The Law Society of Saskatchewan Library's online newsletter
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Aquila Holdings Ltd. v Edenwold (Rural Municipality No. 158), 2017 SKCA 66

Richards Ottenbreit Caldwell, August 28, 2017 (CA17066)

Municipal Law – Assessment – Tax Exemption – Appeal
Statutes – Interpretation – Municipalities Act, Section 95, Section 226

The appellant Aquila and the defendant, Rural Municipality of Edenwold (RM), had entered into a tax exemption agreement regarding the appellant's commercial property. Two years later the appelant Aquila sold the property to the appellant numbered company. As a result, the RM advised in accordance with a provision in the agreement that the exemption no longer applied to the property because it had been sold. The appellants appealed to the Board of Revision and it refused to hear it because the notice of appeal had been filed too late. The appellants then appealed to the Assessment Appeal Committee of the Saskatchewan Municipal Board. The committee held that the appeal period commenced from the date of the owner's receipt of the tax notice, not from the date when the assessment notice was mailed, and in this case, the appeal had been filed within 30 days of the date of receipt of the tax notice. The committee then decided that it had no authority to consider the substance of the appeal because the tax exemption was not statutory in nature but founded on the agreement between the parties.
HELD: The appeal was dismissed. The standard of review was

correctness. The court found that the committee had erred in finding that it did not have authority to deal with the substance of the appeal. There was nothing in The Municipalities Act that prevented an appeal from a decision regarding a tax exemption agreement created under s. 295. The committee had erred in its finding regarding the appeal period starting to run when the tax notice was received. The appeal period commences under s. 226 of the Act when the notice of assessment is mailed. In this case, the notice was mailed in April and the appeal was not filed until September.

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R v Woods, 2017 SKCA 67

Jackson, August 28, 2017 (CA17067)

Criminal Law – First Degree Murder – Conviction – Appeal – Notice of Appeal

The appellant appealed his conviction of first degree murder contrary to s. 235 of the Criminal Code. His trial counsel enumerated the grounds of appeal in his notice of appeal in 2014. In May 2015, the appellant changed lawyers and eventually selected the counsel on this application to amend the original notice of appeal. The proposed amendments were in fact a new notice of appeal and included the ground that the appellant's trial counsel was ineffective, resulting in a miscarriage of justice. Crown counsel consented to all of the proposed amendments except the one relating to his representation.
HELD: The application was allowed in part. Pursuant to rule 13 of the Court of Appeal Rules and rule 5 of the Court of Appeal Criminal Appeal Rules (Saskatchewan), the chambers judge granted the application to file an amended notice of appeal regarding all proposed grounds other than ineffective trial representation. The appeal had been scheduled for hearing in June, and Crown counsel had filed his factum based on that date. The appellant retained his present counsel in June and the panel scheduled to hear the appeal granted a peremptory adjournment to September 2017. If the ground of appeal regarding representation had been included, the appeal would have been able to proceed as scheduled.

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Richards Jackson Caldwell, August 29, 2017 (CA17068)

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

The appellant commenced an action against his former employers, mangers, co-workers, union and union labour relations officer. He appealed from the decision of a Queen's Bench judge to strike his claim in negligent representation and conspiracy (see: 2015 SKQB 358) and a subsequent decision of another Queen's Bench judge to strike his claim in detinue and conversion (see: 2016 SKQB 72).
HELD: The appeal was dismissed. The judges who struck the statement of claim relied on the proper legal principles and applied them correctly.

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R v Piapot, 2017 SKCA 69

Ottenbreit Caldwell Whitmore, August 30, 2017 (CA17069)

Statutes – Interpretation – Criminal Code, Section 753.1

The appellant appealed against his convictions for a number of offences: assault by threatening to use a vehicle as a weapon, contrary to s. 267(a) of the Criminal Code; failing to stop the vehicle when pursued by a police officer, contrary to s. 249.1(1) of the Code; and dangerous driving, contrary to s. 249(1)(a) of the Code. He received a total sentence of 36 months and was designated a long-term offender (LTO) and received a seven-year long-term supervision order (LTSO) (see: 2016 SKPC 38). The appellant also appealed the designation. The grounds of appeal related to the conviction raised whether the trial judge had erred in considering the credibility of the appellant and the complainants, misapprehension of the evidence and in finding that the appellant had used his vehicle as a weapon when he had not hit the complainant's vehicle with his. The appeal regarding the designation raised whether the trial judge had used the wrong test pursuant to s. 753.1 of the Code in assessing the future risk of the appellant's reoffending by finding that the designation was warranted if he should reoffend by committing any type of offence, including non-violent ones.
HELD: The conviction appeal was dismissed. The sentence appeal was allowed and the matter remitted to the trial court for

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a new hearing as to whether the appellant should be designated an LTO. Regarding the appeal related to the convictions, the court found that the trial judge had not erred in his findings regarding the credibility of the appellant or the complainant witnesses. The judge had not erred in inferring that the appellant had the requisite intent to use his vehicle as weapon regardless of the fact that he had not actually struck the complainant's vehicle with his. Regarding the LTO designation appeal, the court reviewed the legislative history of s. 753.1 and the transcript of the examination of the Crown's expert witness who had prepared the assessment report. It held that s. 753.1(1)(b) of the Code requires the risk of reoffending to be a violent one. The trial judge erred in law by concluding that any risk to reoffend would satisfy the requirements of s. 753.1(1)(b).

