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highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 19, No. 8 **April 15, 2017**

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R. v. Bartlett, 2015 SKPC 87

Gordon, June 10, 2015 (PC15171)

Criminal Law – Assault – Sexual Assault
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Criminal Law – Evidence – Credibility – Complainant

The accused was charged with sexual assault, contrary to s. 271 of the Criminal Code. The accused applied pursuant to s. 276.2 to determine whether evidence was admissible. The evidence was details and text messages of activities between the accused and complainant the day after the incident that the accused indicated supported his honest but mistaken belief that the complainant consented to the sexual activity forming the charge. The applicant argued that the evidence was limited in nature, relevant to an issue at trial, and did not offend the "twin myths" that were referred to in Seaboyer and codified in s. 275(1) of the Criminal Code. The accused wanted to cross-examine the complainant on the communications that were of a sexual nature the next day and of the sexual activity that he said occurred the next day. He argued that the complainant was not credible because her account of their relationship was untrue, not that her sexual history made her unworthy of belief. The issue was whether the evidence of sexual conduct by the complainant with the accused, that is said to have occurred after the alleged sexual assault, was admissible.

HELD: The court considered s. 276(3) and found that points (a), (c), (d), and (f) supported granting the application and allowing limited cross-examination. Section 276(3)(b), the balancing of society's interest in encouraging the reporting of sexual offences, gave the court some concern. The court did note that the cross-examination in this case would be limited and related to sexual activity with the same accused in very close time to the alleged offence. The court also considered the balancing of the rights of the accused and the complainant in s. 276(3)(g). The court concluded that the application by the accused for admissibility met the criteria of s. 276(2), and he was given leave to elicit evidence at trial concerning the incident referred to in his affidavit. The text messages and the interactions between the accused and the complainant that occurred the next day and were not sexual in nature did not fall within the ambit of s. 276.1 and therefore the normal rules of evidence applied.

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R. v. Cannon, 2015 SKPC 128

Gordon, December 16, 2015 (PC15172)

Criminal Law – Procedure – Production Order
Constitutional Law – Charter of Rights, Section 8

The accused was charged with driving while his blood alcohol content exceeded .08, contrary to ss. 253(1)(b) and 255(1), and impaired driving, contrary to ss. 253(1)(a) and 255(1) of the Code. A witness called 911 when she saw the accused's vehicle veer across a highway, crossing two lanes and entering a ditch. The vehicle overturned and the accused was injured. An RCMP officer arrived on the scene after medical personnel were assisting the accused. He found broken beer bottles scattered around the vehicle, although only one bottle was missing its cap. He then went to the hospital where the accused had been taken, and as he spoke to the accused, he smelled alcohol coming from him. The officer went to the detachment to get a breath kit but could not find one so returned to the hospital. Believing that he had reasonable and probable grounds, the officer made the Intoxilyzer demand and gave the accused his s. 10(b) Charter rights, but the accused did not answer, appearing to feign sleep. The officer then prepared an Information to Obtain (ITO) and based on it, a justice of the peace issued a search warrant. The defence brought a Charter application alleging that the accused's s. 8 Charter rights had been denied and requesting the exclusion of all hospital records and all other evidence obtained after the

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breach and exclusion of all evidence obtained by the issuing of the warrant based on the ITO of the officer. A voir dire was held with respect to the production order (PO).
HELD: The Charter application was dismissed. The court found that there had been no breach of the accused's s. 8 Charter rights. The officer had ample objective and subjective grounds to make the demand. There was a basis on which the authorizing justice of the peace could issue the warrant and therefore the search was authorized by law.

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R. v. Quewezance, 2015 SKPC 149

Gordon, December 8, 2015 (PC15173)

Criminal Law – Defences – Credibility
Criminal Law – Evidence – Identity of Accused – Sufficiency
Criminal Law – Impaired Driving – Driving over .08

The accused was charged with driving over .08 and driving while impaired, contrary to ss. 253(1)(b) and 253(1)(a) of the Criminal Code, respectively. The trial was adjourned for the accused to try and locate an essential witness. The issue was identity. The police received information about a possible impaired driver and an officer passed a vehicle meeting the description of the vehicle and then turned around and met it head on. The officer pulled in front of the vehicle and stopped it. At that point there was no one in the driver's seat, but he said he saw the driver of the vehicle getting into the back seat and not sitting still. The officer smelled alcohol coming from the accused in the back seat. She was arrested. The officer observed that she had slurred speech, glossy eyes, and the odour of alcohol from her breath. The accused indicated to the officer that she had changed seats on impulse. The passenger testified that she was sitting in the passenger's seat and that her and others had been drinking the night before. She said that someone else was driving them around because they were intoxicated and that the accused was in the back seat. The passenger said that the accused appeared to be moving when they were stopped because the driver bumped her as he moved into the back seat from the driver's seat. The accused was not able to locate the driver to attend at the trial. The accused also testified. She indicated that she did not tell the officer that the other person was driving the car because she did not want him to get into trouble. He had just been released from jail a few days earlier and she thought he was still facing charges. The Crown argued

that the video and evidence of the officer showed the accused moving from the driver's seat to the back seat.
HELD: The court found the accused's explanation for her behaviour and comments to the officer were believable in the situation. The court also could not conclude from the video that the accused was moving into the back seat. The accused was a larger woman, and the court could not see how she could quickly get into the back seat as described by the officer. The other passenger that the accused said was driving was much slighter than the accused and would have been able to move into the back seat much easier. The Crown applied the W.D. analysis and concluded that the Crown did not prove that the accused was the operator of the vehicle at the time in question. The court also said that even if it was unable to say the accused should be believed, the court would be unable to decide who to believe and therefore would still find that the Crown did not prove that the accused was the operator of the vehicle.

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R. v. Grewal, 2015 SKPC 152

Lavoie, October 27, 2015 (PC15174)

Criminal Law – Arrest – Reasonable and Probable Grounds
Criminal Law – Controlled Drugs and Substances Act – Possession and Trafficking of Narcotics
Criminal Law – Defences – Charter of Rights, Section 8, Section 9
Criminal Law – Evidence – Confidential Informant
Criminal Law – Firearms
Criminal Law – Proceeds of Crime

The accused was charged with 13 offences on two informations. The charges were as follows: one count of trafficking in cocaine, contrary to s. 5(1) of the Controlled Drugs and Substances Act (CDSA); two counts of possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of CDSA; two counts of possessing marihuana, contrary to s. 4(1) of the CDSA; three counts of possessing the proceeds of crime contrary, to ss. 354(1) and 355(b) of the Criminal Code; two counts of unsafe storage of a firearm, contrary to s. 86(2) of the Criminal Code; one count of possessing a sawed-off gun for a purpose dangerous to the public peace, contrary to s. 88 of the Criminal Code; one count of possessing a firearm without a licence to possess it or a registration certificate for the firearm, contrary to s. 91(1) of the Criminal Code; and possessing a firearm knowing it was obtained by the commission of an offence, contrary to s. 96(1) of

the Criminal Code. An officer received information from a confidential informant (CI#1) in relation to the accused. CI#1 had provided the officer with information on various crimes between 2007 and 2013, and he considered CI#1 to be extremely credible, having provided information to base judicial authorizations for search warrants six or seven times. CI#1 described the accused and his vehicle and indicated to the officer that he sold cocaine through a dial-a-dope system. CI#1 gave the officer the accused's cell number used to order drugs. The cell phone number was registered to a false name and nonexistent address. The vehicle was registered to the accused. A second informant, CI#2, provided information to another officer describing the accused, his phone number, and prices for cocaine. Surveillance was conducted on the residence that the vehicle was registered to and the accused and his vehicle were observed. The truck was later observed at an apartment building where two different individuals entered and, shortly thereafter, exited the vehicle one after another. The vehicle then went to a restaurant and officers in unmarked police vehicles boxed in the accused's vehicle and arrested him. The issues raised on voir dire were as follows: 1) did the officer that ordered and/or made the arrest of the accused have reasonable and probable grounds to make such an arrest; 2) did they have the requisite subjective belief, supported by sufficient objective criteria; and 3) if any of the accused's rights were breached, then what remedy, if any, should be accorded to the accused.

