The Law Society of Saskatchewan Library's online newsletter
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Subject Index

Walker v Bank of Montreal, 2017 SKCA 42

Jackson Herauf Wilkinson, June 8, 2017 (CA17042)

Statutes – Interpretation – Limitation of Civil Rights Act, Section 2

The appellants had granted a residential mortgage in favour of the respondent that secured a loan in the amount of $460,800. The loan was a consolidation of existing debt, part of which was the balance of $373,089 owed on the original loan that had enabled the appellants to purchase the land. The remaining $87,711 was non-purchase money financing approved by the respondent. The appellants fell into default, and the respondent commenced foreclosure proceedings when the balance owed had increased to $536,186. The property was sold through judicial listing orders and the net sale proceeds were paid to the respondent. As the proceeds were insufficient, the respondent sought an order entitling it to the deficiency. The chambers judge considered s. 2 of The Limitation of Civil Rights Act (LCRA) and held that the amount of the deficiency should be $162,675.99. The issues on appeal were how the proceeds of sale should be applied against the mortgage balance and what the proper amount of the deficiency was.
HELD: The appeal was allowed. The court reviewed the purpose and policy behind the LCRA. It then examined its conflicting decisions in Hrynewich Holdings and Andrews and held that the latter was a per incuriam judgment and therefore not binding and the approach set out in Hrynewich would guide the

disposition of this appeal. Therefore, it found with respect to each issue that the holding in Hrynewich meant that payments should be allocated on a pro-rated basis to purchase money and non-purchase money debt balances and the proper amount of the deficiency to which the respondent was entitled to judgment against the appellants was $31,160.23.

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Aalbers v Aalbers, 2017 SKCA 43

Caldwell Herauf Whitmore, June 8, 2017 (CA17043)

Family Law – Child Support – Application to Vary – Appeal
Family Law – Spousal Support – Application to Vary – Appeal

the appellant appealed the decision of a Queen's Bench judge in chambers that dismissed in large part the appellant's application to vary the child and spousal support payments ordered by the trial judge in 2010 (see: 2014 SKQB 387). The trial judge had awarded custody of three daughters to the respondent, imputed income to the appellant of $115,000 per annum for child support purposes, and ordered him to pay $2,034 per month, pursuant to the Guidelines. He was ordered to pay spousal support in the amount of $1,500 per month, which was not based on his actual income (see: 2010 SKQB 318). The appellant unsuccessfully appealed both decisions to the Court of Appeal (see: 2013 SKCA 64). He then applied to Queen's Bench for orders varying both the child and spousal support orders, effective to the date that they were issued and to expunge arrears of support payments. The chambers judge found that, as the youngest daughter had been living with the appellant since December 2010 and the oldest daughter since May of 2012, there had been a material change in circumstances. Therefore, the primary residence, custody and support related to those two children was changed and arrears expunged. On the basis of the evidence provided by the appellant, the chambers judge was unable to find any material change since the trial regarding the income imputed to him by the trial judge that would warrant a variation of the child support order as it pertained to the youngest daughter. Further, nothing had changed since the trial to warrant a variation of the spousal support order. The issues raised on appeal were whether the chambers judge erred in finding the following: 1) there was no material change in the appellant's income imputed to him in 2010; 2) the respondent continued to be in need of support; and 3) child support should remain unchanged except for the changes made as a result of the change in primary residence of

Statutes – Interpretation – Cities Act, Section 217(6), Section 227

Statutes – Interpretation – Cities Act, Section 227

Statutes – Interpretation – Limitation of Civil Rights Act, Section 2

Cases by Name

2017 SKQB 164 R v Gerein-Moore

Aalbers v Aalbers

Amalgamated Transit Union Local 1374 v Saskatchewan (Minister of Finance)

Argue v Argue

Babich v Babich

Gary L. Redhead Holdings Ltd. v Swift Current (Rural Municipality No. 137)

Gyorfi v Pacheco

Hanson v Morin

Hnidy v Hnidy

Holmes v Jasteck Master Builder 2004 Inc.

Jahnke v Thomas

Jones v Jones

Kieper v Cheverie

Prince Albert (City) v Prince Albert Co-op Association Ltd.

R v Aisaican

R v Belfour

R v Christianson

R v Collins

R v Dyck

R v Hoang

R v Lommerse

R v Racette

R v Stonechild

two of the daughters.
HELD: The appeal was dismissed. The court found with respect to each issue that the chambers judge had not erred in his findings: 1) the evidence presented by the appellant had not proven a material change in circumstances with respect to his income and therefore the same income was imputed to him. The judge had properly reviewed the complex corporate farming arrangements in which the appellant and his family were involved and had not been persuaded by the appellant's accounting arguments; 2) there had been no material change in circumstances because the judge was not persuaded that the respondent was in a new spousal relationship. There had been no lessening of the economic disparity between the parties since the support decision was made; and 3) because the judge had correctly rejected the appellant's argument that there had been a material change in his income, the ground that his child support obligation had been eliminated also failed.

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Hnidy v Hnidy, 2017 SKCA 44

Jackson Ryan-Froslie Wilkinson, June 8, 2017 (CA17044)

Contracts – Enforcement – Interspousal Contract
Family Law – Child Support – Adult Child
Family Law – Child Support – Enforcement
Family Law – Child Support – Interspousal Contract
Family Law – Child Support – Retroactive Support

The appellant mother appealed the chambers order that dismissed her claim for ongoing child support and retroactive support. The claim was dismissed on the ground that each of the children ceased to be a child at the material time, the date of the hearing before the chambers judge. The chambers judge determined that the children were both no longer children upon their graduations from high school because one entered the workforce and the other pursued hockey aspirations. The parties married in 1989, separated in 2010, and entered into an interspousal contract in October 2011. The contract provided for a review of the amount of dividend income to be added to the respondent's employment income for the purposes of child support. The respondent did not request an order for child support when he applied for divorce several months later. In June 2012, the respondent unilaterally reduced the child support by half because the oldest child graduated from high school and entered the construction industry. In September 2013, the

R v Viterra Inc.

R v Young

S.C., Re

South Hill Mall Property Holdings Inc. v Prince Albert (City)

United Steelworkers v Comfort Cabs Ltd.

Walker v Bank of Montreal

Wiebe v Prairie Railcar Services Ltd.

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appellant started receiving a billet allowance of $400 from the youngest child's hockey team. The respondent therefore reduced the child support by $400 per month. In October 2013, the appellant retained legal counsel and requested income information from the respondent. He provided some information, but did not provide 2011 corporate income tax returns for the two companies the appellant knew about and he never revealed the existence of another company. The respondent ceased paying any child support in January 2014 when the youngest child turned 18, but before he finished high school. The respondent agreed at chambers that he was obligated to pay child support until June 2014 with respect to the youngest child. The youngest child elected to play Junior A hockey in British Columbia when he graduated from high school. The issues were as follows: 1) did the chambers judge err in concluding that the children had respectively ceased to be children within the meaning of the Divorce Act on June 30, 2012, and June 30, 2014; 2) did the chambers judge err in holding that the court had no jurisdiction to entertain the appellant's claim for retroactive support because at the material time (date of hearing) neither child was a child within the meaning of the Divorce Act; and 3) did the chambers judge err by failing to consider the appellant's claim in relation to a breach of the contract.
HELD: The issues were dealt with as follows: 1) the chambers judge did not make a manifest error in concluding that the children were no longer children of the marriage upon their high school graduations; 2) the appellant argued that the matter should be considered because she requested financial disclosure at a time when the youngest child was still a child within the marriage. The court reviewed the D.B.S. cases from the Supreme Court of Canada. The appeal court found that the court was not seized with the issue of child support because the divorce was granted without a claim for corollary relief. An original application for statutory child support must be brought while the child remains a dependent child pursuant to the applicable statutory definition. The chambers judge did not err in concluding that she lacked jurisdiction to entertain the appellant's support claim for retroactive or ongoing support under either federal or provincial support legislation; and 3) the appellant claimed that the respondent breached the contract by failing to disclose financial information and also by unilaterally reducing or terminating child support during the currency of the agreement. The appellant was not precluded from advancing the claim even though it was brought after the children ceased to be children within the meaning of the Divorce Act. The appeal court found that the chambers judge erred in principle, and it allowed the appeal regarding a breach of the contract. The matter was returned to Queen's Bench for reconsideration. The court

awarded the appellant costs of $1,500 because of the mixed success and her much lower income.

