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Criminal Law – Robbery

The Crown appealed the respondent's acquittal on a charge of robbery, contrary to ss. 343(a) and 344 of the Criminal Code. Two individuals robbed a convenience store. There was surveillance video at the store showing the masked man wearing a sweatshirt and sweatpants with a Starter logo on them. The respondent and another were detained by the police about two blocks from the convenience store. The respondent was wearing clothes similar to those in the surveillance video. The trial judge concluded that the jacket worn by the masked man at the robbery was similar to the respondent's, but said he could not conclude they were one and the same. The trial judge said that the Starter brand of clothing was not a unique brand so he had a reasonable doubt that the masked man and the respondent were the same person. The issues on appeal were whether the trial judge erred: 1) by applying the criminal standard of proof to individual pieces of evidence; and 2) by failing to consider the evidence as a whole. HELD: The appeal was allowed. The issues were determined as follows: 1) the appeal court found that the trial judge applied the criminal standard of proof to individual pieces of evidence, thereby erring; and 2) after concluding that he could not

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determine anything definite from each piece of evidence, the trial judge failed to consider the evidence as a whole. The trial judge should have considered the similarities that he recognized in the clothing evidence because he had not rejected the evidence outright as being unreliable. Three pieces of clothing were virtually identical and the baseball cap worn by the respondent and the one on the surveillance video were very similar. The failure to consider the evidence as a whole was an error. The appeal court held that the error could have had a material bearing on the acquittal. A new trial was ordered.

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Peter Ballantyne Cree Nation v Canada (Attorney General), 2017 SKCA 5

Ottenbreit Herauf Whitmore, January 19. 2017 (CA17005)

Civil Procedure – Summary Judgment
Civil Procedure – Appeal – Application for Rehearing

The appellants applied for a rehearing of the appeal to this court pursuant to rule 47 of The Court of Appeal Rules. The chambers judge had dismissed one of the appellant's, a First Nation, claims in entirety after the other appellant, S., applied for summary judgment. On appeal, the court dismissed the appeal other than the claim in continuing trespass claimed by the First Nation. The parties agreed that the test to consider on an application for a rehearing was set out in Storey. The First Nation argued that there were new facts, that could not have been discovered earlier, that gave rise to a fiduciary breach claim against the respondent. A separate court decision held that the respondent breached its fiduciary duty to the First Nation by issuing a licence under s. 34 of the Indian Act, to allow a corporation to occupy a reserve and it thereby caused flooding on the First Nation's land. The First Nation argued the facts were not available earlier because the respondent denied issuing a licence. The respondent argued that the letter the court relied on to find the issuing of the licence was argued throughout the proceedings between the parties. S. argued that the First Nation's application for rehearing contained arguments that were contradicted by material in their claim. S.'s application for rehearing raised three issues: 1) did the court proceed on a misunderstanding that S. agreed a trespass had occurred; 2) did the court's reasons contain an inconsistency and should the court hear and decide the irrevocable consent/proprietary estoppel issue; and 3) was there uncertainty inherent in the remission of the issue of consent and

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damages to the Court of Queen's Bench.
HELD: No special or unusual circumstances were identified by the First Nation's application for rehearing, for three reasons: throughout the proceedings S. argued that one of the respondents gave authorization to build and operate a dam; the First Nation did not attempt to pursue the discoverability argument on appeal; and there were no new facts or circumstances that arose out of this court's decision. The First Nation's application for rehearing was dismissed. The issues raised by S. were dealt with as follows: 1) the court's analysis was not affected by the court's view that S. had agreed a trespass had occurred. The court also undertook extensive analysis on whether the flooding constituted trespass. The court determined that this circumstance was not special or unusual in a way that would warrant a rehearing; 2) the First Nation argued that any consent to trespass was revoked. S. did argue that the consent originally granted was irrevocable. However, the First Nation argued that the licence was not transferred to S. The court found numerous reasons why the irrevocable consent/proprietary issues should be remitted back to the Court of Queen's Bench rather than the appeal court deciding them on a rehearing; and 3) there was no uncertainty that flowed from the Court of Queen's Bench. The application for rehearing by S. was dismissed with costs to the First Nation.

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Mamchur v Sun Country Health Region, 2017 SKCA 6

Ottenbreit, January 19, 2017 (CA17006)

Civil Procedure – Affidavit Evidence – Cross-examination – Appeal
Civil Procedure – Appeal – Leave to Appeal
Civil Procedure – Documents – Production – Appeal
Civil Procedure – Pleadings – Amendment – Appeal

The defendant doctor applied for leave to appeal decisions of the chambers judge. The plaintiff issued a claim in 2015 suing the defendant for breach of contract and, in the alternative, unjust enrichment. After the plaintiff applied for summary judgment, the defendant disputed the designation of the plaintiff in the statement of claim and applied for an order to determine whether the plaintiff was a legal entity capable of commencing an action or contracting with the defendant. Alternatively, the defendant sought an order to amend his defence to state that the plaintiff was not a legal entity. The plaintiff then applied to

substitute its name on the claim, so the defendant applied to determine whether the plaintiff could use the new name. In 2016, the defendant applied for various additional orders. The chambers judge granted the plaintiff leave to substitute its name. The defendant was allowed to amend his defence only to state the plaintiff was not a legal entity and to cross-examine the plaintiff's affiants on the summary judgment application, but not others. The defendant's application regarding document production was dismissed. The defendant argued that the chambers judge made five errors.
HELD: The application for leave was denied. The court analyzed whether the appeal was of sufficient merit and of sufficient importance. The court was not satisfied that any of the grounds of appeal were meritorious. All of the decisions that the defendant sought leave for were with respect to matters of practice and pleading that are discretionary decisions, which have a high standard of review. The court was also not satisfied that any of the grounds of appeal met the level of importance under the test. The order was all in relation to procedural matters that did not raise any important issue of law.

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Copper Sands Land Corp. v Edwards, 2017 SKCA 7

Lane Ottenbreit Caldwell, January 27, 2017 (CA17007)

Residential Tenancies Act – Appeal
Statutes – Interpretation – Residential Tenancies Act, Mobile Home

The common issue in the three cases was whether The Residential Tenancies Act, 2006 applied where a mobile home was owned by a tenant, the respondents in each case, but the site that it was located on was owned by a landlord, the appellant. The appellant leased the sites to the respondents. A hearing officer determined that the Act applied and that the landlord had contravened it. On appeal, the chambers judge agreed that the Act applied but sent the matters back for new hearings. The chambers judge found that there was a breach of the principles of natural justice because the landlord had not been given the opportunity to present evidence and make submissions once the hearing officer ruled on the issue of jurisdiction. The landlord argued that the definition of mobile home in the Act did not include the circumstances in these cases, and therefore, the chambers judge made errors in law in upholding the decisions of the hearing officer. The landlord appealed pursuant to ss. 72(1)

and (2) of the Act.
HELD: The appeals were dismissed. The Act applied to the circumstances, and therefore, the chambers judge correctly confirmed that the hearing officer had the jurisdiction to hear the matters. The appeal court upheld the chambers decision remitting the matters to the hearing officer for new hearings. The court did not determine whether the correctness or reasonableness standard of review applied because either standard would have resulted in the same conclusion. The Act only allowed for one plausible interpretation, and that was the one the hearing judge arrived at and that the chambers judge confirmed. The chambers judge did not err in his interpretation of the Act. The appeals regarding jurisdiction were dismissed and the matters were remitted to the hearing officer as ordered by the chambers judge.

