The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 19, No. 21 **November 1, 2017**

Subject Index

R v Montgrand, 2017 SKCA 49

Caldwell Herauf Ryan-Froslie, June 20, 2017 (CA17049)

Criminal Law – Assault – Sexual Assault – Sentencing – Dangerous Offender – Appeal
Statutes – Interpretation – Criminal Code, Section 753(1)(a)(i), Section 753(1)(a)(ii)

The appellant was designated a dangerous offender and sentenced to 36 months' incarceration followed by a 10-year long-term supervision order. The appellant appealed only against the designation on the ground that it was unreasonable. The evidence considered by the sentencing judge included: a number of offences committed by the appellant in the past that involved physical and sexual assault; the circumstances of the predicate offence of sexual assault wherein the appellant had removed the pants of a sleeping woman and when she awoke asked her if he could have sexual intercourse with her; and the testimony of the forensic psychiatrist engaged to assess the appellant. The psychiatrist found that the appellant was at high risk to reoffend as a sexual offender, spousal offender and by way of general violence. The risk factors related to his continuing substance abuse of alcohol and drugs. His sexual behaviours had been part of a general impulsivity rather than aggression. In the face of victim resistance, the psychiatrist noted that the appellant did not persist. The appellant argued that the judge erred in the following ways: 1) in his assessment of the future risk he posed under s. 753 (1)(a)(i) because the evidence did not establish

Criminal Law – Evidence – Credibility

Criminal Law – Motor Vehicle Offences – Dangerous Driving Causing Bodily Harm

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Approved Screening Device – Demand – Forthwith

Criminal Law – Motor Vehicle Offences – Impaired Driving – Care and Control – Sentencing – Curative Discharge

Criminal Law – Possession of Child Pornography

Family Law – Child Support

Family Law – Child Support – Notice to File Income Information

Family Law – Custody and Access – Best Interests of the Children

Family Law – Custody and Access – Hague Convention

Family Law – Custody and Access – Variation

Family Law – Family Property – Division

Family Law – Spousal Support – Compensatory

Regulatory Offence – Animal Protection Act, 1999 – Strict Liability

Cases by Name

Ayles v Ayles

B.S.P. v C.M.

Birnie v Birnie

Bodnarek v Bodnarek

Campbell v Campbell Estate

a likelihood of him causing death, injury or severe psychological damage in the future to another person; and 2) in finding he was substantially indifferent to the consequences of his behaviour under s. 753(1)(a)(ii).
HELD: The appeal was allowed. The court found that the evidence adduced at the appellant's dangerous offender hearing was insufficient to warrant that designation under s. 753(1)(a)(i) or (ii), and pursuant to the authority given to the court by s. 759(3)(a)(i) of the Code, designated him a long-term offender under s. 753.1.

 Back to top

R v Spencer, 2017 SKCA 54

Richards Jackson Whitmore, June 28, 2017 (CA17054)

Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Sentence
Criminal Law – Defences – Charter of Rights, Section 8, Section 11(b)
Criminal Law – Making Available Child Pornography
Criminal Law – Stay of Proceedings

After his second trial, the appellant was convicted of making available child pornography, contrary to s. 163.1(3) of the Criminal Code. The second trial resulted when the appeal court ordered a new trial after the Crown appealed the appellant's acquittal. The appellant admitted to installing "LimeWire" on his computer and saving child pornography to the shared folder. The issue at trial was whether the appellant knew by using LimeWire he was making child pornography available to others or whether he was willfully blind to that fact. Files saved to LimeWire are accessible to other LimeWire users. An officer traced the appellant's IP address as being the one downloading child pornography. The officer contacted the internet provider and obtained the information without a warrant. The officer then obtained a warrant to search the appellant's residence. The first trial judge determined that the appellant did not have a reasonable expectation of privacy in the information held by the Internet provider so there was no search, and that the appellant would have had to take an active step to indicate intent on the making available charge. On appeal, the court found that if there was a search it was not unreasonable. The appeal court was unanimous in finding that the trial judge erred by determining that the plain meaning of s. 163.1(3) required a positive step to make available child pornography. The Supreme Court of Canada found that the first trial judge did err, and it upheld the

Choquette v Viczko

Gurniak v Saskatchewan Government Insurance

Haztech Fire and Safety Services Inc. v M. Thompson Holdings Ltd.

M.L.S. v N.E.D.

National Bank of Canada v KNC Holdings Ltd.

R v Dondale

R v Gustafson

R v Halyk

R v Lommerse

R v Martin

R v McKenzie

R v McLaughlin

R v Montgrand

R v Moosomin

R v Morin

R v Schlechter

R v Spencer

V.H. v D.E.

Walker v Walker

Winnitowy v Dellow

Court of Appeal's order for a new trial. The Supreme Court held that obtaining the subscriber information was a search that was not authorized by law, but that the evidence should not be excluded. The Supreme Court of Canada also held that s. 163.1(3) does not require the accused must knowingly, by some positive act, facilitate the availability of pornography. Willful blindness was a live issue that had to be considered. At the second trial, the judge dismissed the appellant's application for a stay under ss. 7 and 11(b) of the Charter. The appellant was convicted by the second trial judge. The issues dealt with by the appeal court were as follows: 1) did the second trial judge's reasons permit meaningful appellate review; 2) what was the appropriate remedy; and 3) the Crown sentence and the appellant's cross-appeal.

HELD: The conviction appeal was allowed and a stay of proceedings was ordered. The issues were dealt with as follows: 1) the appeal court found four aspects of the trial judge's reasons that could cause the appellant concern: a) the assessment of his credibility. The trial judge did not say whether he rejected some or all of the appellant's evidence, or on what basis he did so. The appeal court found that a credibility assessment was an essential part of the case against the appellant; b) the mens rea requirement for willful blindness. The trial judge's reasons did not make it clear whether he determined that the appellant had an actual suspicion that he was making child pornography available to others, and he made a conscious decision not to confirm that suspicion. The appeal court said that the trial judge's reasons did not permit the court to determine whether the trial judge performed the required analysis and whether the conclusion was correct; c) the trial judge's treatment of the evidence and the videotaped statement. The court was concerned with whether the second trial judge considered the video recording of the appellant's statement. The appeal court concluded that the second trial judge was required to refer to and resolve discrepancies between the appellant's testimony at the trial and the transcript of the previous statement; and d) conclusion on the sufficiency of reasons. The trial judge's reasons did not to meet the test of sufficiency required by cases. Something more was required to establish the link between the evidence and the verdict; 2) the strongest factor against imposing a stay of proceedings was that the charge the appellant was facing was a serious one. On the other hand, almost ten years passed since the appellant was first charged. The delay was not due to the complexity of the case, but because of two issues: whether the request to the internet service provider was a search contrary to s. 8 of the Charter; and whether downloading the material from LimeWire fell within the making available charge. After weighing numerous factors, the appeal court held that it

was an appropriate case to order a stay; and 3) there was no need to consider the issue.

 Back to top

Campbell v Campbell Estate, 2017 SKCA 55

Richards Jackson Ottenbreit, June 30, 2017 (CA17055)

Civil Procedure – Appeal
Civil Procedure – Application to Strike Statement of Claim
Civil Procedure – Limitation Period
Civil Procedure – Pleadings – Amendment – Appeal
Limitation of Actions
Statutes – Interpretation – Limitations Act, Section 12

The appellants appealed the chambers decision that struck their statement of claim and granted the respondent summary judgment dismissing their entire claim. The appellants were children of the deceased. The respondent was the deceased's lawyer and executor of his will. The claim alleged that the delay in transferring farmland to them caused them loss. The letters probate were issued in 1990 and the appellants' claim was issued in 2011. The chambers judge concluded that the appellants' claim was statute-barred and that the claim should be struck. The appellants did not argue that the chambers judge was incorrect in concluding that the claim was statute-barred, but rather they argued that the chambers judge failed to apply s. 12 of The Limitations Act to the claim. They argued that they should have been allowed to amend their claim and proceed by virtue of s. 12.
HELD: The appeal was dismissed. There was no explicit request for an amendment nor was an argument made to the chambers judge to amend the claim. The appellants sought to amend their claim to add a claim for accounting by the respondent. The claim's only cause of action was statute-barred so the appellants were seeking to substitute a completely new cause of action. The appeal court found that it was unreasonable to expect that the chambers judge would interpret vague references to passing accounts as a request to amend the claim to include a claim for accounting.

