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



*R v Big River First Nation*, 2017 SKPC 16

Morin, July 14, 2017 (PC17056)

Environmental Law – Canadian Environmental Protection Act, 1999, Section 238 – Sentencing
Aboriginal Law – Reserves – Band

The accused, the Big River First Nation, pled guilty to a charge under s. 238(1) of the Canadian Environmental Protection Act, 1999 (CEPA, 1999) for failure to comply with an Environmental Protection Compliance Order, thereby committing an offence contrary to s. 272(1)(a) of the Act. The accused operated a gas bar on the reserve. In 2011 an inspection by Environment Canada (EC) of the premises revealed that the accused was committing various offences regarding the gas pumps, lines and storage tanks and a warning was issued. In 2014 EC issued the order because of ongoing contraventions of the Storage Tank Systems for Petroleum Products and Allied Petroleum Products Regulations. The order specified that the accused was to take certain measures before specified dates. The accused made efforts to comply but was unable to complete them. The issue in the case involved how to categorize the gas bar for the purposes of sentencing as the Act prescribed monetary penalties appropriate to corporations, small-revenue corporations, and individuals, respectively.
HELD: The accused was fined the amount of $10,000. The court found for the purposes of the CEPA, 1999 that that the accused was an individual as the operator of the gas bar. The court

considered the minimum fine for individuals under the Act, $5,000, as unreasonable given the seriousness of the offence. However, a maximum fine would have caused unnecessary hardship to the accused as the gas bar was operated for the benefit of the community.

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*R v Maxim*, 2017 SKPC 37

Green, June 30, 2017 (PC17045)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Marijuana
Constitutional Law – Charter of Rights, Section 8, Section 9, Section 24(2)

The accused was charged with possession of marijuana 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 the accused's s. 8 Charter rights had been violated because the officer did not have lawful grounds to detain him. The accused's s. 9 Charter rights had been violated when his vehicle had been searched, and he requested that the evidence obtained from the search be excluded pursuant to s. 24(2) of the Charter. A voir dire was held. RCMP officers had stopped another vehicle at the side of the road and because the accused did not slow when it passed the police vehicle with its emergency lights on, the officers stopped him. The officer testified that the accused appeared nervous. He produced his BC driver's licence and a rental agreement from Regina for his vehicle. He explained that he was heading to Winnipeg to see family. It was the Monday of the Thanksgiving weekend. The officer checked the Police Information Portal and discovered that the accused had been charged with trafficking marijuana in 2011 and was suspected of producing it in 2013. The rental agreement showed that the vehicle was supposed to be returned within two days and the officer found it odd that the accused would be travelling on the last day of the weekend. He knew from experience that drugs were often carried from BC to Winnipeg. Based on his observations and experience with drug operations, the officer told the accused that he was detaining him for a drug investigation, gave him his rights to counsel and the police warning. The officer testified that the accused did not seem surprised by the detention but his level of nervousness increased. The accused was found to have over $1,000 in cash in his pocket and the officer then arrested him because that amount

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**Disclaimer**

of cash was consistent with drug payments. He arrested the accused for possession of a narcotic and repeated his rights and the warning. The officer then searched the vehicle and found two suitcases full of marijuana. The accused was rearrested for possession for the purpose of trafficking.
HELD: The application was dismissed. The court found that the accused's ss. 8 and 9 Charter rights had been breached. Although the court was satisfied that the officer had an honest belief when he detained the accused that he was violating the Act based on his experience and observations, his belief was not reasonable. The court did not regard the officer as having a reasonable belief upon which to rely in arresting the accused based on the amount of cash that the accused was carrying, his nervousness and lack of surprise. Applying the Grant principles, the court found that the officer's actions fell at the lowest end of the fault spectrum. The impact on the accused was in the medium range. The court admitted the evidence as it would not bring the administration of justice into disrepute.

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## *R v Musey*, 2017 SKPC 46

Green, June 30, 2017 (PC17046)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Breath Sample – Presumption of Accuracy
Statutes – Interpretation – Criminal Code, Section 258(1)(c)

The accused was charged with driving while his blood alcohol content exceeded .08, contrary to s. 253(1)(b) of the Criminal Code. The accused was taken to a detachment to provide breath samples on the Intox EC/IR II breath instrument and his samples gave readings of 100 mg percent and 90 mg percent. The accused raised two issues at trial: 1) whether expert evidence about the functioning of the instrument raised a reasonable doubt that the accused provided two samples that exceeded 80 mg percent rebutted the presumption of accuracy in s. 258(1)(c) of the Code. The defence called a forensic toxicology expert employed by the RCMP, qualified to give opinion evidence on the operation of the Intox EC/IR II, an approved instrument under the Code. He testified that this approved instrument has a margin of acceptability within plus or minus 10 mg percent. On redirect he was asked if breath samples which registered as those of the accused had done could mean a reading of 90 mg percent and 80 mg percent and he respondent that it was possible; and 2)

whether the officer properly conducted the observation periods of the accused before each breath test so as to rebut the presumption. The accused testified that during the first 15-minute observation period before breath samples were taken, the officer who was observing him spent periods of time writing notes, talking to other officers and moving to other locations. Before the second breath test, the accused burped twice but did not inform the officer as he had not been made aware that this was necessary.
HELD: The accused was found guilty. The court found that the evidence presented by the defence had not rebutted the presumption of accuracy of the instrument provided by s. 258(1)(c) of the Code. The court found the following with respect to each issue: 1) the expert's evidence did not show that the instrument in this case was malfunctioning or being operated improperly. The sanctioning by Parliament of these instruments would have taken into account their limitations. The expert's evidence had not raised a reasonable doubt that the accused provided breath samples that showed his blood alcohol exceeded 80 mg percent; and 2) regarding the observation periods, the decision in R v By established the requirements that there must be both evidence of a deficiency in the test process and how such a deficiency relates to the proper operation of a breath instrument. In this case, although the officer did not carefully observe the accused during the observation periods and the accused may have burped, there was no evidence about the potential effect of any undetected alcohol in the accused's mouth on the proper operation of the instrument or whether the deficiency in the observation of the accused and the presence of alcohol in his mouth might have produced test results on the instrument that overestimated his blood alcohol content.

