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R v Branscombe, 2017 SKCA 71

Caldwell Whitmore Wilkinson, September 1, 2017 (CA17071)

Criminal Law – Trial – Indictable Offence – Election

The Crown appealed from the decision of a Queen's Bench judge sitting on a summary conviction appeal that the joint trial of an indictable and a summary conviction offence in Provincial Court constituted a nullity because the respondent had not received his right to elect mode of trial (see: 2016 SKQB 394). The accused had been charged with committing two weapon-related offences. The first count was pointing a firearm, contrary to s. 87(2) of the Criminal Code, a hybrid offence under which the Crown was entitled to proceed summarily. The second count was possession of unlicensed firearms, contrary to s. 92 of the Code, an indictable offence for which the accused had the right to elect mode of trial under s. 536(2) of the Code. The Crown elected to proceed summarily on both counts and the trial proceeded in Provincial Court. Before argument occurred, the omission to put the election to the accused was discovered. The trial judge decided that it was appropriate to sever the two counts in the information, thereby retaining jurisdiction over the s. 87(2) offence. She adjourned the indictable offence to allow the respondent to elect his mode of trial. She found the accused guilty on the first charge (see: 2015 SKPC 138). The accused then elected trial before judge alone. He waived his right to a preliminary hearing but reserved his right to argue that an abuse of process had tainted the proceedings in Provincial Court. The

defence then appealed the trial judge's disposition in its entirety by summary conviction appeal to Queen's Bench. The accused argued that the trial conducted on the second count in the absence of election constituted an abuse of process. The appeal judge found that the procedural irregularity related to s. 536(2) of the Code had resulted in a misjoinder of offences for trial that could not be saved by s. 686(1)(b)(iv) of the Code. Consequently, the trial judge was without jurisdiction and the entire trial was a nullity. He set aside the conviction of the first charge and ordered a new trial on both counts. The major issue was whether the appeal judge erred in deciding that the trial judge had no jurisdiction to convict the accused for the summary conviction offence due to the flawed election on the indictable offence, given that the trial judge was entitled to sever the counts at any stage under s. 591(3) of Code.
HELD: The appeal was allowed in part and the appeal judge's order set aside and the matter returned to him for consideration of the grounds of appeal as raised by the accused in his notice of appeal. The court found that the appeal judge had correctly identified the issue of whether the trial judge had the jurisdiction to sever the counts but erred in his conclusion that she did not on the basis that he described, and therefore, the appeal judge failed to address the grounds raised by the accused in his notice of appeal respecting the first count. The appeal judge was also directed to determine whether the trial judge's severance of the two counts was contrary to the interests of justice or prejudicial to the accused.

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Richards Caldwell Whitmore, September 5, 2017 (CA17072)

Criminal Law – Assault – Assault Causing Bodily Harm – Acquittal – Appeal

The Crown appealed the decision of a Provincial Court judge after trial that the respondent was not guilty of assault causing bodily harm. The accused had been awakened by his spouse when she slapped his body and wrenched his leg. Both parties were extremely intoxicated at the time. The accused awoke, got up and hit the complainant in the face with his hand. The trial judge characterized the blow as a reflexive action and acquitted the accused. The Crown's ground of appeal was that the respondent had born the burden of proving that he had struck the complainant involuntarily and was required to have

submitted expert psychiatric evidence, relying upon R v Stone.
HELD: The appeal was dismissed. The respondent's act was found to be involuntary because it was reflexive and Stone did not apply in such circumstances.

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R v Madsen, 2017 SKCA 73

Jackson, September 8, 2017 (CA17073)

Criminal Law – Assault – Aggravated Assault – Conviction – Appeal
Criminal Law – Judicial Interim Release Pending Appeal

The appellant was convicted of committing an aggravated assault, contrary to s. 268 of the Criminal Code. He applied for an order pursuant to s. 679 of the Criminal Code that he be released from custody pending his appeal from conviction and sentence.
HELD: The application was dismissed. The court found that the appellant had not established that his detention was not in the public interest. Considering the thoroughness of the trial judge's consideration of his defence of self-defence, his grounds of appeal were not strong. The offence was serious and the injuries suffered by the victim were catastrophic, and in light of the aggravating circumstances, the accused should remain in custody pending appeal.

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R v Chu, 2017 SKCA 75

Jackson, September 8, 2017 (CA17075)

Civil Procedure – Appeal - Notice of Appeal – Application to Extend Time
Criminal Law – Disclosure
Constitutional Law – Charter of Rights, Section 7

The appellant applied to extend the time to file a notice of appeal from a Queen's Bench decision. The appellant was convicted of trafficking but on appeal, the court found that the Crown's failure to disclose during the trial constituted a breach of s. 7 of the Charter (see: 2016 SKCA 156). A new trial was ordered. The appellant then made an application to the new trial judge requesting a reward of costs incurred on the appeal. The new

trial judge held that the claim should be heard by the Court of Appeal as it had found the breach of s. 7. The appellant then applied for relief under Court of Appeal rule 71 and s. 9(6) of The Court of Appeal Act to extend the time to file the notice of appeal regarding his claim for costs. The Crown argued that the appellant was attempting to appeal an interlocutory criminal order and there was no right of appeal in a criminal matter under the Act or the Rules.
HELD: The application was dismissed. The Criminal Code does not permit a right of appeal to the Court of Appeal.