 Back to top

Haztech Fire and Safety Services Inc. v M. Thompson Holdings Ltd., 2017 SKCA 56

Richards Herauf Whitmore, July 18, 2017 (CA17056)

Civil Procedure – Summary Judgment
Damages – Future Damages – Mitigation
Landlord and Tenant – Appeal
Landlord and Tenant – Commercial Lease – Termination – Future Rent
Landlord and Tenant – Commercial Lease – Termination – Mitigation
Lease – Commercial Lease

The appellant appealed the decision granting summary judgment to the respondent and granting leave to return the matter to the court to assess future damages in the summary procedure context. The appellant was the tenant in a 10-year and six-month lease of commercial space. When the appellant breached the lease and vacated the premises, it remained vacant for two years. The respondent rejected an offer to purchases the premises and an offer to lease a portion of the premises. In December 2015, 50 percent of the space was rented, and in February 2016, another 18 percent was rented. The remainder was vacant at the date of the summary judgment application. The chambers judge was not satisfied that the appellant met the onus of establishing that the respondent failed to mitigate its damages. Therefore, the chambers judge did not find any triable issue. The chambers judge awarded damages of $500,041.15 to the respondent. The claim for summary judgment with respect to future damages was dismissed, but the respondent was granted leave to return the matter of future damages to the court. The issues were as follows: 1) did the chambers judge err in determining that the respondent adequately mitigated its damages; and 2) did the chambers judge err in adjourning the matter and granting leave to the respondent to return to the court to prove future damages.
HELD: The court allowed the appeal. The issues were determined as follows: 1) there was no evidence that declining to accept an offer to lease a portion of the premises was unreasonable. There was no reviewable error in that aspect or with respect to the chambers judge's decision regarding the decision not to sell the property. The respondent did not have an obligation to sell the premises in order to mitigate its damages; and 2) the appeal court found that it was a reasonable conclusion that the summary judgment application be dismissed with respect to future damages. The respondent's evidence regarding future damages was deficient. The chambers judge found that future damages was a genuine issue for trial. The respondent terminated the lease when it was breached, therefore the chambers judge erred in applying the rationale from a case where the lease was not terminated so damages had not yet been

incurred. Pursuant to the lease, all future rents were accelerated and became due and owing at the time of the termination of the lease. The onus was on the respondent to prove all its damages as of the date of adjudication, including future damages. The appeal was allowed and the issue of future damages was to be determined by way of trial.

 Back to top

National Bank of Canada v KNC Holdings Ltd., 2017 SKCA 57

Richards Ottenbreit Caldwell Whitmore Ryan-Froslie, July 20, 2017 (CA17057)

Bankruptcy and Insolvency – Receiver – Priority of Claims
Builders' Lien – Priority
Statutes – Interpretation – Builders' Lien Act, Section 22

The appeal concerned the priority of certain liens filed against assets of an oil and gas company under The Builders' Lien Act, relative to a security interest held by the appellant bank. The chambers judge held that s. 22 of the Act gave the lienholders priority over the appellant in relation to a variety of assets. The appellant argued that the case the chambers judge relied on was wrongly decided and therefore, the chambers judge's reading of s. 22 of the Act was incorrect. In March 2014, the appellant had a receiver appointed pursuant to s. 243 of the Bankruptcy and Insolvency Act. There were a number of liens registered after the appellant's security was registered (referred to as the "lienholders"). The liens totaled $490,388. The Cenex case had interpreted s. 12 of The Mechanics' Lien Act, the legislative antecedent of s. 22 of the Act, as creating priorities between those liens and other security interests. The chambers judge followed the Cenex case and ordered that $490,388 be subject to the lienholders' priority. The issues were as follows: 1) the interpretation of s. 22(2) of the Act; 2) the priority of working interests of a company in certain oil and gas leases belonging to companies put into receivership at the same time. The company held working interests under oil and gas leases owned by the debtor and other companies in the amount of $1.2 million dollars as a result of joint venture billings. The value of the interests was found to be between $90,000 and $113,000 by the receiver. The issues were not dealt with by the chambers judge. The appellant acknowledged that the lienholders had a priority interest in the working interests and, therefore, had a priority claim to the lien fund in the amount of the value or those interests, $90,000. One of the lienholders argued that the receiver failed to properly or

clearly value the working interests. They argued that the lienholders were entitled to priority claims in the full amount of the lien fund; and 3) did the lienholders have a claim on the lien fund grounded in the trust provisions found in s. 6 of the Act. HELD: The appeal was allowed. The issues were determined as follows: 1) s. 22 of the Act and s. 12 of The Mechanics' Lien Act were effectively the same. On the basis of the ordinary and grammatical meaning of its own terms, the appeal court found nothing to suggest that s. 22 had anything to do with priority of builders' liens in relation to other kinds of security interests. Section 22 is found in Part III of the Act that deals with the nature and scope of liens, whereas priorities are dealt with in Part VI. The appeal court found that the Cenex case was decided incorrectly. The appeal court could not reconcile the plain meaning of the words of s. 22(2) with the result in Cenex; 2) the appeal court found that the lienholders were entitled to share in the lien fund to the extent of $90,000 as suggested by the appellant. The appeal court did not give effect to the lienholder's argument regarding the receiver's valuation for three reasons: a) the argument was new and not presented to the chambers judge or in its factum; b) the argument could not be dealt with properly on the basis of the record before the court; and c) the appeal court had some questions about the idea that a failure by a receiver to conduct a proper valuation or inventory should automatically rebound to the exclusive benefit of lienholders; and 3) the appeal court did not deal with the submission. The lienholder could have previously made the trust argument and did not. The appeal court agreed with the appellant that the trust argument amounted to a collateral attack. The appellant's appeal was allowed and the lienholders were entitled to $90,000 from the lien fund.

 Back to top

R v Halyk, 2017 SKPC 51

Kovatch, June 22, 2017 (PC17041)

Criminal Law – Motor Vehicle Offences – Dangerous Driving Causing Bodily Harm
Criminal Law – Defences – Necessity

the accused was charged with dangerous driving causing bodily harm to the victim and with leaving the scene of an accident to escape civil or criminal liability. The accused had advised his common law spouse, from whom he was estranged, that he would not return their infant daughter to her but agreed to meet

with her in a shopping centre parking lot later in the day. His spouse advised her father and her brother that she needed their help in preventing the accused from removing the child and they agreed to meet at the parking lot. The father and brother each testified that when the accused arrived, they drove their vehicles in front of and behind the accused's vehicle to try and block it. While the accused was still in his vehicle, the father walked toward him. The accused accelerated and the father jumped out of the way and ended up either on the hood or the roof of it. He then fell off and sustained serious injuries. The brother opened the driver's door of the accused's vehicle but eventually fell off without harm. The accused testified that when the brother opened the door of the vehicle he also began punching the accused. He turned the wheel and hit the gas. He reached past the brother and was able to pull the father off the roof of his vehicle and the two men hit the pavement. The accused argued that because of the danger he was in, he raised the defence of necessity.
HELD: The accused was convicted of dangerous driving causing bodily harm. The court found that operating the vehicle with people on top of it and on the side was dangerous to them and to the public. His evidence showed that he intended to throw the father from the vehicle. The defence of necessity was not available to the accused. He was not in imminent danger when the two men confronted him. The accused could have locked the vehicle and called the police. It was not necessary for him to drive dangerously to get away. The accused was acquitted of leaving the scene because he had not been aware of the injuries to the father when he left.