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Riel v Riel, 2017 SKCA 74

Richards Ottenbreit Herauf, May 17, 2017 (CA17074)

Family Law – Child Support – Appeal
Civil Procedure – Court of Appeal Rules, Rule 59

The appellant appealed from the decision of a Queen's Bench judge awarding joint custody of the two children of the marriage and their primary residence to be with the respondent (see: 2016 SKQB 174). The appellant had applied for an order allowing her to move to another location because of employment. The appellant also appealed with respect to the trial judge's order that she pay support for the children. She also brought an application to adduce fresh evidence pursuant to Court of Appeal rule 59. At trial, the parties' financial information was available, but they had agreed that the issue of child support was not to be considered. The trial judge acknowledged the fact but then made the order. The fresh evidence sought to be adduced by the appellant concerned the children's emotional state, the father's employment status and his medical condition.
HELD: The application was allowed in part. The court dismissed the appeal of the order pertaining to custody because it found that the trial judge had not made any palpable and overriding error. The appeal regarding support was granted. In the circumstances the matter was remitted back to the trial judge for the purposes of determining whether reasonable arrangements were in place for the support of the children under s. 11(b) of the Divorce Act. The application to admit fresh evidence was dismissed because it did not add any new factors to what the

trial judge had considered.

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Wetsch v Kuski, 2017 SKCA 77

Lane Ottenbreit Caldwell, September 14, 2017 (CA17077)

Family Law – Child Support – Adult Child
Family Law – Child Support – Determination of Income – Appeal
Family Law – Child Support – Shared Parenting

The appellant appealed from the decision of a Queen's Bench chamber judge regarding the parties' cross-applications to vary child support. The parties had three children, the eldest of whom was cognitively and intellectually disabled. The parties divorced in 2006 but continued to litigate the issues of custody and child support. In 2009, the appellant applied for shared parenting of the two youngest children on the grounds that such an arrangement had been in place for some time. The trial judge decided that the children should remain in the primary care of the respondent and fixed child support accordingly. During the trial, it was revealed that the appellant had received a significant capital gain but had not disclosed it. He refused to provide details despite continued efforts by the respondent to acquire the relevant information. In 2010, the oldest child turned 18 and the appellant unilaterally ceased paying child support for her. She remained in the respondent's care until 2014. She had attended a one-year training course in another town in 2012 to 2013. In 2012, the parties formally instituted a shared parenting regime. The following matters were disputed by the parties in a special hearing in chambers and formed the issues on appeal. The appellant argued that the chambers judge erred in the following ways: 1) imputing income to him in respect of the capital gain. He had provided evidence that explained how he had structured the sale and his tax affairs in such a way that the capital gain generated from a sale of assets had not substantively increased his income. The judge recalculated the amount of the appellant's s. 3 support obligations from 2010 to 2014 for the three children by including the total amount of the sale proceeds. The judge had been influenced in her decision regarding the capital gain because of the appellant's original and ongoing failure to disclose it; 2) determining the status of the oldest child as an adult child of the marriage and his support obligation to her. The judge found that this daughter had ceased to be a child for child support purposes on the date of her eighteenth birthday but regained the status during the period in which she had attended

the post-secondary institution. She then incorrectly applied s. 3(2)(a) of the Guidelines to establish the amount of child support he should pay; and 3) calculating his s. 9 child support obligations. The judge found that all of the children were in the care of the respondent from 2010 to 2012 but the two youngest had been in shared custody since 2012. In addition, between 2012 and 2014, the parties had had a hybrid parenting arrangement because the eldest child was in the sole care of the respondent. The appellant had argued that a straight set-off of child support obligations under s. 9 of the Guidelines was appropriate for the two youngest children. The respondent opposed a set-off and argued that the full Table amount should be payable for three children given the disparity in parental incomes and the disproportionate burden she bore in caring for the children. The judge stated the objective of s. 9 in shared parenting arrangements was to avoid disparity between households. In order to achieve the objective, she used the household income ratio (HIR) as determined under Schedule II of the Guidelines to provide a baseline of comparison rather than income disparity. HELD: The appeal was successful in part. The court found with respect to each issue that the chambers judge: 1) had properly exercised her discretion in imputing the income from the capital gain to the appellant under ss. 19(1)(f), 22(1), 23 and 24(c) of the Guidelines, in considering the appellant's failure to disclose financial information. The court did not find any problem with the judge's conclusion that the appellant's evidence was insufficient and unreliable; 2) had not erred in finding that the daughter had regained her status as a child of the marriage when she attended school. However, the judge erred in applying s. 3(2)(a) of the Guidelines in these circumstances where the appellant had established that the assumption that Table amounts were appropriate had been displaced. The evidence showed that the adult child was able to support herself during her training through government grants and assistance provided by her grandparents. The court varied the amount of child support ordered by the chambers judge and ordered the appellant to pay the appropriate sum in retroactive child support for the relevant period; and 3) erred in principle in using the HIR and was unable, in light of the incomplete evidence before her of the parties' respective incomes, to conduct the proper Contino analysis under s. 9 of the Guidelines. The court remitted the issue to the Court of Queen's Bench and ordered the parties to provide the necessary evidence.