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*R v Jacobson*, 2017 SKPC 61

Kovatch, July 11, 2017 (PC17055)

Criminal Law – Defences – Charter of Rights, Section 10(b), Section 24(2)
Criminal Law – Driving over .08

When the accused was charged with driving over .08., he argued that his s. 10(b) Charter rights were breached and the evidence should be excluded. The accused was the driver of a vehicle stopped at 1:08 am. The officer determined that a smell of alcohol was coming from the accused, so he gave the accused an ASD

demand. The accused was arrested at 1:16 am when he failed the ASD. The accused indicated that he wanted to call a lawyer and he was advised that he could call one from the detachment. At the detachment, the accused indicated that he only wanted to call a specific lawyer. The accused also said that he had already called the lawyer on his cell phone and left a message. Further, he showed the officer that he had also texted the lawyer. When the officer asked if he wanted to speak to anyone else, the accused said he only wanted to talk to that lawyer. The accused confirmed that again after he used the washroom. The officer then gave the accused the Prosper warning. The officer did not ask the accused if he was then waiving his right to speak to counsel and whether he wished to take the test prior to speaking to counsel. The first breath sample was taken at 1:46 am.
HELD: The officer properly advised the accused of his right to counsel. The accused invoked his right and advised of his counsel of choice. The officer was then obligated to not take further steps for a reasonable period of time, so the accused could speak with the counsel of his choice. The first sample was taken at 1:46 am and the stop was made at 1:08 am, therefore the two-hour time limit for the presumption was not becoming a factor. The officer only waited for a call back for twenty minutes or less. The court held that the accused was entitled to continue to wait for a call back or to pursue other counsel, and the officer was obligated to hold up his investigation until the accused had exercised his right to counsel. Alternatively, the officer could give the Prosper warning. The court could not conclude that the accused clearly and unequivocally waived his right to counsel. The officer did not expressly ask the accused if he was waiving his right to counsel. He said that the accused's body language indicated that he was in a hurry and that he wanted to conclude the process. The court found that the standard required for an effective waiver is very high. The accused's s. 10(b) Charter rights were breached. The court undertook a Grant analysis and concluded that the Certificate of Analysis and all evidence obtained after the breach was to be excluded.

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*R v Cole*, 2017 SKPC 64

Tomkins, July 13, 2017 (PC17052)

Criminal Law – Defences – Charter of Rights, Section 7, Section 9, Section 24
Criminal Law – Mens Rea – Roadside Screening Device – Refusal to Provide Breath Sample

Criminal Law – Motor Vehicle Offences – Roadside Screening Device – Refusal to Provide Breath Sample
Statutes – Interpretation – Traffic Safety Act, Section 209.1

The accused was charged with failing or refusing to comply with a demand that he provide a breath sample for analysis, contrary to s. 254(5) of the Criminal Code. An officer stopped the accused shortly after midnight to check licence, registration, and driver sobriety. At the driver's door, the officer noted a strong smell of alcohol from the vehicle, the driver's eyes were bloodshot and slightly droopy, and his speech was slurred. The driver, the accused, initially denied having anything to drink, but then told the officer he had a beer five minutes before he was stopped. The officer explained how to blow into the machine and also explained that failing to provide a sample would result in being charged with refusing to do so. The accused started blowing three times, but stopped almost immediately. The accused was afforded nine opportunities to provide a sample over a period of six minutes. After the accused was taken to his parents' home, the officer blew into the ASD to ensure that it was working properly. The officer did not test or retain the mouthpieces used by the accused to attempt to provide samples. The video equipment installed in the police vehicle was not operational because the RCMP had not yet developed policies or trained officers on its use. An officer that attended the scene to deal with the vehicle saw the arresting officer give directions to the accused and also observed the accused not make any effort when he was blowing into the ASD. The accused indicated that he was trying to follow the officer's instructions and he did not have any health or breathing problems that could compromise his ability to blow properly. The issues were as follows: 1) were the accused's s. 7 Charter rights breached by the RCMP's failure to activate and operate video equipment installed in the police vehicle; 2) were the accused's s. 9 Charter rights breached because the officer stopped the accused primarily to gather information about activities in the neighbourhood and to reduce impaired driving and not, as the officer testified, for the purposes of checking licence, registration, and sobriety; and 3) was the mens rea necessary to commit the offence proved because the accused was unable to provide a suitable sample, when he did not intend the result.
HELD: The issues were determined as follows: 1) the court concluded that there was no obligation on the Crown to create evidence. The Crown was only obligated to preserve and provide evidence that existed. In any event, the court noted that the accused did not show that he was prejudiced by the fact that the vehicle stop and related events were not recorded. There was little conflict between the evidence of all three witnesses so it was unlikely that a video recording would assist significantly; 2)

the officer's opening questions regarding where the accused had been and was going was not found to change the officer's purpose in stopping the vehicle. The accused did not establish, on a balance of probabilities, that the vehicle stop was made for a reason other than pursuant to the officer's authority under s. 209.1 of the Traffic Safety Act or that his s. 9 Charter rights were breached. The court undertook a s. 24 analysis in case the conclusion was incorrect and found that the breach and impact would be serious and the interest in ensuring that police officers do not infringe the liberty of citizens arbitrarily would outweigh its interest in adjudication of the case on its merits. All of the evidence after the arbitrary stop would have been excluded; and 3) the court accepted each officer's testimony in its entirety. The court doubted the accused's honesty. The court was not satisfied that he did not understand why he was unable to provide a suitable sample. Therefore, the Crown's obligation to prove that the ASD and mouthpiece were in working order did not arise. The court was not satisfied that the accused was making an honest attempt to provide breath samples and believed he may have been attempting to deceive the device and/or the officer. The accused was found guilty.

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*Statham v 1414695 Alberta Ltd.*, 2017 SKQB 193

Rothery, June 27, 2017 (QB17188)

Bankruptcy and Insolvency – Application for Bankruptcy Order

The applicant applied for orders that each of the four respondents, Liberty, 1414695 Alberta (141), Criddle, and Spence, be adjudged bankrupts on the basis that they had committed an act of bankruptcy within six months. The alleged act was ceasing to meet liabilities as they became due under s. 42(1)(j) of the Bankruptcy and Insolvency Act (BIA). Other allegations included that Criddle had disposed of assets and Liberty had secreted its property with intent to defraud creditors under s. 42(1)(g) of the BIA. Criddle and Spence were equal shareholders and directors of Liberty, an Alberta corporation involved in land development. Spence was the sole shareholder and director of 141. Liberty purchased two quarter sections of land from the applicants for $12.8 million. It raised moneys to develop the land by a complicated investment scheme. The applicants took advantage of the scheme and loaned money to other investors by giving mortgages that required payment of interest only. Liberty and 141 collected the interest payable. The applicants became

alarmed regarding Liberty's operation of the first phase development fund and sought explanations and accounting. After a hearing, the court issued a consent order regarding disclosure by the respondents and the freezing of Liberty's accounts among other things. The applicants alleged the following: 1) Liberty owed them a debt of $1,000 as they were owed interest payments of $9,600 under the mortgages. There was evidence that some mortgagors had defaulted on interest payments. Regarding the operation of the development fund, Liberty was not permitted to pay out any money from the fund account without notice to the applicant's counsel under the consent order. The applicants discovered in documents disclosed by the respondents that Liberty had transferred the sum of $73,300 to its bank account. Spence deposed that he had panicked before the consent order was made and transferred the funds because they were owed by the development fund to Liberty and he was merely paying it back; 2) 141 owed them $240,000 because they loaned it that amount for the purposes of investing in the second phase of the development. 141 stated that it had paid and continued to pay monthly interest owing to the applicants and it had not been proven that it ceased to meet its liabilities under s. 42(1)(j) of the BIA; 3) Spence owed them $240,000 because he misappropriated the funds they gave to 141 to invest on their behalf; and 4) Criddle owed a debt of $209,999 and had stopped paying the monthly interest payments on the loan.