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PS International Canada Corp., 2017 SKCA 78

Richards Lane Ottenbreit, September 18, 2017 (CA17078)

Contract Law – Interpretation – Appeal

The appellant appealed from a decision of a Queen's Bench judge that dismissed its application for summary judgment against the defendants (see: 2016 SKQB 232). The appellant, a marketer of specialty crops, entered into production contracts with both the defendant farm corporations to supply grade #2 lentils at an agreed-upon price. As the growing season was wet, the defendants' lentil crops were of a lower grade. They treated their contracts with the appellant as having been terminated and sold their production to a different company. The appellant had to purchase replacement product at a higher price and sought compensation from the defendants for the additional cost. The appellant argued that the chambers judge erred in the following ways: 1) in finding that the grade of the crop was a true condition precedent; and 2) in his treatment and application of the doctrine of frustration. He found that one of the defendants could not have brought his production up to the required grade as the required measures would have amounted to a drastic change in the contract and as a result the contract had been frustrated.
HELD: The appeal was dismissed. The court found that the chambers judge had not erred with respect to the following: 1) his finding that a true condition precedent was not dependent on the actions of a third party; and 2) his construction of the contract and the application of the doctrine of frustration. The grade term in it did not empower the appellant to require the delivery of lentils of any quality. The appellant was wrong in its contention that the doctrine of frustration could not be applied in this case because the problem of wet conditions was foreseeable.

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Embee Diamond Technologies Inc. v I.D.H. Diamonds NV, 2017 SKCA 79

Ottenbreit Caldwell Ryan-Froslie, September 19, 2017 (CA17079)

Statutes – Interpretation – Limitations Act, Section 11
Statutes – Interpretation – Electronic Information and Documents Act, 2000

The appellant appealed a decision of a Queen's Bench chambers judge to dismiss its application to strike or dismiss the claims of the respondent on the basis that they were statute-barred (see: 2017 SKQB 79). The issues were whether the chambers judge erred in the following ways: 1) by reversing the burden of proof under s. 18 of The Limitations Act; and 2) in his interpretation of the requirements for "in writing and signed" under The Limitations Act and The Electronic Information and Documents Act, 2000 (EIDA 2000).
HELD: The appeal was dismissed. The court found with respect to each issue that the chambers judge: 1) had erred in reversing the burden of proof and naming the appellant as bearing it. However, the chambers judge correctly assessed the evidence before him in a way that neutralized the effect of the error. He determined that the question of whether s. 11 of The Limitations Act barred the respondent's claim turned on whether the appellant had factually and legally acknowledged its indebtedness to the respondent through a series of emails. The judge reviewed the evidence and found that it had; and 2) the judge had correctly interpreted and applied the EIDA 2000 and then held that the electronic nature of the acknowledgment had satisfied the requirements of s. 11 of The Limitations Act.

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R v Bracken, 2017 SKPC 69

Rybchuk, August 23, 2017 (PC17061)

Constitutional Law – Charter of Rights, Section 10(b)
Regulatory Offences – Environmental Management and Protection Act, 2010

The accused was charged with violating provisions of The Environmental Management and Protection Act, 2010. He

alleged that statements he made at the time of the offence to a conservation officer were not voluntary and that his s. 10(b) Charter rights had been violated. A voir dire was held. The accused, who was licensed under The Municipal Refuse Management Regulations to haul and dispose of liquid domestic sewage, was seen by a conservation officer driving his sewage disposal hauling truck. The officer followed the truck until the accused parked it on lands owned by him. The officer watched the accused dumping what he believed was liquid sewage onto the land. Sewage dumping had occurred on the same land in the past. The officer began asking questions of the accused to obtain evidence against him. He did this without informing the accused that he was under investigation or providing him with a cautionary warning or right to counsel under s. 10(b) of the Charter. The accused argued that the statements he made had not been voluntary on the basis that the Crown had failed to prove that he had an operating mind at the time. The conservation officer testified at the hearing as to the questions asked and the answers given. The accused did not testify.
HELD: The court found that the accused's s. 10(b) Charter rights had not been breached and that the statements he made were voluntary and would be admitted in the trial proper. The Charter has limited application in cases involving the enforcement of regulatory matters in which accused persons choose to voluntarily participate and by their nature are subject to government regulation. Here the officer was not required to advise the accused of his right to counsel when he requested information of him at the sewage dumping site.

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R v Neufeld, 2017 SKQB 250

Brown, August 22, 2017 (QB17235)

Constitutional Law – Charter of Rights, Section 10(a), Section 10(b)
Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Conviction – Appeal

The accused appealed his conviction of driving while his blood alcohol exceeded .08 after trial in Provincial Court (see: 2015 SKPC 92). The grounds of appeal were that the trial judge erred in failing to find that the appellant's s. 10(a) and s. 10(b) Charter rights had not been breached. The appellant argued that the Certificate of Analysis should have been excluded. At trial the arresting officer testified that he received a complaint about a

disturbance at a convenience store caused by a man who had been seen driving a white truck. The officer saw the appellant in a white truck near the store and followed him. The appellant parked his truck and was getting out of it when the officer said, "Come here". The appellant complied and was asked whether he had had anything to do with the disturbance and the appellant said no. The officer noted that the appellant's eyes were bloodshot and there was alcohol on his breath. He was asked to take the ASD test and he failed it. He was advised of his right to counsel and said that he understood and did not want to call counsel. At the police station the officer did not ask the appellant again whether he wanted to consult with a lawyer. The accused took the Breathalyzer test and failed. The defence argued at trial that when the officer had psychologically detained the appellant as he was getting out of his truck and failed to inform him of the reasons for his detention, his s. 10(a) Charter rights had been violated. The trial judge found that the officer was entitled to speak to the appellant and had no other reasonable alternative to deal with the situation. The appellant was under no compulsion to incriminate himself. Because the officer smelled alcohol on the appellant's breath, the actions of the officer were justified and no breach of s. 10(a) had occurred. The defence argued that the officer should have asked the appellant again at the police station whether he wanted to consult counsel, and that failure breached s. 10(b) of the Charter. The trial judge found that the appellant's answer had been clear and unequivocal and there was no duty to inform him again at the police station and dismissed the argument.
HELD: The appeal was dismissed. The trial judge had not erred in his findings. If there was psychological detainment at the time the appellant first spoke to the officer, it ceased when the officer accepted the appellant's answer. The officer's subsequent actions were based upon the smell of alcohol and were not inappropriate. Nothing in the following investigation that led to the breath samples being taken violated the Charter.