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R v Knox, 2017 SKCA 8

Lane Ottenbreit Caldwell, January 30, 2017 (CA17008)

Criminal Law – Conduct of Trial – Jury Trial – Charge to Jury – Appeal

The appellant appealed his convictions after trial by judge and jury for sexual assault, contrary to s. 271 of the Criminal Code, and unlawful confinement, contrary to s. 279(2) of the Code, both arising out of an incident that occurred in November 2013. The appellant was also tried but was acquitted on a sexual assault charge arising out of an incident involving the same complainant in February 2013. The complainant testified at trial that the appellant had had sexual intercourse with her without her consent in November 2013 while visiting her home. The appellant was a friend of her husband's and a frequent visitor to their house. In February 2013, the appellant had attempted to sexually assault her in the basement of her home. She tried to avoid any contact with him thereafter until the next incident occurred. The appellant testified that the complainant had initiated the sex and that it was consensual in the case of the November charge. He made an application pursuant to s. 276(1) and (2) of the Code to admit evidence of the complainant's previous sexual activity for the purpose of bolstering a defence of honest but mistaken belief and to contradict her testimony that she was afraid of him after February 2013, thereby attacking her credibility regarding her version of events leading to the November 2013 incident. The trial judge granted the application

in part holding that that the evidence was admissible for the purpose of countering evidence that the complainant was afraid of him before the alleged offence in November but was not admissible to support the defence of mistaken belief. The appellant described numerous occasions starting in October 2012 of the complainant making sexual advances to him. The complainant denied that there was any sexual contact between her and the appellant at any time other than the non-consensual incidents described in her testimony. She was not cross-examined regarding the alleged previous consensual encounters nor was she cross-examined regarding the testimony of a witness for the defence. The witness worked with the complainant and testified that she was told by her that she loved the appellant. The complainant testified before this witness and was cross-examined about her relationship, wherein she acknowledged that they were co-workers but asserted that she had never discussed events pertaining to the trial with her. The defence declined to recall the complainant and stated that the accused intended to rely on the witness's evidence to show that the complainant lied. The appellant raised eight issues on appeal regarding the trial judge's charge to the jury. The issues included the following: 1) whether the trial judge repeatedly and incorrectly instructed the jury regarding the standard of proof as it related to the specifics of the evidence. The judge's repeated labelling of the allegations such as "the first incident", "the February incident" and "the first sexual assault incident" demonstrated a misrepresentation of the proper standard of proof that could have influenced the jury's understanding of that standard so that it did not apply the standard set out in W.(D.); and 2) whether the trial judge erred in instructing the jury regarding the use to be made of the defence witness's evidence by both improperly interpreting what was termed the "contradictory evidence rule" and its applicability to the material evidence. The defence argued that the defence witness's testimony directly impugned the complainant's credibility and the trial judge limited the use of her evidence by applying the rule in Browne v Dunn. He erred in his instruction to the jury that the alleged statement made by the complainant to the witness, to which she had not been given the opportunity to respond, did not negate the witness's evidence and that it was open to them to decide credibility.

HELD: The appeal was dismissed. The court reviewed the jury charge and found the following: 1) when it was assessed as a whole, the trial judge's explanation of the standard of proof and choice of language was not so incomplete or unbalanced as to amount to a miscarriage of justice. The jury had found the appellant not guilty of the February sexual assault charge, which indicated that it was well aware of and therefore properly

instructed on the burden and standard of proof and W.(D.), as well as their application to the facts of the case; and 2) that in view of the approach taken by defence counsel, it was appropriate for the trial judge to invoke the rule in Browne v Dunn, to instruct the jury to consider that the complainant was not specifically questioned about the alleged statement, and to consider the weight to be given to her evidence and that of the defence witness in that light. However, he made it clear that failure to comply with the rule in Browne v Dunn did not negate the evidence of the witness. His instructions were balanced and fair.

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R v Adam, 2017 SKPC 7

Harradence, January 16, 2017 (PC17003)

Criminal Law – Controlled Drugs and Substances Act – Possession – Cocaine – Sentencing – Joint Submission
Criminal Law – Sentencing – Aboriginal Offender

The accused pled guilty to possession of cocaine, contrary to s. 4(1) of The Controlled Drugs and Substances Act, willfully attempting to obstruct justice by providing false evidence during the criminal trial of a co-accused, contrary to s. 139(2) of the Criminal Code, and three charges relating to breach of her release document, pursuant to s. 145(3) of the Code. The Crown and defence counsel put forward a joint submission of an 18-month conditional sentence order that included electronic monitoring, no electronic devices, search clauses and 200 hours of community service work along with other conditions. They admitted that it was a hefty sentence for a first-time offender. The sentencing judge noted that the submissions made no reference to Gladue and ordered a pre-sentence report. The report identified that the accused was a member of a remote northern First Nation. She lived in a home where there was poverty, alcoholism and domestic violence. She left home when she was 13 and moved between various relatives' residences. She began associating with peers who had a criminal lifestyle and began a relationship with the co-accused who abused her. At the trial of the co-accused, the accused testified that the drugs belonged to her and he was not involved. She later admitted that her testimony was false because she feared for the safety of her family because of comments made by the co-accused. Since the trial she ended her relationship with the co-accused and distanced herself from her former friends. The accused was also

attending school, participating in student affairs and attending Aboriginal ceremonies. She was at a low risk to reoffend. HELD: The joint submission was rejected because it would be contrary to the public interest. The court found that there was no evidence that counsel had considered Gladue factors in arriving at the submission. The pre-sentence report related addiction and domestic violence to the history of the accused as an Aboriginal person. The court sentenced the accused to 12 months' probation with mandatory conditions and additional optional conditions.