HELD: The bankruptcy applications against the four respondents were dismissed. The court found the following: 1) the applicants failed to prove that Liberty owed them the debt because interest payments were the responsibility of the mortgagors. They would have to pursue their civil remedies but not in bankrupcty. The court ordered Liberty to pay $73,300 into court; 2) the applicant failed to prove the debt owed to 141 or that there was an act of bankruptcy on its part; 3) the alleged claim against Spence was not one founded in debt, thus there had been no compliance with s. 43(1)(a) of the BIA; and 4) as Criddle resided in Alberta, the bankruptcy application must be brought there in accordance with s. 43(5) of the BIA.

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*Construction Workers Union, Local 151 v Saskatchewan Labour Relations Board*, 2017 SKQB 197

Dawson, June 30, 2017 (QB17184)

Administrative Law – Judicial Review

## Labour Law – Judicial Review – Labour Relations Board

The applicant union applied for judicial review of a decision of the Saskatchewan Labour Relations Board. It sought an order quashing or setting aside the decision and directing the board to issue a certificate to the union to represent the employees of Technical Workforce (Technical). The application was supported by Technical, a construction services company that was performing work as a subcontractor on the Regina Bypass project. The union had applied to the board to be certified as the bargaining agent for the employees of Technical in Saskatchewan as an all-employee bargaining unit, also known as a non-craft unit. Technical had no objection to the certification application and, at the time it was made, had hired seven engineers for the first phase of the project. The board verified the number of employees in the bargaining unit and conducted a mail-in and secret ballot vote. Six employees voted in favour of the applicant. The board notified the union and Technical that the board had identified some issues that required submissions and argument prior to making the order but specifically only queried whether the "build-up principle" should apply in this case. In the interim, Technical continued to hire more employees but advised the board by affidavit that at the time of the application, no additional contracts had been secured by Technical and it was unsure what its future staffing needs would be. During the hearing, the board did not ask any questions about or advise the parties that the methods of dispatching workers or hiring hall models were relevant to the application nor did the board ask the parties to address the distinction between craft and all-employee units on the application of the build-up principle in Saskatchewan. When the board issued its decision (see: 2016 CanLII 44644), it found as fact that there was no dispatch of members represented by the applicant to this worksite but rather, unrepresented employees were the norm. It held that the build-up principle should apply in construction when a non-craft union applied for certification. The issues were as follows: 1) did the board breach the principles of procedural fairness and natural justice. The applicant argued that the board had not provided notice to the parties of the issues it unilaterally considered to be of importance and were relied upon to reach its decision and made findings of fact in the absence of any evidence on those issues; and 2) was the board's decision unreasonable. The applicant argued that the board made errors of fact and law that engaged both aspects of reasonableness: the transparency and intelligibility of the decision and whether it fell within the range of possible acceptable outcomes.
HELD: The application was granted and the board's decision was quashed. The matter was remitted back to the board to be heard by a new panel, ordering it to issue a certificate to the

applicant. The court noted that the standard of review of the board's decision was reasonableness and the board has an obligation to adhere to a high level of procedural fairness. The court found the following with respect to each issue: 1) the board breached its duty of procedural fairness. The applicant and Technical were denied the right to be heard because the board failed to inform the parties, allow them to call evidence or make representations concerning the issues affecting the disposition of their case; and 2) the board's decision was unreasonable. It made findings respecting the difference between craft and non-craft units and dispatch of members in each of the units without any evidence on the issue. It found that the build-up principle applied to the construction industry and that the expected build-up of employees in this case was extreme and this conclusion was not supported by the evidence.

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*Siguenza v Moran*, 2017 SKQB 200

Elson, July 5, 2017 (QB17186)

Family Law – Custody and Access – Primary Residence

The parties shared joint custody of their two children with the primary residence of both being with the petitioner. The respondent had reasonable access. After the respondent indicated that he desired a specific parenting arrangement regarding one of the children, the parties reached an agreement that was confirmed in a consent judgment. It provided that the respondent would have regular parenting every second weekend from Thursday afternoon to the following Monday. It also stipulated that the respondent would have parenting time for two weeks of summer with the child. On the occasion of the first summer of this arrangement, the respondent requested that he have the child for two separate weeks. The request was denied by the petitioner because she asserted that the weeks had to be consecutive.
HELD: The court decided that the respondent should have summer parenting time with the child for one week in July with the option of an additional week before or after the week in question or he could choose one week in August. The court noted that the respondent's original proposal would result in him having more parenting time than the petitioner and that would not reflect the proper interpretation of the consent judgment in light of the fact that the petitioner was the primary resident parent. The respondent could have two non-consecutive

weeks of summer parenting but only if the arrangement would still result in the petitioner having more total parenting time than the respondent for the months of July and August.

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*Smooke v Rosemont Estate Condo Group 101222494*, 2017 SKQB 201

Danyliuk, July 5, 2017 (QB17201)

Civil Procedure – Queen's Bench Rules, Rule 1-6, Rule 3-2(7) – Irregularity
Civil Procedure – Costs – Solicitor-Client Costs
Condominiums – Condominium Property Act – Condominium Fees
Condominiums – Condominium Property Act – Oppression

The applicant's condominium fees were increased from $210 to $260 by the respondent condominium corporation for the unit the applicant occupied. The applicant argued that the increase was improper and illegal. When the applicant inquired about the increase, the respondent corresponded to him that the board of the respondent voted unanimously in favour of the increase. The correspondence also indicated that there was likely going to be a deficit for 2017 of $17.85 per unit. The increase, therefore, resulted in a surplus of $860 for 2017. The applicant indicated that two board members completed the financial statements rather than hiring an outside accountant. He further indicated that they completed a reserve fund study, which was not to be done internally either. The applicant continued to pay $210 per month, and the respondent wrote to him outlining their collection options for the remainder. The applicant also indicated that he was being repressed by the respondent and he sought the appointment of an administrator under s. 101 of The Condominium Property Act, 1993. The issues were as follows: 1) the requirements of the legislation and regulation; 2) did the respondent breach any of the requirements; 3) if so, what was the remedy; and 4) the proper cost award.
HELD: The court dismissed the application in its entirety. The court disregarded the argument in the applicant's affidavit. The issues were determined as follows: 1) s. 54(3) of the Act provides that owners are not exempt from paying assessments to either the common or reserve fund, even when they are involved in a dispute with the condominium corporation; 2) the Act, in ss. 57 and 58, indicates that the board can levy funds from time to time and it does not say it has to be done with audited financial statements or at an annual general meeting. The respondent did

not breach s. 39 of the Act. There was also no evidence that the respondent failed to properly prepare financial statements as required. Section 99.2 of the Act deals with oppression. The court found that the legal test for oppression was not met. There was no legal basis for the applicant's oppression claim. The applicant argued he was oppressed because the respondent did not undertake some sort of dispute resolution mechanism with him. The court determined that the applicant failed to establish any irregularities or problems that would justify the intrusion and expense of appointing an administrator pursuant to s. 101. The applicant failed to establish any wrongful acts of the respondent giving rise to a remedy in his favour. The application was dismissed in its entirety; 3) there was no remedy; and 4) the respondent claimed solicitor-client costs. The court concluded that this was not an appropriate case for the award of solicitor-client costs. The court fixed the costs at $1,500.