HELD: The issues were determined as follows: 1) the subjective reasons for the officer's belief that he had reasonable and probable grounds to make the arrest included a description of the accused, the accused's vehicle and licence plate, and the cell phone number. The surveillance evidence confirmed the accused at the address the vehicle was registered. Further, individuals were observed entering and exiting the vehicle one after the other. The court found that the officer clearly had the subjective belief on what he felt were objective criteria for reasonable and probable grounds to effect a warrantless arrest of the accused; 2) the court looked at the entire constellation of events and concluded that there were clearly sufficient objective criteria for the individual officers who arrested the accused to have reasonable and probable grounds to believe he was involved in street-level drug trafficking; and 3) the court did not have to address remedy because the warrantless arrest of the accused was found to be lawful.

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R. v. Pascal, 2016 SKCA 152

Lane Caldwell Herauf, December 6, 2016 (CA16152)

Criminal Law – Assault – Sexual Assault – Sentencing – Long-term Offender – Appeal

The appellant appealed against his designation as a long-term offender (LTO) and resulting seven-year long-term supervision order (LTSO). He also sought leave to appeal against his determinate sentence of two years of imprisonment on the grounds that it was demonstrably unfit. The accused was 18 when he committed the predicate offence of sexually assaulting a sex-trade worker. He began committing crimes at 13 years of age, and when he was 15, he committed an aggravated assault against his girlfriend. The trial judge dismissed the Crown's application to have him designated as a dangerous offender (DO) (see: 2013 SKQB 289) and exercised his discretion under s. 753(5) of the Criminal Code to designate the appellant as an LTO. He found on the evidence that the LTO criteria under s. 753.1 of the Code had been established and imposed the two-year determinate sentence and the seven-year LTSO (see: 2013 SKQB 447). In the DO hearing, a forensic psychiatrist assessed the appellant as being at high risk to commit serious acts of personal violence in the future. In his opinion, it was unusual for such a young man to have committed acts of sustained violence as in the case of his attack on his girlfriend and on the victim in the predicate offence, and they were indicative of a high risk to commit serious acts of violence in the future. However, the appellant's risk was potentially manageable in a community setting if he participated in and responded to programming for intensive violence and therapeutic substance abuse. The appellant's grounds of appeal were that the trial judge erred in the following ways: 1) by failing to consider his young age when designating him; 2) in finding a "pattern" based upon his young offender criminal record and only one adult offence; and 3) by failing to consider a less restrictive sentence and imposing the LTSO, which was excessive in light of his youth.
HELD: The appeal was dismissed and leave to appeal was denied. The court found with respect to each ground the following: 1) the trial judge considered the appellant's age and found it a material and relevant fact in the circumstances in that it was the basis of his rejection of the Crown's application for a DO designation, and he accepted the psychiatrist's report, which focused on the appellant's youth; 2) an LTO designation can be made without any finding as to a pattern. The trial judge found that the first and third preconditions to the designation were established on the evidence. Regarding the second precondition, the judge had to consider whether there was a risk the appellant

would reoffend and he was entitled to consider his criminal record as a young offender; and 3) the question in this appeal was not whether the designation and sentence were disproportionate but whether they were reasonable in the circumstances. The appellant's youth and record as a youth did not obviate an LTO designation or the imposition of an LTSO as provided by s. 74 of the Youth Criminal Justice Act. The judge found that the appellant posed a substantial risk to reoffend under s. 753.1(1)(b) and what was necessary to control the risk under s. 753.1(1)(c). The findings were supported by the evidence. As the appellant had served his term of imprisonment, an appeal against it was moot and therefore leave to appeal it was denied.

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R. v. Walsh, 2016 SKCA 162

Lane Ottenbreit Caldwell, December 14, 2016 (CA16162)

Criminal Law – Recognizance – Breach – Appeal

The Crown appealed against the acquittal of the respondent on charges that he breached his s. 810.1 recognizance, contrary to s. 811 of the Criminal Code. In 2013 a Provincial Court judge found that there were reasonable grounds to fear that the respondent would commit a sexual offence against a child. The judge ordered, with the consent of the respondent, a recognizance under s. 810.1 of the Code that included a condition requiring that he not attend or be in close proximity to places where children under 16 were or would be expected to be present. Subsequently, the respondent admitted that he had twice attended an arts festival after he and a police officer assigned to supervise him in the community agreed that terms of the recognizance would prohibit him from doing so. At his trial for breaching the order, the respondent argued that the condition described above was overly broad and the judge had exceeded his statutory authority and had therefore violated the respondent's s. 7 Charter rights. The respondent did not challenge the constitutional validity of s. 810.1 and sought a stay of the charge under s. 24(1) of the Charter. The trial judge found that a lawful recognizance must strike a balance between the defendant's liberty interest and public safety concerns and dismissed the s. 811 charge because she found the condition offended that principle. Therefore, the Provincial Court judge who made the order lacked the statutory authority to make it and the condition was invalid. The Crown argued that the trial

judge erred in law by allowing the respondent to collaterally attack the validity of the recognizance. The respondent argued that as the Crown had not raised the rule against collateral attack before the trial, the appeal should be dismissed.
HELD: The appeal was allowed and a new trial was ordered. The court found that this was a case in which an appellant could raise a new argument involving a question of law alone. No further evidence was required to enable the court to decide the question of whether the rule applied in these circumstances. The court found that it did and that the trial judge erred. The respondent could not attack the validity of the recognizance after being charged with violating it when he had not previously appealed against it or applied to vary it. The court ordered a new trial because it found that the respondent might have at least an arguable defence to the s. 811 charge based on the interpretation that a trial judge might give to the conditions of the recognizance that had not been considered at his trial or on the appeal.

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R. v. S. (A.), 2016 SKCA 166

Jackson Lane Whitmore, December 7, 2016 (CA16166)

Criminal Law – Appeal – Acquittal
Criminal Law – Defences – Alibi
Criminal Law – Evidence – Beyond a Reasonable Doubt
Criminal Law – Evidence – Identification

The Crown appealed the respondent's acquittal from 14 charges under the Criminal Code, which included the following: breaking and entering and committing an assault causing bodily harm; one count of robbery; two counts of theft under $5,000; theft of a motor vehicle; failing to keep a curfew; and possessing a weapon for a dangerous purpose. The charges resulted from a home invasion committed by C. and another individual. Two people entered a home where two people were sleeping in a bedroom. One of the victims indicated that he was hit with a baseball bat by C., who also had a handgun. The other victim said she was struck with a baseball bat in her bedroom. The lights to the bedroom were turned on and the victim recognized C., the long-time common law partner of her sister, as the person swinging the bat. The second assailant had his face covered with a bandana from just below eye level. The female victim testified that she recognized the second assailant as the son of C. and her sister, the respondent. She also indicated that C. called him by his family nickname four times. The male victim was not certain

as to the identity of the second assailant, but he did hear C. call him by his nickname at least three times. The issue at trial was the identity of the second assailant. The respondent testified and denied being away from the reserve to commit the offences. The respondent's grandmother and aunt supported the respondent's evidence. The trial judge found that the victims were quite confident in their identification of the respondent and they were sincere in their testimony, but the trial judge was left with a reasonable doubt given the traumatic nature of the incident and the paucity of supportive evidence linking the respondent to the crime. The trial judge found he could not categorically reject the respondent's alibi evidence as being unreliable or inaccurate. The trial judge had a reasonable doubt about the guilt of the respondent and acquitted him.