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R v Heinbigner, 2017 SKPC 47

Penner, August 17, 2017 (PC17069)

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

The accused was charged with impaired driving and driving while her blood alcohol content exceeded .08. The accused's vehicle was seen by a witness to leave the road, travel through a parking lot and crash into a building. At no time did the witness see the vehicle slow in its speed. When the witness went to the vehicle, she found the accused unconscious in the driver's seat. The investigating police officer smelled alcohol on the accused's breath and, after the accused had been taken to the hospital, made a breath demand. Although the accused was conscious, the officer decided that she was unable to understand the demand. He later obtained a Production Order for the accused's medical records. The manager of the lab and the phlebotomist who took the accused's blood samples both testified as to the standard nature of the hospital's practice regarding the collection and testing of blood, although neither of them could recollect the accused. The Crown called a specialist in forensic alcohol to testify as an expert in providing evidence regarding blood alcohol and the effect of alcohol on the operation of a vehicle. Based upon the accused's health records, the expert testified as to the blood alcohol concentration at the time of the accident as being between 228 and 268 milligrams of alcohol in 100 millilitres of blood. The defence argued that the Crown had not proven continuity of the blood samples and the accuracy of the expert's opinion could not be relied upon.
HELD: The accused was found guilty of driving while her blood alcohol content exceeded the legal limit. The defence had not challenged the information in the health records when he cross-examined the lab manager and the phlebotomist. The court was satisfied that the hospital records were accurate and reliable and proved the facts beyond a reasonable doubt. It accepted the expert's calculation of the range of blood alcohol concentration at the time of the accident. The Crown stayed the impaired driving charge in accordance with Kienapple.

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R v Moses, 2017 SKPC 62

Lavoie, July 28, 2017 (PC17058)

Criminal Law – Assault – Sexual Assault

The accused was charged with committing a sexual assault, contrary to s. 271 of the Criminal Code. The offence allegedly occurred after a party held in a house where four of the Crown's witnesses resided. In their testimony they said that after finding the victim asleep, they placed her, fully-clothed, on a sofa. Each of them said that they later saw the accused sitting on the sofa with the victim and neither of them had clothing on the lower part of their bodies. The victim was either asleep or unconscious. The police officer who attended at the scene said that the victim appeared to be intoxicated. The officer was eventually able to wake her and she confirmed that she had been drinking. The victim was taken to the hospital, but she refused the sexual assault kit or to provide a written statement. The victim did not appear at the trial. The accused did not testify. Counsel for the Crown and the accused agreed that if the accused removed the victim's clothing while she was unconscious, it would be the actus reus of sexual assault under s. 271.
HELD: The accused was found guilty. The court was satisfied that the only logical inference to be drawn from the circumstantial evidence was that the accused removed the victim's clothing while she was unconscious and unable to give any consent in law.

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R v Kossick, 2017 SKPC 66

Scott, April 5, 2017 (PC17059)

Criminal Law – Evidence – Witness – Expert Witness

The accused was charged with possession of methamphetamine for the purpose of trafficking. At the time of arrest, the police seized 3.82 grams of the drug, two cell phones and $90 in cash. The arresting officer viewed some of the messages on the cell phone and transcribed them, and later the same cell phone was searched pursuant to a search warrant and analyzed. At trial, the Crown called an RCMP officer to provide expert opinion regarding the following: 1) methods of packaging and distribution of the drug; 2) general patterns and effects of usage; and 3) the language, paraphernalia and proceeds of crime connected to the possession, use, trafficking and distribution of the drug. During the voir dire concerning the officer's qualification, the Crown tendered two expert reports prepared by him. The defence opposed the admission of certain parts of one report. It argued that some of the opinions would usurp the function of the trier of fact and were prejudicial and without

probative value.
HELD: The officer was accepted as an expert in the distribution and sale of the drug and would be permitted to testify as an expert witness and provide his opinion with respect methods of packaging, distribution and pricing of the drug; observable signs of usage of the drug; language, jargon and slang used by dealers and purchasers of the drug, limited to his understanding of the meaning of the terms; and paraphernalia and proceeds of crime connected to possession, use, trafficking and distribution of the drug but not regarding the absence of consumption tools such as scales in the case of the accused. The officer was not qualified to offer his opinion regarding general patterns of use and consumption, his conclusion as to whether the accused was in possession of the drug for the purpose of trafficking, and his interpretation of entire conversations derived from cell phone messages.