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R v V.A.D., 2017 SKQB 266

Layh, September 7, 2017 (QB17251)

Criminal Law – Assault – Sexual Assault – Victim Under 16 – Sentencing

The accused pled guilty to having committed sexual assaults on the victim between 2010 and 2014, contrary to s. 271 of the

Criminal Code. The accused, the victim's grandfather, began sexually assaulting her when she was 10 years of age while she was living in his house with her mother and family. The victim estimated that the accused assaulted her between 75 to 100 times. In 2014, the victim gave birth to a child. The accused told her to say that another man had forced her to have intercourse with him, but the victim gave a statement to the RCMP that the accused was the father. The accused then disappeared. He was arrested a year later and had remained in remand since. The accused, a 53-year-old Aboriginal man, had five children. He attended residential school between the ages of seven and 13 where he suffered sexual and emotional abuse. He left school at 13 and began using drugs and alcohol. His parents were impoverished and when they found work in other locations, they would leave the offender in the care of others where he again experienced abuse. The accused's criminal record began when he was 17. The record included two convictions for assault and, in 2008, conviction for sexual assault and forcible confinement. The victim gave a victim impact statement describing her depression, anxiety and distrust. She had her childhood taken away from her and now had to care for her own child as well as her siblings in order to help her mother.

HELD: The accused was sentenced to eight years in prison. The court gave him remand credit of 1.5 days for time in custody. The court followed the Court of Appeal's decision in R v L.V. and found that the sexual assaults were severe and ongoing. The offender was in a position of trust and authority to the victim who was of tender years and, as a dependent child, had to live with him. He had a substantial criminal record, including a conviction for sexual assault. Although the accused's guilty plea was a mitigating factor, he originally evaded arrest. The Gladue considerations were present and the court noted that the offender's culpability was reduced because of the disadvantage he had experience as an Aboriginal person and the sexual abuse that he had suffered.

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Labrash v Saskatchewan Veterinary Medicine Association, 2017 SKQB 267

Smith, September 12, 2017 (QB17259)

Civil Procedure – Queen's Bench Rules, Rule 3-56(3)

The applicant veterinarian applied for judicial review pursuant to Queen's Bench rule 3-56 of the entire investigation and

discipline proceedings brought against him by the respondent, the Saskatchewan Veterinary Medicine Association, and sought an order of certiorari quashing them. The respondent had inspected the applicant's clinic in late 2009. Eventually the respondent's Disciplinary Committee held a hearing at which the applicant represented himself. He pled guilty to some of the charges. The committee issued a final decision in October 2011 and imposed a number of penalties on the applicant. The respondent informed the applicant that he had 30 days from the date of the decision to appeal it. He prepared a notice of appeal without the help of legal counsel, but due to the failure of his staff, the document was not faxed to the defendant until after the appeal period had expired. The respondent advised the applicant that the appeal was null and void as a result. The applicant misunderstood the final nature of the committee's decision and continued to resist paying the fines and costs levied by it. The respondent suggested that the parties use mediation, and the applicant agreed. It occurred between 2013 and 2015. During the mediation, the applicant did not claim that he was not guilty, and after the process had ended, the respondent was satisfied that the applicant had discharged his responsibilities and the matter was closed. In 2016, the respondent refused the applicant's demand that it reopen his case, expunge his guilty plea and refund his penalty.

HELD: The application was dismissed. The court reviewed the factors set out in Queen's Bench rule 3-56(3) and found that there had been undue delay. It calculated that five years and three months had elapsed from the time of the Committee's final decision in October 2011 to the time of the application for judicial review. The applicant had not provided a reason for the delay. To grant the application would be prejudicial to the respondent. It was important to recognize the importance of finality to the good administration of regulatory bodies. The court also noted that it refused to grant certiorari on the basis that the applicant had had an adequate remedy to appeal the committee's decision under s. 28 of The Veterinarians Act, 1987. The court would not hold it against the respondent that the applicant had exercised this right improperly, due to his choice to represent himself, his staff's clerical error and his five-year delay in bringing this application.

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Brinkworth v Walzack, 2017 SKQB 268

Scherman, September 13, 2017 (QB17260)

Civil Procedure – Queen's Bench Rules, Rule 1-3, Rule 3-23, Rule 3-26

The plaintiff's claim against the defendants included causes of action based in contract for liquidated demand and other relief based upon the law of partnership, fiduciary duty, constructive trust and unjust enrichment. After the defendants failed to file a defence, the plaintiff applied for default judgment in respect of his liquidated damage claim but asked the court to order that he could bring an application for judgment for the other relief sought in the claim at a later date.
HELD: The judgment for liquidated damages was granted. The plaintiff was given leave to bring an application under Queen's Bench rule 3-26 to seek any judgment for any other relief sought in his claim. The court interpreted Queen's Bench rule 1-3, rule 3-23 and rule 3-26. It found that rule 3-26 expressly contemplated default judgment for claims beyond those described in rules 3-23 and 3-24. It was satisfied that the claim in this case involved distinct claims of relief arising under distinct causes of action and therefore issues of res judicata and the finality of judgments would not arise.

