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The appellant was a passenger in a vehicle that was stopped by police. His identification was obtained by the officers and a CPIC search revealed that he was on statutory release. The officer arrested the appellant after being advised by Corrections Canada's National Monitoring Centre (NMC) that they would be issuing a warrant because the appellant had breached his statutory release conditions. The appellant told the officer that his parole had recently expired, but the officer did not investigate that claim. The appellant was charged with trafficking and possession of proceeds of crime when a roadside search of the appellant revealed cash and a search at the detachment revealed drugs. It was determined that the NMC warrant was invalid because the appellant's release term had been completed. The trial judge found some Charter breaches but did not exclude the evidence pursuant to s. 24(2). The appellant was convicted of one count of possession of methylone for the purpose of trafficking and one count of being in possession of cocaine. He was sentenced to 42 months' imprisonment. The appellant appealed his convictions. The issues on appeal were: 1) whether the trial judge erred in failing to find that the appellant was detained contrary to s. 9 of the Charter when the officer took his identification; 2) whether the trial judge erred in concluding

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that the appellant's s. 9 rights had been violated when he was arrested; 3) whether the trial judge erred in finding the search immediately after the appellant's arrest was a violation of his rights under s. 8 of the Charter; 4) whether the trial judge erred in failing to find the search at the police station was conducted in violation of the appellant's rights under s. 8 of the Charter; and 5) whether the trial judge erred in failing to exclude the evidence.

HELD: The appeal was allowed. The issues were determined as follows: 1) the officer obtained the appellant's identification because it was his practice to do so. The appeal court examined the factors considered by Grant to determine a s. 9 breach: a) a reasonable individual in the appellant's shoes would have felt as if he or she was the subject of investigatory attention and not able to exit the vehicle and walk away; b) the officer did not give the appellant the option not to provide his identification and his identification was kept for approximately 30 minutes; and c) little was known of the particular circumstances of the appellant. The trial judge erred by failing to find that the appellant had been psychologically detained while the officers had his identification in their possession; 2) the appellant was initially arrested for offences contrary to the Corrections and Conditional Release Act. The trial judge found the appellant's arrest to be unlawful because at the time of the arrest there was not yet a warrant from NMC. The appeal court disagreed with the Crown's submission that the appellant's initial arrest was not pursuant to the warrant but was pursuant s. 137.1 of the Corrections and Conditional Release Act; 3) the appellant's arrest was unlawful and therefore the pat-down search that followed was also a violation of the appellant's s. 8 Charter rights. The trial judge did not err in that conclusion; 4) the trial judge concluded that the search of the appellant at the detachment was not a s. 8 Charter breach because a policy of searching everyone entering custody seemed reasonable. The appellant's arrest, however, was unlawful and, therefore, so was the search at the detachment; and 5) the appeal court performed a s. 24(2) Grant analysis: a) the evidence did not support a conclusion that the officers acted in good faith when they arrested the appellant. The officers did, however, honestly believe that the appellant was in breach of his release conditions and that they would shortly be in possession of a warrant. The appeal court agreed that the roadside pat-down search of the appellant was only a "minor degree of seriousness". The search at the detachment was also not the sort of activity the appeal court would have found to suggest that evidence should be excluded; b) the ss. 8 and 9 Charter breaches were significant; and c) the balance tipped in favour of excluding the evidence and therefore reversing the decision of the trial judge. The appeal was allowed, the convictions were set aside, and acquittals were directed.

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Ottenbreit Herauf Whitmore, August 28, 2018 (CA17180)

Criminal Law – Appeal – Acquittal
Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking
Criminal Law – Evidence – Witness – Expert
Criminal Law – Judges – Gatekeeper Role