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R v Kossick, 2017 SKPC 67

Scott, July 28, 2017 (PC17060)

Constitutional Law – Charter of Rights, Section 8, Section 9

The accused was charged with possession of methamphetamine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act (CDSA). He brought a Charter application alleging that his s. 8 and s. 9 Charter rights had been breached and sought exclusion of the evidence under s. 24 of the Charter. A police officer saw the accused riding a bicycle. As the officer knew the accused and was aware that he was a suspect in a bicycle theft investigation, he contacted the lead investigator in the theft and confirmed with him that the accused was arrestable. The officer testified that he did not have the time to check CPIC or the Saskatoon Police databases because he thought that he would lose sight of the accused. However, the officer admitted that he knew where the accused lived and it would have taken two minutes to conduct the computer searches. The officer stopped the accused, informed him he was under arrest for theft, placed him in handcuffs and searched him. He found two cell phones and returned them to him. He continued to search and found 3.82 grams of what appeared to be a drug in the accused's pocket. After the search, the accused told the officer that he had already been arrested for the theft a couple of days earlier and released on conditions. The officer advised him that he was no longer under arrest for theft but

arrested for possession of a controlled substance. After he placed the accused in the rear seat of the police vehicle, he saw the accused trying to use his cell phone. The officer removed it from him and placed it beside him on the front seat and then, as the phone was unlocked, he could read messages as they arrived. At the police station the officer continued to view messages and scroll through the contents of the phone. Based on the messages and the accused's previous history of trafficking, the officer believed that the accused was in possession for the purpose of trafficking. He made notes of the messages he read and then obtained a search warrant for the phone and it was analyzed.
The issues related to the alleged Charter breaches were as follows: 1) did the officer have reasonable grounds to arrest the accused. The accused argued that because he had been arrested earlier for the bike theft, his second arrest on the same charge was unlawful and was an arbitrary detention contrary to s. 9; 2) was the search of the accused's cell phone a lawful search incident to arrest. If the arrest was unlawful, the search violated s. 8; 3) did the officer have the necessary grounds to obtain the search warrant for the phone; and 4) if the Charter had been breached, what was the appropriate remedy.
HELD: The accused was found not guilty after the court excluded the evidence pursuant to s. 24 of the Charter. The court found the following with respect to each issue: 1) the arrest was unlawful and violated the accused's s. 9 Charter rights. Although the officer's belief that he could arrest the accused was subjectively reasonable, it was not objectively reasonable as he should have independently verified the investigating officer's information using the computer databases. There was no urgency, it would not have taken much time and the officer knew where the accused lived; 2) because the arrest was unlawful, the search of the accused's person was unreasonable and violated the accused's s. 8 Charter rights. The search of the cell phone by the officer was not incidental to the arrest, it was unlawful and it also breached s. 8. The officer had arrested the accused for possession but immediately returned the phones to him indicating that he did not believe that they were of use in his investigation of the charge. When he began reading the messages, he embarked on an investigation to discover evidence of trafficking before the accused was charged with that offence; 3) the evidence from the unlawful search of the phone was excluded. Therefore, the messages found on it could not support the information to obtain the search warrant; and 4) the evidence should be excluded because of the number of Charter breaches and the serious impact on the accused of the search.

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R v N.S.D., 2017 SKPC 71

Martinez, August 18, 2017 (PC17070)

Criminal Law – Witness Under 18 – Testimony – Mode of Protection
Criminal Law – Assault – Sexual Assault – Victim Under 16

The accused was charged with sexual assault of and sexual interference with a 13-year-old victim. The trial was scheduled to be heard in the small northern community in which the alleged offences were committed. After interviewing the complainant, the Victim/Witness Specialist contacted the Crown prosecutor and recommended that she be allowed to testify from outside the courtroom. The Crown then applied under s. 486 and s. 486.2(1) of the Criminal Code for an order that the victim be allowed to testify from Saskatoon via CCTV or from behind a screen in the courtroom from which the public would be excluded. The defence submitted that the victim should testify from behind a screen in the court with the public present. He suggested that his ability to cross-examine the victim would be impaired if she were not in the courtroom and it would be difficult to assess her demeanour. Since the victim's apparent age at the time of the incident might become an issue at trial, the presiding judge would not be able to properly assess that question without seeing her in person.
HELD: The application was granted and the court agreed that victim could testify by CCTV from Saskatoon. It found that the Crown had not met the evidentiary burden necessary to justify it making an order to exclude the public from the courtroom. The court considered the age of the victim and her fear and anxiety about testifying in court where she would almost certainly see the accused or his family if she were to attend the trial, and decided that she could give her evidence from Saskatoon by CCTV. If the trial judge found that this arrangement interfered with the accused's right to a fair trial or limited his assessment of the complainant's age if she were not there in person, the trial judge could amend the order.