HELD: The appeal was dismissed. The trial judge's decision could be read as showing error in several respects; however, he did not make his finding of a reasonable doubt on those grounds. The trial judge indicated three times that he had to consider the totality of the evidence. The appeal court could not agree with the Crown's assertion that the trial judge failed to instruct himself properly about assessing the accuracy of the identification evidence or that he failed to consider the evidence on that issue as a whole. The Crown made two arguments with respect to the alibi evidence: 1) the trial judge misapprehended the defining features of alibi versus non-alibi evidence. At trial, the Crown only argued that the evidence was not reliable, not that it was not alibi evidence at all; and 2) the trial judge mis-instructed himself when he said he had to categorically reject alibi evidence before he could convict. The appeal court interpreted the trial judge's reasons as holding he was required to apply the W.D. analysis. The appeal court found that the evidence did not suffer the usual deficiencies present in many alibi cases. The respondent gave notice of the alibi defence early on, he testified, and other evidence supported his testimony. Even if there was an error on how the trial judge approached the evidence, the appeal court was not satisfied that the Crown discharged its burden of showing that the verdict would not necessarily have been the same if there had been no error in law. The appeal from acquittal was dismissed.

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R. v. Mullin, 2016 SKPC 114

Gordon, September 13, 2016 (PC16167)

Criminal Law – Blood Alcohol Level Exceeding .08

Criminal Law – Defences – Charter of Rights, Section 9 – Remedy for Breach

The accused was charged with driving over .08. The court determined that there was a breach of his s. 9 Charter rights because he was detained in cells longer than necessary. The accused argued that there was a clear nexus between the overholding and the service of the Certificate of Analysis because it was served on the accused just prior to him being released.
HELD: There was a nexus between the breach and the service of the certificate; however, a nexus does not automatically lead to a stay of proceedings. The accused could have been released earlier, but the six hours was not so great as to require a stay of proceedings. The appropriate remedy was a reduction in sentence. The accused was found guilty of driving over .08.

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R. v. Hrynkiw, 2016 SKPC 128

Green, December 16, 2016 (PC16138)

Criminal Law – Blood Alcohol Level Exceeding .08 – Approved Screening Device – Forthwith
Criminal Law – Breathalyzer – Demand for Sample – Reasonable and Probable Grounds
Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 24(2)

The accused was charged with driving over .08 and impaired driving. An officer was following the accused's vehicle and said that it was swerving within its lane. The officer turned on the emergency lights after the accused slowed from 110 km/h to 80 km/h upon reaching a bridge. It took a little bit for the accused to stop. The officer smelled alcohol coming from the inside of the vehicle. The accused said he'd had one or two drinks, the most recent being just before he left the restaurant he worked at. He said that he was swerving because he was texting and driving. The officer indicated that she did not believe the accused about texting and driving because she did not see a light from a cell phone screen when she was following him. The officer did not investigate whether the accused's cell phone had been recently used. The officer said that the accused staggered a bit when he was walking to the police vehicle. The officer said that she smelled alcohol on the accused's breath when they were standing outside the police vehicle. The officer said she delayed administering the ASD for a few minutes because the officer

believed the accused had recently consumed alcohol. The officer said that she thought it took about five minutes to drive from the restaurant to the traffic stop location. The actual distance was 14.6 km. When the officer tried to turn on the ASD, it was not working. The accused was arrested for impaired driving, given the breath demand, and taken to the detachment. The officer indicated that as she was talking to the accused in the police vehicle there were more and more signs of impairment. The issues were: 1) was the accused's s. 9 Charter right violated when the officer did not immediately attempt to administer the ASD, but instead waited to do so; 2) were the accused's ss. 8 and 9 Charter rights violated because the officer did not have reasonable grounds to make the breath demand under s. 254(3) of the Criminal Code; and 3) was there proof beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol.
HELD: The issues were determined as follows: 1) the demand for an ASD sample under s. 254(2) was lawful. Further, the court was satisfied that the officer had a factual basis to suspect that immediate administration of the ASD would yield inaccurate results. The court was not satisfied that the officer did not administer the ASD forthwith nor was the accused arbitrarily detained; 2) the court accepted that the officer honestly believed the accused was driving while impaired, but the court did not accept that her belief was rationally sustainable on an objective basis. The court found that at the point the officer brought the accused back to the police vehicle she only had a suspicion that the accused had alcohol in his body. The court was not satisfied that the additional observations in the police vehicle were sufficient to raise the reasonable suspicion that the accused had alcohol in his body to a reasonable belief that he was committing the offence of impaired driving. The accused's ss. 8 and 9 Charter rights were breached. The court undertook a s. 24(2) Charter analysis: the breaches were serious, but mitigated by the circumstances; the impact of the breach was moderate; and there was no doubt that society's interest in the adjudication of the case on its merits favoured inclusion of the Certificate of Analysis into evidence. After balancing the three factors, the court found that admitting the certificate would not bring the administration of justice into disrepute; and 3) in total, all the evidence left the court with a reasonable doubt that his impairment was proved as required by law. The accused was found guilty of driving over .08.

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R. v. Peck, 2016 SKPC 133

Gray, October 14, 2016 (PC16158)

Criminal Law – Blood Alcohol Level Exceeding .08 – Breath Demand – Reasonable and Probable Grounds
Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 10(b), Section 24
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08

The accused was charged with driving while over .08 and impaired driving. An officer saw the vehicle the accused was driving go through a stop sign at 11:33 pm. The officer said the accused side-shuffled when he got out of the vehicle. The officer noted alcohol on the accused's breath and he appeared remorseful when accused of drinking and driving. The officer did not use the ASD. The officer agreed that the video recording of the stop did not show the accused had any difficulty walking. The officer said that the side-shuffle was in an area not shown on the video. The accused testified that he had one beer at 10:00 pm and another a half an hour later. He said the roads were ice-packed from rain and then snow, causing him to slide through the intersection and then drive slowly. At the detachment, the accused said that he wanted to contact his lawyer. The officer located the number and dialed the phone. The officer left a message indicating that the accused was at the police station. The accused was advised that his lawyer was not available and he said that he did not want any other lawyer. The officer did not know where he got the number for the lawyer, but agreed that it was not the number shown in two phone books, nor was it the cell phone number listed for the lawyer. The accused was told that if he wanted to call a lawyer at any time he should just let the officer know. The Prosper warning was read to the accused at 12:38 am. The accused indicated that he wanted to call a lawyer when the breath technician arrived. The accused spoke to Legal Aid and the accused said that he was absolutely satisfied with the call and said he did not want to call any other lawyers. According to the accused, he thought that Legal Aid was his only choice, but agreed that no officer told him it was. The accused was never provided with a list of lawyers' numbers or a phone book. The issues on voir dire and trial were as follows: 1) were there violations of ss. 8 and 9 of the Charter; 2) was there a violation of s. 10(b) of the Charter; 3) should the Certificate of Analysis be excluded; 4) was the presumption of accuracy set out in s. 258(1)(c) rebutted; 5) did the Crown prove the offence of driving while over the legal limit; and 6) was the offence of impaired driving established.
HELD: The issues were determined as follows: 1) the officer held an honest, subjective belief that he had reasonable grounds to