The respondent was convicted of possession of cocaine rather than possession for the purpose of trafficking. The Crown appealed. The weight of the cocaine was 56.68 grams. The expert concluded that the cocaine was possessed by the respondent for the purpose of trafficking. He testified that the amount of cocaine would last between 16 to 56 days for one user and that it was valued at $3,000. The expert acknowledged that he had heard of people using higher amounts but did not factor them into his calculations because he had been told higher use was an exaggeration. He said that a mere user of cocaine would not have two ounces at any given time but admitted that it was possible for someone to purchase two ounces of cocaine for personal use. There were no other typical signs of trafficking cocaine. The trial judge did not find that the expert's evidence regarding physiological effects and maximum usage rate met the criteria outlined in Mohan. The expert's conclusion about the respondent possessing cocaine for the purpose of trafficking was also excluded. The issue was whether the trial judge erred in exercising her function as gatekeeper of the opinion evidence by excluding the expert's conclusion as to maximum daily usage of cocaine.
HELD: The appeal was dismissed. The Crown had a stringent standard to meet on the appeal. If the maximum daily usage evidence was not admitted, the average use range would be less reliable and have less weight. The trial judge did not err in rejecting the evidence on physiological effects because the expert lacked medical or other specialized training. The trial judge also rejected maximum usage evidence of the expert, based on the reliability of the expert's technique in coming to his opinion. The main source of the expert's opinion was from what cocaine users told him. The trial judge could not determine the accuracy or reliability of the information. The expert also acknowledged that that his information was likely not representative of the broad population of cocaine users. He also admitted to rejecting any of the high usage rates. The appeal court concluded that the trial judge did not err in rejecting the expert's opinion regarding maximum usage rates because she had many legitimate reasons for arriving at the conclusion. The trial judge was also found to have performed her role as gatekeeper as required. The trial judge found that the expert's evidence regarding maximum usage rates did not meet the cost-benefit analysis. The trial judge was also found not to err in excluding the expert's final conclusion that the respondent possessed the cocaine for

the purpose of trafficking because the trial judge was capable of making the final finding of fact; it was not beyond her knowledge and experience and was not technical or scientific in nature. The expert's evidence that the amount of cocaine was more than he had ever seen a mere user have in their possession was also properly excluded by the trial judge. The expert evidence admitted by the trial judge could only prove that the respondent possessed more than the average user. There was a reasonable doubt as to whether the cocaine was possessed for the purpose of trafficking.

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R v Nahnybida, 2018 SKCA 72

Jackson Caldwell Schwann, August 30, 2018 (CA17182)

Criminal Law – Aggravated Refusal to Provide Breath Sample
Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Sentencing
Criminal Law – Dangerous Driving causing Death
Criminal Law – Sentencing – Totality Principle – Consecutive Sentences – Concurrent Sentences

The respondent/appellant (hereinafter respondent) was the driver of a vehicle that went into the ditch. One of the three passengers died. The respondent had two trials, one for each indictment. On the second indictment, the respondent pled guilty to driving while disqualified and breach of probation. He was found guilty of aggravated refusal by judge alone, contrary to s. 255(3.2) of the Criminal Code. The trial for the first indictment occurred months later before judge and jury where the respondent was found guilty of operating a motor vehicle in a manner dangerous to the public, thereby causing death contrary to s. 249(4) of the Criminal Code. He was found not guilty of operating a motor vehicle while his ability to do so was impaired by alcohol. The respondent was sentenced to 40 months' imprisonment on the dangerous driving causing death conviction and a 40-month concurrent sentence on the aggravated refusal. He was sentenced to 6 months consecutive for the driving while disqualified with a 6-month concurrent sentence for the breach. The respondent and friends had been consuming alcohol on the day of the incident. An accident reconstruction expert testified that the truck brakes had never been applied and the truck's minimum speed before entering the ditch was between 131 and 133 km/h. The respondent indicated that he must have fallen asleep. The second officer on the scene testified that she formed the belief that the respondent was impaired by alcohol and that he had operated a motor vehicle while impaired by alcohol within the previous three hours. The trial judge concluded that the officer's subjective belief that the respondent had been operating a motor vehicle while impaired

by alcohol within three hours prior to the breath demand was objectively reasonable. The issues on the conviction appeal were: 1) whether the jury's finding of guilt on the dangerous driving causing death conviction was contrary to law or was an unreasonable verdict; and 2) whether the officer's "reasonable grounds to believe" were objectively sustainable for the aggravated refusal conviction. The Crown and respondent both sought leave to appeal the sentence on the dangerous driving and aggravated refusal convictions and the respondent also sought leave to appeal the driving while disqualified sentence.