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R v Pechawis, 2017 SKPC 9

Bauer, January 19, 2017 (PC17008)

Criminal Law – Sentencing – Armed Robbery
Criminal Law – Sentencing – Aboriginal Offenders
Criminal Law – Sentencing – Dangerous Offender – Determinate Sentence – Long-term Supervision Order

The accused was convicted of attempted robbery. He also entered guilty pleas to offences of assault and resisting a peace officer. The Crown sought to have the accused declared a dangerous offender with a determinate sentence and long-term supervision order. The robbery offence occurred when the accused gave a bartender a note that read "give me all your money or I will shoot you" while he was leaning forward with his hand behind his back as if he had a weapon. The accused had taken treatment while incarcerated to deal with his issues. He was living with his girlfriend and her children for six months prior to the predicate offence. In the months preceding the offence the accused started to struggle with addictions again. The Crown's expert testified that the accused had a longstanding substance abuse problem and without significant changes there was a high likelihood that he would commit further acts of violence. The accused was a 43-year-old First Nations man. He began abusing substances at an early age and struggled with addictions since that time. The accused had a lengthy criminal record for offences committed while he was under the influence of alcohol and drugs. The accused's parents worked outside of the home and he was well provided for. The accused's father had attended residential school and there was violence between the mother and father. The accused's parents separated when he was 12. The issues were as follows: 1) did the accused meet the criteria for a dangerous offender declaration under s. 753(1)(a) of the Criminal Code; 2) if not, did the accused meet the criteria to

be declared a long-term offender; and 3) what was the appropriate sentence for the offences.
HELD: The court declared the accused a dangerous offender and sentenced him to a determinate sentence followed by a long-term supervision order. The issues were dealt with as follows: 1) the robbery was a personal injury offence because it involved the accused threatening violence to the victim and holding himself in such a position that the victim believed he had the ability to carry out that violence. The offence is subject to imprisonment of ten years or more; 2) the accused had many convictions relating to failure to restrain violent behaviour. The court found that there was a pattern of repetitive aggressive behaviour that emerged with a robbery in 2000. The pattern was one of excessive use of substances, resulting in violent offending to continue to maintain his highs. The court did not consider all of the offences as part of the pattern because some did not involve substance use and some involved a lesser level of violence. The court considered the Gladue factors present. The court concluded that the accused's risk to re-offend in a violent manner remained high and he was therefore declared a dangerous offender; and 3) the court agreed with the Crown that a determinate sentence followed by a long-term supervision order was appropriate because: the accused expressed remorse; the Crown's expert indicated that with appropriate treatment there was a realistic possibility that his risk could be reduced to a safe level; the accused had strong support within the community; and there were a number of risk-reducing programs available to the accused as set out in the Gladue report. The aggravating factors were: the accused had a record with over 50 previous offences, a number of them being violent; and he threatened to shoot the victim of the attempted robbery. The mitigating factors were: the accused's remorse and his insight into his criminal behaviour with a willingness to address the factors that lead to his offending. The court found the appropriate sentence to be four years with a long-term supervision order for a period of ten years from the accused's release from custody. The accused was sentenced to six months for the assault and for resisting a peace officer, both concurrent to each other and to the robbery sentence. The accused was given remand credit of 40 months for the 29 months he was on remand. Therefore, the accused had eight months left to be served in custody. Ancillary orders were also made by the court.

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R v Moostoos, 2017 SKQB 12

Barrington-Foote, January 16, 2017 (QB17015)

Criminal Law – Manslaughter – Sentencing

The accused was charged with second degree murder but convicted by a jury of the lesser included offence of manslaughter. At the sentencing hearing, tendered as evidence were a pre-sentence report (PSR), the accused's updated criminal record and a brief agreed statement of facts. At the time of the offence the accused was intoxicated and exhausted from the effects of having very little sleep or food for a week because of her crystal meth consumption. She went to the victim's house to borrow money from him so that she could buy liquor. The victim was her great-uncle, who was 70 years old and not in good health. He demanded oral sex in exchange for money. In the past, the victim had sexually abused the accused as well as other members of her family. When the accused attempted to leave the victim's home, he grabbed her and refused to let her go. He told her that he had given her AIDS when he had sexually assaulted her in the past. The accused became angry and stabbed the victim five times in the upper chest. She recalled stabbing him only once. The accused surrendered to the police the next day and confessed to the killing. The PSR described the accused as a 35-year-old Aboriginal woman who was a member of the James Smith Cree First Nation. She lived with her parents until she was 10 and then was sent to a residential school for three years. Her parents were alcoholics and neglected their children. After both of them were incarcerated, an aunt helped care for the accused and her siblings. At the residential school the accused was verbally abused, beaten and raped. Her schooling ended at grade nine and she began drinking at the age of 12 and using marijuana at 15 and opiates at 17 years of age. When she was 18, the accused began living on the streets, working in the sex trade to support her drug addiction. She left prostitution after six years because of health problems. The accused suffered from hepatitis C and heart problems that would require surgery. Although she had had inpatient treatment for alcohol abuse, the accused was unable to stay sober for more than five months. She had four children between the ages of 11 and 19, all of whom had been in the care of relatives since they were very young. The accused's criminal record was lengthy but for relatively minor offences. At the time of this offence the accused was on probation for theft over $5,000. She was assessed as having a high risk to reoffend. The defence argued that an appropriate term would be at the lower end of the four- to twelve-year range applying to manslaughter because of provocation at the time of the offence and the effect of the victim's sexual abuse of the accused. The defence also emphasized the reasoning in Ipeelee, which confirmed that the court must consider Gladue factors even in

the case of serious offences. The Crown submitted that the accused should be sentenced to a term of eight to ten years and should receive enhanced credit for remand time for only the 140-day period before she was denied bail. The death was not accidental, and the accused's intoxication should not be considered a mitigating factor as it had been taken into account when she was convicted of manslaughter. Provocation should not be taken into account for the same reason and should be considered aggravating, along with the factors that the offence occurred in the home of an elderly unarmed victim. The accused had fled the scene and not sought help. The only mitigating factors were the accused's inculpatory statement to the police, her minor criminal record and her history as an Aboriginal person. However, the Gladue factors did not call for a discount and generally only had impact on non-custodial sentences. HELD: The accused was sentenced to seven years' imprisonment. The accused was given 1.5 days credit for each of the 610 days spent in custody. The court noted that the principles of sentencing applied to manslaughter produce unusual results because the offence covers a broad range of circumstances resulting in sentences that are uniquely variable. The court took into account the Gladue factors in this case, which diminished the accused's moral culpability, and that provocation must be considered a mitigating factor. The accused had taken responsibility for her first serious crime by surrendering to the police and confessing and had expressed her desire to deal with her addictions through participation in any programming available. The aggravating factors included that the victim was unarmed and elderly and the attack occurred in his home. The accused did not call for help.