require the accused to provide breath samples. The court concluded that the grounds the officer relied on could not objectively sustain the breath demand. The detention was not justified and the subsequent breath samples were not lawfully obtained; 2) the accused was not given a reasonable opportunity to contact counsel of choice based on one phone call to a number not listed to that counsel. The accused established that his s. 10(b) right was violated; and 3) the court analyzed the three grounds set out in Grant: a) the court found that the compounding of the violations increased the seriousness of the violations and tended to favour exclusion of the evidence; b) the accused did tell the officer that he was absolutely satisfied with the advice received from Legal Aid. The breach of the accused's s. 10(b) Charter rights, therefore, could not have had a serious impact. The accused's detainment on questionable grounds did, however, have a significant effect on the accused. The second ground also favoured exclusion; and c) societal interests in pursuing drinking and driving prosecutions is high. The third factor favoured admission of the evidence. The court concluded that the admission of evidence under these circumstances would result in the administration of justice being held in disrepute, and the Certificate of Analysis was excluded from evidence; 4) the accused indicated that the officer had left the room he was in before both breath samples were taken and the accused did not recall whether he had burped, belched, or vomited during that time. The court was satisfied that the accused was not under constant observation in the minutes preceding the breath samples. The court did not make any ruling on the matter because it was before the Court of Appeal and because the Charter findings rendered it moot; 5) the Crown failed to prove the driving over .08 charge because there was no admissible evidence on the breath sample results; and 6) the court had a reasonable doubt as to whether the ability of the accused to operate a motor vehicle was impaired, even slightly, by the consumption of alcohol. The accused was found not guilty of driving while impaired.

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R. v. Nelson, 2016 SKPC 140

Gordon, October 20, 2016 (PC16164)

Criminal Law – Sentencing – Pre-Sentence Report
Criminal Law – Sentencing – Robbery
Criminal Law – Sentencing – Sentencing Principles

The accused pled guilty to robbing money from a credit union and using threats of violence to two people while doing so, contrary to s. 344(1)(b) of the Criminal Code. The accused entered the credit union at 10:30 am. He approached a teller and handed her a note advising her not to set alarms or she would get it first. The note also requested money and that she only had three minutes. The accused acted like he was on the phone and made references to the supervisor, saying if there was anything funny they would get hurt. The accused obtained $100,051 in cash and all but $3,340 was returned. In a warned statement that the court ruled as voluntary, the accused indicated that he was just walking around and by chance went to the credit union to take out money. The accused did not use a weapon, had no prior criminal record, and complied with all release conditions. The accused married his childhood sweetheart in 1993 and had one child. In 2008, the accused learned that his wife had met another man online. They sold a house and the wife spent the $90,000 profit without providing any receipts. The accused took out a loan to pay his wife the equity in another house and his daughter became involved in a toxic relationship. The accused suffered financially and lost his house and car, still having debts of $60,000. The accused was in a new positive relationship and was working more than full-time hours, earning $1,000 per week. The accused was attending counselling for depression and abuse. The accused apologized and expressed remorse. He was 52 at the time of the offence. The accused argued that the range for sentences was between one and three years, but that a suspended sentence and probation was also available.
HELD: The mitigating circumstances were: the accused did not use a weapon; he had no prior criminal record; and he complied with all release conditions. The aggravating circumstances were: the offence was serious; the teller had to return to the vault for more money because the accused was not satisfied with the initial amount; the threats; credit unions are vulnerable victims; the offence occurred during business hours when other members of the public could have been present; there was a note; there was some sophistication because he asked for small bills and did not park in front of the bank; and the impact statements of the victims. The court discussed the proportionality principle of sentencing as it applied to the case. Specific deterrence was not found to be a real concern nor was it necessary to separate him from society for the sake of public protection. The court indicted that the sentence must nonetheless give adequate attention to the principles of denunciation and general deterrence. The court reviewed the principle of parity in sentencing. The court held that a fit sentence was two years less one day incarceration. He was given eight days of credit for the five days he spent on remand. Ancillary orders were also made.

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R. v. Weiers, 2016 SKPC 159

Martinez, December 5, 2016 (PC16130)

Criminal Law – Controlled Drugs and Substances Act – Trafficking – Cocaine – Acquittal

The accused was charged with trafficking in cocaine, contrary to s. 5(1) of the Controlled Drugs and Substances Act, and of uttering threats to cause bodily harm, contrary to s. 264.1(1)(a) of the Criminal Code. The trafficking charge arose because the accused's two self-confessed accomplices informed the police that the accused stored significant quantities in their home. One of the accomplices testified that she had never used cocaine but that the accused brought it to her home and packaged it there. The other accomplice testified that he used cocaine and that the accused had taught him how to break up cocaine, weigh and package it. Both accomplices testified that there wasn't any cocaine in their house on the date of the offences with which the accused was charged nor was there any cocaine in it when the police came to interview them. Regarding the offence of uttering threats, the accused had sent text messages to the brother of one of the accomplices. The accomplice's brother had been in their house when he received the text and showed it to them. The accused then arrived and left with the brother. The accomplices feared for his safety so they contacted the RCMP. The accomplice's brother did not testify.
HELD: The accused was found not guilty of the trafficking charge and was convicted on the charge of uttering threats. The court found with respect to the first charge that the offence of trafficking in cocaine could be made out when someone gives it to another person to hold onto for them. However, in this case, there was no evidence about the nature of the substance the accused had his accomplice hold for him except that he told them it was cocaine. The court could not conclude beyond a reasonable doubt that the substance was in fact cocaine. Regarding the second charge, the court reviewed the contents of the text message. It found that the accused had sent the message and that the words constituted a threat of bodily harm and that he intended the recipient to take it seriously.

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R. v. Musey, 2016 SKPC 160

Green, December 16, 2016 (PC16139)

Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 10(b)
Criminal Law – Breathalyzer – Demand for Sample – Reasonable and Probable Grounds

The accused was charged with driving over .08 contrary to s. 253(1)(b) of the Criminal Code. The officer saw a vehicle driven by the accused approach him. It had a loud muffler and was accelerating quickly. The officer turned around and followed the vehicle. He engaged the emergency lights when the vehicle accelerated quickly after a light turned green. The officer said that he stopped the vehicle to check for valid licencing and registration, insurance and sobriety. The officer did not write down the reason for the stop in his notes or general report. The officer could smell alcohol coming from the accused's breath, although he indicated that he had not been drinking. When the accused failed the ASD test, the accused was arrested for impaired driving and given the breath demand before being taken to the detachment. The officer testified that he read the accused his rights to counsel from a card that he also read at the voir dire. The officer said that the accused said "Yep" when asked if he understood his rights and that he indicated he did not want to contact a lawyer. The officer maintained that he gave the accused his rights to counsel even though it was not included in his notes. The accused said that he remembered the officer mentioning something about a lawyer, but he did not recall anything about Legal Aid duty counsel nor information about how he might be able to contact a lawyer. The accused also denied that he had been given the breath demand. The accused argued that his Charter rights were violated in three ways: 1) his s. 9 right was violated because the officer did not have lawful authority to stop the vehicle; 2) his rights under ss. 8 and 9 were violated because the officer was not entitled to rely on the ASD fail result in arresting the accused for impaired driving and reading him the s. 254(3) breath demand; and 3) his s. 10(b) rights were violated in the manner that he was advised of his right. The officer testified on the voir dire with respect to all alleged breaches and the accused testified with respect to the alleged s. 10(b) breach.
HELD: The alleged Charter breaches were considered as follows: 1) the court was satisfied that the officer's reasons for the stop were as indicated and were allowed pursuant to s. 209.1 of The Traffic Safety Act. The accused's s. 9 Charter rights were not violated by the traffic stop; 2) the accused argued that the officer should have delayed administering the ASD test. The court

disagreed. The officer had a reasonable suspicion that the accused had alcohol in his body because the officer smelled alcohol coming from the accused's breath and he had difficulty getting his driver's licence out of his wallet. The officer also acted appropriately when he proceeded to administer the ASD when he did. The accused's ss. 8 and 9 Charter rights were not violated as alleged; and 3) the court concluded that the officer advised the accused of his right to retain and instruct counsel in the words he testified to, which was consistent with the requirement of the law. The court was not satisfied that the accused accurately recalled what the officer said to him that night. The court found that the officer satisfied the informational component of the accused's right to counsel and the accused validly waived his right. Therefore, the court held that the accused's s. 10(b) Charter rights were not violated. There were no breaches of the accused's Charter rights.