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*R v Prockner*, 2017 SKQB 202

Pritchard, July 6, 2017 (QB17189)

Criminal Law – Murder – Sentencing
Statutes – Interpretation – Youth Criminal Justice Act, Section 72(1)
Criminal Law – Young Offender – Murder – Sentencing

The accused pled guilty to first degree murder after he stabbed his former girlfriend to death. The offence took place when the accused was aged 16 years and 8 months old. The Crown applied to have him sentenced as an adult. The accused had been denied the option of receiving an Intensive Rehabilitative Custody and Supervision Order (IRCS) under s. 42(2)(r)(i) and (ii) of the Youth Criminal Justice Act (YCJA), and he had applied for an order of certiorari quashing that decision. The accused remained eligible for a standard youth sentence under s. 42(2)(q) of the YCJA. A pre-sentence report (PSR) indicated that the accused was at the fourth of five levels of risk and likelihood to offend again. He had a problem managing his emotions. It noted that an adult sentence would allow for a much longer period of access to services. A number of psychiatric and psychological assessment reports were submitted. With the exception of one psychiatrist, the opinions of the experts indicated that they were uncertain whether the accused would be able to deal with the issues in his life, but it would require treatment for a lengthy period. There was agreement that he was not remorseful. He was characterized

as someone who described himself as depressed and suicidal but was not actually either. Evidence was given of how long the accused had been planning to kill his former girlfriend, the manner in which he killed her and his post-offence behaviour.
HELD: The accused was sentenced as an adult and given a life sentence under s. 235(1) and s. 745.1(b) of the Criminal Code. Because of that decision, it was unnecessary for the court to consider the application for certiorari. The court found that the Crown had rebutted the presumption of diminished culpability of the accused as a young person under s. 72(1) of the YCJA. The court relied upon the facts that the accused planned the killing for over a year. The victim did not die immediately when the accused first stabbed her, but he continued to stab her eight more times. After the offence, he was composed and deliberate in the way he tried to dispose of evidence. The court was also satisfied that a youth sentence would not be of sufficient length to hold the accused accountable for his offending behaviour. The court was not convinced that the accused was committed to making behavioural changes based on the evidence of how he had dealt with his mental health problems before and after the offence. The accused had not shown remorse or an understanding of the consequences of his act.

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*Schutte v SaskTel*, 2017 SKQB 203

Gunn, July 6, 2017 (QB17190)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike

The defendant applied for an order striking the plaintiff's statement of claim under Queen's Bench rule 7-9(1)(a) on the basis that under rule 7-9(2)(a) it disclosed no reasonable cause of action.
HELD: The application was granted. The court reviewed the pleadings drafted by the self-represented plaintiff and found his claims had no reasonable prospect of success and struck them.

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*SEIU-West v Extendicare (Canada) Inc.*, 2017 SKQB 204

Gunn, July 6, 2017 (QB17191)

Labour Law – Arbitration – Judicial Review
Administrative Law – Judicial Review

The union applied for an order quashing the decision of the arbitrator regarding the grievance of one of its members on the ground that it was unreasonable. The respondent employee owned and operated long-term care facilities. The collective agreement made provision for vacation time but was silent regarding payouts for them. The respondent paid out an employee who had not used her vacation entitlement within the annual period. The employee filed a grievance claiming that the payout was made without her consent. The arbitrator concluded that the employer was entitled to pay the grievor her unused vacation entitlement accrued during the year at her regular rate of pay and dismissed the grievance. Among the issues raised by the union were whether the arbitrator unreasonably interpreted the agreement as permitting the employer to pay out vacation credits at the end of the year and permitting it to be paid out at a regular rather than overtime wage rate.
HELD: The application was dismissed. The standard of review was reasonableness. The court found with respect to each issue that the arbitrator's decision was reasonable. As the agreement was silent on the issue of payouts, she accepted the employer's argument that s. 33.1 of The Labour Standards Act operated to fill the void and it mandated a payout. The arbitrator's interpretation of the agreement was reasonable in finding that vacation payouts would be calculated at regular rates. To confer the type of monetary benefit that the union suggested would require express language.

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*Sekerbank T.A.S. v Arslan*, 2017 SKQB 205

Barrington-Foote, July 7, 2017 (QB17192)

Civil Procedure – Queen's Bench Rules, Rule 3-72, Rule 3-84
Statutes – Interpretation – Enforcement of Money Judgments Act, Section 5, Section 8

The proposed plaintiff, Alternatifbank (ABank) applied pursuant to Queen's Bench rules 3-72 and 3-84 to be added as a plaintiff to the action of the plaintiff, Sekerbank, against the defendants and to amend the statement of claim. ABank asserted a debt claim against the defendants. The defendants applied pursuant to s. 8 of The Enforcement of Money Judgments Act (EMJA) to terminate the preservation order, which prohibited any dealings with 850,000 shares, or alternatively they sought an order

reducing the number of shares subject to the order and requiring the plaintiff to post $3 million as security pursuant to s. 5(7) of the EMJA and $40,000 security for costs. Regarding ABank's application, it argued that its claim in debt against the defendant arose out of the same transaction based on the allegation that Arslan transferred the shares to a trust (the other defendant was the trustee) in June 2013, the time at which he stopped paying his debts in full and thus denied it the opportunity to collect its debt. ABank sought the same relief as Sekerbank: judgment against both defendants under The Fraudulent Preferences Act and The Fraudulent Conveyances Act. The defendants argued that the limitation period that applied to ABank's claim had expired and the application should be denied. Regarding the defendants' application, they argued that the plaintiff's strategy in the Saskatchewan action was to await the outcome of the proceedings they had initiated in Turkey against the plaintiff. The Saskatchewan action was independent from the Turkish action, and the plaintiff's approach was unacceptable in the circumstances of the preservation order made against them in 2014. The plaintiff had not prosecuted its actions against them without delay as required by s. 5(c) of the EMJA. The defendants asserted that the share prices increased since 2014 and were now worth $18 million more than the plaintiff's claim. If the preservation was not terminated, they requested that the number of shares be reduced to 100,000.

HELD: The proposed plaintiff's application was granted. The defendants' application to terminate the preservation order or to reduce the number of shares subject to the order was dismissed. The court ordered the plaintiff to post $1 million as security under the EMJA and an additional $40,000 as security for costs. The court found that although the limitation period had expired, it would add ABank as a plaintiff and amend the statement of claim pursuant to s. 20 of The Limitations Act, because to do so would not create a wholly new proceeding and the defendants had not provided evidence that they would suffer prejudice. The preservation order was not terminated after the court reviewed the history of the proceedings in both Saskatchewan and Turkey and found that the plaintiff had not failed to prosecute its action without delay. The court found that there was insufficient evidence to justify the reduction in the number of shares subject to the order. The information of the value of the security fell short of demonstrating a sufficient change in circumstances, especially in light of the addition of ABank's claim. The court found that the order should be modified under s. 5(7) of the EMJA to have the plaintiff provide security because there was evidence that the trust may have suffered and could suffer losses in the future as a result of the order. The order for security for costs was justified based on the considerations specified in

Queen's Bench rule 4-24.