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Edenwold (Rural Municipality No. 158) v Murray, 2017 SKQB 15

Kalmakoff, January 16, 2017 (QB17009)

Civil Procedure – Limitation Period
Civil Procedure – Curing Irregularities
Civil Procedure – Originating Notice
Civil Procedure – Queen's Bench Rules, Rule 1-6(4), Rule 3-53, Rule 7-1
Municipal Law – Bylaw
Municipal Law – Expropriation – Compensation
Statutes – Interpretation – Municipalities Act, Section 358

The applicant rural municipality (RM) sought an order setting matters down for a compensation hearing pursuant to s. 7 of The

Municipal Expropriation Act to determine the amount to be paid into court pursuant to s. 11 of the MEA in relation to land the RM wanted to expropriate from the respondents. The respondents applied for an order pursuant to rules 3-53 and 7-1 of the Queen's Bench Rules directing a trial of the issues as to whether the RM was expropriating the land lawfully, for a purpose authorized by the MEA. The respondents' land was adjacent to the RM's gravel pit and, therefore, the RM became interested in their land as a potential source of gravel. The RM's existing gravel pit was nearly exhausted. In November 2015, the RM offered to purchase the land for $1.5 million, but the offer was rejected. In February 2016, the respondents leased the land to the third respondent, RBO, allowing them to extract and sell gravel from the land. Later in February 2016, the RM offered the respondents $1.517 million and served them with a notice of expropriation. The offer was rejected and the RM registered a miscellaneous interest against the land. In May 2016, the RM passed Bylaw No. 2016-14 (expropriation bylaw), authorizing the RM to expropriate the land, pursuant to the provisions of the MEA. The RM argued that the bylaw was valid because it would ensure that the RM would have an adequate source of gravel going forward to fulfil its duty to build and maintain roads within the municipality. The respondents assert that was not the true purpose for the bylaw. They maintain that the purpose was to acquire a source of gravel that the RM could sell at a profit.
The court analyzed the following issues: 1) how can the expropriation bylaw be challenged; 2) did the Queen's Bench Rules permit the respondents' application to be amended and treated as an application under s. 358 of The Municipalities Act; 3) should the respondents be permitted to file an amended originating application to quash under s. 358 of The Municipalities Act; 4) what terms and conditions should be included in the order; and 5) sanction.
HELD: The respondents' application could not succeed as it existed. The issues were analyzed as follows: 1) to challenge the validity of a bylaw, the party must either apply for prerogative relief or apply pursuant to s. 358 of The Municipalities Act; 2) the respondents' application did not comply with rule 3-49(1)(g), because it was not in the form of an originating notice. The application was in form 6-5, and it complied with rule 6-5, but it did not refer to s. 358 of The Municipalities Act. The court did, however, cure the non-compliance pursuant to rule 1-6(4). The court found that to do so would not cause irreparable harm to the RM. The RM would be allowed to file further information to support their case. The court also found the remedy granted to be the most effective means to resolve the matter in a way that was fair to the parties, and therefore, it was in the overall interests of justice to do so. The respondents' original application

was filed within the time limit prescribed by The Municipalities Act, and so the court was satisfied that it was not in effect extending the time limit; 3) the court held that the respondents were permitted to file an amended originating application, in form 3-49, applying to quash the expropriation bylaw pursuant to s. 358 of The Municipalities Act. The RM's application was adjourned; 4) the court did not impose timelines for the filing of materials, but instead, allowed the parties to bring the matter back to the court if they could not agree on timelines; and 5) the respondents were ordered to pay costs of $1,500 to the RM forthwith.

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R v Bialski, 2017 SKQB 17

Kalmakoff, January 16, 2017 (QB17016)

Criminal Law – Appeal – Conviction
Criminal Law – Customs Act Offences
Criminal Law – Defences – Charter of Rights, Section 8, Section 11(b)
Criminal Law – Evidence – Admissibility – Relevance

The appellants were convicted for offences under the Customs Act. Appellant B. was convicted of making a false or deceptive statement to a Canada Border Services Officer with respect to imported goods, contrary to ss. 153(a) and 160, and with willfully evading compliance with provisions of the Act, or attempting to evade payment of duties, contrary to ss. 153(c) of the Act. B. was sentenced to pay a fine of $4,200 plus a $1,800 surcharge with respect to each of the two counts. Appellant S. was convicted of one count of making a false or deceptive statement to a Canada Border Services Officer with respect to imported goods, contrary to ss. 153(a) and 160 of the Act. She was sentenced to a fine of $4,200 and an $1,800 surcharge. The trial judge applied the Kienapple principle to stay a charge of failing to provide accurate information regarding imported goods, contrary to ss. 7.1 and 161 of the Act, against both appellants. S. was acquitted of a charge of willfully attempting to evade payment of duties, contrary to ss. 153(c) and 160 of the Act. The appellants appealed their convictions. The appellants had purchased a motorhome and folding bikes in the United States nine days prior to them attempting to gain entry into Canada. B. advised the Border Security Officer that they had not purchased anything during their ten-day stay in the US, and that the motorhome and all its contents were their son's, a resident of

the US. A search of the motorhome and its contents revealed documents showing the appellants purchased the motorhome and some of its contents. B. raised a concern before the Crown began calling evidence. Apparently, the Minister reviewed the seizure of the motorhome and bicycles pursuant to s. 131 of the Act, and the decision was favourable to the appellants. When B. attempted to cross-examine Crown witnesses on the review decision, the trial judge did not permit it, indicating the decision of another tribunal was not relevant, and could not stop the Crown from proceeding with the charges. The grounds of appeal were as follows: 1) did the trial judge err in his treatment of the appellant's attempts to lead evidence of the Minister's decision; 2) did the Crown fail to make full disclosure; 3) could the appellants raise a s. 11(b) Charter issue for the first time on appeal; and 4) could the appellants raise a s. 8 Charter issue for the first time on appeal.

HELD: The appeals were dismissed. The court dealt with the grounds of appeal as follows: 1) the Ministerial review concluded that, rather than seize the motorhome, the officers should have refused the appellants entry into Canada. The court referenced s. 10 of the Act as authority for the officers to seize goods where the officer has reasonable grounds to believe that the Act or its regulations were contravened by the goods. A Ministerial review can be applied for pursuant to s. 131(1). The appellants argued that the doctrine of issue estoppel prevented the Crown from proceeding because the Minister had already undertaken a review of the matter. The court did not find that issue estoppel applied to the circumstances because the Ministerial review was not a prior criminal proceeding that led to a judicial decision. The court also found that the trial judge correctly ruled that evidence about the Minister's decision was inadmissible. The evidence was irrelevant. The court also concluded that it was not an abuse of process for the Crown to proceed with the charges notwithstanding the Ministerial decision, or because the Crown did not lead evidence regarding the Ministerial decision. The Crown was under no obligation to call witnesses or lead evidence that it considered unnecessary to the case. Further, there was nothing to suggest any improper motive or bad faith on the part of the Crown by deciding to continue the criminal prosecution; 2) the court could not find anything on the record to support the appellants' argument that the Crown failed to make full disclosure. The appellants were already aware of the Ministerial decision; 3) the appellants argued that their s. 11(b) Charter rights were violated because they were not tried within a reasonable time. The information was sworn July 2014 and the trial concluded almost 23 months later, in June 2016. The 18-month presumptive ceiling from Jordan was exceeded. However, there was no proper evidentiary

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basis for the court to decide the issue because it had not been considered at trial; and 4) a proper evidentiary record upon which to base an appeal did not exist because the appellants did not raise the issue at trial. The court noted that the trial judge concluded that the searches were authorized under s. 99 of the Act, in any event. The finding was well support by the evidence.