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R v Black, 2017 SKPC 74

Loewen, August 30, 2017 (PC17071)

Criminal Law – Attempted Murder – Sentencing – Long-term Offender

The Crown applied to have the accused found a dangerous offender under s. 753(1)(iii) of the Criminal Code. The accused pled guilty to a charge of attempted murder contrary to s. 239 of the Code. He had had sex with the victim while they were both heavily intoxicated. The victim then told him that she was going to charge him with rape. The parties argued, and the accused kicked and stomped on the victim, causing severe injuries to her face. While she was incapacitated as a result of the assault, the accused ignited the victim's clothing on fire. She suffered severe burns that eventually led to the amputation of her legs. The defence conceded that the accused's level of intoxication was not so great as to vitiate his ability to form the specific intent required for the mens rea under s. 239. The accused left the victim while her clothes burned and when he walked by later and could see the fire, he did not stop to offer assistance. The accused had suffered from addiction issues for many years. His lengthy criminal record did not disclose any prior instances of violence of the magnitude of this offence. It was comprised primarily of property and drunk driving offences. Pre-sentence reports written during the accused's involvement with the criminal justice system as a youth noted that the accused had witnessed the murder of his mother when he was 10 years old. The psychiatrist who prepared the assessment for the Crown's dangerous offender application described the accused as having eight separate psychiatric diagnoses. Due to the complexity of accused's problems, the singular act of significant violence in his history, coupled with the fact that he could not recall assaulting the victim, led the psychiatrist to state that it was difficult to express a psychiatric opinion. He was unable to forecast the accused's prospects for treatment and for risk management in the community. The psychiatrist retained by the defence noted that the risk posed by the accused of committing a violent act was 20 percent within four years of his release in the absence of intensive correctional treatment and appropriate community management. He agreed with the Crown's expert that it was too early to tell whether the accused could function in the community if he received the treatment that would be available to him in a federal prison.

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HELD: The application was dismissed. The court found that the accused qualified under s. 753.1(1) of the Code and designated him a long-term offender. The Crown had not met the burden of proving beyond a reasonable doubt that, despite the brutality of his behavior, he was unlikely to be inhibited by normal standards of behaviour as required by s. 753(1)(a)(iii) of the Code.

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Harvey v Flatlander Construction Ltd., 2017 SKPC 75

Baniak, August 30, 2017 (PC17062)

Contract Law – Breach

The plaintiffs and the defendant entered into a contract for the defendant to build a new home. Their relationship deteriorated almost immediately. Despite the defendant's willingness to remedy any defects, the plaintiffs were unwilling to allow any further work to take place and they took possession before the final walk through and inspection was done. The parties then availed themselves of the services of the New Home Warranty Program (NHWP). As part of the process of conciliation, the plaintiffs agreed to take the cash settlement rather than allowing the defendant to make the structural repairs that were identified by the conciliator as being necessary. The plaintiff executed final releases regarding future claims against the NHWP. They then filed a claim against the defendant alleging breach of contract and asking for $30,000. The defendant denied negligence and alleged that any delays or inability to finish certain work was due to the plaintiffs' behaviour in firing the tradespeople employed by it or denying them access to the property altogether.
HELD: The action was dismissed. The plaintiffs failed to prove their case. The only evidence offered regarding the plaintiffs' claim was their own testimony. As they were not qualified as experts, their opinion was based on their own beliefs.

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Acara Glass and Aluminum Ltd. v 101231250 Saskatchewan Ltd., 2017 SKPC 76

Jackson, August 31, 2017 (PC17063)

Statutes – Interpretation – Bills of Exchange Act

The plaintiff corporation supplied products to a business for many years and issued invoices to it under the name "Platinum House and Auto Glass" (Platinum). In April 2015, the plaintiff was informed by the ostensible owner of Platinum that the name on the invoice should be changed to "Expert Glass" (Expert). The plaintiff resubmitted the invoice but the cheque received in payment from Expert was returned for reason of insufficient funds. The owner of the plaintiff corporation personally

attended at Expert's business location to collect the funds. He was informed by a person there that the cheque would not be replaced as it was the debt of Platinum and Expert now operated the business. This person was the president and sole shareholder of the defendant corporation and Platinum and Expert were only trade or business names of it. Cheques that the plaintiff had received from Platinum and then Expert both showed the defendant corporation's name on them.
HELD: The plaintiff's claim was allowed. The court found that the Bills Exchange Act applied and the cheque received by the plaintiff from Expert was a negotiable instrument and it was its holder. The defendant, as the sole legal entity, remained liable on the outstanding debt to the plaintiff, irrespective of the change in its operating name.

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Stevenson Hood Thornton Beaubier LLP v Farago, 2017 SKQB 246

Mills, August 21, 2017 (QB17238)

Family Law – Spousal Support – Death of Payee
Statutes – Interpretation – Enforcement of Money Judgments Act, Section 28

The applicant law firm brought an application under s. 28 of The Enforcement of Money Judgments Act (EMJA) to maintain a registration filed under s. 21. In 2014, the respondent and his spouse entered into an interspousal agreement that included an obligation for the respondent to pay spousal support in monthly amounts and also by annual lump-sum payments. The latter provision stated that the respondent should pay to the applicant law firm in trust the amount of $5,000 on March 1 commencing in 2015 to 2018. In January 2015, the respondent's spouse died and her estate assigned all estate rights in the interspousal agreement to the applicant. The applicant registered the judgment in 2016 under s. 28 of the EMJA. After the respondent demanded that the applicant discharge the judgment, the applicant made this application. The respondent had not made any of the payments. Under the terms of the agreement and the judgment, the obligation arose after the death of the spouse.
HELD: The application was dismissed. The court discharged the judgment. Spousal maintenance, whether periodic or lump sum in nature, does not survive the death of the payee. In this case, the assignment of the judgment to the applicant did not give it the right to register it, and therefore, it was not enforceable

under s. 28 of the EMJA.