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United Steelworkers v Comfort Cabs Ltd., 2017 SKCA 45

Jackson Whitmore Ryan-Froslie, June 15, 2017 (CA17045)

Administrative Law – Judicial Review – Appeal
Administrative Law – Judicial Review – Labour Relations Board
Labour Law – Common Employer
Labour Law – Judicial Review – Labour Relations Board
Labour Law – Labour Relations Board – Unfair Labour Practices

The appellant union appealed the Queen's Bench decision dismissing its application for judicial review of a decision of the Saskatchewan Labour Relations Board. The appellant applied to the board regarding the following: an unfair labour practice application alleging that the respondent refused to negotiate the terms and conditions of taxi licences owned by franchise operators affiliated with the respondent; and a common employer application seeking a declaration that the respondent and others were all one employer for the purpose of collective bargaining. Both the board and lower court dismissed the applications. The respondent was a taxi broker that had 80 taxi plates associated with it. In April 2014, the union was certified by the board as the bargaining agent for all taxi drivers employed by the respondent. The respondent refused to bargain with the union regarding taxi plates under its name because they were not matters that the respondent had any authority or control over; the terms of the taxi plate leases were negotiated between franchise owners and lease operators. The board found that the terms and conditions of taxi plates were distinguishable from the terms and conditions of the employment relationship between taxi drivers and the respondent. The board held that the taxi plate lease agreements were not properly the subject of collective bargaining with the respondent. Taxi plate leasing was found to be more of an entrepreneurial relationship than an employment relationship. The respondent also did not become a party to the arrangements between lease operators and franchise owners, so the respondent did not have to bargain over it. The board dismissed the union's application for a common employer declaration because there was no evidence of an actual or imminent erosion of the union's bargaining rights. The chambers judge found that the board's decisions were reasonable. The issues for the Court of Appeal were as follows: 1) did the

chambers judge correctly conclude that the board's conclusions were reasonable with respect to the union's unfair labour practice application; and 2) did the chambers judge correctly conclude that the board's conclusions were reasonable with respect to the union's common employer application.
HELD: The appeal court first decided whether the union's new Charter argument on appeal respecting the Charter-protected rights of freedom of associations could be considered. The issues on appeal were determined as follows: 1) the union argued that s. 2(d) of the Charter guarantees the rights of employees to meaningfully associate and collectively bargain on fundamental workplace issues. The union argued that taxi plate lease rates was a fundamental workplace issue because it directly affected the drivers' compensation. The court found that the argument could only be successful if it could be established that it was unreasonable for the board to have held that the respondent had no control over the taxi plates. The court found the board's decision on that issue was reasonable. The argument ignored the fact that the Saskatchewan Employment Act only requires employers to bargain with employees. Franchise owners are not employers of taxi drivers. The certification order did not apply to the franchise owners and the union was never certified to represent taxi drivers to negotiate terms of their relationship with franchise owners. The chambers judge correctly concluded that the board's decision under the unfair labour practice application was reasonable; and 2) the court did not agree with the union that the board's decision was a result of its failure to consider that bargaining rights could be eroded in ways other than shifting work from a unionized branch of a corporate family to a different non-unionized branch. The court agreed that, given the board's finding the terms of the taxi plate leases were not properly the subject of collective bargaining in the unfair labour practice application, there were no existing bargaining rights to erode or fragment. The union also did not name all the franchise owners in its claim and therefore, a common employer declaration would not have fulfilled any potential, valid, or sufficient purpose. The chambers judge correctly concluded the board's determination of the common employer application was reasonable.

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Jones v Jones, 2017 SKCA 46

Lane Ottenbreit Caldwell, June 15, 2017 (CA17046)

Family Law – Family Property – Division – Appeal

Family Law – Child Support – Appeal
Family Law – Spousal Support – Appeal
Statutes – Interpretation – Family Property Act, Section 2

The appellant appealed the decision of a Queen's Bench judge regarding the division of property and the determination of spousal and child support (see: 2015 SKQB 136). The appellant and the respondent had been married for 27 years and had four children. The appellant was an investment advisor with RBC Dominion Securities since 1991, and by mutual agreement the respondent had stayed at home to look after the children and to assist the appellant in furthering his career. The trial judge found that the appellant's book of business to be family property as defined in s. 2(1) of The Family Property Act. Based upon an expert report provided by the respondent's witness, the trial judge valued the book of business at $1,600,000. The amount was not reduced by the judge as the appellant had not provided evidence regarding discounting the valuation for tax and other contingencies. The parties had a shared parenting arrangement, with only one child under the age of 18 at the time of trial. The judge determined that the appellant's income was $865,100 and the respondent's was $100,000. The respondent provided evidence of the child's expenses but the appellant did not. The judge used a straight set-off approach and found that under the Guidelines, the appellant should pay child support for one child at $5,690 per month after applying the net difference between the Guidelines amount owed by each party based on their incomes. The judge found that the respondent was entitled to spousal support on a compensatory and non-compensatory basis. Her half-share of the family property would earn income, but she should receive $9,000 per month indefinitely. The appellant raised numerous grounds of appeal, which included whether the trial judge erred: 1) in determining the book of business was family property, and if it was, had the property been properly valued. He argued that the book belonged to his employer and it was not an asset that he could sell. Alternatively, the judge erred in valuing the book by relying on the respondent's expert; 2) in a number of ways in ordering the child support, such as using a straight set-off basis for child support in a 50-50 shared parenting arrangement without taking into consideration s. 4 of the Guidelines and by failing to take into account the respondent's correct income because it did not include her income from investments; and 3) regarding the amount of spousal support, because the respondent had significant assets that were increasing in value, had made no effort to become self-sufficient and did not intend to do so.
HELD: The appeal was dismissed in large part. The court found with respect to each ground that the trial judge had not erred: 1) in finding that the book of business was family property. The

definition of family property under s. 2(1) is not limited to "ownership" but includes that property in which a spouse has an "interest". In this case, the appellant clearly had an interest in the book of business as it determined his annual income. There was no evidence that the appellant would be prevented from taking a list of his book of business to another brokerage firm and receiving compensation for doing so. As the appellant presented no evidence as to valuation and contingencies, the trial judge correctly made his determination of value on the evidence before him; 2) in his determination of the proper amount of child support based on the evidence presented to him. The appellant had conflated the issue of child support with that of spousal support; and 3) in his understanding of the evidence and the considerations governing the support award.

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Gary L. Redhead Holdings Ltd. v Swift Current (Rural Municipality No. 137), 2017 SKCA 47

Jackson Herauf Ryan-Froslie, June 16, 2017 (CA17047)

Municipal Law – Assessment Appeal – Appeal
Statutes – Interpretation – Municipal Board Act
Statutes – Interpretation – Municipalities Act

The appellant appealed from the decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board (SMB) pursuant to The Municipal Board Act. The appellant had initially appealed the assessment of its properties by the respondent, Saskatchewan Assessment Management Agency (SAMA). SAMA determined that the market adjustment factor (MAF) for the appellant's properties, as well as others, should be fixed at .86 for the 2015 taxation year. The appellant appealed to the Board of Revision (board) under s. 225 of The Municipalities Act, and SAMA cross-appealed. Regarding the appropriate MAF, the board agreed with SAMA that the MAF was too low as certain older sales had been improperly included in the sales array. However, the board found that the correct assessment could not be implemented for 2015 because it would create inequity for other property owners who had not appealed their assessments. The appellant appealed to the committee under s. 246 of The Municipalities Act. It argued that the board erred by concluding that the MAF was too low and asserted that a .57 MAF should be applied to the properties for which the appeal had been made. The committee dismissed the appeal but increased the assessments on the properties, finding that the MAF should be

.92 and ruled that the board had erred by not increasing the assessment on the basis of SAMA's appeal to it. The appellant then applied for and was granted leave to appeal the Court of Appeal under s. 33.1 of The Municipal Board Act on the grounds that the committee could not act to increase the MAF without an appeal requesting that it do so. The issues were as follows: 1) what was the standard of review to be applied. Since 1943 and confirmed by its 2000 decision in Cadillac Fairview, the court had reviewed the committee's decisions on questions of law and jurisdiction in relation to assessment matters on a standard of correctness. The Supreme Court had suggested in Edmonton v Edmonton East (Capilano) Shopping Centres (Edmonton East) that the standard was reasonableness. In this case, all of the taxpayer, the taxing authority and the tax assessor asserted that the standard should remain correctness; and 2) whether the committee erred in law or jurisdiction when it decided to overturn the decision of the board regarding an appeal by SAMA not to increase the assessed value of the properties for 2015 when there was no appeal by SAMA from that decision and no notice of appeal before it putting that decision in issue and to seek an increase.
HELD: The appeal was allowed and the decision of the board restored. The court held the following with respect to the issues: 1) the standard of review from the decision of the committee pursuant to s. 33.1 of The Municipal Board Act was correctness; and 2) the committee did not have the authority to increase an assessment when there was no appeal to it requesting an increase.