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Mackay, Re, 2017 SKQB 19

Popescul, January 17, 2017 (QB17018)

Criminal Law – Court Appointed Counsel
Criminal Law – Defences – Charter of Rights, Section 7, Section 11, Section 24(1)
Criminal Law – Faint Hope Application

The applicant made a faint hope application pursuant to s. 745.6 of the Criminal Code after serving 15 years of imprisonment for a first degree murder conviction, in which he was sentenced to life imprisonment without eligibility for parole for 25 years. The applicant applied for a remedy pursuant to ss. 7 and 24(1) of the Charter so he could obtain court-appointed counsel. The applicant was denied Legal Aid because Legal Aid concluded that his application had virtually no chance of succeeding. The applicant's appeal of the decision to deny to the director of Legal Aid was also denied. The issues were as follows: 1) did s. 7 apply to court-appointed counsel in faint hope applications; 2) was it necessary for the applicant to establish "some chance of success" in order to qualify for court-appointed counsel; 3) an analysis of s. 1 of the Charter; and 4) remedy.
HELD: The issues were analyzed as follows: 1) the court determined that s. 7 of the Charter had application and the applicant was entitled to state-funded counsel. The interests protected by s. 7 have been broadly defined to not just include those facing criminal charges. According to the court, s. 7 guaranteed the applicant was entitled to apply for judicial review of the parole ineligibility period after serving 15 years of his sentence. The process of applying to reduce the parole eligibility time affects the applicant's right to "life, liberty and security of the person." That right could not be denied except in accordance with the principles of fundamental justice. Further, the court held that the applicant could not possibly pursue the right to apply for a reduction in parole ineligibility unless assisted by legal counsel. The court concluded that the faint hope application is fraught with incredible complexities that challenge

even the most experienced lawyers and judges; 2) the court had three problems with the Crown's position: a) much of the evidence relied on by the Crown should not have been before the court; b) the court found a significant difference between appeals and s. 745.6 applications. It is objectively possible to determine whether a ground of appeal gives rise to an arguable appeal. In s. 745.6 applications there is not a complete court record to rely on, the facts are unknown, and there is no evidence per se. The issue of merit as determined by Legal Aid was irrelevant. A designation judge will make the determination. The court concluded that there would be a prospective breach of the applicant's right of life, liberty and security of the person and that the prospective breach would not be in accordance with the principles of natural justice unless he has a state-funded lawyer to assist him with his application; 3) the court applied the principles from the New Brunswick case and concluded that the prospective s. 7 Charter breach was not saved by s. 1 and the applicant was entitled to a remedy; and 4) the only two remedies available under s. 24(1) of the Charter in this case were a stay of proceedings or provision of state-funded counsel. A stay of proceedings was not appropriate because it would result in the applicant not being able to pursue his statutory right to make his parole ineligibility reduction application. The court ordered that the government provide the applicant with a state-funded lawyer to assist him with his application to request a reduction in his parole ineligibility.

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A.V.R. v M.J.A., 2017 SKQB 20

Barrington-Foote, January 19, 2017 February 2, 2017 (addendum) February 15, 2017 (corrigendum) (QB17017)

Family Law – Child Support – Adult Child

The respondent applied to the court for a determination of the amount of child support payable by the petitioner for their adult child attending university. The application was made pursuant to the trial judgment because the parties could not agree (see: 2016 SKQB 272). The respondent also applied for the petitioner to pay his child support arrears in full. As the oldest child was attending university in British Columbia and the youngest child still resided with the respondent, the parties agreed that the petitioner should pay the table amount for one child from September to April and for two children from May to August when the oldest child would live with the respondent. The

respondent submitted that the petitioner should pay in addition to the s. 3 table amount in the summer, the sum of $1,000 per month during the academic year for a total of $8,000. Although that would result in the child receiving funds in excess of her proposed budget, it was reasonable for the petitioner to make such payments because the child was making an appropriate contribution to the cost of her own education though scholarships and she should not be obliged to incur a large student loan. The petitioner disagreed and disputed such items in the child's budget as her vehicle costs of $4,145. The respondent also submitted that the child should borrow the maximum amount available to her for student loans.

HELD: The respondent was ordered to pay $500 per month for the child's support for the period January to April 2017. The court found that the child's vehicle expenses were not a reasonable and necessary education expense that the petitioner should have to share. It also found that the child had fully discharged her obligation to contribute to the cost of her education for 2016-2017 and should not have been called upon to borrow as much as she had. The child had applied for another scholarship, and if successful, it might result in her having surplus funds in excess of her budget. The court directed that she should manage the surplus funds to pay future expenses. However, the decision regarding future academic years would be made if and when necessary upon application by the parties. The court ordered the petitioner to pay his arrears in child support by one lump sum payment of $10,000 within 30 days of the judgment and the remainder at a rate of $750 per month until the arrears were fully paid. The court corrected some errors made in calculations in the first judgment pursuant to Queen's Bench rule 10-10 and also issued two addendums to this judgment.

ADDENDUM dated February 2, 2017: [45] There shall be an addition to paragraph 42 of the judgment of January 19, 2017 to include the following as subparagraph 14:

>>>14. The petitioner shall pay the respondent child support pursuant to s. 3 of the Guidelines for the support of B. and K., on the first day of each month from May 1, 2017 to August 1, 2017, in the amount of $1,091.00.

CORRIGENDUM dated February 15, 2017: [46] The judgment of January 19, 2017 shall be amended as follows:

>>>4. Paragraph 12 will be amended by replacing the number $3,540.00 with $3,440.00, the number $38,884.00 with the number $37,784.00, and the number $34,770.00 with the number 34,870.00.

>>>5. Paragraph 42 will be amended as follows:

>>>>>a. In the first line, the number 132 will be replaced by the number 133;

>>>>>b. In paragraph 42(11), the number $54,229.70 will be replaced with the number $54,339.70;
>>>>>c. In subparagraph 42(11)(b), replacing "January 1, 2017" with "February 1, 2017";
>>>6. Paragraph 44 will be amended by replacing the numbers $3,540.00 and $3,450.00 with the number $3,440.00.