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Gelinas v Saskatchewan Crop Insurance Corp., 2017 SKQB 270

Elson, September 13, 2017 (QB17252)

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

The defendant applied for an order dismissing the plaintiff's action on the grounds of inordinate and inexcusable delay. The plaintiff was the named insured under a crop insurance contract with the defendant. He filed a notice of loss in October 2003 and was paid $1,200 by the defendant to cover the actual insured loss. The plaintiff contended that his loss was significantly greater than the payment and issued his statement of claim in 2005 and served it a year later. The pleadings closed in 2006. Mandatory mediation occurred in 2008. The parties' lawyers communicated sporadically. In 2009, the plaintiff's lawyer acknowledged in a letter that the matter had sat idle and suggested proceeding to discovery. The defendant's lawyer advised that the dates for questioning could be set after the plaintiff had provided his statement as to documents. In 2011 the plaintiff's lawyer again noted delay and expressed a desire to resolve the matter. The defendant changed its law firm and the new counsel reiterated the need for document disclosure but suggested dates for questioning. A three-year gap followed

before the plaintiff's lawyer responded. The matter did not progress beyond exchanges regarding potential dates until June 2016 when the defence counsel advised that the application to strike would be made. The defendant filed affidavits in support of its application, describing the personnel who had been involved in the audit that resulted in the denial of the plaintiff's claim and stating that all of them were unavailable to provide evidence as to their recollection.
HELD: The application was dismissed under Queen's Bench rule 4-44. The court found that inordinate delay had occurred and the delay was inexcusable as the plaintiff had not explained or justified it. In assessing whether it was in the interests of justice to permit the action to proceed, the court reviewed the factors set out in International Capital Corp v Schaefer and found that although the defendant had not raised the question of delay before bringing the application, that did not outweigh all the other factors that weighed in favour of granting the application.

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Reed v Dobson, 2017 SKQB 273

Popescul, September 14, 2017 (QB17263)

Civil Procedure – Queen's Bench Rules, Rule 1-3, Rule 7-1

The plaintiff, an orthopedic surgeon, commenced an action against six physician managers and the Regina Qu'Appelle Regional Health Authority alleging multiple workplace transgressions. Counsel for the defendants brought an application pursuant to Queen's Bench rule 7-1 on behalf of three of the physician managers requesting that the court order a separate hearing to take place prior to the trial for the purpose of determining whether the claims against those three defendants were statute-barred under s. 5 of The Limitations Act and in the case of one defendant, whether the claim was also statute-barred under s. 46 of The Regional Health Services Act (RHSA). Counsel argued that the facts relating to these issues were not complex and resolving them prior to trial would save time and expense. The plaintiff opposed the application on the basis that the facts were complex and a full hearing was required. In his statement of claim, the plaintiff asserted that he only discovered that the defendant applicants caused harm to him in late November 2014.
HELD: The application was dismissed. The court was not satisfied that predetermination of the issues presented would be a more convenient, timely, just and cost-efficient way to advance the action. The court found that the question in this case was not

as simple as whether the acts of the defendant applicants took place within two years from the date that the claim was issued. The plaintiff had put discoverability in issue. As well, the plaintiff had alleged bad faith, which also put into question the immunity offered to the defendant applicant under s. 46 of the RHSA. In order to resolve these issues, significant evidence would have to be called.

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Horri v Council of the College of Physicians and Surgeons of Saskatchewan, 2017 SKQB 275

Rothery, September 14, 2017 (QB17265)

Professions and Occupations – Physicians and Surgeons – Discipline – Appeal – Application to Lift Stay
Statutes – Interpretation – Medical Profession Act, 1981, Section 69

The applicant, a doctor, applied for an order pursuant to s. 69 of The Medical Profession Act, 1981, staying the order of the Council of the College of Physicians and Surgeons of Saskatchewan (Sask. College) made under s. 54.01 and s. 54(1)(a) of the Act that revoked his licence to practice medicine in Saskatchewan until his appeal was heard. The College had imposed this penalty under the Act because the applicant's licence had been revoked by the College of Physicians and Surgeons of Ontario (Ont. College) in March 2017 after he had pled guilty to professional misconduct. After that revocation, the applicant filed a notice of appeal of the decision in the Ontario courts, alleging that it had been an error in law. As a result of the appeal, the revocation was stayed pending the hearing of the appeal. When the Sask. College revoked his licence in June 2017 the applicant could no longer practice in the province and so relocated to Ontario to practice there. He sought the stay of the revocation in Saskatchewan pending the determination of his appeals because his medical practice was in Saskatchewan and his young children resided in Estevan. He submitted that he would lose his patients and have difficulty parenting his children if he could not resume his practice. The Sask. College pointed out that test adopted by the Ontario courts in determining whether a stay ought to be lifted when the Ont. College revoked a licence differed from that of Saskatchewan under s. 69.1 of the Act.
HELD: The application was dismissed. The court found that the applicant had not met the onus to show why the Sask. College's

decision ought to be stayed under s. 69 of the Act. His financial difficulties and inability to parent his children were not special circumstances. As the protection of the public was the paramount consideration in Saskatchewan, the court found that the applicant's alleged misconduct in the past could expose patients to harm.