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Babich v Babich, 2017 SKCA 48

Richards Herauf Ryan-Froslie, June 20, 2017 (CA17048)

Civil Procedure – Queen's Bench Rules, Rule 4-19, Rule 4-21
Family Law – Custody and Access – Interim – Variation – Appeal

The appellant appealed from an interim custody order that varied the existing arrangement between the parties (see: 2017 SKQB 32). The appellant had applied at the time of the variation application to have the chambers judge recuse himself because he had presided at two pre-trial conferences with the parties regarding the parenting issues. The judge had refused the appellant's application, finding that although the Queen's Bench Rules specifically restrict a judge's ability to preside over a trial if they had conducted a pretrial conference, there was no

restriction on the conduct of chambers applications.
HELD: The appeal was allowed. The order granted by the chambers judge was set aside and the earlier interim order reinstated. The court agreed with the appellant that the Queen's Bench judge had mistakenly applied the test for actual bias as opposed to reasonable apprehension of bias. Furthermore, the court found that the prohibition against a judge participating in a trial after conducting a pretrial conference extended to the hearing of contested interim chambers applications that dealt with the same issues discussed at the pretrial. The chambers judge also erred in denying the parties a viva voce hearing to allow cross-examination of the psychologist who prepared the assessment report regarding the children, upon which the judge based his decision to vary the interim order.

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Holmes v Jasteck Master Builder 2004 Inc., 2017 SKCA 50

Ottenbreit, June 20, 2017 (CA17050)

Civil Procedure – Court of Appeal Rules, Rule 13
Statutes – Interpretation – Queen's Bench Act, 1998, Section 38(b)

The applicants applied pursuant to rule 13 of the Court of Appeal Rules to amend their notice of appeal of the summary judgment of a Queen's Bench chambers judge made against them in January 2017. They sought to add to their notice of appeal, an appeal against the judge's subsequent order of costs made against them in March 2017 because the chambers judge had reserved the matter. The applicants argued that they should be allowed to amend their notice of appeal to cover both decisions without the necessity of filing a second notice of appeal because both emanated from the same matter. The applicants also argued that they were not required by s. 38(b) of The Queen's Bench Act to obtain leave of the chambers judge to appeal his decision as to costs.
HELD: The application for an amendment to the notice of appeal was denied. The court ordered the applicants to file a separate notice of appeal and noted that they could request that the two appeals be heard together. The court found that in the circumstances, the applicants were not required to obtain leave from the chambers judge to appeal the decisions as to costs. The court established the procedures regarding an appeal of a decision relating to costs where it has issued after the substantive decision: 1) if the party is appealing or cross-appealing all or part

of the substantive decision, no leave is required under s. 38 of the Act; 2) if there is no appeal or cross-appeal of the substantive decision, leave is required under s. 38; and 3) in either case, a separate notice of appeal is required to be served and filed for the costs decision.

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R v Viterra Inc., 2017 SKCA 51

Lane Herauf Whitmore, June 21, 2017 (CA17051)

Labour Law – Occupational Health and Safety – Offences – Acquittal – Appeal
Regulatory Offence – Occupational Health and Safety
Statutes – Interpretation – Canada Labour Code

The Crown appealed the acquittal of the respondent corporation that had been charged with six offences under the Canada Labour Code (CLC). An employee of the respondent had died accidentally at one of its inland grain terminals. The assistant manager had instructed the deceased to look into one of the receiving pits into which trucks dumped their grain, because the manager noticed the flow of grain into it had slowed. The deceased stepped into the pit and was engulfed and suffocated. The trial judge rejected the Crown's position that proof of injury or death was prima facie proof of a violation of occupational health and safety legislation. He then summarized the actus reus of the offences set out in each count, which the Crown had to prove beyond a reasonable doubt, as: (a) failing to instruct how to unplug a blockage in a receiving pit (counts 1 and 2); (b) failing to train and supervise so as to ensure an employee's health and safety when responding to a blockage in a receiving pit (counts 3 and 4); and (c) failing to ensure that an employee was made aware of the hazard of being engulfed in grain in a receiving pit (counts 5 and 6). He found on the facts that the actus reus of the charges had not been established. The issues raised on appeal were as follows: 1) whether the trial judge erred in his analysis of the actus reus and in determination that the actus reus had not been proven; 2) whether he erred in finding the respondent had established the defence of due diligence; and 3) if the judge had erred in his findings, what was the proper remedy.
HELD: The appeal was dismissed. The court decided the appeal on the first ground of appeal and did not consider the other grounds. It reviewed the jurisprudence on the question of whether proof of injury or death was sufficient to establish the

actus reus of an offence and determined that the answer depended on how the charge was particularized. In this case, the court found that the actus reus of a contravention under ss. 124 and 125 of the CLC was not necessarily established by proof of the injury or death of an employee at the workplace. The trial judge had not erred in his articulation of the actus reus of the offences as particularized in the charges nor in his findings regarding the evidence that they had not been proven.

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South Hill Mall Property Holdings Inc. v Prince Albert (City), 2017 SKCA 52

Jackson Herauf Ryan-Froslie, June 21, 2017 (CA17052)

Statutes – Interpretation – Cities Act, Section 227
Municipal Law – Tax Assessment – Assessment Appeals Committee – Appeal

The appellant appealed its 2013 municipal tax assessment to the Board of Revision to challenge the Market Adjustment Factor (MAF) used to calculate the assessment. The board granted the appeal and reduced the MAF. The respondent appealed that decision to the Assessment Appeals Committee of the Saskatchewan Municipal Board. While the committee appeal was pending, the appellant received its 2014 tax assessment notice, which did not show the adjustment to the MAF made by the board, so the appellant appealed its 2014 assessment to the board. The parties agreed at the board hearing that all the arguments and evidence used by the appellant on the 2013 appeal would be applied to the 2014 appeal. The board's decision was to reduce the MAF as it had in 2013. The respondent then sent a supplementary property tax notice adjusting its assessment for 2014 to accord with the board's decision and then appealed the board's 2014 decision to the committee. In January 2015, the committee rendered its decision regarding the appellant's 2013 assessment appeal. It overturned the board's decision and restored the MAF to its original value. The appellant's application for leave to appeal to the Court of Appeal was denied. In August 2015, the respondent informed the committee it was withdrawing its appeal of the board's 2014 decision. It then sent the appellant a supplementary assessment notice for 2014, which was adjusted to reflect its 2013 assessment. The appellant disagreed with the reassessment and requested a ruling from the committee pursuant to s. 227 of The Cities Act as to the effect of the committee's 2013 decision on the appellant's

2014 tax assessment. The committee found that its 2013 decision should be applied to the appellant's 2014 assessment. The appellant was granted leave to appeal to the Court of Appeal on the question of whether the committee had erred in its interpretation or application of s. 227 of the Act.
HELD: The appeal was granted. The court found that the committee erred in its interpretation and application of s. 227. (The court released its decision in Prince Albert (City) v Prince Albert Co-op Association at the same time regarding the interpretation and application of s. 227 (see: 2017 SKCA 53)). Section 227 provides a mechanism by which appeal decisions of the board or the committee can be applied to a subsequent assessment without need for a further appeal where the assessment model has not been altered and nothing has changed with regard to the facts, conditions and circumstances of the property and the subsequent assessment has not been appealed. The section was not applicable in this case because not only was the subsequent assessment appealed but the board's decision reduced the MAF and changed the assessment.