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Schneider v McMillan LLP, 2017 SKQB 21

Scherman, January 20, 2017 (QB17033)

Class Action – Costs
Statutes – Interpretation – Class Actions Act, Section 40

The plaintiff's class action claim was dismissed against two defendants. Those defendants applied for an order that the court had jurisdiction under s. 40 of The Class Actions Act to award costs of the action to them. The plaintiffs argued that costs were not warranted because when the action was commenced and application for certification was made, Saskatchewan was a "no-costs" jurisdiction for class action proceedings. The application for certification was made in November 2010, the action was certified in 2012 and proceeded to trial, and the decision was made in 2016. The amendment to the Act was made effective May 14, 2015. The issue was whether the amendment had retroactive effect that gave the court jurisdiction to award costs against unsuccessful class action plaintiffs who made application for certification of their class actions at a time when Saskatchewan was a "no-costs" jurisdiction.
HELD: It was clear that the legislature intended and directed that the amendment was to have retroactive effect and was to apply retrospectively to proceedings commenced before the section came into effect. Section 40(1) gave the court a broad discretion with respect to awarding costs and s. 40(2) specifically allowed the court to consider any other factor that the court considered appropriate. The court noted one factor that could be considered was the change from being a no cost to a cost jurisdiction and at what stage of the proceedings the change occurred. The court found Saskatchewan Court of Appeal cases to be distinguishable. Both cases referred to by the plaintiff were not only certified before the amendment, they were also concluded before the amendments became effective. The court concluded that the intention of the legislature and the language of s. 40 of the Act were clear. The section had retroactive and retrospective effect for all actions that were decided after the

effective date of the amendment. Whether or not an application for certification was made prior to the date was not found to be relevant. The court ordered that it had jurisdiction under s. 40 of the Act to award costs of the action to the defendants.

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Kassian v Dynamic Glass & Door Ltd., 2017 SKQB 22

Scherman, January 25, 2017 (QB17021)

Business Corporations Act – Oppression Remedy
Civil Procedure – Costs
Civil Procedure – Disclosure of Documents
Civil Procedure – Originating Notice
Civil Procedure – Queen's Bench Rules, Rule 3-51, Rule 3-53
Civil Procedure – Summary Proceedings

The respondents, a corporation and individual shareholders, applied to the court to direct that rules applying to an action started by statement of claim regarding disclosure of documents also applied to oppressive conduct proceedings commenced by way of originating notice. The applicant was an employed general manager, shareholder, director, and officer of the respondent. The applicant started providing management services to the respondent through his corporation KLK in 2003. The applicant owned 46 percent of the issued shares of the respondent. In October 2015, the other shareholders terminated the management contract of KLK and asked the applicant for his resignation as director, which was provided. The respondent commenced an action against the applicant, alleging breach of fiduciary duty. The applicant then brought an originating application pursuant to ss. 207 and 234 of The Business Corporations Act, alleging the respondents acted in manners oppressive, unfairly prejudicial, and unfairly disregarding his interests as a shareholder. The applicant filed extensive affidavit material, but the respondents did not file any affidavit evidence in reply as contemplated by rule 3-52(1). The respondents filed a "Reply to the Originating Notice", wherein they took the position that their actions were not oppressive but rather reasonable because the applicant breached his fiduciary duty to the respondent corporation by directing his efforts to the start-up of a competing business. The respondents therefore say that the documents relating to the start-up business were relevant to the issue of whether there was a breach of fiduciary duty. The issue was whether the court should order disclosure within the context of a summary procedure.
HELD: The Supreme Court of Canada has stressed the

importance of utilizing summary and expedited procedures where appropriate to serve the needs of access to justice and minimize delay. Queen's Bench rules 3-51 and 3-53 do not apply mutatis mutandis to originating proceedings like the previous rules did. The change in rule 3-51 expressly directed that discovery and questioning are presumptively not available in summary proceedings. An application under rule 3-53 is necessary if one party seeks access to the procedures available under Parts 4 and 5 of the rules. The respondents had the burden to satisfy the court that the procedures were necessary in the circumstances of the case. The court concluded that any applications should be made before the hearing judge for the following reasons: the proceedings were summary proceedings that had been before the court for five months and a hearing date had been ordered; the hearing date was imminent; there was court ordered disclosure in other proceedings; the applicant provided evidence that there were no documents; the respondents could seek the disclosure in the other proceedings; the respondents provided no affidavit evidence to support their position; and the respondents hadn't filed the reply evidence contemplated by rule 3-52, and therefore, there was no evidence of a breach of fiduciary duty. The personal respondents were ordered to pay $4,000 in costs to the applicant.

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Halpape v Bank of Montreal, 2017 SKQB 23

Barrington-Foote, January 26, 2017 (QB17019)

Land Titles Act – Interest – Discharge
Real Property – Land Titles Act – Application for Discharge of Interest
Torts – Promissory Estoppel – Estoppel by Representation

The applicant applied pursuant to ss. 107 and 109 of The Land Titles Act, 2000 for an order directing the Registrar of Titles to discharge the respondent's interest held in land formerly owned by the applicant. The respondent's registered interest was for a provincial judgment in the amount of $18,151.35. The applicant's lawyer wrote to the respondent for payout information prior to the sale of the land. The respondent indicated that the amount owing was $0. The applicant then forwarded the respondent their $300 discharge fee on trust conditions that the respondent provide the applicant with a registrable discharge. The sale of the land by the applicant proceeded and the title was transferred to the new owner. A few days after the transfer, the respondent

wrote to the applicant indicating that they made an error with respect to payout information and that $18,151.35 plus interest was payable before obtaining a discharge of the interest. The applicant did not have the ability to pay the amount. The respondent argued that their mistake as to payout information was made because the applicant's letter referred to a mortgage and to a registered interest – provincial judgment. The employee preparing the payout information provided the payout figure for a prior mortgage referred to in the screen shot that was sent to the applicant with the $0 payout figure.
HELD: The order was granted. The court found that the applicant's letter requesting payout information was very clear, despite the reference to a mortgage in the re: line. An employee of the respondent reading the letter with reasonable care would know that the applicant wanted a discharge for the registered interest. The court also found the applicant's letter sending discharge fees and requesting the discharge clear even though it again referred to a mortgage. The only boldface type in the letter referred to the interest. The letter did not disclose a mutual mistake, only the applicant was mistaken. The respondent's representation could be one of fact, as to amount owing, or as a promise to provide the discharge on payment of that amount, or both. The result was the same. The essential elements of promissory estoppel and estoppel by representation are substantially the same. The first letter from the respondent invited the applicant to act on that representation. The applicant even verbally confirmed the erroneous payout figure. The remaining element was detriment. The issue was not whether the applicant was obliged to pay the respondent, but whether the applicant suffered detriment as a result of the respondent's misrepresentations about the discharge. The applicant was unable to clear title and was, therefore, in breach of her obligation to do so. The court found the necessary detriment. The court concluded that it would be unfair and inequitable to permit the respondent to act in a manner inconsistent with its representation. The Registrar of Titles was directed to discharge the respondent's interest.