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Anderson v Saskatchewan Human Rights Commission, 2017 SKQB 277

Danyliuk, September 18, 2017 (QB17267)

Administrative Law – Judicial Review
Statutes – Interpretation – Saskatchewan Human Rights Code, Section 27.1(2)(d)
Civil Procedure – Queen's Bench Rules, Rule 3-56(3)

The applicant sought judicial review of a decision made by the chief commissioner of the Saskatchewan Human Rights Commission (SHRC). The applicant had been a student in the College of Medicine of the University of Saskatchewan. After complaints were received from doctors, nurses and patients in 2010, the applicant sought and received treatment for his problems and accommodation from the University. The applicant's conduct was the subject of ongoing concerns and in 2014 after receipt of another complaint, the University initiated an investigation through the Investigation Committee (IC). The applicant argued before it that the university had failed to accommodate his disability. The university accepted the IC's recommendation in 2015 that the applicant be dismissed from his residency program. The applicant did not exercise any of his rights of internal appeals within the university process. He complained to the SHRC in June 2015. He alleged discrimination based on the university's failure to accommodate his disability. After waiting for a year for the SHRC to formalize the complaint, the university applied to the commissioner to dismiss the complaint, relying upon s. 27.1(2)(d) of the Saskatchewan Human Rights Code. The commissioner granted the application and dismissed the complaint in February 2017. The parties agreed that the tribunals had concurrent jurisdiction. The issues were as follows: 1) what was the appropriate standard of review; 2) whether the commissioner erred in his determination that the issues before the IC and the SHRC were substantially the same. The issue raised by the University was whether the application should be dismissed pursuant to Queen's Bench rule 3-56(3)

because of undue delay as there had been two years between the IC's decision and the filing of this application.
HELD: The application was dismissed. The court found the following with respect to each issue: 1) the standard of review of reasonableness applied to the commissioner's decision that the tribunals considered complaints that were essentially the same; 2) the commissioner had not erred because his decision was reasonable. The commissioner applied the correct test in relying upon the Supreme Court's decisions in Hebron and Figliola. The court rejected the applicant's argument that issue estoppel was involved in this case. Here, the statutory provision, s. 27.1(2)(d) of the Code, was created to identify and screen out duplication of litigation. The court applied the functional approach to the adequacy of the Commissioner's reasons as set out in Sautner and found that they permitted meaningful review, considered the substantive issues and explained why he decided as he did. The court rejected the University's application to dismiss the claim as any undue delay had been caused by the SHRC process and not by the applicant.

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Karpinski v Zookewich Estate, 2017 SKQB 278

Mills, September 18, 2017 (QB17268)

Wills and Estates – Proof of Will in Solemn Form
Wills and Estates – Testamentary Capacity
Wills and Estates – Undue Influence

The applicant applied to have the respondents prove, in solemn form, the will of his deceased brother. The testator made his will in 2006 and appointed the respondents, his sister and her husband, to be the executors and sole beneficiaries of the estate. The will had been prepared by a lawyer in Yorkton. He had since died but his notes regarding the preparation of the will and a Power of Attorney were submitted as evidence. The testator had lived with his both of his parents until 1999 and then alone with his father until the latter's death in 2007. Although he inherited farm land from his parents, he also purchased a number of quarters himself. He owned 11 quarters and operated the farm alone until 2015. The executors, who resided in Saskatoon, moved the testator to a nursing home in the year prior to his death in 2016. The applicant argued the following: 1) the will had not been made in accordance with s. 7 of The Wills Act, 1996. He contended that the first page of the will had been replaced. He submitted an affidavit deposed by the secretary at the law firm

where the will had been made that it was the normal practice for the firm to have the testator and the witnesses initial every page and in this case, there were no initials on the first page; 2) the testator had been subject to undue influence by the executors in determining the contents of the will. He filed the affidavit of his daughter who advised that the testator (her uncle) told her that he was leaving his estate to his nieces and nephews. She recalled the testator saying this in 2015 but did not provide any similar information regarding the time at which the testator made the will; and 3) the testator lacked the necessary capacity when he signed the will. The applicant deposed that the testator had lived with his parents because he was not able to take care of himself and would not have understood the legal terminology used in the will.

HELD: The application was dismissed. The court found the following with respect to each issue: 1) the evidence provided by files from the law firm showed the copy of the original will did not have signatures on every page; 2) there was no evidence in the lawyer's file that the testator's daughter had any involvement in the preparation of the will. The applicant had not provided evidence of what the testator had said about the contents of his will at the time of its making; and 3) the lawyer's file did not show that he had any concerns respecting testamentary capacity at the time the testator signed his will. The lawyer had executed the certificate of independent legal advice indicating that the testator understood the terms of the Power of Attorney. The testator had managed the farm operation for many years and without further evidence, the applicant had not established that the testator would not be able to understand the contents of his will. The court awarded party and party costs to the respondents and found that they were also entitled to solicitor/client costs from the estate.

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Saskatoon Surgicentre Inc. v Saskatoon Regional Health Authority, 2017 SKQB 280

Layh, September 18, 2017 (QB17255)

Contract Law – Breach – Tender – Implied Contract

The plaintiff, a private medical facility operated by a number of physician shareholders, provided elective surgical procedures for third party insurers. The defendant, the Saskatoon Health Region, made a request for proposals issued to third parties respecting procurement of certain medical services. When the

plaintiff's proposal was not accepted, it alleged that the defendant breached the terms of an implied contract, the "Contract A" established in the Supreme Court's decision in Ron Engineering. The plaintiff also claimed that it had relied upon representations made by the defendant during negotiations of an earlier short-term contract between the parties that the plaintiff would receive favourable consideration regarding a future long-term contract.
HELD: The action was dismissed. The court reviewed the discussions between the parties at the time that they entered into their short-term contract in 2010 and found that there was no indication in the defendant's conduct to suggest that it had not acted properly or that the plaintiff relied upon any representations in the agreement that it would be favoured in any later long-term contract. The court also reviewed the documents in the defendant's request for proposals and concluded that they indicated that the defendant intended to enter into further discussions and negotiations and therefore it did not engage the formation of a Contract A.