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Prince Albert (City) v Prince Albert Co-op Association Ltd., 2017 SKCA 53

Jackson Herauf Ryan-Froslie, June 21, 2017 (CA17053)

Statutes – Interpretation – Cities Act, Section 217(6), Section 227
Municipal Law – Tax Assessment – Assessment Appeals Committee – Appeal

The appellant, the City of Prince Albert, appealed the decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board regarding the interpretation and application of ss. 217(6) and 227 of The Cities Act. The appeal was heard and decided together with South Hill Group Mall Property Holdings Inc. v Prince Albert (South Hill Group) (see: 2017 SKCA 52). The background to this appeal was that the respondent appealed its 2014 tax assessments regarding its commercial property in Prince Albert to the Board of Revision. The board had allowed an almost identical appeal from South Hill Group with respect to their 2013 property tax assessment regarding the Market Adjustment Factor (MAF) used the by the city's tax assessor. The board allowed the respondent's 2014 appeal for the same reason it had allowed the South Hill Group's 2013 appeal. The city appealed the board's decision regarding the respondent to the

committee. Before that appeal could be heard, the committee overturned the board's decision relating to the South Hill Group's 2013 property assessment appeal. The South Hill Group applied unsuccessfully for leave to appeal the committee's decision to the Court of Appeal. The city then withdrew its appeal of the board's 2014 decision regarding the respondent, believing that the committee's decision would apply to the 2014 property tax assessments for both the respondent and the South Hill Group. The respondent requested a ruling from the committee pursuant to s. 227 of The Cities Act to determine whether its decision regarding the South Hill Group would apply to its 2014 property tax assessment. The committee concluded that its decision had no effect on the respondent's assessment because it related to property owned by a different tax payor. The committee also held that the city's withdrawal of its appeal did not fall within the scope of s. 217(6) of the Act, and therefore, the city's appeal could not be reinstated pursuant to that section. Consequently, the committee's ruling was that the board's 2014 decision governed the respondent's 2014 property tax assessments. The city was granted leave to appeal the committee's ruling regarding ss. 217(6) and 227 of the Act.
HELD: The appeal was dismissed. The court found that the committee had not erred. The purpose of s. 227 of the Act, as determined in its decision in South Hill, was to provide a mechanism by which appeal decisions of the board or committee could be applied to subsequent assessments of the same property without the need for an appeal. The section only applies to property that was the subject of the appeal, otherwise the annual right of appeal set out in s. 197 of the Act would be meaningless if the outcome of one taxpayor's appeal could be imposed on other property owners who were not parties to the appeal. The court also found that the committee correctly interpreted and applied s. 217(6) of the Act. The section could not apply to a case such as the appellant's because it had withdrawn its appeal. The section applies to the failure to perfect an appeal, which is a procedural defect. Withdrawing an appeal is not a procedural defect.

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R v Young, 2017 SKPC 22

Bauer, February 16, 2017 (PC17038)

Criminal Law – Controlled Drugs and Substances Act – Possession of Marihuana
Criminal Law – Defences – Charter of Rights, Section 8, Section

9

Criminal Law – Suspended Sentence – Probation – Calculation of Probation Period

Statutes – Interpretation – Interpretation Act, 1995

The accused was charged with possession of cannabis marihuana in an amount less than 30 grams, contrary to s. 4(1) of the Controlled Drugs and Substances Act. On July 15, 2016, an officer observed the accused in a bar and conducted a computer check and found that the accused had been given a suspended sentence and placed on probation for 12 months on July 15, 2015. One of the conditions was that the accused not be in a bar. When the accused was asked if he had anything on him, the accused produced a package of marihuana from his pocket. The accused argued that the evidence of marihuana was obtained in violation of his ss. 8 and 9 rights under the Charter. He indicated that his probation order started July 15, 2015, and ended July 14, 2016, so he was not committing a breach of probation and should not have been arrested. The Crown argued that the arrest was lawful because, based on The Interpretation Act, 1995, the probation order did not expire until midnight July 15, 2016.
HELD: The court concluded that the probation commenced on July 15, 2015, pursuant to s. 719(1) of the Criminal Code, and it ended at midnight on July 15, 2016, as determined by s. 28 of The Interpretation Act. The officer had reasonable grounds to believe the accused was committing an offence because he was in the bar before midnight. The arrest was lawful and not a breach of s. 9 of the Charter. The search was also lawful as incident to the arrest. The evidence was admitted and the accused was found guilty of possession of marihuana.

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R v Christianson, 2017 SKPC 45

Daunt, May 17, 2017 (PC17035)

Criminal Law – Motor Vehicle Offences – Impaired Driving
Constitutional Law – Charter of Rights, Section 8, Section 9, Section 10(a), Section 10(b)

The accused was charged with having care or control of a vehicle while his ability to operate it was impaired by alcohol, contrary to ss. 255(1) and 253(1)(a) of the Criminal Code. The defence brought a Charter application alleging that the accused's ss. 8, 9 and 10 rights had been violated and requesting the exclusion of evidence pursuant to s. 24(2). A voir dire was held. The only witness called was the RCMP officer who had arrested the

accused. Although a police video taken at the time depicted the events described in his testimony, the Crown neither played it in court nor tendered it into evidence. In cross-examination, defence counsel played a portion of it for the purpose of testing the reliability of the officer's testimony. After dismissing the witness, counsel realized that she had neglected to tender as an exhibit the DVD containing the video file. Crown counsel agreed to have the DVD entered as an exhibit. Defence counsel clarified that she was tendering into evidence only the portion of the video file that was played in court and put to the witness. Crown counsel then objected and said that she would not have consented to defence counsel tendering the exhibit after the close of her case if the whole video was not going in. The court reserved its ruling on this preliminary issue. The officer testified regarding his observations of the accused: he smelled of alcohol, had slurred speech, lost his balance and swayed while he walked to the police cruiser. As a result, the officer put the accused in the cruiser to isolate the smell of alcohol before he formally arrested him about ten minutes later. He then read him his right to counsel, gave the police warning and made the breath demand. At the detachment the accused provided breath samples. The officer admitted in cross-examination that he detained the accused for impaired driving when he put him in the police cruiser but did not tell him why he was being detained. The portion of the video played by defence counsel contradicted the officer's evidence that the accused displayed the signs of impairment.

HELD: The application was granted. The court found that the accused's ss. 8, 9, 10(a), and 10(b) Charter rights had been violated. After analyzing the breaches, the court decided to exclude the evidence under s. 24(2) of the Charter because it would bring the administration of justice into disrepute. Regarding the preliminary evidentiary issue, the court ruled that the portion of the video that was played in court and put to the officer on cross-examination was admissible. The defence counsel's mistake in not having the DVD marked as an exhibit was a technical one. The voir dire involved the lawfulness of police actions and the Crown bore the burden to justify those actions. Crown counsel chose not to lead evidence of the video and not to tender it into evidence, nor did the Crown decide to use the video on a re-direct to allow the officer to explain any discrepancies. The defence was entitled to choose to cross-examine the witness with a portion of the video contradicting his version of events to cast doubt on the accuracy of his observations. The court found the officer's evidence to be unreliable in light of the video. The accused was arbitrarily detained contrary to s. 9 of the Charter because as soon as he was placed in the police cruiser, he was not only detained, he was

taken into custody and a de facto arrest was made without grounds because the accused had not shown any evidence of impairment. The accused was not informed of the reason for his detention nor given his right to counsel at that time. Therefore, there was a breach of the accused's ss. 10(a) and (b) Charter rights. Between the de facto arrest and the formal arrest, no further investigation took place to provide grounds to arrest where none existed before. The violation of the accused's s. 8 Charter right occurred when the officer placed him in the police cruiser to establish whether the smell of alcohol came from him. As the arrest was unlawful, there was no power to search incident to it.

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R v Dyck, 2017 SKPC 49

Kaiser, May 23, 2017 (PC17037)

Criminal Law – Breach of Undertaking
Criminal Law – Evidence – Credibility
Criminal Law – Harassment
Criminal Law – Utter Threats

The accused was charged with the following Criminal Code offences: harassing L.D., contrary to s. 264; failing to comply with his undertaking not to directly or indirectly communicate with R.D., contrary to s. 145(5.1); and uttering a threat to R.D. to cause R.D. bodily harm, contrary to s. 264.1(1)(a). The accused was married to L.D. for 18 years and R.D. was their oldest child. The first day of the alleged harassment charge was in February 2016 when the accused let the nitrogen out of L.D.'s tires on her van so that it was unusable. In March 2016, L.D. went to a lawyer, changed her bank accounts, and told the accused that she was seeking a divorce. The children and L.D. moved to a shelter for women and children. L.D. obtained an Emergency Intervention Order (EIO) granting her exclusive possession of the residence and the accused was ordered not to have communication or contact with L.D. or the children or be near their work or schools. The accused moved into an apartment with a balcony overlooking the backyard of the family home. In May 2016, the accused and L.D. entered into a consent order regarding custody and access of the children. The accused left a trailer with his tools in the yard of the home. In June 2016, the accused entered the home and had words with R.D., leading to the threat charge. R.D. indicated that the accused told him that he would hit him so hard he would not know what was coming.