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*Morrice v Morrice*, 2017 SKQB 206

Brown, July 10, 2017 (QB17193)

Family Law – Spousal Support – Interim

The applicant respondent applied for interim spousal support under s. 15.2 of the Divorce Act. The parties separated initially in 2007, reconciled and then separated permanently in 2011. They were divorced in 2015. The petitioner was employed as a nurse and had recently remarried. The applicant had been employed at various times as a commercial pilot, a manager in the construction industry and in sales. At the time of the application, his only income was from the rental of hangar space at the airport and he was about to lose his tenant. He estimated his annual expenses at $51,000. The petitioner respondent argued that there was no entitlement to spousal support on the basis there had been a delay of six years in making the application, that the applicant was intentionally underemployed and that income should be imputed to him. He had known for some time that his tenant was vacating and had done nothing about it. The applicant responded that at most, imputation of income should be at $30,000. The issue was whether the applicant had a valid claim to spousal support based on the non-compensatory or needs-based approach.
HELD: The application was dismissed without prejudice to the applicant seeking it in a final way at trial. The applicant had not provided evidence showing a diligent search for work. He had chosen to earn less income. The court exercised its discretion and imputed annual income of $55,000. Although there was a disparity between his income and the petitioner's, the court considered the applicant's reluctance to obtain employment, his needs as well as the delay in bringing the application as not warranting interim spousal support.

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*Binning v Canada (Minister of National Revenue)*, 2017 SKQB 207

Thompson, July 10, 2017 (QB17194)

## Bankruptcy and Insolvency – Discharge – Income Tax Debt

The bankrupt filed an assignment in March 2016 and applied for discharge. As his personal income tax liability exceeded 82 percent of his unsecured liabilities and totaled $581,800, a hearing was required by s. 172.1 of the Bankruptcy and Insolvency Act (BIA) to determine whether the bankrupt's unsecured liabilities should be discharged, and if so, on what terms. The Minister of National Revenue opposed the discharge and submitted that the bankrupt should make a $200,000 payment with a suspension of 36 to 48 months. The evidence presented regarding the four factors listed for discharge under a s. 172.1 bankruptcy was as follows: 1) the bankrupt's circumstances at the time the income tax was incurred was that he was a self-employed drywaller. He estimated his average net earnings between 2005 and 2015 at $110,500. He normally worked with other sub-contractors and then split the payments he received with them, taking just over a third for himself. He was not able to provide the details of these payments because he was a terrible recordkeeper. He had personal issues, including gambling, that cost him $24,000 for each year of the 10-year income tax period; 2) as far as efforts made by the bankrupt to deal with his income tax debt were concerned, he had not made a significant effort. In 2007 he made a consumer proposal, but it was annulled in 2009 because he failed to meet the payment terms; 3) regarding whether the bankrupt had preferred other creditors while owing income tax, there was no evidence that he had made other payments of other debts; and 4) the bankrupt's future prospects were good. He was 52 years of age and in good health. He continued to work as a drywaller. He had overcome some of his problems and had not gambled in some time. His annual income had been reduced and the trustee believed that the bankrupt would be able to pay $300 per month.
HELD: The bankrupt would be eligible for discharge in 48 months from the date of the order and once he had paid either $30,000 to the trustee or the amount available according to the Surplus Income Standards for the suspension term. Other conditions included filing quarterly income and expense reports to the trustee and complying with his post-bankruptcy income tax obligations. The court found that the first-time bankrupt had persistently failed to deal with his income tax obligation for 17 years. He was not an honest but unfortunate debtor regarding his income tax liability because of his gambling and failure to keep proper business records. Because of the trustee's report, the court accepted that the bankrupt was not able to earn the income necessary to allow him to pay $200,000.

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*Bridgewater Bank v Mulligan*, 2017 SKQB 208

Mills, July 10, 2017 (QB17209)

Mortgages – Foreclosure – Judicial Sale – Costs

The plaintiff bank claimed solicitor-client costs after the judicial sale of the defendant mortgagor's property. The plaintiff's solicitors argued that costs in the amount of $24,400 were justified because the involvement of the defendant's son in the mortgage proceedings and the judicial sale required numerous applications. After foreclosure proceedings had begun, the defendant's son informed the court that his father was suffering from mental health problems and was not in a position to look after his interests. The plaintiff's solicitor spent time speaking to the public trustee and to the son, although the latter had no legal interest in the matter. The numerous applications made by the plaintiff regarding the judicial sale were caused when it changed the upset price and amended the statement of claim. The plaintiff's lawyer spent a lot of time in preparing a draft order confirming the sale and the solicitor's statement of account. HELD: The application for costs was granted in the amount of $6,000. The court noted that costs for a standard foreclosure were $4,000 and it permitted an additional $1,000 to be added because of time spent dealing with the defendant's son and $1,000 for fees because of time spent dealing with the mental health issue. The numerous additional court applications that sought amended order had not arisen out of the activity of the mortgagor, and the time spent was excessive.

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*J.F.T. v M.N.S.*, 2017 SKQB 209

Danyliuk, July 10, 2017 (QB17202)

Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Children's Law Act
Family Law – Custody and Access – Interim

The parties had one child, born 2011. Two matters were in dispute: the Universal Child Care Benefit and child tax payments, and where the child should attend grade one in the fall. The child attended kindergarten in C., where the mother lived, and the father wanted the child to attend grade one in North Battleford, where he lived. North Battleford and C. are 60

kilometers apart. The parties began parenting the child on a week-by-week basis in the fall 2016. The father argued that there was no status quo established by the child's attendance at kindergarten in C. The father indicated that no before-and-after-school daycare would be required if the child changed schools. The father also said that he was unable to drive the child to school in C. five days per week. The mother said that the child was primarily in her care from July 2014 to July 2016 due to the father's employment. She argued that the child should remain in school in C., where he had success. The mother and her spouse worked 8:00 am to 4:00 or 5:00 pm. The father and his spouse both worked shifts. The child attended before-and-after-school daycare while residing with the mother. The father argued that the weekly rotation would not work for him for the next year, but did not provide evidence in that regard.
HELD: The court easily dealt with the Universal Child Care Benefit and child tax payment and held that it should be excluded from the order because those arrangements are generally not dealt with by the court. The court analyzed the factors set out in The Children's Law Act, 1997: 1) there was no evidence of problems with the school the previous year; 2) the child was familiar with the grade one teacher at C.; 3) the present parenting arrangement worked well; 4) the variation of interim arrangements is not encouraged; 5) there was a lack of evidence of any positive benefit for the child that a change would bring; 6) there was a lack of evidence from the father as to why the shared parenting arrangement would not work; 7) the father's evidence did not explain what the problem was with the current arrangement or the ability to maintain a weekly rotation if the child attended the current school; and 8) the fact that there would be no need for daycare in North Battleford was attractive, but not determinative. There was no evidence of any problems with the daycare. The court ordered that the child would attend grade one in C.