 Back to top

R v Martin, 2017 SKPC 52

Green, June 29, 2017 (PC17047)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Approved Screening Device – Demand – Forthwith
Constitutional Law – Charter of Rights, Section 8, Section 9, Section 10(b), Section 24(2)

The accused was charged with driving while his blood alcohol content exceeded .08. The accused was stopped by an RCMP officer because she had seen his vehicle leaving the parking lot of a bar and accelerating quickly. While she followed his vehicle, she did not observe any problems with his driving but signaled

for him to stop. He did so and told the officer that he had had one drink. The accused was smoking at the time of the stop, which the officer believed was a strategy to mask the smell of alcohol. As a result of these factors, the officer made an ASD demand. She advised the accused of his right to counsel but he indicated that he did not want to contact a lawyer. Because the accused had been smoking, the officer waited for 15 minutes before administering the test in accordance with her training on the proper use of the ASD. She admitted in cross-examination that she had made a mistake and she should have read the ASD manual, which prescribed a wait of only five minutes. The accused failed the ASD test and the officer arrested him for impaired driving and made the breath demand. The accused provided two breath samples with readings of 90 mg percent each. The defence brought a Charter application, alleging that because the officer did not have a reasonable suspicion that the accused had alcohol in his body when she made the ASD demand, he had been arbitrarily detained contrary to s. 9 of the Charter. As the officer had not taken the ASD sample forthwith as required by s. 254(2) of the Criminal Code, the accused's ss. 8, 9 and 10(b) Charter rights had been violated. As a result of these breaches, the defence requested that the breath sample evidence be excluded under s. 24(2) of the Charter. A blended voir dire and trial was held.

HELD: The application was granted. The evidence was excluded and the accused found not guilty. The court found that based on the factors relied upon by the officer, she had reasonable grounds to make the ASD demand and therefore no breach of the accused's s. 9 Charter right had occurred. The officer had not obtained the ASD breath sample forthwith and thereby violated the accused's ss. 8, 9 and 10(b) Charter rights. The 15-minute delay was unreasonable and unjustified. Applying the Grant principles, the court found that the breach was serious, the impact on the accused was moderate and that admitting the evidence would bring the administration into disrepute.

 Back to top

R v McLaughlin, 2017 SKPC 54

Metivier, June 26, 2017 (PC17042)

Criminal Law – Evidence – Credibility
Criminal Law – Firearms Offences

The accused was charged with 17 weapons-related offences. He had initially been arrested for weapons offences in early March

2014 following the execution of a search warrant at the house he shared with his girlfriend. He was released from custody on strict conditions that included that he possess no weapons. The charges in this trial were laid shortly after the accused's release as the result of a separate police investigation into a firearms transaction between two men, Harder and Mychan. Harder was under surveillance by the police on the day in question. They observed him go to the accused's house first for a period of time, followed by numerous stops at commercial locations. He then drove to Mychan's house where he removed a large bag from a car parked in the backyard and put it in the rear seat of his truck. Shortly thereafter the police made a traffic stop of Harder's vehicle that resulted in the seizure of multiple weapons. Harder was a drug dealer and member of the Fallen Saints Motorcycle Club, as was the accused. Harder made a deal with the police to work as a confidential informant and to testify in criminal proceedings resulting from the investigation in exchange for prosecutorial immunity and financial compensation. It was the Crown's theory that all the firearms came from the accused's residence except for one rifle contained in the black bag, which was acquired from Mychan. Both Harder and the accused's girlfriend testified for the Crown, stating that Harder picked up the firearms when he stopped at the accused's house. The guns had been stored in the attic of the garage. There were discrepancies between their versions as to how they had participated in the transfer of the guns from the attic to Harder's truck. In his testimony, the accused said that Harder had come to his house to purchase some tires. After loading the tires, he said that Harder showed him two duffle bags in his truck that contained weapons and ammunition and offered to make a deal with the accused. The accused rejected the offer because of his release conditions. Both the Crown and the defence acknowledged the application of the Vetrovec principle regarding Harder's evidence. The issue was the credibility and reliability of the witnesses to be assessed by applying the principles of R v D.W.
HELD: The accused was acquitted of all charges. Although the court had serious concerns about the credibility or reliability of all three witnesses, it did not believe Harder's evidence and was left with a reasonable doubt that the accused was in possession of the firearms or that he transferred them to Harder.

 Back to top

R v Morin, 2017 SKPC 55

Schiefner, June 22, 2017 (PC17048)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Care and Control – Sentencing – Curative Discharge
Criminal Law – Motor Vehicle Offences – Driving while Disqualified – Sentencing

The accused pled guilty to a number of offences which included the following: 1) operating a vehicle while disqualified in 2010, contrary to s. 259(4) of the Criminal Code; and 2) having care and control of a vehicle while his ability to operate a vehicle was impaired by alcohol in 2014, contrary to s. 253(1)(a) of the Code. Prior to sentencing, the accused applied for a curative discharge pursuant to s. 255(5) of the Code regarding the impaired driving charge but as that section was inapplicable to driving while disqualified, the appropriate sentence had to be determined. With respect to application for a curative discharge and the impaired driving charge, the evidence of the offence showed that the accused had been found asleep in his vehicle at the side of a road with the engine running. The accused had blacked out after drinking with some friends. The information in the Pre-Sentence Report indicated that the accused, a 50-year-old Aboriginal man, had been raised in a stable home on the Big River First Nation reserve. He had been sober for the past two and a half years. He completed an inpatient treatment program at the Metis Addictions Councils of Saskatchewan. He was presently receiving treatment on his reserve from an addictions counsellor, attending AA meetings and participating in cultural ceremonies and healing circles. The counsellor testified that the accused needed two more years of supervision and was motivated to maintain his sobriety. The accused had been working as a mechanic on his reserve for the past two and a half years. The Chief and council attended court and communicated their support. His children had begun living with him and he was in a stable spousal relationship. Regarding the driving while disqualified charge, the accused's lengthy criminal record was examined, which included 17 prior convictions for the same charge. His last driving offence occurred in 2005 and his last offence of any kind, failing to comply with an undertaking, occurred in 2009. The Crown sought an incarceral sentence of 24 to 36 months. Based on the accused's proposed treatment plan and the gaps in his offending, the defence argued that his sentence should be community-based.
HELD: The accused was granted a curative discharge of the driving while impaired offence and given a conditional sentence of 18 months in jail to be served in the community on a Conditional Sentence Order subject to numerous conditions. The court found that the curative discharge was warranted because of the gaps in the accused's offending and because there was evidence that something had changed in his life that motivated

him to continue with treatment and that there was a reasonable prospect that the plan would succeed. The court based its sentence for driving while disqualified on the fact that the offence had occurred seven years earlier and although the accused had not been consistently sober since, there was evidence that he was now motivated to change. The gap principle applied to this offence as well.

 Back to top

R v Dondale, 2017 SKPC 58

Cardinal, June 21, 2017 (PC17050)

Regulatory Offence – Animal Protection Act, 1999 – Strict Liability
Criminal Code – Cruelty to Animals – Causing Unnecessary Suffering

The accused was charged with two counts of violating s. 4 of The Animal Protection Act, 1999 by causing chickens and horses respectively to be in distress and with two counts of violating s. 445.1(1)(a) of the Criminal Code of willfully permitting chickens and horses to be caused unnecessary pain or suffering. The Crown called two animal protection officers, a veterinarian and an animal pathologist. The officers had been called to the accused's hobby farm beginning in 2013 in response to a complaint. During that visit, the officer found that 200 chickens were living in unclean conditions. At the next visit, the officer was accompanied by the veterinarian. They testified that the living conditions of the chickens was unbearable. The veterinarian also inspected the nine horses kept by the accused. One of them was under-weight and needed attention from a veterinarian. A dead chicken was sent to the pathologist who testified that the bird was malnourished and suffered from a severe health problem. The accused was given specific instructions as to how to improve his care of the chickens and the ailing horse. Follow-up inspections occurred on more occasions, but the accused had not improved the conditions or care of the animals. The accused testified that he cared for his chickens in accordance with their own behaviours and explained that they could live with dirty water and excessive manure in their coop. The horse was old and that was why she was underweight.
HELD: The accused was found guilty of all four counts. The court accepted the evidence of the Crown witnesses and found that of the accused to be unbelievable. The Crown had proven

the actus reus of s. 4 of the Act, a strict liability offence beyond a reasonable doubt. The accused had not proven on a balance of probabilities that he took all reasonable steps to avoid causing distress to the chickens or the horse. He failed to follow any of the recommendations of the SPCA or the veterinarian. Regarding the Code offences, the court found that the accused had failed to provide evidence to the contrary and the Crown had proven beyond a reasonable doubt that the accused was guilty of both charges.