The accused was released on an undertaking. The accused attended R.D.'s football practices in September 2016 leading to the breach of undertaking charge. The accused had previously pled guilty to charges of assaulting L.D., who testified that the physical violence stopped after the assault charge, but the accused would yell at her for hours only a few inches from her face and would only stop when she agreed with him. She also testified as to other events where she felt the accused mistreated her and she was in fear. L.D. testified that the accused had cut her off from family and friends for the better part of 2008 to 2016. There were numerous pictures tendered of L.D. taken by the accused during the alleged period of harassment. R.D. also testified to being emotionally and physically abused by the accused.

HELD: The court allowed evidence of prior discreditable conduct of the accused for the following reasons: to provide context to the court in deciding what effect the accused's conduct, during the period alleged in the charge before the court, had upon the complainant; to provide context regarding whether L.D.'s fear was reasonable, within the meaning of s. 264; and to identify whether the accused had the necessary mens rea. The conduct could not be used to prove that the accused was disposed to commit this or any other offence. The court found L.D. to be a credible witness who was candid and testified without exaggeration. R.D. was found to be credible overall by the court. The accused's overall credibility was assessed as being low. With respect to the charge of threatening bodily harm to R.D., the court concluded that it was not plausible that the accused did not remember the essence of the exchange. The court found that the accused said the threatening words indicated by R.D. and that those words established that bodily harm was threatened. The threat of psychological harm was also proven. The accused was found guilty of the threat charge, contrary to s. 264.1(1)(a). With respect to the harassment charge, the court first examined whether the accused engaged in any of the conduct set out in ss. 264(2). The court concluded that the accused probably followed L.D. but was not convinced beyond a reasonable doubt that he did. The court was convinced beyond a reasonable doubt that the accused engaged in repeated communication with L.D. or a person known to her as proscribed in ss. 264(2)(b). He was also engaged in watching and besetting the accused. Further, the court was convinced beyond a reasonable doubt that the accused engaged in threatening conduct. The court found that L.D. lived continually in fear and was satisfied beyond a reasonable doubt that L.D. was harassed within the meaning of s. 264. The court then turned to the mens rea of the harassment offence and concluded beyond a reasonable doubt that there were many instances where the accused knew his behaviour was harassing.

Back to top

In other instances, the court found the accused was reckless as to whether his behaviour would harass L.D. The court was also convinced beyond a reasonable doubt that the accused's conduct caused L.D. to fear for her safety and that fear was reasonable. The court did not accept any evidence that showed the accused had lawful authority to engage in the impugned conduct. The accused was found guilty of criminal harassment. The accused was found not guilty of breaching his undertaking because the charge alleged the breach when the accused was at R.D.'s football practice but there was no evidence that the accused actually communicated with R.D. as would be required for a breach of the undertaking.

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R v Lommerse, 2017 SKQB 99

Megaw, April 10, 2017 (QB17090)

Constitutional Law – Charter of Rights, Section 8, Section 24(2)

The accused made a Charter application alleging that his s. 8 Charter rights had been infringed and requesting that evidence obtained by the police during the execution of a search of his computer be excluded pursuant to s. 24(2) of the Charter. In a judgment issued in January 2017, the court found that that the accused's s. 8 Charter rights had been violated but the question of whether the evidence should be excluded was not determined at that time because there had been no evidence presented of either the nature of the evidence nor the location from which it had been seized. The Crown proceeded with its case and called all of its evidence in order for the court to determine the s. 24(2) issue. The accused had been charged as a result of the investigation into a complaint of sexual assault of a minor and sexual exploitation of that minor. A warrant was obtained to determine if there was corroborating evidence to be found on the accused's computer that would support the statements being made by the complainant. The investigating officer obtained a warrant that authorized a search of the accused's computer devices. The Information to Obtain (ITO) in support of the warrant sought only a search of the "search history of the computer". The evidence given by the RCMP computer forensic specialist and an officer from the Internet Child Exploitation (ICE) unit regarding their respective examinations of the accused's computer indicated that they searched it for child pornography. The officer with ICE did not find any accessible pornography on the computer but found an image in the recycle

bin. The other officer used a forensic program to search the computer and it located over 400 images of either child nudity or child pornography. Only 18 files were found in specific locations. The officer testified that it was possible to utilize different forensic tools to restrict an analysis to a specific area of the computer so that he could have obtained only Internet history without extracting any images from the balance of the computer storage locations but did not do so. The accused sought to exclude all of the images of child pornography located on his computer or alternatively, to exclude those images not automatically cached by a web browser during an Internet search.
HELD: The application was allowed in part and the balance of images found on the computer were excluded from the evidence at trial pursuant to s. 24(2) of the Charter. The court found that the evidence found through temporary Internet sites was admissible. The reason for obtaining the warrant was apparently abandoned by the police at the beginning of the search of the computer. The police had no authority to search the computer generally. They were only authorized to look at the Internet history. The search of the non-Internet history was a serious infringement of the accused's s. 8 Charter right. The temporary files created as a result of the visits on the Internet was evidence of Internet history, and because of this connection, this evidence was not excluded.

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R v Aisaican, 2017 SKQB 131

Megaw, May 11, 2017 (QB17124)

Criminal Law – Expungement of Guilty Plea

The accused pled guilty to: possessing six firearms, contrary to s. 91(1) of the Criminal Code; and possessing cannabis resin for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. The parties agreed on a joint submission for sentencing, and sentencing was adjourned for a year. There were originally a total of 14 charges that resulted from a search authorized by search warrant on the accused's home. The guilty pleas were entered in May 2015, the sentencing was set for May 2016, and the accused then applied to expunge his guilty pleas. The accused testified. He also waived solicitor-client privilege to allow the file contents to be tendered and to permit his former lawyer to testify. The lawyer had over 30 years of experience in criminal law, including firearm offences, drug- and search-and-

seizure-related issues, and the Charter. A preliminary hearing was held in July 2014 after the accused elected trial by Queen's Bench judge sitting alone. Four police officer witnesses testified at the preliminary hearing. The accused was present at the preliminary hearing. At the time that the guilty pleas were entered, the court did not make inquiries pursuant to s. 606 of the Criminal Code, but the accused was accompanied by counsel. The accused sought to withdraw his guilty pleas for the following reasons: 1) his counsel did not provide him with the disclosure to review and consider his options; 2) his counsel did not properly advise him on the essential elements of the offence and he should not have pled guilty as a result; 3) his counsel failed to properly prepare for the upcoming trial; 4) he did not realize the consequences of his guilty pleas; 5) he was not in his correct operating mind due to stresses and other influences at the time he entered his guilty pleas; and 6) he had defences to all of the charges and his counsel neglected to consider those defences and advance those defences at a trial.

HELD: The court found that there was a recurring theme throughout the lawyer's notes regarding the accused's desire to put the matter off for as long as possible because of his roles with his First Nation. The accused then contacted the lawyer and renewed retainer arrangements were made. The lawyer also made notes showing his compliance with s. 606 of the Criminal Code. The court reviewed each of the accused's reasons for expungement: 1) the court determined that the accused knew the case he was confronted with from the Crown. The accused was provided with all of the necessary information to permit him to properly consider and evaluate his options prior to entering his pleas; 2) and 3) the lawyer explained the essential elements of the offences to the accused and he understood them. There was nothing in the file to indicate that the lawyer was unprepared for the trial; 4) the accused had 22 previous criminal convictions, with his last conviction being 22 years ago. The previous convictions ranged from driving while impaired to attempted robbery with violence. He received various sentences for the offences. The court found that the accused was able to understand concepts familiar in the criminal justice system. Further, it was concluded that the accused voluntarily pled guilty; 5) the court found no evidence to establish the accused was not capable of making decisions when he pled guilty; and 6) the accused suggested several lines of defence but did not apply them to the facts or evidence to show how they would apply to his charges. The accused's application was dismissed.