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*J.M.W., Re*, 2017 SKQB 210

Schwann, July 11, 2017 (QB17203)

Family Law – Guardianship – Dependent Adult – Adult Guardianship and Co-decision-making Act
Family Law – Guardianship – Personal and Property Guardian

The applicant father applied to be appointed as the personal and property guardian for his adult son, J., under The Adult

Guardianship and Co-decision-making Act. The application was opposed by J.'s mother. The parties separated in 2011 and the father had since remarried and had stepchildren. A viva voce hearing was ordered. J. was 19 years old, suffered from severe autism and Fragile X, and required around-the-clock care. J. was generally happy, but at times became aggressive. In July 2016, there was an incident that led to the family moving J. from his mother's home to his paternal grandparents' home, where he continued to reside. His behaviour had improved since moving in with his grandparents. J. stayed with his father on weekends and got along with the other children in the home. All of the parties agreed that J. should reside in a group home. They also agreed that J. was in need of a personal decision-maker and property guardian pursuant to the Act and would continue to need one for the remainder of his life. The issues were as follows: 1) should the father be appointed as J.'s personal and property guardian; 2) should the mother be appointed jointly with the father as the personal guardian for J.; and 3) should the mother have access to J.

HELD: The issues were determined as follows: 1) the court was satisfied that J. was a person whose capacity was impaired to extent that he was unable to make reasonable decisions with respect to some or all of the matters identified in s. 15 of the Act and was therefore in need of a personal guardian. It was also in the best interests of J. to appoint his father as his personal guardian. The court also ordered, pursuant to s. 40(1)(b), that the father be appointed as property guardian for J. A review was not ordered; 2) the mother was the parent predominantly involved with J.'s schooling, medical care, etc. The court disagreed with the mother with that there were no major issues facing J. on the horizon. The court also found that the mother's confidence in her and the father's ability to work together was not supported by the evidence. The court concluded that the mother's firm resistance and forceful personality would make it difficult for the parties to effectively communicate and arrive at a consensus about J.'s care. There was an order that the mother continue to be involved in the multi-disciplinary meetings concerning J. and that the father shall take all reasonable measures to ensure she remains involved. The father was also ordered to consult the mother on major decisions concerning J.'s health and welfare in writing, and the mother was entitled to her input in relation to those decisions; and 3) the mother was found to be entitled to enhanced access to J. She was given reasonable access of not less than twice a week and of not less than two hours duration. The access was to be coordinated with and under the supervision of J.'s respite care providers.

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*Schramm v Schramm*, 2017 SKQB 212

Chicoine, July 12, 2017 (QB17196)

Civil Procedure – Queen's Bench Rules, Rule 3-2, Rule 3-49, Rule 3-72, Rule 6-3
Civil Procedure – Pleadings – Originating Application
Civil Procedure – Applications – Notice of Application

The applicant filed an originating application (OA) in 2013 that sought an order directing that five quarters of farmland registered in her name and that of her son, the respondent, as joint tenants, be transferred into her sole name in accordance with the terms of a declaration of trust that she claimed created a resulting trust in her favour. The respondent filed his own notice of application (NOA) shortly thereafter, requesting an order that all matters raised in the OA be directed to trial or, alternatively, an order requiring the applicant to attend for cross-examination on her affidavit. Both applications were adjourned sine die with the consent of the parties. In 2015, the applicant filed an amended OA that removed the resulting trust claim and invoked s. 109(1) of The Land Titles Act (LTA), requesting an order that the respondent, as trustee, be required to transfer titles to the land into her name alone. That application was adjourned numerous times by consent. Then the respondent filed this application requesting leave to amend his 2013 NOA to convert it into an OA and add a claim that the applicant was in breach of an oral contract in relation to the farmland and a claim pursuant to The Improvements under Mistake of Title Act (IMTA). Background to the disputes between the parties was that when the applicant became the sole owner of the farmland after the death of her husband in 1998, the respondent and she decided that he would farm the land and she would take care of the farm books, crop and hail insurance, and the banking. In 2001, the respondent's name was added to the bank account into which the applicant deposited farm income and paid her expenses. The parties signed a memorandum indicating that the respondent had no beneficial interest in the joint account until after the applicant's death. In 2003, the respondent moved to the farm with his family and asked the applicant to transfer all of the farmland to him. With her lawyer's advice, she agreed to transfer the lands into their joint names, and the parties executed a trust declaration to ensure that she could use them as she wished during her lifetime. The transfer was for estate planning purposes. The farm income continued to be deposited into the joint account. In 2009, the applicant said that the respondent requested that the farm be operated as a partnership in order to

obtain tax incentives. She agreed, and they began to file their returns as a partnership but nothing changed in the operation of the farm. In 2011, the applicant averred that the respondent asked her to transfer all the lands into his sole name and she refused. Their relationship deteriorated, and in mid-2012, the respondent stopped depositing any money into the joint bank account. In his affidavit, the respondent deposed that his and the applicant's agreement to form a partnership in 2009 included that his share would increase from 25 percent to 100 percent by 2012. The arrangement was reviewed in the presence of their accountant. However, it was never reduced to writing. In his affidavit, the accountant could not recall nor find any record of this meeting and the arrangement. The respondent estimated that he made capital contributions in the amount of $721,600 to the farm. If the farmland was transferred into the applicant's name, he wanted the court to reimburse him for that amount and for the value of his labour as well as other costs. Among the issues were as follows: 1) should the applicant be allowed to amend her OA to clarify that the remedies sought were a declaration that a valid trust existed and an order requiring the trustee comply with the request to transfer titles to the applicant; and 2) should the respondent be allowed to convert the 2013 NOA filed in response to the applicant's OA into an ON and add the two claims.

HELD: The court granted the application and gave the applicant leave to amend her OA as described. The court ordered under s. 109 of the LTA that the titles to four quarters of the farmland be transferred to the applicant as sole owner. The defendant's application to amend his NOA was denied and his other applications dismissed. The court found the following with respect to the issues: 1) the amendments to the applicant's pleadings were permitted under Queen's Bench rule 3-72 as necessary to determine the real questions in issue between the parties. As there was no conflict in the evidence concerning how the joint tenancy was created and the terms of the trust declaration, the applicant was entitled to have the lands transferred into her name. The court made no order regarding the ownership of the home quarter, as the applicant did not seek to remove the respondent and his family from it; and 2) under Queen's Bench rules 3-2(2) and 3-49(1), the NOA could not be converted into an OA or any other form of commencement document. The respondent's NOA filed pursuant to Queen's Bench rule 6-3(1) was not a pleading and was not amenable to being amended pursuant to rule 3-72. The respondent should proceed by statement of claim to pursue his claims that the applicant was in breach of an oral contract relating to the farmland and for a remedy under IMTA, but neither action could be commenced by OA.