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R. v. Toma, 2016 SKPC 162

Scott, December 1, 2016 (PC16140)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Care or Control
Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Care or Control

The accused was charged that he had care or control of a vehicle in the following cirmcumstances: 1) while his ability to operate it was impaired by alcohol, contrary to s. 253(1)(a) of the Criminal Code; and 2) while his blood alcohol content exceeded .08, contrary to s. 253(1)(b) of the Code. The accused was driving on a gravel road at approximately 2:15 am when he missed a turn and drove his vehicle into a slough. He testified that he was frightened but delayed calling for help for over an hour because he thought that he would figure out what to do. He testified that he turned off the vehicle and called a tow truck and waited a considerable amount of time for it to arrive. The tow truck operator testified that he arrived at 4:00 am and found the accused in the driver's seat with the engine running. He pulled the vehicle out of the water and onto the incline of a ditch beside the road. The accused remained in the passenger seat with the engine running when the police arrived at 4:30 and he then turned it off. The officers testified that the accused said that he had had a couple of drinks approximately one to one and one-half hours before he drove off the road. He failed the ASD test

and was arrested for care or control and a breath demand was made. The officers observed that the accused had red bloodshot eyes and that they smelled alcohol on his breath. The first breath sample was taken at 5:40, showing a reading of 140. The issues were as follows: 1) whether the accused had the care or control of his vehicle; 2) whether the Crown could rely on the Certificate of Qualified Technician to establish the accused's blood alcohol level at the time of the offence; and 3) whether the accused's ability to operate a motor vehicle was impaired by alcohol. HELD: The accused was found guilty of the second count but a judicial stay was entered regarding the first count to take effect at the expiry of all appeal periods. The court found the following with respect to the issues: 1) the accused had rebutted the presumption in s. 258(1)(a) of the Code when his vehicle was in the slough. He was not in the driver's seat for the purpose of setting the vehicle in motion. Once the vehicle was towed out of the slough, the court found that the accused was in actual care and control. The vehicle was operable, the engine was running and there was a realistic risk of danger that he would decide to drive it; 2) the time at which the accused stopped having care and control of his vehicle was 4:30 am. The first breath sample was taken within the two-hour period contemplated by s. 258(1)(c) of the Code. The Crown could rely upon the Certificate of Qualified Technician to establish his blood alcohol level at the time that the accused had care or control of the vehicle. The accused was found to be in care or control when his blood alcohol level exceeded .08; and 3) the accused was found to have had care or control of his vehicle while impaired based on the evidence.

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R. v. Marckoski, 2016 SKPC 163

Gordon, November 24, 2016 (PC16161)

Criminal Law – Controlled Drugs and Substances Act – Possession and Trafficking in Narcotics
Criminal Law – Defences – Charter of Rights, Section 10(b)

The accused was charged with possessing methamphetamine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act (CDSA), and possession of marihuana, contrary to s. 4(1) of the CDSA. The accused argued that his s. 10(b) Charter rights were violated and that the remedy should be exclusion of any statements made subsequent to the breach. The accused was a passenger in a vehicle that was

stopped. He was arrested as a result of outstanding warrants. A search incident to arrest revealed a folding knife and BB gun. He was arrested on weapons charges and the accused was read his rights to counsel. The accused indicated that he wanted to call a lawyer. The accused was asked if he wanted to call a lawyer at the detachment and he said no, that he would call a lawyer before court. The vehicle was searched and cannabis marihuana was found in the centre console while smaller plastic bags with three to four crystals in each were found under the front passenger seat where an officer said the accused had put his bandanna. The accused was woken up in cells and arrested for the trafficking charge. The accused was given his rights to counsel again, and he said that he did not want to call a lawyer. The accused asked about the whereabouts of the driver of the vehicle and told the officer that she should not be in cells because everything was his. The officer testified that he did not ask for the information from the accused, that the accused was not impaired by drug or alcohol, and that he did not make any threats or promises to the accused. The officer agreed that he did not give the accused a Prosper-type waiver. The officer did not make notes about the accused's statement until a few days later. HELD: The court found that there was a breach of the accused's right to counsel because the accused had indicated a desire to contact a lawyer and then said he would before court. The court held that the accused should have been given a Prosper warning. According to the court, the remedy would be to exclude any further evidence, but there was no further evidence obtained after the breach. The officer was found to follow proper procedure by giving the accused his rights to counsel when he was subsequently charged with offences under the CDSA. The accused said "no" when asked if he wanted to contact a lawyer. The court concluded that there was obviously no reason for the officer to conclude that the accused wanted to or was thinking about or had questions with respect to contacting a lawyer given his new charges. The accused's s. 10(b) rights were clearly not breached when he was advised of the charges under the CDSA. The officers implementational duty was not triggered because the accused said that he did not want to contact a lawyer. The Charter application was dismissed.

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R. v. Marckoski, 2016 SKPC 164

Gordon, December 15, 2016 (PC16162)

Criminal Law – Controlled Drugs and Substances Act –

Possession and Trafficking in Narcotics
Criminal Law – Evidence – Credibility

The accused was charged with possessing methamphetamine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act (CDSA), and possession of marihuana, contrary to s. 4(1) of the CDSA. The accused was a passenger in a vehicle that was stopped. As the vehicle was being stopped an officer saw the accused take off a blue bandanna and said he placed it under the passenger seat. He was arrested as a result of outstanding warrants. A search incident to arrest revealed a folding knife and a BB gun. Over $1,000 was also located on the accused. He was arrested on weapons charges. The co-accused indicated that there would be cannabis marihuana in the console of the vehicle. The vehicle was searched and cannabis marihuana was located in the centre console and smaller plastic bags with three to four crystals in each were found under the front passenger seat where the accused had put his bandanna. The accused was woken up in cells and arrested for the trafficking charge. When the accused was presented with a recognizance on previous charges, he asked about the whereabouts of the driver of the vehicle and told the officer that she should not be in cells because everything was his. The officer receiving the confession did not write it down in his notes but only included it in his report a few days later. Additional items seized from the vehicle included: cell phones; notebooks with names of buyers, amounts owing and what was purchased; pipes; bongs; etc. Two of the cell phones and one notebook was located in the co-accused's purse. The accused testified that the co-accused had picked him up to hang out for the day and that he had only been in the car about two minutes when they were stopped by the police. He said that he had used cocaine and drank beer that day. He said that the cash found on his person was from being paid cash for working for his cousin. He denied any of the money was from selling drugs and he said he did not know there were drugs in the car. He denied putting drugs under the passenger seat. He also denied that he told the officer that the drugs were his when he was woken up in cells. The accused did acknowledge taking off the blue bandanna. The accused said he had the weapons because he was scared of a man whose girlfriend he had slept with. The issue was whether the accused had knowledge and control of the drugs found in the vehicle and therefore whether he had the drugs in his possession.