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R v Ghoman, 2017 SKQB 281

Chow, September 19, 2017 (QB17269)

Courts and Judges – Jurisdiction – Summary Offences Procedure Act

The appellant was issued an offence notice ticket under The Traffic Safety Act. The appellant did not appear at her trial date. Her friend appeared on her behalf. The court issued a default conviction and ordered payment of a fine. The appellant appealed the default conviction and sentence on grounds that she was led to believe that she could be represented at trial by a friend in lieu of appearing personally.
HELD The appeal was dismissed. The case was not distinguishable from the Kimery case. Section 23 of The Summary Offences Procedure Act sets out the process one must follow to take issue with a default conviction. That procedure involves an appearance before a justice, not an appeal to the Court of Queen's Bench. The appellant did not proceed pursuant to s. 23. The court did not have jurisdiction to entertain the appeal.

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C.F. v D.F., 2017 SKQB 284

Chow, September 21, 2017 (QB17270)

Family Law – Child Custody and Access – Shared Parenting – Child Support
Family – Custody and Access – Assessments
Family Law – Child Support – Imputing Income
Family Law – Child Support – Retroactive Support

By an interim order, the parties had enjoyed joint custody of their children and shared parenting responsibilities on a weekly rotation for approximately three years. The father paid interim child support in the amount of $250 per month, along with two-thirds of s. 7 expenses. At pre-trial, the court directed preparation of a custody and access assessment. By the time of trial, the parties had resolved most of their outstanding issues. They agreed that they should continue to enjoy joint custody of their children, but the father wished to maintain the current shared parenting arrangement, while the mother advocated for primary residence of the children with her with specified access to the father. Other issues included the quantum of child support, contribution to s. 7 expenses and retroactivity of support. Several witnesses testified at trial, including the author of the custody and access report. It was her opinion that the interim parenting arrangement had not been working well for the children as the parties had different parenting styles and approaches to discipline and were unable to arrive at a consistent regime. She recommended that the parenting arrangement be changed. Regarding child support, the mother alleged that the father was intentionally underemployed. The father was a self-employed, journeyman electrician. The court heard evidence from a journeyman electrician as to his hourly wage and the estimated annual income of journeyman electricians in the area.
HELD It was in the best interests of the children that the shared parenting arrangement be maintained. There was no compelling evidence to suggest that either child's personality, character or physical, emotional, psychological, economic or emotional needs would be better served by altering the arrangement. Although the author of the custody and access assessment is a court witness, the weight afforded to her evidence is in the discretion of the court. Consistency between households is only one factor the court must consider in determining the best interests of children. The court must also consider stability from maintaining a relationship with a loving, involved parent, the parties' long-standing shared parenting arrangement, and the maximum contact principle. The parenting relationship was not so

acrimonious as to be untenable. The parties had repeatedly demonstrated that they were capable of cooperating for the benefit of the children. Both parents were loving, capable parents, but also fallible people who have struggled at times to adapt to a difficult situation and have behaved less than admirably. There was no evidence to suggest that the father continued to lose his temper or engage in inappropriate discipline. There being no evidence as to increased costs of the shared parenting arrangement, it was appropriate to determine support obligations by way of set-off pursuant to s. 9 of the Guidelines. The father voluntarily chose self-employment over paid employment and was intentionally unemployed, but his decision to work from home was reasonably justified by the needs of the children. He had, however, unreasonably deducted expenses from his total income and the court imputed a sum equivalent to those expenses. Thus, the father's total income was $48,777 and the mother's was $27,646. After set-off, the father was ordered to pay the sum of $269 per month plus 64 percent of all s. 7 expenses. There being no evidence as to the parenting arrangements in the two months between the mother vacating the home and the interim order respecting custody and support, no evidence that either party moved to vary the interim order or seek disclosure of the other's financial information prior to trial, nor any evidence of hardship, the court dismissed the application for retroactive child support.

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D.A. v T.A., 2017 SKQB 285

Goebel, September 21, 2017 (QB17281)

Family Law – Child Support – Application by Persons of Sufficient Interest
Family Law – Child in Need of Protection – Person of Sufficient Interest – Grandparents

In 2007, the petitioners, the grandparents of the respondent's two children, were declared persons of sufficient interest, and the grandchildren were placed in their indefinite care pursuant to s. 37(1)(b) of The Child and Family Services Act. In 2010, the petitioners, the respondent and the children's father signed an informal child support agreement that required each of them to pay $250 per month. The petitioners then registered the agreement with the Maintenance Enforcement Office (MEO). The petitioners commenced a proceeding under The Family Maintenance Act, 1997 (FMA) in 2011 that sought an interim

order for child support from both parents. The respondent then filed an answer and counter-petition that sought an order expunging arrears accumulated under the agreement and assessing her child support obligations pursuant to the Federal Child Support Guidelines. The applications were adjourned and sat in abeyance for over five years. By 2016, MEO took steps to enforce the agreement against the respondent by garnishing her wages, and she responded with this application. The issues were as follows: 1) whether the petitioners had standing to seek child support; 2) whether the respondent had an obligation to pay support to the petitioners; 3) whether the child support agreement had an effect upon the court's jurisdiction to make a retroactive or prospective support order; 4) whether there was sufficient uncontroverted evidence to determine the respondent's past child support obligations; and 5) what amount of child support was payable by the respondent. She argued that the court should retroactively assess her obligations pursuant to the Guidelines, taking into account her actual income since 2010. Further, the court should take into account that the petitioners received a monthly non-taxable payment of $1,600 from the Ministry for the support of the children. And if the respondent was found to have to pay child support, the court should apply s. 10 of the Guidelines, finding that the Table amount would result in undue hardship to her as she had new family obligations. Her annual income consisted of social assistance in the amount of $14,500 and she submitted that amount should not be included for the purposes of paying support.