 Back to top

R v Gustafson, 2017 SKPC 63

Scott, June 29, 2017 (PC17051)

Criminal Law – Dangerous Driving
Criminal Law – Defences – Charter of Rights, Section 7
Criminal Law – Disclosure
Criminal Law – Drive while Disqualified
Criminal Law – Evading Police
Criminal Law – Evidence – Circumstantial Evidence
Criminal Law – Evidence – Identification

The accused was charged with three Criminal Code offences: operating a motor vehicle in a dangerous manner, contrary to s. 249(1)(a); failing to stop in order to evade a police officer while operating a motor vehicle, contrary to s. 249.1(1); and operating a motor vehicle while disqualified from doing so, contrary to s. 259(4). Cst. T. testified that he attempted to stop the accused when he observed the accused do brake stands, spinning his rear tires, at an intersection on his motorcycle. The motorcycle accelerated to 94 km/h and drove between two vehicles without sufficient space to maneuver. Cst. T. noted the driver was wearing tan work boots, jeans, a tan coat with black highlights, and a black, closed-face helmet. The motorcycle make and licence plate were identified. The motorcycle was registered to the accused. While the officer was at the accused's residence, the accused arrived on foot wearing a black skullcap, green shirt, jeans, and tan boots. The officer testified that the accused was without a doubt the same person as in the photograph he viewed. The accused smelled of alcohol, so the officer gave an ASD demand, which registered a fail. The motorcycle was located and the key found on the accused was used to turn it on. The officer watched the convenience store video where the motorcycle was parked and it showed the accused at the store. The video could not be procured by the police. The owner of the store testified that the accused was a regular customer. He said

the accused came into the store around lunch time on the day of the incident. The owner said he helped the accused lift the motorcycle off the ground. The owner said the accused told him he would return later and left on foot. The accused testified that the motorcycle was stolen from his driveway. He said that on the day in question he drank a mickey of alcohol and then walked to the convenience store and returned home to find the police there. He said that the key the officer took was for the helmet and accessories, not for the ignition. The issues were: 1) did the Crown's failure to disclose the in-store video breach the accused's s. 7 Charter rights, and if so, what was the appropriate remedy; 2) did the Crown prove beyond a reasonable doubt that the accused was the driver of the motorcycle; and 3) did the Crown prove all elements of the offences beyond a reasonable doubt.

HELD: The issues were determined as follows: 1) the video was relevant to identity, and the Crown had a duty to disclose all relevant information in its possession. The video was never in the Crown's possession. The court determined that the failure to obtain and preserve the video did not amount to unacceptable negligence. The accused also failed to establish actual prejudice as a result of the video not being available. The accused's s. 7 Charter rights were not breached. The court also noted that even if the accused's rights were breached, exclusion of the evidence would not have been warranted; 2) the officer could not see the driver's face, so they must rely on circumstantial evidence. The store owner's evidence was straightforward and definite. The court did not believe that the motorcycle had been stolen and it was not consistent with the observable, undisputed facts. The court was not left with a reasonable doubt as a result of the accused's testimony. The court concluded that the circumstantial evidence was not reasonably capable of supporting an inference other than that the accused was the operator of the motorcycle. The court was satisfied beyond a reasonable doubt that the accused was the driver of the motorcycle; and 3) the court was satisfied that the manner of driving was a marked departure from the norm and posed a danger to the public, having regard to all of the circumstances. The accused was found guilty of dangerous driving. The accused was also found guilty of evading police and driving while disqualified.

 Back to top

B.S.P. v C.M., 2017 SKQB 179

Dufour, June 20, 2017 (QB17175)

Family Law – Custody and Access – Hague Convention

The petitioner father brought an application under the Hague Convention on the Civil Aspects of International Child Abduction to have four children returned to North Dakota. The petitioner and the respondent had lived together for eight years on the Fort Berthold Reservation. The petitioner was the biological father of the three youngest children and they were all members of the reservation, but the respondent and the oldest child were not. In September 2016, the respondent took the children to Saskatchewan without the knowledge or consent of the petitioner. He then obtained an ex parte order from the Tribal District Court that the respondent return the children to his custody. Under the Convention, the parties agreed that the children's place of habitual residence was North Dakota. The issue before the court was whether the petitioner had "rights of custody" under the Convention that were breached when the respondent took the children to Saskatchewan.
HELD: The court ordered the respondent to return the three youngest children to North Dakota. It found that they had been wrongfully removed. As there was insufficient evidence regarding the meaning of "rights of custody" under the state or tribal law, the court determined that the petitioner had "rights of custody" as defined by s. 3(1) of The Children's Law Act, 1997. It also applied the common law presumption that the petitioner's custody rights included the ability to share in the decision as to where the children would reside but that right only extended to the parties' biological children.

 Back to top

Bodnarek v Bodnarek, 2017 SKQB 180

Megaw, June 20, 2017 (QB17163)

Family Law – Spousal Support – Compensatory
Family Law – Spousal Support – Duration of Spousal Support
Family Law – Spousal Support – Determination of Income
Family Law – Spousal Support – Evidence
Family Law – Spousal Support – Non-compensatory
Family Law – Spousal Support – Retroactive

The issue was whether spousal support should be paid to the petitioner. The respondent did not provide any vive voce evidence. The parties were married for 11 years, which was a second marriage for both of them. At the time of separation, both parties were 57 years old. They were both employed in jobs of long standing at the time of marriage, but the petitioner resigned

from her employment during the marriage to preserve her pension amount given concern of the employee pension plan under-funding. The petitioner testified that the resignation and her staying out of the work force was a joint decision between them. She then started part-time work earning $32,000, but this employment was terminated in July 2015 without cause. She has been looking for employment since and working weekends at a commercial office cleaning position. The petitioner indicated that her income was $15,000 with an additional $7,776 when Canada Pension Plan payments were approved. The respondent's line 140 income for 2015 was $137,144.22. In July 2015, an interim order required the respondent to pay monthly spousal support of $950 based on the respondent's indication that his 2014 income was $83,350.51. The issues were as follows: 1) what was the effect of the respondent not testifying; 2) was the petitioner entitled to spousal support; 3) what was the effect of the respondent's income increasing between the date of separation and the present time; 4) what was the appropriate amount and duration for the spousal support; 5) should there be retroactive support order; and 6) costs.