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*Hillsdon v Hillsdon*, 2017 SKQB 213

Brown, July 13, 2017 (QB17204)

Family Law – Spousal Support – Determination of Income
Family Law – Spousal Support – Interim
Family Law – Spousal Support – Review of Final Order

The parties applied pursuant to a built-in review process to the trial decision they received in 2015. The primary trigger for the application was the retirement of both parties. The parties married in 1980 and separated in 2009. At trial, the court determined the family property issues and ordered that the respondent pay the petitioner $3,000 per month in spousal support, which was reviewable at the insistance of either party, upon the retirement of either party. The respondent was receiving $7,352.58 per month in pension. The pension was a defined benefit pension plan and therefore increases to his pension entitlement were due to his increased income after petition and trial. In January 2017, the respondent applied to have his spousal support reduced to $410 per month. The petitioner then applied to have portions of the respondent's affidavit struck and for an order that the respondent provide particulars of any life insurance, that he must designate her a sole beneficiary of his life insurance policy, and that he confirm the particulars of the policy upon 30 days' request. The respondent questioned the petitioner's decision to quit a well-paid position while she had only a small amount of income from other sources. The court dealt with the following: 1) the respondent's increased income and, in particular, whether the petitioner was able to take advantage of the increased income the respondent had created through his circumstances and whether the advantage the petitioner sought to take must account for her retirement. The respondent argued that the petitioner was seeking to double-dip because all assets, including his pension, were divided previously; 2) whether the exceptions to double-dipping were applicable; 3) the petitioner's means and needs; 4) the conclusion on pension and support; and 5) the designation on the respondent's life insurance policy.
HELD: The court reviewed the respondent's affidavit and struck portions of it. The court dealt with the issues as follows: 1) the rule is not to allow double recovery while recognizing that there are necessary exceptions. One exception is where the payor spouse has the ability to pay, the payee has made a reasonable effort to use the equalized assets in an income-producing way

and, despite this, an economic hardship from the marriage or its breakdown persists. Another exception is spousal support based on need. At trial, the judge concluded that the value of the respondent's pension was at the lowest end value. A higher value allocation could have been used. The court did not have all the facts to determine the amount of the respondent's retirement income that was attributable to post-petition contributions; 2) the court found that the petitioner's decision to retire early was not a reasonable choice. The court found that much of the petitioner's economic hardship she now had was from her own choice to retire not from the marriage breakdown. She was still, nonetheless, entitled to support; 3) the court concluded that it would have been reasonable if the petitioner had moved to another form of income, even if it was not a full replacement of the income. The respondent's health was also an issue to be finalized if the parties proceeded to pre-trial and trial. The review set out at trial was interpreted to include the respondent's actions to increase his pension entitlement. The fact that the respondent was cohabiting with another partner did not alter the court's conclusions; 4) the court attributed income of $49,000 to the petitioner and the respondent was attributed income of $88,000. The petitioner had a need for support. The range of support pursuant to the Spousal Support Advisory Guidelines was between $1,072 and $1,430. The court ordered support of $1,250 per month for two years, at which time the matter could be reviewed if it had not proceeded further. The reason for the review was to ascertain the state of the respondent's health at that time and consider how the petitioner's consulting business or other income generating activities were going; 5) the petitioner could have asked for the relief at trial and didn't. The court did not find that the petitioner met her onus and, therefore, dismissed her application without prejudice to an evaluation based on full factual information if the parties chose to proceed to pre-trial and trial. The court awarded costs of $250 to the petitioner given the elements of the respondent's affidavit that were struck.

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*R v Nagy*, 2017 SKQB 214

McMurtry, July 14, 2017 (QB17197)

Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Sentence
Criminal Law – Assault
Criminal Law – Conviction – Sufficiency of Reasons

Criminal Law – Evidence – Extrinsic Misconduct Evidence
Criminal Law – Utter Threat

The appellant appealed his convictions and sentence. He was given a suspended sentence and 24 months probation with a number of conditions for Criminal Code convictions of assault, contrary to s. 266, and uttering a threat to destroy a dwelling property, contrary to s. 264.1(1)(b). The appellant and complainant had been a couple for 36 years and had three adult sons. In September 2015, the complainant moved from the family home to a trailer on the family farm and lived with one of the sons, C. Two of the sons and the appellant worked together on the family farm. There was hostility between the father and his sons. The complainant described an argument between C. and the appellant and in doing so referred to previous instances where the appellant had physically assaulted C. The appellant's counsel objected to the complainant's evidence of previous bad acts by the appellant, but the trial judge allowed her to continue. The trial judge indicated that she would use the evidence for the limited purpose of explaining why the complainant chose to get involved in the situation between her son and her husband. The complainant explained that she was no longer going to let the appellant act that way towards the children, so she held up her hands to prevent the appellant from reaching C. The complainant said that the appellant pushed her into the storage closet when C. told him to leave. The appellant had also bit her hand. The appellant testified that C. grabbed him around the neck and shoulder and he did not remember anything until he got up 60 feet from the trailer, by his truck. He said that he did not bite the appellant or push her into the closet. The utter a threat incident occurred when the appellant again attended at the trailer. The complainant recorded the incident with her cell phone. The appellant was recorded saying, "The trailer would end up in a pile one morning". The appellant agreed that he meant he would bulldoze the trailer. The issues on appeal were as follows: 1) the admission of extrinsic misconduct evidence; 2) the sufficiency of the trial judge's reasons for conviction; and 3) the sentencing appeal.
HELD: The issues were dealt with as follows: 1) the court found that the trial judge's comment regarding the appellant being a "bitter and angry man" was a gratuitous comment that did not relate to her reasons for convicting the appellant. The court was unable to draw an inference that the trial judge relied on evidence of the appellant's previous conduct in convicting him of assault. The trial judge was able to hear the appellant's words and tone of voice to convict him of the threat charge. The trial judge was found to accurately refer to the evidence before her and the evidence was reasonably capable of supporting her conclusion. The trial judge properly used the evidence of the

appellant's previous conduct; 2) the appeal court was satisfied that the trial judge adequately reviewed the evidence and provided concrete reasons for conviction. The trial judge indicated that she believed the complainant and did not believe the appellant. The appeal court indicated that the appellant's testimony lacked an air of reality so the trial judge did not have to explain why she didn't believe him. With respect to the uttering a threat charge, the appeal court was satisfied that the trial judge understood the Crown was required to prove intent, beyond a reasonable doubt. The appeal court determined that it was sufficient for the trial judge to advise the appellant that she was convicting him because of the words he used and his tone of voice when saying them. The conviction appeal was dismissed; and 3) the appellant did not have a criminal record and the offences were on the less serious end of the spectrum. The appeal court found that the probation orders were appropriate in the circumstances of the offences committed against a spouse, in the absence of a criminal record. The sentence appeal was also dismissed.

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*Rick Peterson Farms Ltd. v Saskatchewan Crop Insurance Corp.*, 2017 SKQB 215

Keene, July 14, 2017 (QB17205)

Insurance – Crop Insurance – Provincial Appeal Panel – Appeal
Civil Procedure – Queen's Bench Rules, Rule 5-12(2)
Civil Procedure – Disclosure of Documents – Privilege

The plaintiff brought an action against the defendant, Saskatchewan Crop Insurance Corporation, after its claim for crop insurance was denied. It then appealed the denial to the defendant's Provincial Appeal Panel. To participate in the appeal process, the plaintiff signed an agreement that acknowledged the application was voluntary and the recommendation made from the panel to the defendant's board of directors constituted privileged information. After the appeal was heard, the board informed the plaintiff that it was unsuccessful. The plaintiff then sued and requested that the defendant provide documents, including a copy of the report of the panel's recommendations. The defendant refused to provide the report, citing privilege, and the plaintiff applied to compel its disclosure under Queen's Bench rule 5-12(2)(a). The plaintiff argued that the report must be disclosed because it was relevant to the matter in issue and did not enjoy litigation privilege because it had not been created

with that dominant purpose. The acceptance clause did not amount to an agreement that the report would be privileged. The issues were as follows: 1) did litigation or settlement privilege apply; 2) was the report privileged because of the confidentiality clause as in the case of Union Carbide v Bombardier; and 3) did the clause operate to privilege the report even if Bombardier could be distinguished.
HELD: The application for disclosure was granted. The court found the following: 1) litigation privilege did not apply. It distinguished Cote v Saskatchewan Crop Insurance because after that decision, the defendant had changed its policy and required producers to sign the confidentiality clause to pursue a provincial appeal; 2) the parties agreed that confidentiality clause was unqualified and was not contingent on litigation and therefore they had agreed the report would be privileged. The decision in Bombardier was not applicable to the circumstances in this case; and 3) it was necessary to apply the Wigmore factors. Because the parties had signed a confidentiality agreement, only the fourth factor was relevant: whether the defendant had established that the injury caused by disclosure of the communications would be greater than the benefit gained by the correct disposal of the litigation. The court found that the reasons in Cote supported its decision that the applicant's right to have disclosure under The Queen's Bench Rules was more important than any difficulties that the defendant might encounter if the report were disclosed.