HELD: The application was granted. The court found the following with respect to each issue: 1) the petitioners had standing to apply for child support under s. 12(1) of the FMA and as persons of sufficient interest under The Children's Law Act, 1997; 2) the respondent had the obligation to provide support for her children under s. 3(1) of the FMA; 3) it had the jurisdiction to examine domestic contracts and could hear this application; 4) there was insufficient evidence before it to allow it to determine the respondent's retroactive support obligations. The matter was left for pre-trial; and 5) under the Guidelines, the respondent's income must include her social assistance payments. The Table amount payable on that income for two children was $186 per month. The Ministry's payment to the petitioners was not a "special provision" pursuant to s. 3(4) of the FMA and, therefore, was not relevant to the respondent's s. 10 hardship application. However, because the respondent's standard of living was significantly lower than that of the petitioners, and because she was trying to establish a stable life, free of drugs, and support her new family, the court determined that the amount of support should be reduced to $75 per month.

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B.B. v C.B., 2017 SKQB 286

Chow, September 22, 2017 November 2, 2017 (corrigendum) (QB17271)

Family Law – Division of Family Property – Unequal Division
Family Law – Costs – Solicitor-Client

The respondent did not reply to the petition and was noted for default. He further failed to attend at pre-trial and at trial. At trial, the court directed he be contacted and instructed to appear. He did so and, at his request, the court adjourned trial so he could seek counsel. Prior to trial reconvening, the petitioner served him with a notice to disclose. He failed to reply even after the court ordered that he do so. When trial reconvened, he again failed to appear. Trial proceeded in his absence. The petitioner was the only witness. She sought division of property and solicitor-client costs.
HELD The respondent had notice of the proceedings and declined to participate. It was appropriate to proceed without him. The petitioner proposed an in specie division of family property. The dates employed in the appraisals exhibited as part of the petitioner's case were the only evidence available to the court. As such, those dates were appropriate dates for valuation. The court ordered division and distribution in accordance with the proposal. The proposed division resulted in an unequal division in favor of the respondent. This was a rare and exceptional case justifying an award of solicitor-client costs. The respondent repeatedly declined to participate in proceedings and also failed to comply with the court-ordered notice to disclose or to serve and file any financial information whatsoever. Solicitor-client costs do not necessarily equate to the costs a party pays their lawyer. The petitioner had already received awards of costs against the respondent at other points in the course of the matter. Further, the trial was brief. The court assessed solicitor-client costs in the fixed sum of $10,000.
CORRIGENDUM dated November 2, 2017: [1] Paragraph 20 shall be amended to read as follows:
>>>[20] Although she originally petitioned for an unequal division of the family home and property, the petitioner confirmed, through her counsel, that she seeks only an equal division and distribution of the parties' family home and property. She advised she wishes to remain in the family home, and to ensure that the parties two sons continue to have the opportunity to farm. For those reasons, she requests that the home quarter, legally described as SE 13-14-16 W2, as well as SW

13-14-16 W2 and NW 13-14-16 W2, and 50% of the mineral title to NW 31-14-16 W2, as well as the family home and household goods, along with the outbuildings and granaries and the Ford Edge all be transferred to her absolutely. The petitioner submits, on the basis of the various appraisals and statements exhibited in the proceedings, that the aggregate value of this property is $1,701,700.00.
[2] Paragraph 29 shall be amended to read as follows:
>>>[29] The petitioner has proposed that the court effect the following division and distribution of their family property: [see corrected judgment for table]
[3] Paragraph 38(1)(c) shall be amended to read as follows:
>>>c. Surface Parcel Number 108075236 Reference Land Description: NW Sec 13, Twp 14, Rge 16, W2 Extension 0.
[4] Paragraphs 38(4)(c) shall be amended to read as follows:
>>>c. Surface Parcel Number 108075236 Reference Land Description: NW Sec 13, Twp 14, Rge 16, W2 Extension 0;

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United Steel Workers, Local 5917 v Arch Transco Ltd., 2017 SKQB 288

McMurtry, September 22, 2017 (QB17273)

Arbitration – Judicial Review – Collective Agreement
Administrative Law – Arbitration – Stay

Both parties sought judicial review of a decision of a single arbitrator, which set the terms of a first collective agreement. The employer sought a stay of operation of the collective agreement, pursuant to rule 3-60(2) of the Queen's Bench Rules, until the determination of the judicial review applications.
HELD The court dismissed the application for stay. The employer would not suffer irreparable harm by the court's refusal to grant a stay. Any unnecessary expense to the employer could be compensated by damages, but the employees would stand to lose all benefits of collective bargaining if a stay was granted. The balance of convenience favoured the union.