HELD: The court undertook a W.D. analysis because credibility of witnesses was a significant issue. The court was not satisfied beyond a reasonable doubt that the Crown proved its case. The most critical pieces of evidence that the Crown relied on were the drugs under the passenger seat, the marihuana in the centre

console, and the blue bandanna. The court did accept that the officer saw the accused put the bandanna under the passenger seat. However, the officer was found to be mistaken because other officers and the accused say the bandanna was in the cup holder. The marihuana was in the closed console and the methamphetamine was under the passenger's seat, not in plain view. There was no evidence that the accused handled the packages in any way. The court accepted the accused's evidence that he did not see the blue bong in the back seat and noted that it would not prove possession of the drugs in any event. The court could also not totally reject the accused's explanations for having so much cash and weapons on him. The court was troubled that an officer with as much experience did not take the time to write the confession from the accused in his notes. The court did not accept the officer's explanation that he knew he would not forget what the accused said so did not need to write it down. The court was still left with a reasonable doubt when all of the evidence was considered, including the alleged confession of the accused. The accused was found not guilty.

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R. v. Armstrong, 2016 SKPC 165

Baniak, December 13, 2016 (PC16147)

Criminal Law – Defences – Duress
Criminal Law – Firearms

The accused was charged with a total of 25 offences over four informations. The majority of the offences were weapons or firearm offences contrary to s. 86 to s. 96 of the Criminal Code. There were also four counts of offences contrary to s. 117.01(1) of the Criminal Code, possessing a firearm while prohibited from doing so by reason of an order made pursuant to s. 109(1) of the Criminal Code. The actus reus and mens rea of the offences was proven, but the accused argued that she committed the offences under duress. An officer testified that he was involved in the pursuit of a vehicle. At one point the vehicle stopped and the back seat passenger got out. The vehicle continued driving, at times with disregard for traffic laws. Firearms were thrown out of the vehicle. The front seat passenger, the accused, jumped out of the vehicle and ran from the police. The officer and his partner chased the passenger, and when they caught her, she had a folding knife inside a pocket. There were various items located in the vehicle, which included ammunition, knives, crystal meth, and bear spray. The driver of the vehicle was a male in a

relationship with the accused. She met the driver of the vehicle about a month after being released on previous charges. They had a six-week relationship and began smoking meth together the day they met. The accused said that the male told her to throw two guns out the window. She said that she believed if she did not do as he told her he would shoot her. The accused also indicated that she took a jacket from the back seat and put it on, and unknown to her the jacket had a knife in it. She said the male told her to stay in the vehicle when the other passenger got out. The accused acknowledged that the male wrote to her while she was in jail and that she wrote to him. They also had a conversation while in cells at the courthouse prior to the trial. The accused argued that both the statutory defence of duress (s. 17 of the Criminal Code) and the common law defence of duress were applicable. She asserted that she was compelled to commit the offences because of fear of the male driver of the vehicle. HELD: The court found that the accused knew of and had possession of the rifle, shotgun, ammunition in the cup holder, and knife wedged between the front seat and the console. The court found that she did not know or have possession of the ammunition in the back seat bag, the ammunition in the make-up bag, knives in the back seat, or bear spray. The court also had reasonable doubt as to the accused having knowledge of the folding knife in the jacket pocket or the crystal meth. The court proceeded to examine the elements of duress: 1) the male did not explicitly threaten the accused, but the court did find that it was reasonable for the accused to fear that he would inflict violence on her if she disobeyed him because of their past. An implicit threat existed; 2) the accused's belief that she would be victimized if she did not obey the male was reasonable under the circumstances; and 3) the court found that the accused had multiple opportunities to leave the relationship prior to the day of the offences. There were also opportunities to exit the vehicle with minimal risk during the chase. One example is when the vehicle stopped and the other passenger got out. The accused said she did not get out on these occasions because she was scared of getting hit by other vehicles, but the court did not believe her. She also ran from the police and did not stop when they asked her to. The court did not examine the remaining three elements. The defence of duress was not available to the accused. The accused was found guilty of seven offences.

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R. v. Khan, 2016 SKPC 167

Kovatch, December 13, 2016 (PC16137)

Criminal Law – Assault – Assault by a Police Officer
Criminal Law – Evidence – Credibility

The accused was charged with assault after events that occurred while he was on duty as a probationary constable with a police service. The accused attended a restaurant after the manager called when she was suspicious of possible drug activity by their dumpsters. A witness, an intoxicated young man, testified that he was outside for a cigarette when the accused yelled, "Stop or I'll shoot". He indicated that he ran, stopped, and was taken down by the accused. The witness said he was cuffed and the officer pushed his face into the ground three times and told him to quit resisting. He had marks or injuries to his face from the pavement. Two other officers attended the scene. One of the officers said that after the cuffs were on the witness the accused said, "There you go. That's what you get for running from the police" and pushed his head and face into the pavement. When the officer said he would take over, the accused resisted and pushed the witness's face into the pavement two more times. The officer said that all of the pushes occurred after the cuffs had been placed on the witness. The other officer that attended testified to similar events as the first officer. The accused said that he chased the witness who then turned as if to fight the accused. The accused decided to take him down because he was resisting. He denied that he pushed the witness's face into the pavement. The accused admitted to saying "this is what happens when you run from the police", but said that he was just referring to things getting difficult for everyone when you run from the police. The Crown's argument was that the accused used gratuitous or retributive violence against the accused. HELD: The court concluded that the accused had grounds for arrest, there was no assault by the takedown of the witness, or the arrest or placement of the cuffs. The court undertook a W.D. analysis regarding the conflicting evidence. The court held that it could not accept the accused's evidence that he did not push the witness's face into the pavement. The court accepted the Crown's evidence. The court made its conclusion for the following reasons: the accused's approach to the entire incident showed some real inexperience, which led to frustration, such frustration being taken out on the witness; the act of pushing the witness's face into the pavement was more consistent with the accused's statements than was the accused's explanation for why he said "That is what you get for running form police"; the witness's testimony and the officers' testimony was consistent; and two experienced officers testified that the accused pushed the witness's face into the pavement after he was handcuffed. The court was satisfied beyond reasonable doubt that the Crown proved the charge and found the accused guilty of assault.

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R. v. Goyak, 2016 SKPC 168

Rybchuk, December 20, 2016 (PC16148)

Criminal Law – Assault – Sexual Assault
Criminal Law – Fitness to Stand Trial – Limited Cognitive Test
Criminal Law – Unlawful Confinement

The accused was charged with sexual assault and unlawful confinement contrary to ss. 271 and 279(2) of the Criminal Code, respectively. The issue was whether he was fit to stand trial. An expert psychologist prepared a Psychiatric Report and testified by video. The expert indicated that the accused's cognitive disabilities were significant enough to disrupt his ability to learn. The accused suffered from a mental disorder from as early as birth. He could not read or write, not even his name. The accused was 52 years old. The expert diagnosed him with an Intellectual Disability Disorder and an Unspecified Anxiety Disorder. The expert's overall opinion was that the accused was unfit to stand trial.
HELD: An accused person is fit to stand trial if he or she has at least a limited cognitive capacity to be able to understand the nature, object, and possible consequences of the proceedings and to communicate with counsel. The court examined the branches of the fitness test: 1) the expert indicated that the accused had difficulty understanding the roles of the various people in court and concluded that he did not understand the nature or object of the proceedings; 2) the accused had an impaired ability to estimate or even understand what the consequences were with the possible outcomes of the proceedings; and 3) the third branch of the fitness test in Saskatchewan decision in Jobb was interpreted to mean that the accused only had to be capable of recounting facts of the alleged offences, whereas in Ontario the branch also includes the ability to seek and receive legal advice so that the accused can participate in the proceedings in a meaningful way. The court found that the accused did not meet the test at either end of the spectrum. The expert found the accused incapable of communicating the essential facts of the case to a lawyer. He was also incapable of seeking or receiving legal advice and participating in the proceedings in a meaningful way. The court accepted the expert's findings. The accused did not meet the limited cognitive capacity standard under any of the three branches of the fitness to stand trial test. The accused was unfit to stand trial and the court directed the matter be remitted to the Saskatchewan Review Board for disposition

hearing.