HELD: The conviction appeals were dismissed. Leave to appeal the sentences was granted; however, the appeals were both dismissed. The conviction appeals were dealt with as follows: 1) the jury was not precluded from relying on the respondent's alcohol consumption to determine whether the driving was a marked departure from the standard of a reasonably prudent driver. The trial judge properly instructed the jury to consider the totality of the evidence, which included, but was not only the respondent's evidence; 2) an officer is entitled to draw a reasonable inference from the totality of the circumstances. The trial judge property examined the reasonableness of the officer's belief based on the totality of the evidence. With respect to the sentence for dangerous driving, the trial judge determined that the respondent's alcohol consumption could not be considered as an aggravating factor because of the acquittal on the impaired driving charge. The trial judge committed an error in principle by disregarding relevant evidence about the respondent's alcohol consumption as an aggravating factor for sentencing purposes. The appeal court concluded that the error in principle had no bearing on the sentence. The respondent argued that the trial judge erred in her assessment of his moral culpability when sentencing for the dangerous driving. He said that he simply nodded off when there was no other traffic. The trial judge did not err in that regard. The appeal court did not agree with the respondent that the trial judge imposed a demonstrably unfit sentence because she erred in principle by not giving effect to the principle of parity. With respect to the sentence for aggravated refusal conviction, the Crown argued that the trial judge erred by failing to consider the respondent's voluntary consumption of alcohol as an aggravating factor. The appeal court found difficulty with the Crown's submissions because almost all the evidence pointed to regarding the alcohol consumption was learned at the jury trial not from the judge alone trial for the aggravated refusal charge. Pursuant to s. 724(1) of the Criminal Code the sentencing judge can only consider information disclosed at the trial for the conviction that the sentencing pertains to. The sentencing on the refusal conviction was proportionate and the appeal court did not adjust it. The Crown also argued that the sentences for the refusal and dangerous driving convictions should have been consecutive. The appeal court saw no basis for appellate intervention even though the sentences could have been consecutive to one another

because the offences related to different legally-protected interests. It was open to the trial judge to impose a consecutive sentence for the drive while disqualified because the charge addressed a different legally-protected interest. Also, the additional six months did not make the overall sentence clearly or manifestly excessive, nor was it a marked departure from other sentences. It was not demonstrably unfit.

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R v Hahn, 2018 SKCA 73

Jackson Herauf Schwann, August 31, 2018 (CA17183)

Criminal Law – Appeal – Conviction
Criminal Law – Harassment
Criminal Law - Mistrial
Criminal Law – Stay of Proceedings
Criminal Law – Subpoena
Judge and Courts - Bias

The appellant was convicted of harassing a judge of the Queen's Bench Court over a period of two-and-a-half years. He was sentenced to 17 months' incarceration followed by 3 years' probation. At his first jury trial the appellant had counsel, but the trial was declared a mistrial because he held up an inflammatory poster. The appellant did not have legal counsel at his second jury trial, but the trial judge did appoint an amicus curiae for the court. The harassment began after the appellant did not receive the remedies he requested from the judge in family chambers court. The appellant's grounds of appeal were as follows: 1) the trial judge erred when he quashed the subpoena to have the judge that refused the appellant's bail testify, which then led to a wrong decision with respect to an application for a stay of proceedings; 2) the trial judge erred by not granting a stay of proceedings; 3) the trial judge erred by ordering a mistrial with respect to the first trial; and 4) the second trial was unfair.
HELD: The appeal was dismissed. The grounds of appeal were considered by the appeal court as follows: 1) the appellant argued that if the subpoena had been issued he would have been able to show that bias existed at the highest level of the judiciary and therefore a stay of proceedings should have been granted. The judge found as a fact that the appellant wanted the subpoenas to elicit evidence regarding matters of adjudication and administration, which have been found to be reasons worthy of protection by the Supreme Court of Canada; 2) the appellant's first argument regarding the stay of proceedings appeal was that the trial judge required him to prove "actual" bias. The appeal court concluded that the appellant misread the decision. The appellant's additional arguments did not consider that the trial judge looked at whether a stay of proceedings would be an appropriate