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Moser v Chernoff, 2017 SKQB 25

Scherman, January 27, 2017 (QB17034)

Contracts – Breach – Fundamental Breach
Contracts – Breach – Non-competition
Contracts – Interpretation

Corporations – Breach of Fiduciary Duty

Two optometrists, Dr. C. and Dr. M., practiced optometry as a partnership and operated an optical dispensary through a corporation, Corp. O. Their arrangement was subject to a partnership agreement (PA) and a unanimous shareholder agreement (USA) (collectively referred to as the 99 Agreements). Dr. M. decided to retire and proposed to sell his interest. Dr. C. would not sign a consent to the sale between Dr. M. and Dr. S. until agreements were in place between himself and Dr. S. Meanwhile, Dr. S. and Dr. M. made a contingency plan to work together if the sale did not proceed and they arranged to lease the business premises of the partnership and Corp. O. Ultimately, Dr. S. decided to open her own independent practice and Dr. M. began a part-time practice outside of the 30-mile radius of the non-competition clause in the PA. A request was made by Dr. M. to dissolve the partnership and Corp. O., and Dr. C. gave Dr. M. an article 28 notice based on the grounds that Dr. M. had not been participating in the practice for a period of more than three months. The issues for determination were as follows: 1) did the 99 Agreements continue to be operative; 1a) was Dr. C. obligated to purchase Dr. M.'s interest in the partnership; 1b) was Dr. C.'s corporation obligated to purchase the shares of Dr. M.'s corporation in Corp. O.; and 1c) did Dr. M. fundamentally breach the terms of either or both of the 99 Agreements such that the buyout provisions of those agreements were no longer operative; 2) if the terms of the buyout provisions remained operative, what amount was Dr. C. contractually obligated to pay Dr. M. for his interests; 3) did Dr. M. commit fiduciary breaches in respect of either the partnership or Corp. O that caused damages to them; 4a) what was the law with respect to causation within equitable relief; 4b) did entering into the contingency agreement cause Dr. S. to compete and thus harm the partnership; and 4c) did acquiring the lease harm the partnership or Corp. O.; and 5) what damages, if any, was Dr. C. entitled to due to Dr. M.'s breaches of fiduciary duty.
HELD: The issues were analyzed as follows: 1) the 99 Agreements were in full force and effect; 1a) Dr. C. was obligated to purchase Dr. M.'s partnership interest; 1b) Dr. M.'s corporation was obligated to offer its shares in Corp. O. to Dr. C.'s corporation; 1c) the fundamental breach doctrine did not apply for numerous reasons. Also, the court noted that it would be wrong in principle to treat breaches of fiduciary obligations as constituting a fundamental breach of contract; 2) Dr. M. argued that one-third should be substituted with one-half in the 99 Agreements because the one-third was in the agreements because there were originally three optometrists. The court found that the words used in the 99 Agreements were clear and unambiguous; 3) Dr. M. breached his fiduciary duties when he

entered into a contingency agreement with Dr. S. that could have resulted in him competing with the partnership and when he arranged to have another corporation lease the business premises; 4a) the partnership and Corp. O. were already disgorged when the lease obtained by Dr. M. and Dr. S. was assigned to the partnership and Corp. O; 4b) Dr. S. decided to go on her own because she did not want to practice with Dr. M. or Dr. C., not because of the contingency plan; and 4c) the economic consequences to the partnership and Corp. O. were due to competition from Dr. S., not due to harm that would not have occurred but for the breaches of Dr. M. The court also concluded that Dr. C. was not entitled to compensation from Dr. M. for the consequences of its loss of patients because the patient loss occurred due to Dr. S.'s new practice and the partnership not maintaining sufficient optometrist capacity; and 5) Dr. M. breached his fiduciary duty when he sent out recall notices to former patients but advertising in the yellow pages did not breach his restrictive covenant. Dr. M.'s fiduciary breaches did cause Dr. C. to spend time on the breaches rather than servicing patients. Therefore, Dr. M.'s breach of his fiduciary duty did harm the partnership and Corp. O. The court concluded that damages of $95,243.79 payable to Dr. C. from Dr. M. was appropriate. The damages were made up of the following: $45,243.79 for additional expenditures for legal and accounting; and $50,000 of equitable compensation. The court also ordered the following: Dr. M. had to account to Dr. C. regarding the net locum income he earned the summer of 2010; Dr. C. had to pay Dr. M. $110,580 pursuant to the retirement buyout provisions of article 25 of the PA; Dr. C.'s corporation had to pay Dr. M.'s corporation $168,881 pursuant to the retirement buyout provisions of article 5 of the USA; and pre-judgment interest applied, subject to set-off of amounts owed by Dr. M. to Dr. C. Each party was ordered to bear their own costs.

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A.S., Re, 2017 SKQB 26

Dufour, January 26, 2017 (QB17022)

Family Law – Child in Need of Protection – Child and Family Services Act – Person of Sufficient Interest – Indefinite Order

The Ministry of Social Services sought an indefinite order placing a seven-year-old and a five-year-old with a person of sufficient interest, their mother's second cousin. The children's biological parents had significant histories of drug abuse. The

mother admitted that she could not take care of the children properly at the time of the application. The father said that he had quit doing drugs and could offer the children a good home. Both parents had other kids that did not live with them, and the children were left alone for overnight periods with the mother's 12-year-old daughter on at least six occasions. The children were apprehended in October 2013 and placed in the care of the mother's second cousin. During this period, the father was charged with assaulting the mother. Both parents attended a pre-trial conference, which resulted in a six-month consent order in October 2014. They agreed to abide by a number of conditions while the children remained in care. The mother did not make much progress after the order. The father was showing promise, but only attended one counselling session before deciding it was not for him. He also quit attending Narcotics Anonymous and providing toxin screens. Although the father did attempt to improve his situation and did have positive visits with the children, he refused to undergo a parenting assessment. The Ministry had concerns about his mental health, and his psychiatrist testified that he had a "stimulant-induced mood disorder". In other words, he was at risk mentally when doing drugs. The psychiatrist said that he would not be surprised if the father relapsed and started using marijuana again. He also said that if the father did not want treatment, he was minimizing or unaware of his problems. The issues were as follows: 1) did the children continue to be in need of protection; and 2) if so, what was the appropriate order.

HELD: The court analyzed the issues as follows: 1) the caregiver testified that both children were very fearful if they were left alone when they were first placed with her. One of the children was in counselling. The court found that the children's greatest need was for stability. The court found that the father failed to make progress in the areas that mattered most. He needed help to overcome his drug addiction issues and his parental deficits, but he would not accept help. The court found that the father was unable to provide the children the minimal standard of care that would be tolerated in our society and the children were in need of protection pursuant to s. 11(b) of The Child and Family Services Act; and 2) returning the children to their father was not a viable option pursuant to s. 37(1)(a) of the Act. The court did not accept that he would work with the Ministry so that he could provide a safe and stable environment for the children. The court also found that a temporary order pursuant to s. 37(1)(c) was not appropriate because of the nature and severity of the father's deficits and lack of real progress to date. The court was impressed with the caregiver. The children lived with her for about three years and called her "mum". She was designated as a person of sufficient interest and the children were placed with

her indefinitely.