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R v Racette, 2017 SKQB 132

Zarzeczny, May 9, 2017 (QB17120)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Sentencing
Criminal Law – Motor Vehicle Offences – Dangerous Driving – Sentencing

The accused was found guilty after trial of the following charges: impaired driving, contrary to ss. 255(1) and 253(1)(a) of the Criminal Code; leaving the scene of an accident, contrary to s. 252(1) of the Code; failing to provide a breath sample, contrary to s. 254(3) of the Code; and dangerous driving, contrary to s. 249(1)(a) of the Code (see: 2017 SKQB 60). The accused was 52 years of age. He did not have a valid driver's licence at the time he committed the offences. The accused had 12 previous Criminal Code driving convictions, including five for impaired driving or driving over .08. The other offences included driving while disqualified, dangerous driving and failing to remain at the scene. However, he had not committed any offences since 2008. The Crown submitted that the aggravating factors were the circumstances of these offences and the accused's prior record, particularly his driving record. There were no mitigating factors and an appropriate sentence was four to five years' imprisonment. The defence argued that an appropriate prison sentence was 32 months. The totality principle was applicable and the offences were part of one continuing incident. The accused had had a significant period of non-offending. He had been employed for 14 years with the same employer and supported four children. He had never received in-patient alcohol treatment. The accused had had a difficult childhood where his parents and grandparents were alcoholics. (Although his background was Metis, neither the Crown nor the defence submitted that his circumstances engaged the Gladue principles.)
HELD: The accused was sentenced to 36 months and was prohibited from driving for three years. For the offences of dangerous driving and impaired driving, the court imposed a sentence of 24 months each to be served concurrently. For the failure to provide a breath sample, the court imposed a sentence of six months consecutive to each of the 24-month sentences. For his failure to remain at the scene, a sentence of six months consecutive to each of the other sentences was ordered. The court found that the aggravating factors consisted of the accused's level of intoxication and his behaviour when arrested. All the offences showed the accused's disregard for his legal and moral obligations.

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R v Stonechild, 2017 SKQB 138

Elson, May 12, 2017 (QB17125)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Manslaughter
Criminal Law – Sentencing – Pre-sentence Report
Criminal Law – Sentencing – Remand Time

The accused was charged with second-degree murder, but found guilty of the lesser and included charge of manslaughter. The victim was 84 years old. The accused took a bus to Regina with the intention of visiting the victim and giving him gifts of cigarettes and alcohol. The accused referred to the victim as "Uncle" because they were close, not because they were actually related. The victim and accused drank alcohol together when the accused arrived at the victim's house. The victim's body was found draped over a kitchen chair the next morning by a caregiver attending at his home. The victim had at least 20 lacerations consistent with being struck with his cane. He was also stabbed 14 times by knife and 2 times by screwdriver. The accused was 54 at the time of the offence. He was a First Nation man who had 63 previous criminal convictions from 1972 to 2010. Nine of those were violent offences. The accused was incarcerated for all violent offences, with the lengthiest term being four years. A Gladue report was prepared. The accused attended a Residential School from 1961 to 1968 where he endured physical, sexual, and emotional abuse. When he left the school, he was placed in foster care. In 1994, the accused began living a life of sobriety, but relapsed in 2004 shortly after he received a portion of his residential school settlement. The accused had five children, but one died at 18 months old in foster care. The accused was an accomplished artist, with much of his art reflecting his Aboriginal culture. The accused had support from his First Nation and they had designed a "traditional healing plan" for him. The pre-sentence report indicated the accused's alcohol problem began at 15 years of age. The accused's risk to reoffend was measured as high, with substance abuse being a major risk factor. The pre-sentence report also indicated that the accused's motivation to address his substance abuse issues was quite weak.
HELD: The court considered the accused's moral culpability for the manslaughter offence. The offence was brutal and violent and the difference in physical ability was an aggravating factor. The victim was also someone with a history of extending hospitality to the accused. The attack was not planned, it was

sudden. The court did not find any aspects of the accused's personal characteristics mitigated his culpability for the act. There was little evidence of remorse. The court found the level of moral blameworthiness in the case to be high. The court considered the Gladue factors, specifically that the accused was the third generation of residential school survivors. The accused's substance abuse issues were contributed to by the environment he was brought up in. The Gladue factors were found to lessen the accused's moral culpability. The court did not agree with the suggestion in the Gladue report that the accused be sentenced as outlined by his First Nation. The sentence would require the accused to inflict serious bodily harm on himself, which is something the court could not order. The sentence also failed to take into account all of the necessary principles of sentencing. A sentence of a significant period of imprisonment was appropriate under the circumstances and was justified by the moral blameworthiness of the offence. The court found the appropriate sentence was a term of imprisonment of 15 years. The accused was given credit at 1:1.5 ratio for time served, a credit of 2,376 days.

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R v Collins, 2017 SKQB 139

Tholl, May 18, 2017 (QB17131)

Criminal Law – Child Pornography – Accessing
Criminal Law – Child Pornography – Possessing

The accused was charged with possession of child pornography, contrary to s. 163.1(4) of the Criminal Code, accessing child pornography, contrary to s. 163.1(4.1) of the Code, and making child pornography available, contrary to s. 163.1(3) of the Code. The charges were laid after the Integrated Child Exploitation Unit of the RCMP investigated the downloading of child pornography files over the Internet to a computer that was owned and used by the accused. The accused pled not guilty to the offences. He did not dispute that he owned the computer or that child pornography was located on it but denied that he was the person who accessed, possessed or made available the child pornography. The accused testified that a number of other people might have downloaded and then deleted the file-sharing program LimeWire and the child pornography that was acquired through it. He testified that he had not used his computer during the time period when the RCMP found activity on it regarding the pornography.

HELD: The accused was found guilty. Applying the principles of R v W.(D.), the court did not believe the accused's testimony and was not left with a reasonable doubt with regard to identity on the basis of his testimony and the other evidence. Taking into account all the evidence, the court concluded that there was no other reasonable inference that could be drawn other than the guilt of the accused.

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Hanson v Morin, 2017 SKQB 150

Scherman, May 24, 2017 (QB17142)

Civil Procedure – Queen's Bench Rules, Rule 3-26
Civil Procedure – Applications – Applications without Notice
Civil Procedure – Pleadings – Statement of Defence – Noting for Default

The plaintiff brought an application without notice pursuant to Queen's Bench rule 3-26 for an assessment of damages and judgment made after the defendant was noted for default. The plaintiff claimed he suffered injuries because of a 2014 vehicle accident caused by the defendant. As the defendant was subsequently convicted of impaired driving and consequently had no insurance coverage, the plaintiff implicitly brought his application for judgment under the no fault regime of The Automobile Accident Insurance Act (AAIA). He claimed that under s. 103 and 104 of the AAIA as they existed at the time of the accident, he was pursuing claims for general and special damages against the defendant for non-economic loss that were in excess of his no fault coverage.
HELD: The application to assess damages and for default judgment was dismissed with leave given to the plaintiff to bring the application again, supported by proper supporting evidence and subject to notice of the application being served on the defendant and SGI. The court noted the following defects in the application as made: 1) the plaintiff's affidavit evidence regarding his injuries and damages was vague, general and subjective; 2) as the claim for damages was significant, the defendant should have been served with notice, regardless of the fact that Queen's Bench rules do not expressly require a noted-for-default defendant to be served; 3) there was nothing in the plaintiff's evidence that addressed the issue of whether he was a person entitled to benefits under Part VIII of the AAIA that would qualify him to bring an action for damages for non-economic loss under s. 201; and 4) that the plaintiff intended to

seek payment from SGI under s. 59(2) of the AAIA after obtaining judgment, but had not given SGI notice of the application.

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Amalgamated Transit Union Local 1374 v Saskatchewan (Minister of Finance), 2017 SKQB 152

Schwann, May 26, 2017 (QB17143)

Municipal Law – Zoning Bylaw – Enforcement

The Rural Municipality applied for an order requiring the respondent to comply with the direction contained in its development officer's order to remove temporary commercial buildings from land, within a time set by the court and for costs of the application. The RM relied upon s. 242 of The Planning and Development Act, 2007 and s. 370 of The Municipalities Act. The respondent was a business corporation and owner of land in the RM. It operated a golf course, and in 2011, the clubhouse was destroyed by fire. The respondent obtained a temporary development permit to erect temporary buildings for use on the land for one year. The temporary commercial buildings were erected and another temporary permit was issued in 2013 for an additional year. It expired in June 2014 and no further permits had been issued. In 2011, the RM adopted a zoning bylaw, and in it, it regulated the land on which the clubhouse was located as R2 for high density residential development. The RM's development officer issued an order to the respondent in May 2016 requiring it to remove the temporary buildings by June 10, 2016, to comply with the zoning bylaw. The respondent failed to appeal the order and did not remove the building and continued its commercial use in contravention of the bylaw and the order. The respondent argued that the court should not order compliance because it alleged that the RM acted in bad faith because the RM had, for example, mistakenly zoned the land as residential and that the order was high-handed, requiring the respondent to remove buildings necessary to its operation in the midst of golf season.
HELD: The order was granted: the respondent was to remove the buildings and cease commercial use by October 21, 2017, unless otherwise authorized by the RM. Pursuant to Queen's Bench rule 11-1 and rule 11-19(3), the respondent was awarded costs. The court was not persuaded that the RM was acting in bad faith in seeking to enforce its order. The temporary buildings contravened the bylaw and the development officer's order as

properly issued.

