including assessment and completion of programming for addictions. The accused was prohibited from operating a motor vehicle for a period of three years.

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Underhill (Litigation Guardian of) v. Central Aircraft Maintenance Ltd., 2016 SKQB 354

Popescul, October 26, 2016 (QB16351)

Civil Procedure – Queen's Bench Rules, Rule 4-5

The plaintiff filed a request for the appointment of a case management judge pursuant to Queen's Bench rule 4-5. The defendant objected on the basis that the mandatory mediation requirements of s. 42(1.1) of The Queen's Bench Act, 1998 had not yet been satisfied.
HELD: The request was denied. As the parties had not yet participated in the mandatory mediation process, the application was premature.

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Sergent v. Borisko, 2016 SKQB 355

Goebel, October 27, 2016 (QB16352)

Family Law – Division of Family Property

The petitioner brought an application under The Family Property Act (FPA) for division of the family property. The parties began living together in 1999 and separated in 2008. During this period, they resided in the respondent's home. The respondent worked as a plumber and sole employee for his business, incorporated as Lane Mechanical. They kept their finances separate during the relationship but did not have a written agreement regarding the disposition of property if they separated or if one party died. During the last years that they lived together, they built a new home on an acreage. The respondent purchased the land and financed the construction. The petitioner was involved in the design and décor of the home. Although the petitioner thought of it as her dream home, she moved out of the house at the end of 2008 and moved back to the first house that the parties had shared. Although she agreed to pay the respondent rent, she never did so. She married her current spouse in 2009 and they lived in the house while the respondent continued to pay the mortgage, taxes and insurance for the home. The major issues remaining at trial were the following: 1) which residence was the family home for the purposes of the FPA. The petitioner argued that the new home was the family home given the parties' mutual intention to reside there as spouses whereas the respondent submitted that the first home should be designated as the family home because of the length of time of their residency in it; 2) what was the value of the corporation in which the respondent was the sole shareholder. The accountant for the corporation testified on behalf of the respondent. He advised that because of its size and absence of regular contracts, the value of it would not include individual or commercial goodwill. The value of the corporation should be adjusted for the tax that would be triggered when it was sold and the respondent was paid out of the value of the shares; and 3) whether the property should be divided unequally. The respondent argued that an equal distribution of property would be unfair and inequitable given the parties' intention to keep their financial affairs separate and that their conduct throughout the relationship demonstrated this intention. HELD: The application was granted. The respondent was ordered to pay the sum of $853,500 to the petitioner and to transfer his ownership interest to her in the property where she resided. The court found with respect to the issues that: 1) the new home should be designated as the family home for the purposes of valuation and distribution pursuant to s. 22(1) of the

Act. The parties had moved their personal belonging and relocated their business operations to it. They socialized and hosted family events there while the first home was listed for sale and abandoned as their primary residence. The first home was therefore to be considered under s. 21 for distribution; 3) the value of Lane Mechanical as proposed by its accountant was accepted by the court. The court permitted the contingent tax liability as calculated by the respondent's accountant but discounted it by 50 percent to allow for the respondent's ability to tax plan and defer the disposition of the dividends; and 3) it was not prepared to find an equal division of property would be unfair based on the fact that the parties maintained separate financial portfolios. However, the court found that it would be unfair under s. 23(1)(c), (d) and (q) of the Act to divide the significant increase in the value of the respondent's business between the dates of separation and application. The respondent would receive 75 percent of the net value of the business and the respondent would receive 25 percent.

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Saskatchewan Federation of Labour v. Saskatchewan, 2016 SKQB 365

Ball, November 7, 2016 (QB16358)

Constitutional Law – Charter of Rights, Section 2 – Freedom of Expression
Constitutional Law – Charter of Rights, Section 24(1) – Damages
Constitutional Law – Constitution Act, Section 52(1)
Constitutional Law – Validity of Legislation – Charter of Rights, Section 1

The plaintiffs successfully claimed that their fundamental freedom of association right pursuant to s. 2(d) of the Charter was infringed by enactment of The Public Service Essential Services Act (PSESA). The Supreme Court of Canada suspended the declaration of invalidity of the legislation pursuant to s. 52(1) of the Constitution Act for one year. The plaintiffs then returned to the court to pursue their claim for damages under s. 24(1) of the Charter. There were two threshold issues: 1) did the court have jurisdiction to award damages under s. 24(1) of the Charter where the enactment of a statute was subsequently found to be unconstitutional; and 2) if so, was there a basis for awarding damages to the plaintiffs under s. 24(1) of the Charter.
HELD: The threshold issues were determined as follows: 1) s. 52(1) was designed to address unconstitutional laws enacted by the legislative branch of the government and s. 24(1) provides

individuals with redress for unconstitutional actions by the executive branch of the government. The court held that it had jurisdiction to award s. 24(1) damages in conjunction with a declaration of invalidity under s. 52(1), but only in the most unusual of cases: a) where government engaged in conduct that was "clearly wrong, in bad faith or an abuse of power"; and b) relief was necessary to provide the claimant with an effective remedy. The plaintiffs argued that damages were due to compensate for the manner that the legislation was implemented by government officials. The plaintiff unions argued that the legislation empowered governmental agents to "overdesignate" the employees as a necessary result or effect of the statute. There was no determination that the governmental agents ever exercised their discretion in an unconstitutional manner. The court concluded that it did not have any jurisdiction under s. 24(1) to grant the plaintiffs a remedy in the action based on the way government officials designated employees as essential service workers pursuant to the PSESA. The court considered the second issue in any event; 2) the essence of the plaintiffs' argument was that if the PSESA had not been enacted and implemented, unionized public sector employees would have had more bargaining power, which would have resulted in more financially beneficial collective agreements. The argument assumed that the right to strike resulted in financial gain for employees. The court found the assumption to be inconsistent with the Charter, the jurisprudence, and the role of the strike in labour relations disputes. The court also held that the plaintiffs did not establish a basis for an award of s. 24(1) damages because of the manner that the government officials exercised their discretion under the PSESA. The court next considered whether damages would be inappropriate or unjust even though they were shown to be functionally justified. The purpose of the legislation was a pressing and substantial one requiring policy choices to be made that were not dictated by the constitution. The court did not agree that the government ought to have known that the PSESA would be declared invalid. The plaintiffs did not establish a basis in law or in fact that could support a s. 24(1) award of damages.

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