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Rock Developments (Prince Albert) Inc. v Carlton Spur Development Corp., 2017 SKQB 247

Danyliuk, August 21, 2017 (QB17239)

Injunction – Interlocutory Injunction – Requirements

The plaintiff applied for an injunction against the defendant. The parties owned adjacent commercial properties with the defendant having street frontage and the plaintiff's lot being to the rear of the defendant's property. Their predecessors in title to the properties entered into an easement agreement in which they agreed that a sign pylon would be erected in a specific location on the defendant's lot and the plaintiff would have the exclusive right to use the top 15 feet of the sign pylon for its signage, leaving the remainder for the defendant's usage. The purchaser's predecessor in title never built on the property nor used the sign. Before the sale to the plaintiff occurred, the defendant began using the sign pylon for its own tenants' signage. The plaintiff purchased the land in 2016 and began to build shopping premises and then leased the space to three retail stores. The plaintiff promised those businesses that they would be able to advertise on the plaintiff's portion of the sign. It asked the defendant to remove its tenants' signs, but the defendant refused. The defendant argued that the plaintiff's predecessor had abandoned the agreement. The easement was registered against the titles and when the lots were sold to the parties, the agreement was assigned to them. The easement granted was to be perpetual, for the benefit of the plaintiff's lot. Other provisions included that if a breach occurred, it would cause irreparable harm and injunctive relief could be obtained to prohibit it and that no delay or omission in the exercise of any right would be construed as waiver.
HELD: The application for injunctive relief was granted. The defendant was prohibited from using the top part of the sign. The court found that the plaintiff had satisfied the requirements set out in Potash Corp. v Mosaic. It had established that there was a serious question to be tried. There was no evidence the plaintiff's predecessor in title had abandoned the agreement or that the defendant had never taken any steps to attempt to remove the easement registration prior to this application. In addition to the provision in the agreement regarding irreparable harm, the plaintiff demonstrated a significant risk of harm to it

and to its tenants if they could not advertise on the sign. The balance of convenience favoured granting the injunction as the defendant's tenants could advertise on its portion of the sign. In sum, it was in the interests of justice to grant the injunctive relief.

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C.B. v J.B., 2017 SKQB 251

Brown, August 22, 2017 (QB17236)

Civil Procedure – Queen's Bench Rules, Rule 5-6, Rule 5-25

The respondent applied for an order regarding the disclosure of the petitioner's personnel file from employment with Regina City Police and her psychologist's counselling records starting in 2007. The basis of the application was that the petitioner had made unfounded allegations of sexual abuse by the applicant against their children and also impugned the respondent's expert psychologist's report assessing the petitioner. As well, because the petitioner claimed spousal support, the respondent argued that her work history and psychological condition were relevant as they related to her ability to achieve self-sufficiency. The petitioner submitted that the application was a fishing expedition and did not meet the test of relevance under the new Queen's Bench Rules.
HELD: The application was dismissed. The court found the reasons for disclosure of the records were only bare assertions. The respondent had not provided sufficient evidence of the relevance of the sought-after documents as defined in the Queen's Bench Rules to warrant disclosure in this proceeding.

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Veitch v Wollf, 2017 SKQB 252

Elson, August 23, 2017 (QB17237)

Civil Procedure – Queen's Bench Rules, Rule 3-49
Real Property – Partition and Sale

The applicant brought an originating application pursuant to Queen's Bench rules 3-9, 10-46 and 10-47, s. 70 and s. 71 of The Queen's Bench Act, 1998, and s. 3 or 4 of The Partition Act, 1868. He sought an order for partition or sale of a condominium unit. He and his niece, the respondent Wollf, held the title to the unit

in a joint tenancy. He had assisted his niece with the purchase of the unit by agreeing to be a co-borrower on a mortgage for it. The other respondents were the mortgagee and the condominium corporation. The niece and her four children resided in the unit. She had fallen behind in her payments of the mortgage, and the applicant had made the payments to protect his credit rating but now wanted to sell the property. The niece had made unsuccessful attempts to sell the unit earlier but had moved back in. She believed that the sale would not generate enough funds to pay the mortgage and condominium fees, leaving her with a deficiency.
HELD: The application for partition and sale was granted. The court noted that this was an appropriate case to have been brought by originating application under Queen's Bench rule 3-49 rather than by statement of claim because the new rule was broader in its scope than the former Queen's Bench rule 452. The order for partition and sale was made pursuant to s. 4 of The Partition Act, 1868 because there was no evidence that the applicant was acting improperly in pursuing the sale, and his niece's financial difficulties did not justify the court exercising its discretion to deny the applicant's request.

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Royal Bank of Canada v 101000039 Saskatchewan Ltd., 2017 SKQB 253

McMurtry, August 24, 2017 (QB17240)

Civil Procedure – Queen's Bench Rules, Rule 7-2

The applicant bank applied for summary judgment against the defendants pursuant to Queen's Bench rule 7-2. It had loaned funds to a corporation that were payable on demand and had not been paid. The individual defendants had provided a guarantee on the loan as security.
HELD: The court granted the application for summary judgment. It found that there was no genuine issue requiring a trial.