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*R v T.A.S.*, 2017 SKQB 218

Barrington-Foote, July 14, 2017 (QB17199)

Criminal Law – Criminal Responsibility – Mental Disorder – Criminal Code, Section 672.11(b)
Criminal Law – Defences – Mental Disorder
Criminal Law – Sexual Offences – Criminal Code, Section 150.1 – Presumption of 5 Years

The accused was charged with three Criminal Code charges: sexual touching, contrary to s. 151; invitation to sexual touching, contrary to s. 152; and sexual assault, contrary to s. 271. He applied pursuant to ss. 672.12(1) of the Criminal Code for an order that he be assessed to determine whether he was unfit to stand trial, or was suffering from a mental disorder so as to exempt him from criminal responsibility. The accused was 22 and the complainant was 14 at the time of the alleged offences.

He challenged the constitutionality of the five-year age spread provision in s. 150.1 of the Criminal Code.
HELD: The court ordered that an assessment be conducted pursuant to ss. 672.11(b), which requires a basis for the belief the accused may have a mental disorder of a sort that rendered him not criminally responsible. The court was satisfied that there were reasonable grounds to believe that further evidence of the accused's mental condition was necessary to determine whether the accused was suffering from a mental disorder at the time of one or more of the events that gave rise to the charges. The court found that the evidence of the accused and his mother on the constitutional voir dire raised the possibility he was suffering from depression and anxiety. The court was not satisfied that there were reasonable grounds to believe that further evidence was necessary to determine if the accused was unfit to stand trial because it was clear he could communicate with counsel in a manner that met the legal test. There were reasonable grounds to believe that further evidence of the accused's mental condition was necessary to determine whether he was exempt from criminal liability pursuant to s. 16(1). The accused was ordered to be assessed at the Saskatchewan Hospital in North Battleford.

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*Hampton v Boychuk*, 2017 SKQB 220

Labach, July 17, 2017 (QB17212)

Statutes – Interpretation – Court Jurisdiction and Proceedings Transfer Act
Family Law – Family Property – Division – Jurisdiction

The petitioner filed a petition in Saskatchewan requesting an equal division of the family home and an unequal division of the family property under The Family Property Act (FPA). She had lived with the respondent in a common law relationship for 13 years. The couple had begun living together in Alberta in 2002 and in 2007 purchased a house in Saskatchewan, owned in joint tenancy. They began to spend time in both provinces. After the respondent was served with the petition, he filed a statement of claim in Alberta requesting a declaratory judgment that the petitioner had no proprietary interest in the assets and property owned by him and for an order transferring any property in the names of the parties into his name only. He then filed this application requesting an order that the petitioner's action be transferred to Alberta pursuant to s. 12 of The Court Jurisdiction and Proceedings Transfer Act (CJPTA), that it be stayed in

Saskatchewan pursuant to s. 37 of The Queen's Bench Act, 1998, and the title to the Saskatchewan property be transferred into his name only. The respondent argued that the parties were Alberta residents and the proceeding had more connection with that province. He also argued that, because of their common law relationship, the petitioner was trying to avail herself of the FPA because it would be more favourable to her than Alberta's Matrimonial Property Act.
HELD: The application was dismissed. The court found that it had territorial competence to deal with the issue of division of family property and would not decline jurisdiction. The application to have title transferred into the respondent's name was dismissed because the evidence regarding whether the property was the family home should be dealt with at trial. The court found that, as the majority of the property in question was in Saskatchewan, there was a presumption of real and substantial connection as required by s. 9 of CJPTA, and after reviewing the factors under s. 10(2), the court decided that the action should remain here.

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*R v Obey*, 2017 SKQB 223

Pritchard, July 19, 2017 (QB17208)

Aboriginal Law – Reserves – Public Roadways
Constitutional Law – Charter of Rights, Section 8, Section 9
Criminal Law – Motor Vehicle Offences – Driving While Disqualified – Reserve – Public Road

The accused was charged with having care and control of a vehicle while his ability to operate it was impaired by alcohol contrary to s. 253(1)(a) of the Criminal Code and other offences. The defence made a Charter application alleging that the accused's ss. 8 and 9 Charter rights had been breached. A voir dire was held. The RCMP had been called by a resident of the Muscowpetung First Nation who complained that the accused was driving a blue SUV in a dangerous manner on his property on the reserve. One of the officers who responded to the complaint knew the accused and that he was subject to a lifetime driving prohibition under the Criminal Code. As he knew where the accused lived on the reserve, the officer drove to that residence. He saw a blue SUV parked near the house with its engine running. When he approached the vehicle, he saw the accused was passed out in the driver's seat with a bottle of wine sitting next to him. The keys were in the ignition and the vehicle

was in neutral. After opening the vehicle door and waking the accused, the officer smelled alcohol on the accused's breath. The accused's speech was very slurred. The officer arrested the accused for care and control and read him his Charter rights. The issues in the voir dire were as follows: 1) was the grid road that the accused had been travelling on a public roadway. If not, the accused had not committed the offence of breaching his driving prohibition under s. 259 of the Criminal Code. The accused argued that the road was not public because parts of it were washed out and as a result it was no longer used or connected to the public roads on the reserve. Photographic evidence was tendered showing that grass was growing in the centre of the grid road. The officer testified that the RCMP had always regarded it as a public road and it was still passable. There was no signage indicating that vehicles were not allowed on it. The road was identified on a map of the reserve and it did not indicate that it was a private roadway; 2) did the officers have the right to enter onto the accused's property. The defence argued that the officers required a warrant to enter onto the accused's property; and 3) did the officers have reasonable grounds to arrest the accused.

HELD: The application was dismissed. The court found that there had been no breach of the accused's Charter rights. It held with respect to each issue that: 1) the actual or intended use of the grid road and not its condition was determinative that it was a public road. The court accepted the Crown's evidence that the grid road had been treated as a public highway and that there had been no change to its status. The court also relied upon ss. 2, 3, 4(3) and 6 of the Indian Reserve Traffic Regulations; 2) there was no evidence that the officer exceeded the implied right to enter onto the accused's property for the purpose of questioning him. They were responding to the complaint and had no expectation that they would find him impaired; and 3) the officer had reasonable and probable grounds based upon the evidence of the accused's impairment when found in his vehicle.

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