remedy even if it was assumed that a reasonable apprehension of bias could be found. The appeal court agreed with the trial judge that this was not one of the clearest of cases that would justify a stay of proceedings to rectify the situation; 3) the mistrial was ordered during the first jury trial after the appellant held up a poster showing him standing next to a coffin with his legs shackled. Not all the jurors saw the poster. A mistrial was declared because it was believed that the appellant's right to full answer and defence had been affected by the actions. The jurors may have interpreted it to be another poster referring to the harassed judge. The appellant argued that the mistrial should not have been declared and thus his conviction after his second trial should be set aside. He argued that he would have been acquitted at the first trial because of the way the evidence had been presented. At the second trial, the appellant did not have legal counsel and the appellant's cross-examination of an officer did not elicit specific admissions that were elicited in the first trial regarding the appellant's intention not to harm or harass the judge. The appeal court agreed with the Crown that the appellant could not appeal the validity of the mistrial order from the first trial in the context of an appeal from his conviction at the second trial; and 4) the appellant had three concerns relating to the fairness of his second trial: a) his full statement to an officer was unfairly kept from the jury. The portion of the statement that the appellant indicated should have been before the jury was where he indicated that he did not intend to harm or harass the judge from family court. The Crown only attempted to elicit from the officer statements that he had warned the appellant to stop what he was doing and that the appellant appeared to understand. Also, the appellant's intentions or reasons for putting up the posters was not an element of the offence put to the jury. The appellant was also provided with ample opportunity to cross-examine the officer; b) the judge did not provide him with sufficient assistance. He indicated that his medical condition required the judge to provide a greater level of assistance to him. The trial judge and court administration offered ample assistance to the appellant throughout the second trial; and c) he was unjustifiably denied production of the audiotape of his appearance before the judge in the family law proceedings that he later harassed. The appeal court concluded that the reason the appellant wanted the audio recording was not to address the credibility of the judge, but rather to have another opportunity to complain about the merits of the decision in family court.

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Douglas v Saskatchewan Crop Insurance Corp., 2018 SKCA 74

Richards Ryan-Froslie Schwann, September 5, 2018 (CA17184)

Civil Procedure – Appeal
Civil Procedure - Costs
Civil Procedure – Pleadings – Application to Strike Statement of Claim – Want of Prosecution – Delay

The appellants' claim was struck for want of prosecution after a Queen's Bench Chambers application by the respondent. The appellants appealed. The Chambers judge found that there had been inordinate inexcusable delay given the claim was commenced in July 2003. Further, the Chambers judge found that the interests of justice did not recommend allowing the claim because two of the respondent's witnesses had died and two had left the company. The Chambers judge did not award costs. The respondents requested costs of the Queen's Bench matter and the appeal.
HELD: The appeal was dismissed. There was no error of legal principle, no disregard or misapprehension of a material fact, and the Chambers judge did not fail to act judicially. The Chambers judge cited the relevant authorities and also applied them properly. The appeal court did not accept the appellants' argument that they did not know they had an obligation to move the matter forward. A similar application had been made by the respondent in 2009 and the Chambers judge on that application cautioned that a similar application could be made in the future if the matter was not moved forward. In another application in 2010 the court set out deadlines and the respondent consistently advised the appellants of their obligation to move the matter forward. The appeal court did not award costs in the Queen's Bench matter because the respondent did not cross-appeal the decision of the Chambers judge on that point. Costs of $2,000, rather than the tariff amount of $9,000, were ordered on the appeal.

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Pruden v Olysky Ltd. Partnership, 2018 SKCA 75

Whitmore, September 14, 2018 (CA17185)

Civil Procedure – Appeal
Employment Law – Labour Relations – Adjudicator – Labour Relations Board
Statutes – Interpretation – Limitations Act, s. 3(1)
Statutes – Interpretation – Saskatchewan Employment Act – s. 3-53

The applicant applied for leave to appeal a decision of the Labour Relations Board (Board) pursuant to s. 4-9 of The Saskatchewan Employment Act (Act). The applicant began work with the respondent (Employer) in 2012. In 2017, the applicant advised the Employer that he had difficulty with the work he was assigned. Later that day, he got a note from a doctor excusing him from work for four days because he

was having trouble breathing. At the end of the four days, the applicant told the Employer that he thought his breathing issues were from dust and mold in the workplace. The Employer advised the applicant to let him know if he would be coming to work. The applicant did not attend work for the following three days, after which his employment was terminated for abandoning his job. In April 2017, an occupation health officer found that the Employer had not committed a discriminatory act pursuant to the Health and Safety Division of the Ministry of Labour. The applicant appealed the decision, but not within the required 15 days of service of the decision (s. 3-53 of the Act). The adjudicator of the appeal concluded that she did not have jurisdiction to hear the appeal because there was no provision to allow the adjudicator to extent the time to file the appeal. The applicant appealed the adjudicator's decision to the Board and the Board concluded that the adjudicator's decision was reasonable and correct. The Board agreed with the respondent that The Limitations Act did not apply to administrative proceedings taking place outside of court, so the applicant could not be relieved of the requirement to comply with the limitation period in the Act. The grounds of appeal were: 1) whether the Board erred in finding the adjudicator's decision was reasonable regarding her interpretation of the Act; and 2) whether the Board erred in finding The Limitations Act did not apply to the limitation period in the Act.
HELD: The application was denied. The grounds of appeal were both questions of law so the first branch of the test for leave to appeal was met. The grounds were reviewed for merit by the appeal court as follows: 1) the Board was correct in reviewing the adjudicator's decision on the standard of reasonableness. The adjudicator provided authority for her decision. There was no merit to the first ground of appeal; and 2) the Board's conclusion was made as a result of the plain wording of The Limitations Act. The appeal court also found that the appeal failed on the importance branch. The applicant did not raise a new or controversial issue, nor was there a new or uncertain or unsettled point of law to be addressed by the appeal.