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Barbagianis v Richmond Nychuk, 2017 SKQB 254

Smith, August 28, 2017 (QB17241)

Civil Procedure – Security for Costs

The plaintiff had commenced an action against his former lawyers, the defendants, alleging negligence in the preparation of two claims they had prepared on his behalf that had been struck. An eight-day trial was scheduled to commence in January 2018. The plaintiff submitted that he had not been able to work for reasons associated with his unsuccessful claims. The defendants applied under Queen's Bench rules 4-22 to 4-25 for an order requiring the plaintiff to post $40,000 as security for costs, arguing that if his claim against them was unsuccessful, they would be unable to recover any costs assessed against him. The plaintiff objected to the application because if it was granted it would deny him a chance to prove his claim.
HELD: The application was granted. The plaintiff was ordered to pay $20,000 as security by a certain date, otherwise the defendants were entitled to apply to dismiss his claim.

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R v Snell, 2017 SKQB 255

Labach, August 25, 2017 (QB17242)

Criminal Law – Defences – Self-defence – Acquittal – Appeal

The Crown appealed from the acquittal of the respondent on a charge of assault with a weapon under s. 267(a) of the Criminal Code. The respondent, a police constable, sprayed oleoresin capsicum spray (OC spray) into the face of the victim, a man being held in a cell in the police station. The victim, who was highly intoxicated, had been violent and agitated when brought into the station and he continued to spit, yell and swear while in his cell. The officer decided to speak to him to calm him down. She withdrew her OC spray but kept it down by her leg. The officer testified that because the accused had been spitting, she believed that he was going to spit on her and used the OC spray. The Crown argued that the evidence had not substantiated that the prisoner was going to spit on the officer and she deployed her OC spray to punish him for how he was acting and that the more reasonable option for her to use would have been to move away from the cell door. In his oral judgment, the trial judge applied the principles set out in R v D.W., and based upon the evidence of the respondent that he accepted, he was satisfied that the actus reus and mens rea of the offence had been made out. However, he found that the officer was justified in spraying the victim on the basis of self-defence and it was reasonable in the circumstances. The Crown appealed on the ground that the

judge erred in finding that the evidence proved beyond a reasonable doubt that the elements of the defence of self-defence under s. 34 of the Code were present. As the trial judge had failed to specifically mention the factors set out in s. 34(2), his reasons precluded meaningful appellate review.
HELD: The appeal was dismissed. There was evidence upon which the trial judge could reasonably have reached the verdict that he did, and his decision was correct in law. It was not necessary for the judge to review each of the factors in s. 34(2), and the record revealed that he did in fact address the ones that were relevant in this case.

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Mazza v Mazza, 2017 SKQB 261

Scherman, September 5, 2017 (QB17250)

Family Law – Family Property – Division – Interim Distribution

The petitioner applied for the interim distribution of family property in the amount of $100,000 to enable her to pay for professional valuations of the property and ongoing legal fees incurred in her dispute with the respondent respecting spousal support and division of family property. The respondent argued that there had been no change in his financial position since the date of the petitioner's first application for interim distribution in November 2016. In that application the judge found that the petitioner had not provided sufficient financial information required to assess the factors set out in Conley v Conley. The judge noted that the evidence had not shown that the value of the family property far exceeded the amount of interim distribution sought by the petitioner and dismissed the application. A significant portion of the value of the family property was comprised of three corporations.
HELD: The application was granted. The court found that the petitioner had provided additional financial information regarding the value of the corporate assets and it was satisfied that the net family assets far exceeded the amount of interim distribution sought. The respondent had the ability to pay it, including borrowing the funds. The interim distribution would not have a serious prejudicial effect on the corporate assets or potential tax liabilities. The petitioner's need for the funds was legitimate, particularly because the respondent was using corporate resources to pay his legal fees.

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Artomda Farms (Sask) Ltd. v Norton Rose Fulbright Canada LLP, 2017 SKQB 269

Rothery, September 13, 2017 (QB17261)

Professions and Occupations – Lawyers – Fees – Assessment

The applicant sought an order pursuant to ss. 67, 70 and 71 of The Legal Profession Act, 1990 for the assessment of the bill of fees rendered by the respondent Norton Rose Fulbright, an Alberta law firm, to its client the National Bank of Canada. The applicant had arranged financing with the bank and under the agreement the latter was entitled to retain lawyers to protect and enforce its security over the plaintiff's assets in the event of default. The bank employed the defendant law firm to do so and after it provided invoices for approximately $58,000 for its fees, the bank sought payment from the applicant. Counsel for the applicant advised the defendant that the fees were excessive and his client would be prepared to pay a total of $20,000, otherwise the applicant would have the account taxed. The defendant was also informed by the applicant's lawyer that he would hold in trust until the closing date sufficient funds to pay the amounts in full until the matter was resolved by agreement or taxation, to facilitate closing. The bank advised that the defendant was prepared to reduce its bill by $5,000 as a good faith gesture. The applicant indicated that the amount of the fees was still unacceptable but as it did not want to delay the closing, it would pay $53,000. When the applicant brought this application, the defendant argued that it must be dismissed by operation of the doctrine of accord and satisfaction and the doctrine of estoppel. HELD: The application was granted. The court found that the evidence did not support that the doctrine of accord and satisfaction or the doctrine of estoppel applied. It was not clear that the applicant had agreed to the fee reduction offered in return for giving up its right to have them assessed. The defendant could not argue either that because the Bank demanded payment in full and received it from the applicant that the latter was then barred from seeking an assessment. The court ordered that the assessment should take place in Saskatoon as it was the nearest judicial centre to the location of the applicant's business. The court noted that s. 67(2) of the Act did not apply to the defendant, as it was classified as a visiting lawyer without a law practice in Saskatchewan.