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R v Peekeekoot, 2017 SKQB 27

Megaw, January 26, 2017 (QB17020)

Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 24(2)
Criminal Law – Robbery with Weapon

The accused was charged with carrying a concealed weapon, a machete, contrary to s. 90 of the Criminal Code. An officer received a call that three Native males committed a robbery at knife point. The officer came upon a group of four males close to the scene, and upon approaching them, the accused left the group. The officer followed the accused and grabbed him by the arm and detained him for investigatory purposes by placing him in handcuffs and searching him. The officer said that he searches anyone he puts in handcuffs on the basis of officer safety. The search resulted in locating a two-foot-long machete inside the accused's pants. It was later determined that the accused was not a suspect in the robbery. The issues on voir dire were as follows: 1) was the accused detained by the police officer at the scene; 2) if the accused was detained, was the detention arbitrary and therefore in violation of s. 9 of the Charter; 3) if the accused was not arbitrarily detained, was the search nevertheless in violation of s. 8 of the Charter; and 4) if the search was in violation of s. 8 of the Charter, should the machete be excluded pursuant to s. 24(2) of the Charter.
HELD: The issues were determined as follows: 1) the accused was detained by the police; 2) the accused argued that the discrepancies between the dispatch information and the four males meant that there was no reasonable basis upon which to form a suspicion that the group of four males had been involved in the recently reported robbery. The court said that there must be a recent or ongoing criminal offence and a nexus between the individual and that crime. There were some similarities between the group and the reported details. The robbery occurred only a few blocks away and within a few minutes. The court found that, in all of the circumstances, and based upon the complete constellation of events, there were sufficient factors to allow the officer to complete an investigatory detention of the accused to determine whether further steps would be taken. There was not an arbitrary detention and, therefore, no breach of s. 9 of the Charter; 3) the warrantless search was presumed to be

unreasonable. The officer placed the accused in handcuffs and searched him before doing anything else in the investigation. The court concluded that there was no reasonable basis given for suspecting officer safety was in issue in the case. The accused's s. 8 Charter rights were violated; and 4) the court conducted the necessary Grant analysis as follows: a) the breach was at the upper end of the seriousness spectrum; b) the search was impactful on the Charter-protected rights of the accused; and c) someone carrying a machete is of serious concern and, generally, society has an interest in seeing such cases judged on their merits. The evidence, the machete, was real and therefore reliable. The court concluded that to allow the evidence would be to react to the nature of the evidence rather than to properly consider the Charter violation. The court held that the introduction of the evidence would disregard the Charter protection afforded by s. 8. The evidence of the machete was excluded pursuant to s. 24(2) of the Charter because its admission could bring the administration of justice into disrepute.

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R v Francis, 2017 SKQB 28

McIntyre, January 27, 2017 (QB17023)

Family Law – Division of Family Property – Division of Pension – Administrator as Trustee
Statutes – Interpretation – Pension Benefits Division Act
Trusts – Division of Pension – Family Property

R.F. and R.C. were married, both for a second time. R.C. was an RCMP member and the major item in dispute between them upon separation was his pension. An order was made after trial requiring R.F. to make an equalization payment and to transfer RRSP or LIRA funds. She never made the payments so R.C. made an application to have the amounts payable by R.F. set off against the amounts payable to her from his pension. An order was made requiring the RCMP to pay R.F. 27.9 percent of R.C.'s pension when he started receiving his pension. The order made R.C. and the pension administrator trustees of R.F.'s share of the pension. The payment to R.F. was not to start until the equalization payment had first been set off. The Attorney General of Canada took the position that the court could not order the Federal Crown to make a payment of pension benefits to R.F. R.F. then brought an application for an order requiring the Federal Crown to comply with the order. The Federal Crown

argued that there could not be a requirement to pay R.F. a portion of R.C.'s pension on a monthly basis. The Crown opposed the if-and-when division of the pension.
HELD: After reviewing authorities, the court made several observations: 1) the Family Property Act (FPA) does provide the necessary legislative framework for the "if-and-when concept" in s. 26(2); 2) the if-and-when approach can be achieved either by designating the plan member as a trustee holding the non-member spouse's share in trust and paying it to the spouse or by requiring the pension plan administrator to hold the non-member spouse's share in trust and paying the non-member spouse their share directly; 3) it has been suggested that there needs to be legislative provision for the plan administrator to accept the responsibility of holding the non-member spouse's share in trust; 4) naming a member spouse as trustee of the non-member spouse's share of the pension is not necessary, although it may be preferred; 5) specific legislation can make vesting the pension at the source very difficult. Whether the pension plan administrator could be required to divide the benefit at the source and send a cheque to a non-member spouse had not directly been judicially considered. The court held that it was appropriate, according to the FPA, and within the court's jurisdiction to order that R.C. and the pension administrator held R.F.'s portion in trust for her. The court found that R.F. had an interest in R.C.'s pension and further that R.C. should pay R.F. her share monthly if-and-when he was in receipt of the same and to designate R.C. as a trustee of R.F.'s benefit. The court required a legislative framework allowing the pension administrator to accept the role of trustee and split the pension payments at source. The Pension Benefits Division Act, the Act applying to R.C.'s pension, did not have provisions allowing a pension administrator to accept the role of trustee and to split the pension payments at source. It was not appropriate for the pension administrator to be a trustee of R.F.'s share of R.C.'s pension.

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Firkola v Firkola, 2017 SKQB 31

Zarzeczny, January 31, 2017 (QB17026)

Family Law – Child Support – Variation

The parties were divorced in 2002 and child support was established by a number of consent orders in the early 2000s, updated occasionally. The last update occurred in 2007 and the

respondent's payments were set at $2,262 per month for the three children of the marriage. The petitioner applied to have the respondent's current income and the amount of child support reviewed. The petitioner worked as a teacher with an annual income in 2015 of $86,800 and the respondent owned a pharmacy that provided him income of $318,700 in 2015. The eldest child, now 20 years of age, was in his third year of the engineering program at the University of Saskatchewan, the middle child was attending her first year at the university and the youngest child, 17 years of age, was attending high school and living with the petitioner. The two children attending university had both been awarded scholarships that assisted in paying their expenses. They both lived with the petitioner during the summers while earning employment income. Their expenses while attending university during the 2015 academic year were approximately $24,000 and $22,000 respectively.
HELD: The respondent was ordered to pay a portion of the university expenses of the two children. The court used the approach set out in Fleming v Boyachek that held that one-third to one-half of their expenses should be attributed to adult children and the remainder to be shared by their parents, pro-rata in accordance with their incomes. After deducting one-third from each child's expenses, the petitioner's contribution, set at the rate of 21.5 percent, was set at $3,440 and $3,160 for each child and the respondent was ordered to pay $12,560 and $11,540 respectively towards their expenses. The respondent was ordered to pay $2,490 per month for the youngest child in accordance with the Guidelines.

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