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R. v. Salmond, 2016 SKPC 169

Cardinal, December 14, 2016 (PC16141)

Criminal Law – Motor Vehicle Offences – Impaired Driving

The accused was charged with operating a vehicle while his ability to do so was impaired by alcohol, contrary to s. 253(1)(a) of the Criminal Code. The accused was stopped by an RCMP officer after he had followed the accused's vehicle and observed it weaving in and out of its lane. There were no lines on the road and there was no traffic. The officer testified that the accused's breath smelled of alcohol, his eyes were red and his speech was slurred. The accused seemed confused, and when asked how many drinks he'd had, he replied that he did not know and probably too many. The officer formed his grounds and arrested him for impaired driving. When he was asked to leave his vehicle, the accused was unsteady on his feet. The officer described the accused as having stumbled twice at the detachment. The video from the detachment showed that the officer's recollection of what had happened was not accurate and did not show that the accused had any trouble walking. The accused testified that he had had six glasses of wine over six hours on the night in question. He stated that he did not recall the conversation with the officer about the number of drinks he'd had. A friend of the accused testified that she was in attendance at the same function as the accused and was the designated driver for his group. She did not notice any signs of impairment before the accused left the function or she would have stopped him. She saw him later, before the officer stopped him and said that he spoke and walked normally.
HELD: The accused was found not guilty. The contradiction between the officer's recollection of what happened and what was shown on the video led the court to question the accuracy and reliability of his evidence regarding the manner of the accused's driving. The evidence was insufficient to convince the court that the accused's ability to operate a motor vehicle was impaired by alcohol.

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R. v. S. (T.A.), 2016 SKPC 173

Schiefner, December 16, 2016 (PC16143)

Criminal Law – Assault
Criminal Law – Defences – Self-defence
Criminal Law – Youth Offender

The accused was charged with committing an assault on a youth care worker, L., at a therapeutic group home she was residing in and with breaching the terms of her youth sentence for failing to keep the peace and be of good behaviour. The accused admitted to kicking, punching, and biting L. when her and another youth worker were attempting to restrain her. She argued that she was acting in self-defence because the workers did not have authority to restrain her. The accused was agitated and said that she wanted to die and began heading for the back door. Youth workers followed the accused when she left and they eventually grabbed her arms and began walking her back to the home. The accused started kicking L. and tried to pull her arms away. L. and another youth worker tried to place the accused in a two-person restraint and all three ended up on the ground with the accused's face in the mud. The accused got an arm free and tried to punch L. in the face more than once. She then bit L. on the arm and left a bruise and bite marks. The Crown relied on s. 52 of The Child and Family Services Act to authorize youth care workers to restrain youth in facilities in light of the accused's previous history of self-harm and her indication that she wanted to die. The accused argued that youth care workers do not stand in the place of a parent, and therefore, the use of reasonable force by way of correction is not authorized by s. 43 of the Criminal Code. HELD: The accused was acquitted because the court was not satisfied that the workers had the authority to restrain the accused. The accused was found to be acting in self-defence and her actions were not unreasonable or disproportionate to the force being applied against her. The court was satisfied that the accused said words indicative of self-harm even though she denied it. The court was satisfied that both the subjective and objective elements set forth in s. 34(1) of the Criminal Code were present. The accused's actions were responsive to a non-consensual force being applied against her. The requisite trigger was present: the accused's subjective belief that she was being assaulted. The court had a reasonable doubt that the accused's actions were not reasonable under the circumstances. The court concluded that L. did not acquire the status of standing in place of a parent by either of the two means: 1) she did not assume parental obligations, including financial obligations; and 2) she had not been delegated parental rights by the natural parent. The Minister responsible for The Child and Family Services Act

stands in place of a parent, pursuant to s. 52 of the Act, but the court was not satisfied that the status was acquired by or delegated to anyone else. The court concluded that L. or the other youth care workers were not authorized to use physical force to restrain the accused from leaving the home. The Residential Services Manual gave the workers the authority to use physical restraint to prevent young persons from leaving a residential facility under the circumstances, but the court did not find the contemplated authority to exist in law or to be properly delegated to the individuals in this case.

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R. v. B. (A.J.), 2016 SKQB 373

Danyliuk, November 16, 2016 January 17, 2017 (addendum) (QB16329)

Criminal Law – Appeal – Fresh Evidence
Statutes – Interpretation – Summary Offences Procedure Act, 1990, Section 15

The appellant was convicted after trial for the summary offence of speeding contrary to a city bylaw. When the trial started, the appellant was not present and the trial judge asked his lawyer how he wanted to proceed. The lawyer said that the trial should proceed. The Crown called the police officer who had observed the appellant speeding and given him the ticket. The appellant's lawyer cross-examined the officer whether he had accelerated quickly in order to catch up with the appellant's vehicle. The officer agreed that he had. No evidence was called for the appellant and his lawyer's closing submission related to the issue of reasonable doubt and/or credibility, stating that it was not believable that the police officer had sped up to 100 km/h in order to keep up to the appellant's vehicle. The trial judge found the appellant guilty. The appellant appealed on the grounds that because he had been taken ill and hospitalized on the day of the trial and could not contact his counsel for over a week, a new trial should be ordered, and that in the interests of justice the conviction should be set aside. The appellant also filed an affidavit on the appeal in which he averred that he had been aware of the trial date, planned to attend and had informed his lawyer that he would be present unless he was called to work. It was only as a result of his sudden illness and inability to contact his lawyer that he had not attended the trial. The appellant also contradicted the police officer's version of events. The issues were as follows: 1) whether the affidavit was admissible as fresh

evidence on the appeal; 2) whether the appellant's personal attendance at trial was required or waived; and 3) whether a new trial should be ordered.

HELD: The appeal was dismissed. The court found the following with respect to the issues: 1) it would accept and consider the appellant's affidavit for the purposes of the appeal. The court did so with reluctance because no notice was given by counsel of the application to adduce fresh evidence. No evidence had been presented as to why counsel had not sought an adjournment of the trial but elected to proceed. As the appellant had not suggested the trial judge had erred, the only argument available was that the appellant's conviction was a miscarriage of justice under s. 686 of the Criminal Code. The Court found that the appellant had not satisfied the criteria for due diligence required for the admission of fresh evidence set out in R. v. Palmer. However, if Palmer did not apply because a true miscarriage of justice was alleged arising from a trial irregularity, the court would consider the affidavit; and 2) the appellant "appeared" for the purposes of The Summary Offences Procedure Act, 1990 because his lawyer was present. His personal appearance was not required and the position taken by his counsel at trial amounted to a waiver; and 3) a new trial should not be ordered as there was no miscarriage of justice. The appellant's lawyer already knew that the appellant might not be present at his trial and had contested the charge.

ADDENDUM dated January 17, 2017: [1] Subsequent to the release of my judgment on this appeal (2016 SKQB 373 dated November 16, 2016) appellant's counsel raised a concern with the local registrar, a matter that was subsequently directed to my attention. Specifically, the concern raised was that certain medical information pertaining to the appellant set out in paragraph 16 was unnecessarily included in the decision.

>>>[2] Procedurally, this sort of request for amendment to a judgment ought to be made to the judge making the judgment or order, as opposed to anyone else. See for example: Storey v Zazelenchuk (1985), 1985 CanLII 2365 (SK CA), 40 Sask R 241 (Sask CA); Royal Bank of Canada v Viloria, 2014 SKQB 424 (CanLII), 464 Sask R 177.