HELD: The issues were determined as follows: 1) the court concluded that there was no evidence to support certain arguments advanced by the respondent. The petitioner provided her evidence in a straightforward manner. The court made a number of findings of fact: the decision that the petitioner leave her stable and secure employment was arrived at jointly; the decision for the petitioner to stay at home for one year after her resignation was a joint decision; the petitioner's acceptance of the family home responsibility permitted the respondent to continue on with his employment; the court accepted that the petitioner was making genuine efforts to find replacement employment; the court accepted that the CPP amount should be added to the petitioner's current income; the respondent knew the expected level of his 2015 income at the interim application because he had been receiving such payment for the first six months; the respondent did not comply with rule 15-37(2) of The Queen's Bench Rules to file an updated financial statement seven days prior to trial, nor did he provide any updated financial information during trial, so the court was not prepared to consider that a payment of spousal support would cause him hardship; and there was no evidence of either parties' plans for the future so the court could not consider future events and how that might impact on any spousal support order; 2) the petitioner had, and continued to suffer from, economic hardship because she could not secure employment. The petitioner was found to be entitled to spousal support pursuant to s. 15.2 of the Divorce Act on both a compensatory and non-compensatory basis; 3) the court concluded that there was no evidentiary basis for the post-

separation income to be considered by the court as anything other than current income of the respondent; 4) the court determined the petitioner's income to be $23,290 and the respondent's to be $137,144.22 to find the range of monthly spousal support pursuant to the Spousal Support Advisory Guidelines to be $1,556 to $2,075. A spousal support amount in the mid-range, $1816, was found to be appropriate. The payments were ordered to continue until varied by further court order or agreement of the parties. The court said the amount would adequately compensate the petitioner for the economic disadvantage as well as provide for her needs. The SSAG indicated that an order for an indefinite amount was appropriate and the court agreed. The court did not make the order reviewable; 5) there was not a delay in seeking support and there was no evidence that a retroactive award would cause the respondent hardship. The court found that the respondent should have been paying spousal support since the separation in August 2014. The parties were ordered to provide the SSAG calculations to the court for the determination of the range of available retroactive awards; and 6) the petitioner was entitled to her taxable costs.

Back to top

Back to top

R v Moosomin, 2017 SKQB 182

Smith, June 21, 2017 (QB17187)

Criminal Law – Assault – Sexual Assault
Criminal Law – Break and Enter Dwelling House
Criminal Law – Defences – Charter of Rights, Section 11(b), Section 24(1)
Criminal Law – Delay – Pre- and Post-Charge Delay
Criminal Law – Stay of Proceedings

The three accused were all charged with two Criminal Code offences: sexual assault, contrary to s. 271; and break and enter a dwelling house, contrary to s. 348(1)(a). The offences were both committed against the same complainant. All accused brought an application for a judicial stay of proceedings under s. 24(1) of the Charter grounded in s. 11(b) of the Charter. The grounds for the Charter application were as follows: 1) s. 11(b) rights were breached because the trial did not proceed within a reasonable time due to pre-charge and post-charge delay; 2) the police had enough evidence for charges in July 2008, but the informations against the three accused were not sworn until March 2015, December 2014, and March 2015. The trial is not scheduled until October 2017. The accused's' ability to make full answer and

defence was seriously prejudiced; and 3) it would be two years, seven months and twenty-six days to the end of the trial for the last charged accused, which is over the 30-month threshold as stated by the Supreme Court of Canada in Jordan. In July 2008, the police received a call from the complainant that she had been assaulted. The complainant knew the names of some of the men involved, but only knew nicknames of others. The initial officer left the detachment in September 2008. The matter was not dealt with much further until September 2014. The Crown indicated that staffing levels at detachments were partly to blame. In September 2014, an officer was assigned the file and granted unlimited overtime to complete the task. The officer dealt with the matter efficiently, but the charges were not laid for over six and a half years from the date of the complaint.
HELD: The court took judicial notice that it is not a perfect world where all police detachments have enough officers to work on all files. There are no cases dealing specifically with pre-charge delay and a s. 11(b) Charter application. The court concluded that cases, at most, observe that excessive pre-charge delay can be a factor in assessing post-charge delay for the purposes of a s. 11(b) application. There are cases dealing with pre-charge delay that supported the Crown's argument. The application to impose a judicial stay on the basis of pre-charge delay was dismissed. Jordan directs that delay was the period of time from the date an individual was charged to the anticipated end of trial. The charge arises when the information is sworn. The first accused was charged December 2014, but his conduct was found to have resulted in an eight-month delay and therefore, the post-charge delay fell well below the 30-month Jordan limit. The information for the second accused was sworn in March 2015, but the warrant was not executed until May 2016, when the accused was arrested on other matters. The court concluded that the 14 months between the date the warrant was issued and the date of the arrest did not count against the Crown in a Jordan analysis. Therefore, the post-charge delay was less than 30 months. The third accused voluntarily surrendered in August 2015, and the information was sworn in March 2015. The accused then sought adjournments until December 2015 so the court found the delay was well below the Jordan limit. The matter was a transitional case because it started before Jordan so it was not governed by the strict 30-month rule. The court found that there were inherent delays that were natural incidents to cases where there was more than one accused. Further, the court indicated that it would not impose a stay because of the transitional provisions and the inherent delay cause by a multi-accused indictment, regardless of the delay attributed to each accused. The delays were nonetheless well under 30 months. The application for stays were dismissed.

 Back to top

M.L.S. v N.E.D., 2017 SKQB 183

Goebel, June 21, 2017 (QB17176)

Family Law – Custody and Access – Variation

The parties separated in 2002. They agreed to joint custody and shared parenting of their two sons, which was formalized in a consent judgment granted in 2004. The agreement lasted until 2013 when the respondent father applied to vary the judgment because the children wanted to live with him and the petitioner reluctantly agreed. During the period between the time of the consent judgment and the application, both parties had remarried and the children had become quite hostile to the petitioner. The children began to resist visiting their mother. After contact between the children and the petitioner ceased, she applied for specified parenting time. In February 2014, an order was made directing the family into counselling. The psychologists reported that they were unable to get the children to meet with their mother and expressed the opinion that the potential for reunification would improve if the children's care was temporarily transferred to the petitioner. The petitioner applied for an order giving her primary care. The court found that there had been a material change in circumstances since 2004 and ordered that the matter proceed to a pre-trial conference and trial. In the interim, the chambers judge directed that counselling continue. The trial proceeded in the fall of 2015 and the court heard evidence that the children were in considerable psychological distress and continued to reject the petitioner. Four psychologists testified that immediate action was necessary to allow the children to have a healthy relationship with the petitioner. The judge made an interim order that placed the boys temporarily in the custody of the petitioner and precluded any contact between them and the respondent. Their relationship with the petitioner immediately improved. However, the situation deteriorated again and the judge varied the interim order to reinstate contact between the children and the respondent. The court reserved the issue of what parenting arrangement was in the best interests of the children, now aged 17 and 16 respectively. The respondent argued that the children should be allowed to decide. The petitioner proposed that they remain in her sole custody and primary care with no contact with the respondent until she determined that they were ready for it.
HELD: The court ordered that the children would remain in the

sole custody and primary care of the petitioner during their minority with prescribed and conditional time with the respondent. The court reviewed the history of the attitude and conduct of the children towards the petitioner and the testimony of the child psychologists who had treated them and found that they suffered from parental alienation. The court found that the respondent and his wife had undermined the petitioner's relationship with the children and induced their decision to reject her. Although the children were at an age where their wishes might be taken into account, the court did not give their wishes much weight as they were inauthentic due to the respondent's manipulation and influence.