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Gyorfi v Pacheco, 2017 SKQB 154

Gunn, May 26, 2017 (QB17145)

Landlord and Tenant – Residential Tenancies Act – Appeal

The appellant appealed from the decision of a hearing officer of the Office of the Rentalsman. The appellant was behind in his rent. The respondent served him with the Notice of Hearing but he did not appear. In his appeal, he advised that it was not his intention to be behind in his rent payments but it had happened because he had not received his disability payments due to an administrative problem.
HELD: The appeal was dismissed. The hearing officer had jurisdiction to make the decision and no error of law had occurred.

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Wiebe v Prairie Railcar Services Ltd., 2017 SKQB 157

Barrington-Foote, June 1, 2017 (QB17147)

Civil Procedure – Queen's Bench Rules, Rule 4-44

The defendants brought an application for an order dismissing the plaintiff Wiebe's wrongful dismissal claim for want of prosecution pursuant to Queen's Bench rule 4-44. The two plaintiffs, Wiebe and Atwood, had been involved in a dispute between the other shareholders of a closely held corporation. They commenced their action in April 2013. They were directors and employees of the corporation and were dismissed from their employment and removed as directors in January 2013. The plaintiffs alleged wrongful dismissal and that it and their removal as directors constituted oppression by the individual defendants. Their statement of claim also alleged that the defendants breached their fiduciary duty, duty of care and other duties to the corporation and had committed various other acts of oppression. The defendants had filed their statement of defence in June 2013 and the mandatory mediation session was held the following October, resulting in the valuation of the corporation's shares. The plaintiffs made a settlement offer based

on that valuation in April 2014. The defendants did not respond to the offer but informed the plaintiffs in May that the corporation might be unable to carry on business because of the termination of a licence agreement. An emergency meeting of shareholders was held in June and they unanimously voted to cease operations and authorize liquidation of the assets. The defendants did not wind up the company though, and in July 2014, the plaintiff Wiebe learned that the corporation continued to carry on business. In September 2015, the plaintiffs revived their settlement offer and requested an update as to the status of the business. The defendants did not respond. There was no evidence that they had put pressure on the plaintiffs to proceed. The plaintiff Atwood had discontinued as a party in the action because he was being treated for cancer. The plaintiff Wiebe indicated that he was prepared to proceed without Atwood. HELD: The application was dismissed. The court noted that the defendants' application only pertained to Wiebe's wrongful dismissal claim, presumably on the basis that they believed the oppression and related claims had been resolved simply because of the shareholders' resolution to wind up the corporation or that the other claims did not have merit. This approach was not appropriate in their application to dismiss for want of prosecution. The court applied the test set out in International Capital Corp. v Robinson, Twigg & Ketilson and found that the delay of 27 months that occurred between June 2014 and the time of the application was inordinate. However, it was excusable due to the illness of Atwood. The defendants had not pursued resolution of the claim either and failed to respond a number of times. Although it was then unnecessary for the court to consider the third factor in ICC, whether it was in the interests of justice for the claim to proceed, it did review a number of the relevant considerations and found that the claim should proceed.

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R v Belfour, 2017 SKQB 158

Labach, June 2, 2017 (QB17153)

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

The appellant was charged with drinking and driving offences on September 30, 2011, and convicted on March 31, 2015. Prior to the completion of his trial, the appellant brought a Charter application alleging a breach of his s. 11(b) rights because three and a half years had elapsed between the charge and the trial. The judge analysed how the case had progressed in light of the

Morin factors. Although it had taken a long time for the case to get to trial, the judge concluded that the delay was not unreasonable and dismissed the application (see: 2015 SKPC 49). The appellant appealed his conviction on the ground that the trial judge had erred by dismissing the Charter application. Before the appeal was decided, the Supreme Court's decision in Jordan was released. Counsel for each side presented arguments regarding the impact of that decision on the appeal.
HELD: The appeal was dismissed. The court reviewed the trial judge's classification and attribution of the various periods of delay against the criteria set out in Morin and then reviewed the delays in light of Jordan. The total delay was 1,275 days, and of this, 474 days would be subtracted as due to defence delay so that the net delay of 26.5 months was slightly over the presumptive ceiling for provincial court trials. The only exceptional circumstance in the case to assist the Crown in rebutting the presumption was that the original trial judge became ill for a period of 256 days. As the court found that the Crown mitigated this delay by requesting that a new judge be assigned to the case, that period of delay was subtracted from the net delay, resulting in 18 months, which was below the presumptive ceiling. The court assessed whether the defence had made a sustained effort to expedite the case and found that it had not. Therefore, the appellant had not discharged the onus of showing that the delay was unreasonable.

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Kieper v Cheverie, 2017 SKQB 159

Pritchard, June 5, 2017 (QB17148)

Small Claims – Appeal – Liability in Automobile Accident

The appellant appealed the decision of the Small Claims Court that held he was 100 percent responsible for the collision between his truck and the van the respondent was driving. The appellant had been travelling in the left lane of the double lane eastbound portion of the street and the respondent was travelling in the left lane of the double lane westbound portion of the street. The respondent intended to turn left at the intersection and moved into the intersection to do so. The appellant intended to go straight through the intersection. The light was yellow for both parties just prior to the accident. The trial judge found that the appellant's vehicle could not have been in the intersection at the time of the collision, or if it was, it entered after the respondent's vehicle. The respondent testified

that he saw the appellant's vehicle approaching the intersection but thought that it was far enough away that he had enough time to complete the turn. The respondent had just waited for two other eastbound vehicles to proceed through the intersection.
HELD: The trial judge erred when he concluded that the deciding factor for liability was which of the two vehicles first entered the intersection. The court adopted the test from Vigoren. The trial judge should have determined if, in the circumstances, the appellant should have reasonably anticipated that the respondent's vehicle was going to turn in front of him. The court concluded that if the respondent had exercised reasonable care, he could have avoided the accident by not completing his turn until it was clear that the approaching vehicle had actually stopped. It was probably too late for the appellant to avoid the collision by the time he became aware of the hazard of the respondent deciding to complete his left turn. The respondent was found to be 100 percent responsible for the accident.

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R v Hoang, 2017 SKQB 160

Tholl, June 9, 2017 (QB17154)

Constitutional Law – Charter of Rights, Section 8, Section 10(b)
Criminal Law – Controlled Drugs and Substances Act – Possession for the Purposes of Trafficking – Marijuana

The accused was charged with possession of cannabis marijuana in an amount exceeding three kilograms for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. The defence brought a Charter application alleging that because his ss. 8 and 10(b) rights had been violated, the evidence obtained in a search of his vehicle should be excluded under s. 24(2). The trial commenced with a voir dire. The defence conceded that the RCMP officer's stopping of the accused in his vehicle and subsequent detention for further investigation was reasonable. The officer testified that he requested the accused get out of his vehicle and informed him that he was being detained for a drug investigation and that he had the right to contact a lawyer. The accused seemed to have trouble understanding the officer, so eventually the officer took the accused to the back of the police vehicle because it was noisy at the roadside. The officer noticed that the accused had a cell phone with him but did not remove it. The officer reiterated

what he had told the accused earlier and the accused eventually indicated that he understood why he was being detained and said that he wanted to speak to a lawyer. The officer then decided to obtain the accused's consent to a search of his vehicle and testified that he did not consider whether he should permit the accused to speak to a lawyer before asking for consent. The officer answered in cross-examination that he took no steps to arrange for the accused to contact a lawyer, although he agreed that the accused could have called one on his cell phone while he was alone in the police cruiser for 30 minutes, nor did he consider driving the accused to the nearest detachment, which was about a half hour away. The officer explained to the accused that he wanted to search his vehicle and needed his consent but did not tell the accused that had the right to speak to a lawyer first. The accused agreed to allow the officer to search his vehicle and a bag containing packages of marijuana was found immediately and the accused was arrested. The accused had been detained for 30 minutes at that point. He was read his right to counsel again and the accused repeated that he wanted to speak to a lawyer. The officer then returned to search the vehicle more thoroughly and the accused remained in the back of the police vehicle for another 45 minutes before he was driven to the local detachment.