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Gordon v Nielson, 2018 SKQB 207

Wilkinson, July 19, 2018 (QB17596)

Family Law – Family Property – Interspousal Contract

The parties were married in 2009 and separated in 2015. At the time of trial, their two daughters were aged ten and eight respectively. Since the separation the respondent husband had lived in the family home and the parties had interim joint custody and a shared parenting regime where the children lived with each parent on alternating weeks. Before

their marriage, the parties executed a prenuptial agreement in 2008 in which they agreed that they would keep their respective property, assets and business interests entirely separate. The only shareable assets would consist of property explicitly placed in their joint names. If marital breakdown occurred, neither party would make any claims in relation to property or spousal support. Each of the parties obtained independent legal advice and they agreed that neither of them were at a disadvantage when they signed. In 2008, the respondent had secure employment and was earning $104,900 and the petitioner had just finished her medical training as a radiologist. After she purchased a share in a partnership, the petitioner organized her business affairs to minimize tax liability through two corporate structures and a family trust. A service corporation provided imaging services to, and was paid by, the professional corporation. An optimal allocation of salary and dividends for tax purposes was determined under the service corporation and salaries were paid to petitioner and the respondent and then dividends declared to its shareholder, a family trust. The trust was discretionary: the petitioner was the sole trustee and she could make distributions to herself, the respondent and the children as the designated beneficiaries. Between 2009 and 2010, the respondent lost two different positions due to corporate restructuring and was unemployed from 2010 to 2012. He then established a medical supply business and by 2015, it was earning a net income of $3,500 to $4,500 per month. Late in 2016, the respondent found a new position with an annual income of $86,000 as a pharmaceutical sales representative. He asserted that his business' revenues began to backslide when he was forced to take on this regular employment, as he no longer had time to devote to his company. From 2010 onward, the respondent's economic contributions to the family were minimal to non-existent. The net earnings of his business were retained for its exclusive use. The petitioner's professional earnings supported the family through the seven years of cohabitation. Most of her earnings flowed to the joint account through the income-splitting with the respondent. The issues between the parties were: 1) whether the prenuptial agreement was entitled to deference; 2) whether the respondent had a valid claim in express, constructive or resulting trust in relation to his joint interest in a lot transferred to the petitioner to protect the property from would-be creditors once he started his medical supply business; 3) whether the respondent had a right to spousal support on the basis that significant unanticipated changes occurred during the course of the marriage that made the prenuptial agreement incompatible with the parties' original intentions and the statutory support objectives of the Divorce Act. He claimed to be entitled to spousal support of $21,600 per month for a period of nine years, first on a compensatory basis because he sacrificed his career to become a stay-at-home father and was unable to make RRSP contributions as he would have done had he continued working and on a non-compensatory basis because he suffered a decrease in his standard of living compared to the standard enjoyed during the

marriage. The petitioner contested the claim. She provided evidence that the respondent had not adopted the role of homemaker. The petitioner had employed full-time nannies for the children. The respondent had been out of the workforce for two years, not eight. Her evidence showed that during the marriage, the respondent had been in a position to make and had made RRSP contributions. He was qualified to invest as such by virtue of receipt of regular employment income from the service corporation under the income-splitting protocol; 4) whether the interim shared parenting arrangement should continue. The petitioner proposed that the primary residence of the children be with her and the respondent have access from Thursday to Sunday every second weekend; 5) the determination of the appropriate amount of child support under s. 9 of the Guidelines. The petitioner submitted that her 2017 income should be set at $894,400, comprised of her professional salary plus pre-tax income from her two professional corporations. The respondent submitted that his 2017 employment income of $86,900 was all that was available for child support purposes and that the pre-tax corporate income of $55,500 of his medical supply business should not be taken into account. The petitioner argued that those funds should be attributed to the respondent as income, so that his income would be $146,400. The petitioner estimated that her monthly expenses for the children were $7,940, which included 100 per cent of the children's s. 7 expenses, all of which had been paid entirely by her to date. The respondent indicated in his budget that he would spend $171,400 directly on the children and attributed one half of his legal fees attributable to these proceedings as spending on the children because they had been incurred to defend his right continue the shared parenting arrangement.