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Spicer v Abbott Laboratories, Ltd., 2017 SKQB 271

Barrington-Foote, September 13, 2017 (QB17253)

Statutes – Interpretation – Class Actions Act
Civil Procedure – Queen's Bench Rules, Rule 7-9
Civil Procedure – Pleadings – Statement of Claim – Application to Dismiss

The defendants applied pursuant to Queen's Bench rule 7-9 to have the plaintiff's proposed class action dismissed because it constituted an abuse of process. The plaintiff commenced the action in early 2011 as a representative of a broadly defined group, claiming that his use of sibutramine, developed and manufactured by the respective defendants, had negatively affected his health and that of other class members. Advertised as a weight-loss drug by the defendants, it had in fact increased the user's risk of serious cardiovascular events. Similar actions were commenced against the defendants in Quebec, Ontario and British Columbia by different plaintiffs, but in all the actions, they were represented by the Merchant Law Group (MLG). The proposed class action was denied authorization in Quebec in 2012. In Ontario, MLG advised the defendants that the action would not proceed there until the outcome of the certification application in British Columbia was known. The Ontario plaintiffs brought a motion to temporarily stay the proceedings, but the court refused and permanently stayed it in 2012. In BC, the class action was certified by the Supreme Court, but the Court of Appeal reversed that decision in 2015 on the basis there was no evidence of a methodology that would enable the plaintiffs to prove causation on a class-wide basis. The defendants then made this application to discontinue the Saskatchewan action. The plaintiff, who had not taken any steps to advance it since 2011, then filed an affidavit deposing that he was not involved in the three other actions but had understood that if the BC action had been certified, it would have protected Saskatchewan residents and others across the country. As the BC certification had been denied, this action was the last hope for the class action. The plaintiff also filed an affidavit from a purported expert related to the methods of assessing general causation for pharmaceuticals and adverse events. The defendants did not object to the evidence but argued that the action was an abuse of process and should not be granted because the plaintiff was attempting to re-litigate matters that had already been decided. The plaintiff submitted that The Class Actions Act required that an abuse of process application be dealt with at the certification hearing in accordance with Brooks v Canada.
HELD: The application was dismissed. The court decided that it

had all the evidence necessary to decide the application. Brooks had not held that a defendant could never apply for an order to strike or stay a proposed class action as an abuse of process prior to the certification hearing. Relying upon the contextual approach set out in Kowalyshyn v Valeant regarding the issue of abuse of process, the court noted that this action was the only remaining class action. The court also found that the BC Court of Appeal's decision in the proposed class action had changed the law in requiring evidence of methodology to prove general causation at the certification stage. On this basis, the court exercised its discretion to refuse to apply the doctrine of abuse of process to prevent re-litigation, as to do so would be unfair.

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Edenwold (Rural Municipality No. 158) v Murray, 2017 SKQB 272

Popescul, September 14, 2017 (QB17262)

Statutes – Interpretation – Municipal Expropriation Act, Section 6, Section 11, Section 21
Municipal Law – Expropriation – Compensation

The applicant, the Rural Municipality of Edenwold, applied for an order granting it early entry upon lands subject to expropriation proceedings pursuant to s. 6(1) of The Municipal Expropriation Act. The applicant wanted to acquire the land from the defendants for the purpose of extracting gravel from it for road maintenance. It sought the order because of its immediate need to access the gravel. After the parties were unable to come to terms on the sale, the applicant had obtained an expropriation order under s. 3(1) of the Act. A compensation hearing date had been set to resolve the dispute between the parties as to the value of the land. It had been appraised at between $1.3 and $1.5 million by the applicants and at $5.84 million by the defendants. The applicants were prepared to pay $1.5 million into court pending the compensation hearing. The defendants objected to the early entry by the applicant, arguing that their claim could be prejudiced if the expropriation did not go ahead as the applicant could back out pursuant to s. 21 of the Act. They also submitted that under s. 11(3) of the Act, the payment into court would forever bar all claims for compensation relating to the land, thereby usurping the function of the compensation hearing.
HELD: The application was granted. The court was satisfied that the applicant had met the requirements of s. 6(1) of the Act. The amount of the payment offered by the applicant was sufficient to

justify the entry pending the compensation hearing. The defendants would not suffer prejudice or irreparable harm should the applicant enter and extract gravel and then abandon its plan to expropriate because they would have been appropriately compensated for any damages or losses they suffered. The court found that s. 11(3) of the Act did not apply in this situation.

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