>>>[3] At the time of filing the evidence or arguing this appeal the appellant did not seek any publication ban or other restriction on this evidence, evidence which the appellant supplied on this appeal. The matter is one of public record and while the information is sensitive, the appellant was made substantially anonymous through the use of initials as opposed to his name.

>>>[4] Still, the inclusion or deletion of this medical information is neither here nor there to the gravamen of the decision. It was originally included simply as part of the full review of the

evidentiary record which generally occurs on summary conviction appeals, nothing more. If the appellant is concerned about any effect this could have on his reputation, the removal of that language from the judgment should satisfy such concerns without jeopardizing the nature and meaning of the appeal judgment.
>>>[5] Accordingly I hereby order and direct that in paragraph 16 of the judgment on appeal, 2016 SKQB 373, dated November 16, 2016, where para. 3 of the appellant's affidavit is discussed, that the entire second-last sentence (beginning with the words "The physician's statement . . .") be deleted from same and that this amendment be forwarded to the publishers of such judgments, to be amended accordingly on their public websites.

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R. v. Branscombe, 2016 SKQB 394

Turcotte, December 6, 2016 (QB16396)

Criminal Law – Appeal – Conviction
Criminal Law – Right of Election
Criminal Law – Firearms Offences
Criminal Law – Jurisdiction

A process server attempted to serve the appellant while he was combining. The appellant stood on the elevated platform of the combine holding a long barrel rifle, and he allegedly raised the rifle when the process server approached the combine. The appellant was charged with pointing a firearm at a person, contrary to s. 87 of the Criminal Code. Later the same night, the appellant was stopped on the highway and charged with possessing a firearm when he did not have a licence, contrary to s. 92(1) of the Criminal Code. He said that he was on his way to the RCMP detachment to surrender the firearms. The s. 87 charge is hybrid, permitting summary or indictable proceedings. The s. 92 charge is purely indictable, but not within the exclusive jurisdiction of the superior court under s. 469 nor is it within the absolute jurisdiction of a provincial court judge under s. 553. On the first appearance, an officer acting for the Crown elected to proceed summarily on both charges. The appellant was entitled to an election on the s. 92 charge, but he was not given it. The appellant was not represented and entered not guilty on both charges and the matter was set for trial. The appellant had counsel at trial, but the error regarding the election was not realized until the matter was under reserve after trial. The judge indicated that, because she had not yet rendered her decision,

she was not functus and continued to have jurisdiction over the matters. The s. 92 charge was adjourned for election and plea. She convicted the appellant on the s. 87 charge and sentenced him to a four-month conditional sentence order followed by a six-month probation order. The appellant appealed the conviction and sentence on the ground that the trial judge did not continue to have jurisdiction over the matters after it had been brought to her attention that he had been denied his right of election.
HELD: There was a failure to provide the appellant with his right of election as required by s. 536(2) of the Criminal Code. The proceedings before the trial judge were therefore a nullity. A summary conviction offence can be on the same information as an indictable offence. When there is more than one count, and there is not an application to sever a count in the information, an accused has to make his election on the information as a whole, not on each count in the information. In this case, without the appellant's express waiver to a preliminary inquiry, there was a procedural irregularity that resulted in the loss of jurisdiction to conduct a trial or a preliminary hearing. The trial was a nullity. The nature of the procedural irregularity could not be cured by s. 686(1)(b)(iv). The conviction was set aside and both counts under the information were remitted back to the Provincial Court for election and plea.

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R. v. Strongquill, 2016 SKQB 397

Gunn, December 12, 2016 (QB16386)

Criminal Law – Manslaughter – Sentencing

The accused pled guilty to unlawfully causing the death of the 16-year-old victim, thereby committing manslaughter contrary to s. 236 of the Criminal Code. The accused, who was 21 at the time of the offence, had been drinking with some other young men on the day in question. When they met the victim on the street, the group chased him and the accused stabbed him once with a hunting knife. The group left the victim to die. The accused had no prior criminal record and no involvement with any gangs. Although he was intoxicated at the time of the offence, he rarely drank. He had a wife and a two-year-old daughter, both of whom he supported through his full-time employment. The accused, a member of the Keeseekoose First Nation, was one of 11 children who were raised by parents who were survivors of residential school. They abused their children and each other

and were addicted to alcohol. The accused was apprehended at the age of eight, and on 14 times afterward, and placed in seven different homes. He became a long-term ward of the Ministry of Social Services at 12. He was placed in predominantly white homes in white communities and felt overt racism. The accused accepted responsibility for his act. He was completing his GED while in custody. He was assessed as being at a low risk to re-offend. The Crown and the defence made a joint submission that the accused should receive an eight-year sentence minus credit at a rate of 1.5 for the time spent on remand.
HELD: The accused was sentenced to eight years in prison less 676.5 days in custody resulting in a sentence of six years and 51 days. The court regarded the mitigating factors to be that the accused did not have a criminal record. He expressed remorse to the victim's family and accepted responsibility for his acts at an early date in the proceedings. The accused supported his family and contributed to society through employment. His alcohol consumption was not a mitigating factor but provided an explanation for the senseless violence of the act. The accused had experienced a number of the Gladue factors. The aggravating factors were that the accused was armed and part of a bigger group in the attack against the victim, whom he did not know.

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R. v. Carter, 2016 SKQB 403

Megaw, December 15, 2016 (QB16392)

Criminal Law – Controlled Drugs and Substances – Possession for the Purpose of Trafficking – Cocaine
Criminal Law – Controlled Drugs and Substances – Possession – Constructive or Actual

The accused was charged with possession of cocaine for the purpose of trafficking when one kilogram (brick) of cocaine was found in her vehicle. A confidential informant gave police information that the accused and another were to travel from Regina to Vancouver to pick up cocaine. The accused was under surveillance for the entire trip. The accused and another travelled in the accused's car to British Columbia in 18 hours and proceeded directly to a residence. They were at the residence for seven hours when they drove back to Regina in the accused's vehicle, again with no extended stops. Near Regina, the passenger got out of the accused's vehicle and into a truck. The police stopped the accused's vehicle and the truck. A search of the accused incident to arrest revealed a blue overnight bag

behind the front seats, under the folded-down back seats, but in plain view. A lunch bag inside the overnight bag contained the brick of cocaine and baggies of marijuana. The searching officer indicated that the vehicle had a strong odour of marihuana. The passenger was found to be in possession of a considerable quantity of cash and three cell phones. The accused testified that she had mentioned to an acquaintance that she was going to British Columbia to look for work. The acquaintance asked if the passenger could go with her to visit friends in Vancouver. The accused said that the passenger brought the blue overnight bag with her. The accused said that they went to the passenger's friend's house in British Columbia and that she went to sleep. When she woke up, the accused said she walked into the living room of the house and the passenger was sitting there with a man. The accused said that she agreed to return to Regina when the passenger indicated her desire to do so. The accused testified that it was not unusual for her not to make advance plans regarding her job search in British Columbia, nor was it unusual to take a stranger on the trip. Whether the accused was in possession of the cocaine was at issue.

HELD: The court concluded that the accused was not completely lacking knowledge of the presence of cocaine. The accused did not provide any evidence of plans for the trip nor did she take any clothes or other supplies that would reasonably be expected for a trip lasting more than two or three days. She said that she felt some responsibility for the passenger so agreed to just head back to Regina when the passenger indicated that she wanted to. The court said that, at the very least, one would expect the accused to question the passenger about what was going on, etc. The court concluded that the evidence pointed to a short trip to Vancouver for a specific purpose. The court was not left with a reasonable doubt after considering the accused's evidence. The court then turned to the evidence as a whole and found that the bag was in plain sight and within the knowledge of the accused. The accused was found guilty.

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