 Back to top

Birnie v Birnie, 2017 SKQB 184

Brown, June 21, 2017 (QB17165)

Family Law – Child Support – Notice to File Income Information
Family Law – Procedure – Queen's Bench Rules, Rule 15-2(3) – Minor Informality

The parties were married in 1991 and separated in 2008. They executed an interspousal agreement (ISA) in 2011 resolving family property division, child support, and spousal support. A divorce was granted in 2013. The ISA set out a set amount for child and spousal support until June 2014, and thereafter, the parties were to exchange income tax returns and other necessary documents to assess their incomes and the petitioner's obligations regarding child support. In 2016, the respondent provided income information to the petitioner for the years 2014 and 2015. The respondent sought further information and filed a notice to file income information on the petitioner in October 2016. The respondent then brought an application to obtain an order to comply with the notice on the basis of rule 15-36(1) of The Queen's Bench Rules. The petitioner opposed on the basis that there was no jurisdiction to make an order because the divorce was final, the respondent did not file an answer or counter-petition, the court file was closed, and a requirement to disclose information cannot compel a response without the grounding in the form of a petitioner or application underpinning it. The respondent then brought a further application while the notice application was under reserve. She applied for child support and disclosure of the petitioner's income information. The issues were whether the court had jurisdiction and, if so, should it make an order for compliance

with a notice to file income information brought in the following ways: 1) pursuant to an application for that relief absent an application for child support; and 2) in conjunction with an application for child support in light of the divorce being finalized in a judgment.
HELD: The issues were determined as follows: 1) the petitioner never provided his financial information as required when he commenced the action and filed the petition. He also never served a notice to file income information on the respondent, as required by the Queen's Bench Rules. The initial application for an order requiring the petitioner to comply with the notice to file income information was dismissed because it was brought without an application for child support or variation of child support; and 2) the petitioner's application to strike the claim for child support was dismissed. It was not necessary for the respondent to issue another petition. The divorce judgment did not terminate the jurisdiction of the court to deal with child support pursuant to the Divorce Act. However, an application for an order requiring compliance with a notice to file income information must be accompanied by an application for child support. The petitioner was required to comply with the notice to file income information within 20 days. The court did not require the respondent to file another notice to file income information when the second application, the application for child support, was served. The petitioner already had notice as to why his income information was being requested. The court applied rule 15-2(3) to remedy the minor informality.

 Back to top

R v Lommerse, 2017 SKQB 185

Megaw, June 22, 2017 (QB17166)

Criminal Law – Assault – Sexual Assault – 16-year-old Victim
Criminal Law – Evidence – Credibility
Criminal Law – Sexual Touching – 16-year-old Victim

The accused was charged with two Criminal Code offences: committing sexual assault, contrary to s. 271; and touching the 16-year-old complainant for a sexual purpose while he was a person of trust, contrary to s. 153(1)(a). The accused was a 48-year-old man working in the building supplies industry at the time of the offences. The complainant was involved with drugs and was on probation for a prior criminal offence. The accused had dated the mother of one of the complainant's friends. He met the complainant when he gave her friend, her, and another a

ride home from a party. The accused gave the complainant his number and told her that she could call him if she needed help. The complainant called the accused later that night and said she wanted to stay at his house because she was being kicked out of her parents' house. The complainant spent the night and left the next day. The accused called the complainant's probation officer and arrangements were made for her to stay at a home for troubled youth. The accused gave the complainant a key to his apartment, and the complainant said she stayed there a number of nights, while the accused said it was only a few times. The accused gave the complainant and her friend money and drove them to their drug suppliers to purchase drugs that he let them consume in his house. The accused described himself as a nudist; he walked around his apartment nude and encouraged the girls to do the same. The accused's niece and daughter testified that nudism was part of their family culture and that there was nothing sexual to it. The complainant indicated that the accused gave her massages and while doing so touched her in a sexual way. She also said he got in the shower with her and rubbed his penis against her. The complainant also testified that the accused sexually assaulted her. The accused completely denied the incidents took place. The accused paid for various things for the complainant and her friends. He had to take out a $3,000 loan during the time. The accused said that he did not like drugs or trust drugs users.
HELD: The court did not believe the accused's denial of having engaged either in sexual assault or sexual touching with the complainant given the inconsistency between his stated intention during his testimony and his actual actions. The court concluded that the accused's actions were all aimed at grooming the complainant with the goal of sexual gratification. The accused's testimony did not leave the court with a reasonable doubt. The court was also not left with a reasonable doubt as to the accused's guilt based on the accepted evidence. The accused was found guilty on both counts.

 Back to top

R v McKenzie, 2017 SKQB 186

Scherman, June 23, 2017 (QB17177)

Criminal Law – Possession of Child Pornography

The accused was charged with being in possession of child pornography, contrary to s. 163.1(4) of the Criminal Code. The RCMP Integrated Child Exploitation Unit (ICE) had identified a

certain IP address as receiving multiple images or videos associated with child pornography through the Gnutella peer-to-peer network. The computer itself was identified through its Globally Unique Identifier (GUID) and the noted activity was associated with the user name of "Jack Willow". One video in particular was captured by the officer and consisted of child pornography. The investigating officer determined through the IP that the account had been assigned to the accused. She also found that the computer was accessing the Gnutella network from another IP address for a two-week period. This IP was assigned to the accused's sister. The accused had been evacuated from his home in northern Saskatchewan to his sister's because of forest fires during that period and he had taken his computer with him and used her Internet access. After obtaining a search warrant, the officer found the subject computer and various disks in the accused's bedroom. One of the disks contained 25 video files of child pornography and as a result the accused was arrested. The bedroom was accessible from internal and external doors that were not locked. The computer and the disks were seized and analyzed. The forensic analysis of the computer's hard drive showed no record of a client accessing the Gnutella network or of Jack Willow as a user or of the GUID used to access the video identified by the ICE officer. The recycle bins were empty or contained unreadable files. From a search of unallocated space, a large quantity of video and image files were recovered that the defence conceded contained child pornography. The accused testified that the disks found in his room were not his and that he never played them. He had friends who regularly spent time in his room playing games on his computer and making other use of it. He admitted to accessing adult porn via his computer but never visited sites where child pornography was available and he was not aware that the files found on his computer had been downloaded to it. HELD: The accused was found guilty of the charge. The court did not believe the accused's testimony that he never downloaded or watched child pornography on his computer or on the disks. It found that the accused was an experienced and sophisticated user of computer technology and that he had owned, controlled and utilized his computer throughout the time periods in question. The court believed that the accused had swapped the hard drive of the computer, which explained why there was no records of the client accessing the Gnutella network, Jack Willow as a user or the video captured by the ICE officer on the hard drive that had been seized by the RCMP. The court was unable to find that there was a reasonable possibility that persons other than the accused placed the child pornography on his computer.

 Back to top

Winnitowy v Dellow, 2017 SKQB 187

Dawson, June 22, 2017 (QB17167)

Civil Procedure – Application to Strike Statement of Claim – Abuse of Process
Civil Procedure – Application to Strike Statement of Claim – Collateral Attack
Civil Procedure – Application to Strike Statement of Claim – Res Judicata

The defendants applied to strike the statement of claim. The plaintiffs were the children of the deceased. The defendant D. was a lawyer who was an employee of the defendant firm. The plaintiffs claimed that the defendants were negligent and the plaintiffs suffered damages as a result. In November 2002, the deceased entered into an interspousal contract with J. that dealt with their property rights following their marriage. The contract outlined that J. could live in the real property after the deceased's death as long as she wanted and after she moved out, the property would be sold and the proceeds would be divided equally between the deceased's estate and J.'s estate. D. gave the deceased independent legal advice on the contract. In 2008, the deceased transferred the property into joint names with J., with a right of survivorship. D. drafted and witnessed the transfer authorization. The deceased died in 2014. After the deceased's death, the plaintiffs brought an action against J. for one-half of the value of the property (June 2016 judgment). The judge in the June 2016 judgment rejected the plaintiffs' assertion that the deceased did not understand that by transferring the property into joint names the gift to the plaintiffs of one-half of the property would fail. The court inferred that the deceased intended the property to belong solely to J. upon his death. The court also found that the deceased was not unduly influenced. An appeal of that decision was dismissed. The issue was whether the claim should be struck on the basis of the doctrine of res judicata/issue estoppel, abuse of process or collateral attack. HELD: The claim dealt with the same questions in the June 2016 judgment and the court also considered the same facts, issues, and arguments. The court found that the plaintiffs' claims were contrary to the findings in the June 2016 judgment. The plaintiffs were found to be seeking to re-litigate the decision determined against them in the June 2016 judgment. The court found that the strict requirements of issue estoppel were not met, but the claim did amount to an abuse of process and a collateral attack on the June 2016 judgment. The court said that allowing the claim

would violate the integrity of the administration of justice. The claim was struck in its entirety and the defendants were awarded costs.