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H&H Holdings Ltd. v Ng, 2017 SKQB 295

Rothery, September 27, 2017 (QB17277)

Business Corporations Act – Remedies – Oppression Remedy

The applicants were equal shareholders with the respondents in eight corporations, consisting of seven hotels and one restaurant and bar (the "Operating Companies"). The applicants applied for the court to rectify certain oppressive and unfairly prejudicial behavior committed against them by the respondents. The applicants alleged that the respondents and their management companies received interest-free loans from the Operating Companies without consent and used those monies to construct other hotels in which the applicants had no beneficial interest. They further alleged that the respondents received management fees that were not contemplated by all shareholders and that they were not receiving financial information to which they were entitled. The applicants sought both interim and final remedies, including removal of the respondents' management company, financial disclosure, repayment of the loans, payment of dividends and repayment of management fees. On the return date of the application, counsel for the applicants and respondents presented a draft consent order dealing with some aspects of the application, including appointment of an individual to act on behalf of the applicants with respect to the Operating Companies (the "representative"). The respondents were ordered to repay all intercompany loans and to disclose certain financial information. At the next return date, the applicants had amended the application to add additional corporations owned by the respondents and to seek additional remedies under the Act.
HELD By lending money from the Operating Companies to other entities, interest-free and without security, the respondents conducted themselves in an oppressive manner. They unfairly prejudiced the applicants by building hotels that operate in competition with the hotels owned by the Operating Companies. In other respects, the extent of the oppression and the appropriate remedies were matters that required a trial of the issues. To maintain the status quo pending trial, the representative would continue to act on behalf of the applicants with respect to the Operating Companies.

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Friske v Arborfield (Town), 2017 SKQB 297

Turcotte, September 27, 2017 (QB17284)

Municipal Law – Bylaws

The applicants applied for an order pursuant to Queen's Bench

rule 3-49(1)(d)(ii) and rule 3-56(2)(b) that a bylaw passed by the respondent town was of no force and effect as it concerned them. The applicants resided in the town and decided that they wanted to acquire a pair of goats and keep them in the back lot of their residential property. They consulted with the town's administrator before they purchased the goats and were told by her that there was no bylaw prohibiting residents from having goats but that they should seek permission of the town's council prior to purchasing the animals. The administrator advised the applicants that she would put their request before council at its next meeting. The applicants did not wait and purchased the goats five days before the meeting. At it, the council discussed the issue of residents owning farm animals within the town's limits and decided it was not in favour and to pass an animal control bylaw. The council sent a letter to the applicant informing them of its intention and inviting them to attend the meeting to discuss the issue. The applicants appeared and set out their reasons for wanting to have goats. The council decided to proceed with enacting the bylaw. After passing the bylaw, the town advised the applicants and requested that they remove their goats. The applicants refused and brought this application. They argued that the bylaw was in pith and substance a zoning bylaw under ss. 2(1)(hh), 88 and 89 of The Planning and Development Act, 2007 (PDA) as it dealt with their usage of land in the town. Since they were using their land to keep goats prior to the enactment of the bylaw, their non-conforming use was protected under the "grandfathering" sections of the PDA. The respondent's response was that the bylaw was enacted pursuant to the town's general power as a municipality under s. 8 of The Municipalities Act. It was in pith and substance a bylaw to control animals generally and was not directed to the regulation of land usage within town limits.
HELD: The application was dismissed. The court found that the bylaw was a legitimate exercise of the town's municipal authority: it was in pith and substance an animal control bylaw of general application in the town limits and was not motivated by bad faith or improper purpose.

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Royal Bank of Canada v Hollmann, 2017 SKQB 299

Barrington-Foote, September 29, 2017 (QB17286)

Mortgages – Foreclosure – Judicial Sale – Costs

The applicant bank granted a mortgage to the defendant in 2007.

The property was sold in November 2016 and the proceeds of sale, net of taxes and real estate commission were paid into court. In this application, the bank applied for taxation of its costs and disbursement of those funds. In November 2015, the bank was granted an order nisi for sale by real estate listing with an upset price of $300,000. The bank's law firm was appointed as selling officer. It did not list the mortgaged property for sale in accordance with the order nisi. In May 2016, they requested a comparative market analysis from a real estate agent and were informed by him that the property was worth between $264,000 and $274,000. In August 2016, the bank successfully applied to renew the order nisi. In October 2016, the bank applied for approval of a sale for $265,000, which was granted. The order provided that the net proceeds of property taxes and real estate commission be paid into court, and as a result, $238,700 was paid into court. No further steps were taken until August 2017 when the bank made this application for taxation of its costs on a solicitor-client basis and disbursement of funds after taking into account the defendant's loan, line of credit and credit card debts, including interest at the rates specified in the contracts. The law firm's invoices for legal fees were for $8,658. The defendant objected to the fact that 10 months had passed since the sale proceeds had been paid into court and she had not yet received the surplus and was obliged to pay mortgage interest for that period of time.

HELD: The order was granted. However, the court found that the law firm's invoice for legal fees should be reduced by half to $4,000. Although this was not a standard foreclosure with a single application for an order nisi for sale and order confirming it, there was nothing to explain why the law firm had to make a second application for an order nisi had it taken the appropriate steps in a timely manner. Counsel was not required to do anything out of the ordinary and its invoice failed to identify time spent on the file by paralegals. The court also found that it would not be equitable to order the defendant to pay interest accrued after the date of sale to the date of the order. The bank applied for an order that the net proceeds of sale be paid into court, rather than relying on the 2016 order nisi, which provided for payment of the principal and interest specified in the order from those proceeds. The bank knew there would be a surplus payable to the defendant. It led no evidence, and counsel offered no explanation, as to why the bank took this course – which would result in the defendant paying further interest - or why it failed to bring this application to assess costs and distribute the proceeds promptly after the sale closed.

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