HELD: The application was granted. The court found that the accused's ss. 8 and 10(b) Charter rights had been violated and excluded the evidence under s. 24(2). The accused was found not guilty as a result. The police officer fulfilled the informational component required under s. 10(b) but did not fulfil the second or third implementational duties imposed on him of providing the accused with a reasonable opportunity to contact a lawyer and refraining from eliciting further evidence from him until he had done so. There were no reasons in this case that prevented the officer from allowing the accused to call a lawyer on his cell phone from the roadside. Alternatively, the officer could have promptly transported the accused to the detachment so that he could call a lawyer. By eliciting the accused's consent to search the vehicle, the officer breached the second branch of the implementational duty. The court found that the accused's s. 8 Charter right was violated because his consent to the search was not valid. It was clear to the officer that English was not the accused's first language and he clearly showed that he did not comprehend what was occurring when he was arrested. As he had not been given an opportunity to contact a lawyer when he originally requested to do so, it would not be obvious to him that he would have the right to obtain legal advice before he consented. Therefore, the court could not conclude that the accused understood his right to refuse to consent or that he was aware of the potential consequences of his consent. Applying the

Grant analysis, the court found that the breaches were serious and the impact of the breaches on the accused were substantial in that they led to the discovery of the evidence. The administration of justice would be brought into disrepute if the evidence was admitted.

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Jahnke v Thomas, 2017 SKQB 161

Kalmakoff, June 8, 2017 (QB17149)

Civil Procedure – Queen's Bench Rules, Rule 10-3(5)
Civil Procedure – Service – Extension of Time

The plaintiffs claimed against numerous defendants with respect to a complex series of transactions in the financing of a real estate development project. The plaintiffs received an extension of time for service on two of the defendants and served them within that time. The two defendants applied pursuant to rule 10-3(5) of the Queen's Bench Rules to set aside the order extending the time for service of the claim.
HELD: The defendants had to show that non-service of the statement of claim within the prescribed time was due, in some way, to the inaction of the plaintiffs, and the prejudice accruing to the defendant as a result of the delay in service of the statement of claim outweighed the prejudice that would result to the plaintiff from the loss of the cause of action. The court concluded that the primary reason for service not being effected on the two defendants within six months was the plaintiffs' inaction. The claim was issued in August 2016, but no efforts were made to serve the defendants until February 2017. The court nonetheless found that upholding the order would cause less prejudice to the parties. The claim was served on the defendants shortly after the extension order. Further, there was some evidence that the defendants were aware of the existence of the claim prior to the order. The delay in service caused little or no prejudice, as it related to the ability of the applicants to conduct their defence. The prejudice to the plaintiffs would be substantial if the cause of action against the two defendants was lost. The court concluded that the ends of justice required that the order be upheld.

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Argue v Argue, 2017 SKQB 162

Megaw, June 8, 2017 (QB17150)

Family Law – Application to Exclude Public
Family Law – Child Support – Imputing Income
Family Law – Child Support – Interim – Variation
Family Law – Custody and Access – Custody and Access Report
Family Law – Divorce

The oldest and youngest children lived with the respondent and had not seen the petitioner for a long time. The oldest child was 18 years old. The middle child was living with each parent in a shared parenting regime on a week on/week off basis. The parties had executed a separation agreement in 2014 that purported to resolve all issues between the parties. The issues dealt with were as follows: 1) an application to exclude the public from the courtroom. The respondent sought an order excluding the petitioner's partner from the court; 2) an application for a judgment for divorce; 3) an application to grant the respondent sole custody of the children and directing the parties participate in New Ways Counselling Program; 4) a custody and access assessment. The court previously ordered that a report be prepared, but the assessor decided not to do the report so the parties had canvassed other options but could not agree. The petitioner proposed one individual do the report while the respondent argued that another person should do the report, at the cost of $80,000; 5) an application to vary child support and impute income to the petitioner; 6) an application to obtain a money judgment to replace a child's items; and 7) an application to obtain a money judgment with respect to the accountant's fees the respondent spent to review the petitioner's business records.
HELD: The issues were dealt with as follows: 1) the application was dismissed because the court was unable to determine that the partner presented any form of risk or concern to the respondent; 2) the court determined that satisfactory arrangements had been made to financially care for the children and any ongoing issues would be dealt with at trial. The petitioner was entitled to a judgment of divorce. The application for divorce was severed from the other relief claimed in the matter; 3) the court was unable to conclude that this was an appropriate case to order the parties attend the counselling program. Further, the court did not interfere with the parenting situation at this interim stage; 4) the court found that the person proposed by the plaintiff had the necessary qualifications to complete the report and had been preparing reports for more than 11 years. Also, the parties did not have the resources to pay $80,000 for a report. The court directed, pursuant to s. 97(1) of The Queen's Bench Act, 1998, that a custody and access report be

prepared by the person suggested by the petitioner. The court made various terms and conditions regarding the preparation of the custody and access report; 5) the respondent applied to vary the child support order and impute $150,000 of income to the petitioner. The respondent was unsuccessful on a previous attempt to impute the income. The court did not find that anything had changed in the evidence that would warrant a reconsideration of the issue now. The determination of the petitioner's income would be the subject of evidence at the trial of the action. The court found it appropriate to vary the child support order to reflect the change in parenting arrangements regarding the middle child; 6) the respondent sought judgment in the amount of $3,000 to replace a child's items located at the petitioner's house. There was no itemization of items or the cost to replace them. There was also no indication that the child could not take the items back and forth between the houses. The court did not render a decision on the issue due to the lack of evidence; and 7) the determination of the accountant's costs was found to rest with the trial judge. The respondent's application was dismissed in its entirety while the petitioner was successful with respect to the divorce judgment and the variation of the child support order. The respondent was ordered to pay the petitioner $750 in costs.

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2017 SKQB 164 R v Gerein-Moore, 2017 SKQB 164

Gabrielson, June 8, 2017 (QB17155)

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

The appellant was convicted of driving while his blood alcohol content exceeded the legal limit. He appealed on the ground that the trial judge erred in precluding the appellant from cross-examining the sole Crown witness, the arresting officer, on the functioning of the Breathalyzer machine and its tolerance parameters. The Crown had objected to the questioning because, although the arresting officer was also a trained breath technician, he was not an expert on the operation of the Breathalyzer machine. The trial judge ruled that the officer's opinion was inadmissible because it was not relevant. The appellant argued that in precluding the evidence, the judge denied him a fair trial.
HELD: The appeal was dismissed. The court found that the trial judge had erred in not allowing the officer to be questioned as

proposed by the defence in cross-examination. Defence counsel was entitled to question any witness called by the Crown if the answer to the question is within the knowledge, experience and expertise of that witness. However, the failure of the trial judge to allow cross-examination on this particular issue did not prevent the appellant from making full answer and defence as there would not have been sufficient evidence to the contrary to rebut the presumption pursuant to s. 258(1)(c) of the Criminal Code.

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S.C., Re, 2017 SKQB 165

Brown, June 8, 2017 (QB17151)

Family Law – Child in Need of Protection – Child and Family Services Act – Person of Sufficient Interest – Non-family Members

The child's foster parents applied for an order designating them as persons of sufficient interest (PSIs). The Ministry of Social Services and the father did not oppose the application. The mother did not attend. The grandmother, who was designated a PSI, did oppose the application based on her view of The Child and Family Services Act's emphasis on reunification of families. The child was born in 2014 and was in the care of the foster parents since she was 11 months old. The foster parents have worked to facilitate visits with the child's family members. HELD: The court found it appropriate on the facts to designate the foster parents as PSIs with party status. The court distinguished the facts from the Schindel case where the foster parents applied for PSI well into the matter proceeding through court. Case law indicated the following considerations: the nature of the proceedings; whether a PSI designation would delay the matter; and whether the best interests of the child would be served. The court determined that the threshold established in ss. 23(1)(c) was exceeded.

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