 Back to top

Ayles v Ayles, 2017 SKQB 188

Turcotte, June 22, 2017 (QB17178)

Family Law – Child Support
Civil Procedure – Queen's Bench Rules, Rule 15-29, Rule 15-57

The petitioner commenced proceedings in May 2014 and amended them in February 2015 claiming divorce, custody, access, child and spousal support under the Divorce Act. The respondent was served in April 2015 in Surrey, BC, with copies of the petition for divorce, the financial statement and property statement of the petitioner. No notice to file income information was served on the respondent at that time. The respondent did not file an answer and he was noted for default in August 2015. No further proceedings were taken until June 2017, when the petitioner applied on an uncontested basis for divorce, sole custody of the children, and ongoing and retroactive child support to April 2015 based on annual income imputed to the respondent of $107,900. The income was the average of the respondent's reported earnings for the 2010, 2011 and 2012 income tax years.
HELD: The application was dismissed. The court directed that it be brought back with the hearing date for the application to be set with 37 clear days' notice to the respondent. The court noted that the requirements of Queen's Bench rules 15-29 and 15-57 had not been complied with, in that the respondent had not received notice in 2015 to file income information with respect to the petitioner's claim for child support nor did he receive notice of this application, which included a claim for retroactive child support that was not made in the original petition.

 Back to top

R v Schlechter, 2017 SKQB 189

Barrington-Foote, June 23, 2017 (QB17168)

Criminal Law – Appeal – Conviction
Criminal Law – Blood Alcohol Level Exceeding .08

Criminal Law – Breathalizer – Certificate of Analysis
Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 10(b), Section 24(2)
Statutes – Interpretation – Criminal Code, Section 258(1)(c)(iii) – Requirements – Sample into Device

The appellant appealed his conviction of driving over .08, contrary to s. 253(1)(b) of the Criminal Code, arguing that the trial judge erred: 1) in failing to find a breach of his rights pursuant to ss. 8 and 9 of the Charter; 2) in failing to find a breach of his rights pursuant to ss. 10(b) of the Charter; 3) by failing to exclude the evidence of breath tests administered to him pursuant to s. 24(2) of the Charter, based on the Charter breaches; and 4) in finding that there was compliance with s. 258(1)(c)(iii) of the Criminal Code, and that the presumption in ss. 258(1)(c) applied. The appellant was stopped after driving away from a bar. An ASD demand was made four or five minutes after the appellant left the bar. The ASD registered a fail within two minutes of the demand. The appellant was immediately arrested and given his rights and warnings. A breath demand was made eight minutes after the appellant left the bar. Corporal M. did not try to determine when the appellant had his last drink before making the ASD demand. At the police station, the appellant was placed in a phone room where he spoke to Legal Aid from 11:02 to 11:09. Constable P. administered the Breathalizer and testified that the appellant told her that he had his last drink only about five minutes before the police pulled him over. The two breath samples were taken at 11:28 and 11:50 and resulted in readings of .11 and .12 respectively. The Certificate of Analysis was not tendered. HELD: The issues were determined as follows: 1) Corporal M. had the necessary subjective belief at the time of the demand, but the court found that he was obliged to either make further inquiries, or briefly delay the administration of the ASD test until 15 minutes after the last drink was consumed. Corporal M.'s subjective belief for the Breathalizer demand depended on the results of the ASD, and therefore, the Crown failed to prove that the police had reasonable grounds to administer the Breathalizer test, and the administration of the test constituted a breach of the appellant's ss. 8 and 9 Charter rights; 2) the court found that the accused said he understood and chose to call Legal Aid. There was no ss. 10(b) Charter violation; 3) the offending conduct was not minor or inadvertent. The infringing conduct was serious. The impact on the Charter-protected interests of the appellant was significant. Lastly, the court noted the serious nature of impaired driving and the reliable nature of Breathalizer results. Considering all three factors the court concluded that the Breathalizer evidence must be excluded; and 4) one of the four technical requirements of ss. 258(1)(c) is that

each sample was provided into an approved container or instrument. In this case, the certificate was not filed, so the Crown had to prove compliance through either direct or circumstantial evidence. The appeal court found that the evidence was not reasonably capable of supporting the trial judge's conclusion that the Crown proved beyond a reasonable doubt that there was compliance with ss. 258(1)(c)(iii) of the Criminal Code. The Crown failed to prove that the appellant's blood alcohol content exceeded .08 at the time of the offence. The appeal was allowed and an acquittal was entered.

 Back to top

V.H. v D.E., 2017 SKQB 190

Brown, June 23, 2017 (QB17169)

Family Law – Custody and Access – Best Interests of the Children
Family Law – Custody and Access – Children's Law Act
Family Law – Custody and Access – Grandparents
Family Law – Custody and Access – Sole Custody

The petitioners were the grandparents of the two children and the respondents were the parents. The mother was adopted by the petitioners when she was 12. She had cognitive development delays and lived a transient lifestyle. The mother was aware of the trial, but did not attend. The children's biological father did not attend either. The children were both apprehended at birth and the petitioners were their only caregivers. The oldest child suffered from uncontrollable aggressive outbursts. The mother had few visits with the children in the past year. The father had more visits but missed 22 of 41 scheduled visits, which was particularly hard on the oldest child whose condition required routine and predictability. The father refused to disclose his address and all visits took place at his parents' home. A full assessment regarding the mother's parenting capacity was performed, and it concluded that she did not have the cognitive capacity to reliably, effectively, and responsibly care for the children. The petitioners sought custody even though they were designated as persons having sufficient interest pursuant to The Child and Family Services Act proceeding. The issue was what was in the best interests of the children.
HELD: The court concluded that it was clearly in the children's best interests that the petitioners be given custody of them. The biological factor of the parentage of the children was but one factor for the court to consider, and the court concluded that it

would not be appropriate to put the children in the care of either biological parent. The petitioners were intensely proactive in seeking help for the oldest child's aggressive outbursts. The biological parents did not show a desire or capacity to properly care for the child given his challenges. They had also not begun the process of putting themselves in the position of being appropriate caregivers. The petitioners were found to be cognizant of the connection the children should have with their mother's home country, Haiti. The petitioners were granted sole legal custody of the children pursuant to s. 6 of The Children's Law Act, 1997. The court reserved any decision on whether the petitioners should also be granted guardianship pursuant to the Act. The court granted leave to the parties to submit reasons for such a request. Access to the biological parents was to be arranged with the petitioners and was to be supervised.

 Back to top

Choquette v Viczko, 2017 SKQB 191

Scherman, June 26, 2017 (QB17179)

Civil Procedure – Queen's Bench Rules, Rule 1-3, Rule 7-5
Civil Procedure – Contempt
Wills and Estates – Solicitor-Client Privilege

The plaintiff brought an action to set aside a transfer of land by the executrix of the estate of the deceased to the defendants. The plaintiff applied for and obtained summary judgment of the claim (see: 2014 SKQB 358), and the decision was set aside on appeal because the court found that the chambers judge erred in not conducting a trial or hearing oral evidence (see: 2016 SKCA 52). The defendants then brought an application for the following: 1) a declaration that the plaintiff and the executrix be held in civil contempt for allegedly swearing false affidavits and abusing the court process by bringing an application for summary judgment without complying with disclosure obligations; and 2) orders that no solicitor-client privilege existed with respect to the files of the lawyer who prepared the last will of the deceased and acted for the executrix on the transfer of the land to the defendants and that such files be disclosed. The executrix refused to produce the lawyer's files claiming privilege. She argued that the sole issue in the underlying action was whether the defendants lacked good faith when they purchased the land from the estate, and therefore it was not justified to breach solicitor-client privilege or to delay the resolution of the claim by the pursuit of irrelevant materials. The

plaintiff then brought another application for summary judgment of her claim requesting that it be with oral testimony and cross-examination.
HELD: The defendant's application for an order for contempt was set down for trial of the issues. The judge found that a fair and just determination could not be made on the basis of the affidavit evidence. Credibility assessments would be central to the fact-finding process. The application for an order finding that solicitor-client privilege did not apply to the lawyer's file was granted as was the application that the files be disclosed and produced. The plaintiff's application for summary judgment was dismissed. The court found that it would be necessary to hear and observe witnesses in a conventional trial in order to reach a fair and just determination. The court recommended that the parties consider whether to hear both the plaintiff's claim and the contempt claim together in accordance with Queen's Bench rule 1-3.

 Back to top

Walker v Walker, 2017 SKQB 195

Elson, June 29, 2017 (QB17182)

Family Law – Family Property – Division
Family Law – Child Support – Determination of Income
Family Law – Spousal Support – Determination of Income

The parties separated in May 2013 after a 20-year marriage. Their two daughters were 18 and 20 years old at the time of trial. The respondent mother looked after the home and the children. The petitioner husband began working for an oil and gas production company in 1984 and was still employed by the company (Postell). In addition to his employment, the petitioner had a 50 percent share in an oil rig servicing company (Safari). The other shareholder was part of the Postell family and a shareholder in the Postell company. Postell used Safari exclusively in Saskatchewan for its servicing requirements. The parties each held 50 percent of another company (Outback) that was created so that the petitioner could operate oil wells of his own and provide consulting work for other producers. The petitioner discontinued his work for Outback in 2012. For some period before the separation, the respondent worked as Safari's bookkeeper until she was terminated in 2014. Since then, she had been able to obtain only temporary or part-time employment. In 2014, the court had made an interim spousal support order in the amount of $3,299 per month based upon the petitioner's income

of $135,100, which included imputing 40 percent of Safari's pre-tax income (see: 2014 SKQB 270). The court declined to make an order for interim child support. The children had lived primarily with the petitioner after the separation, although at times one of the daughters resided with the respondent. In 2014 the eldest daughter turned 18 and moved to Calgary to attend university. The youngest daughter turned 18 in 2016 and entered university. The petitioner paid expenses associated with their relocation and costs of university. The issues at trial were as follows: 1) the valuation of Safari and Outback for the purposes of dividing the family property. The respondent argued that Safari should be valued at $1,000,000 as at the date of the application, thereby establishing the petitioner's interest at $500,000. Her expert used the capitalized cash flow technique and calculated goodwill between $60,000 and $130,000. The petitioner's position was that Safari's value was $394,000 as at the date of adjudication. His expert indicated that the appropriate method of valuation was the adjusted net asset approach. Safari's prospect for growth was limited because of its relationship with Postell, which also limited the value of goodwill. Safari's cash flow had been reversing since 2014 due to the price of oil. The parties' valuation of Outback also conflicted. The financial statements showed annual income declining from $80,000 to losses since 2013. The respondent argued that its positive value was $82,000 based on a 2014 appraisal. The petitioner asserted that because of the legal obligations to cover its share of reclamation and remediation costs when the oil wells were abandoned, the company would have negative value; 2) the determination of the parties', particularly the petitioner's, income for the purposes of child and spousal support. The respondent argued that income should be imputed to the petitioner from the pre-tax income from Safari and Outback in accordance with s. 18 of the Guidelines. The respondent also pointed to the petitioner's vehicle allowance of $2,000 per month from Postell that had not been reported as a taxable benefit. The petitioner also obtained personal expenses drawn from Safari; 3) the amount of child support that was payable for each child for the period between separation and the date that they became 18 and whether the court should order child support for the two adult children; and 4) the amount of spousal support payable to the respondent.

HELD: With respect to the issues the court found the following: 1) the appropriate date for valuation of Safari and Outback was at adjudication because of significant decreases in their values since the date of application. The court rejected most of the respondent's expert evidence and accepted the petitioner's expert estimate of $675,000. Characterizing the petitioner's interest as a minority shareholder, the court apportioned the company value to the petitioner at 45 percent ($303,750). The

value of Outback was set at minus $161,000. The liability of the parties for remediation was contingent upon s. 53.6(2) of The Oil and Gas Conservation Act and would cancel out the other and thus no value was included for Outback. After listing the assets and debts of each party, the petitioner was responsible for making an equalization payment to the respondent in the amount of $108,000; 2) for child and spousal support purposes, the respective incomes of each party were established for 2013, 2014 and 2015. Based on those amounts and depending on where each child lived during those years, the court ordered the amounts of s. 3 child support payable. The court reviewed the petitioner's income in light of the respondent's arguments and found that he received higher pre-tax income from Safari than the amount shown on the financial statements. Because of the difficulty in identifying a precise amount, the court found it fair to impute a higher amount to the petitioner in dividend income, relying upon s. 19 of the Guidelines rather than s. 18, and added his vehicle allowance and personal expenses drawn from Safari to his annual employment income for the years in question. The respondent was ordered to reimburse the petitioner for her proportionate share of s. 7 expenses related to each child's attendance at university. From January 1, 2016, forward, each party was ordered to pay their proportionate share of tuition and living costs for each child as long as they remained as a child of the marriage under the Divorce Act; and 3) the petitioner was ordered to pay the respondent spousal support on a compensatory basis and fixed it a the mid-point of the applicable range. The amounts were based upon the petitioner's income determined for the previous year. Commencing January 1, 2017, the petitioner was to pay spousal support in the amount of $4,000 per month until July 1, 2021, at which point support would terminate.

 Back to top

Gurniak v Saskatchewan Government Insurance, 2017 SKQB 199

Smith, July 4, 2017 (QB17200)

Automobile Accident Insurance Act – Appeal
Civil Procedure – Amendment – Statement of Claim
Civil Procedure – Application to Strike Statement of Claim
Civil Procedure – Queen's Bench Rules, Rule 3-74, Rule 13-8

The plaintiff was involved in an automobile accident in 2005 and he argued that he still suffered from injuries. In 2013, a surgeon recommended that he have laminectomy surgery, but the

defendant, Saskatchewan Government Insurance (SGI), concluded that the surgery would be for a problem unrelated to the accident. The plaintiff also sought compensation for body impairment. SGI advised he was only entitled to 2 percent whole body impairment. The plaintiff appealed pursuant to s. 191 of The Automobile Accident Insurance Act. SGI applied to strike the plaintiff's claim on the basis that it not only focused on the s. 191 statutory appeal, but comingled other torts. The matter was argued and the court agreed with SGI to a great extent. The claim was struck except for the portion that was the true s. 191 portion. The plaintiff was given the opportunity to revisit and amend his claim. The plaintiff appealed that ruling and the Court of Appeal quashed the appeal. The plaintiff also amended his claim. SGI then applied to strike paragraph 6 of the claim pursuant to rule 13-8 of The Queen's Bench Rules, on the basis that it contained a pleading of evidence and a pleading of argument. The plaintiff argued that the matter was res judicata because the previous judge dealt with the application to strike the claim, but did not strike paragraph 6. He also argued that the normal rules with respect to pleadings should not apply because the statement of claim, issued pursuant to s. 191, was an appeal process not a normally constituted action. Lastly, the plaintiff argued that SGI's application was beyond the eight days allowed to disallow an amendment to a claim pursuant to rule 3-74. SGI argued that it was not applying to disallow the amendment, but was applying to disallow the entire pleading.

HELD: The court did not find favour with the plaintiff's res judicata argument. It also contemplated that the plaintiff would get his pleadings in order by way of amendment and did not rule conclusively on the issue of the appropriateness of the original paragraph 6. Further, the rules respecting pleadings in a statement of claim were applicable because the appeal process was by way of statement of claim. The court concluded that paragraph 6 contained evidence, opinion, and remonstration. The court agreed with SGI that the application was not the type caught by rule 3-74, but noted that if it was wrong the court would have granted more time to SGI pursuant to rule 13-7(e). The court ordered that paragraph 6 be struck.

 Back to top