HELD: The court found with respect to each issue that: 1) the prenuptial agreement in this case was entitled to full deference relating to the division of property; 2) the respondent's claim in trust, either on an express, constructive or resulting basis, to half of the value of the recreational property was dismissed. The court found that the terms of the prenuptial agreement determined the question because the title to the property was registered in the petitioner's name. Further, it rejected all of the respondent's arguments that a trust had been created; 3) the respondent was not entitled to compensatory spousal support. The court accepted the evidence of the petitioner and found the respondent's claim to be blatantly inaccurate. He had not had to make sacrifices to advance the petitioner's career, nor had he lost economic opportunities as a consequence of child-rearing; 4) the order for joint custody and shared parenting was confirmed. It was in the bests interests of the children to continue in the existing arrangement because there was evidence that they were doing well; 5) the petitioner's calculation of her 2017 income was accepted. The court found that the respondent had not shown that his medical supply business was in decline and added $30,700 to his income from it as well as $5,000 for vehicle expenses he claimed, resulting in income of $122,700 for child

support purposes. The petitioner earned 88 percent of the combined total income. The court applied the Contino analysis. It disallowed the respondent's claim for legal expenses and reduced some of his other claimed expenses. It calculated that the combined monthly expenditures on behalf of the children totaled $15,900 and, applying the ratio of parental incomes, the petitioner would be responsible for $13,900. As she was paying $7,940 currently, the difference of $6,000 per month was payable to the respondent. The court found that there was no reason under s. 9(c) of the Guidelines that would warrant increasing the child support payable by the petitioner simply because of her higher income. The court awarded lump sum costs of $24,000 to the petitioner plus 80 percent of her disbursements.

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Monaghan, Re (Bankrupt), 2018 SKQB 210

Thompson, July 27, 2018 (QB17597)

Bankruptcy and Insolvency – Conditional Discharge

The Minister of National Revenue opposed the bankrupt's application for absolute discharge on the grounds of a high tax bankruptcy as defined in s. 172.1 of the Bankruptcy and Insolvency Act (BIA). As well, the assets of the bankrupt were not of a value equal to 50 cents on the dollar on the amount of the bankrupt's unsecured liabilities. The Canada Revenue Agency (CRA) had filed a proof of claim of $419,800 ($280,200 in income tax liability and $139,500 in penalty and interest) after the bankrupt had made his assignment. He had not paid taxes from 2004 to 2014. The Minister submitted that the bankrupt could be held responsible for his bankruptcy but he argued that he was an honest but unfortunate bankrupt who was an unwitting victim of fraud because he relied on the advice of professions in regard to his participation in a tax shelter known as the Global Learning Gifting Initiative (GLGI). For the first three years that the bankrupt participated in the GLGI program, he received assessments and refunds without a hint that CRA was concerned about the program. In 2007 the bankrupt was made aware that CRA questioned the legitimacy of GLGI and it began disallowing tax credits claimed by the bankrupt. He admitted that he made no efforts to pay his income tax debt and that all payments to the CRA were a result of garnishees. The 61-year-old bankrupt was in poor health and had little prospect of working again. He had RRSPs worth $765,700 that were exempt under the BIA. The trustee's report indicated that the bankrupt's assets were worth $915,500 and his proven unsecured liabilities amounted to $435,300. His assets were worth more than 2.1 cents on the value of his unsecured liabilities.

HELD: The bankrupt was given a conditional discharge. He was ordered to serve a one year suspension and would be eligible to apply for a discharge order if he paid $100,000 in minimum monthly payments of $1,000. The court found that this was a high tax bankruptcy under s. 172.1 of the BIA and that the bankrupt contributed to the bankruptcy by rash speculations within the meaning of s. 173(e) of the BIA because after he received notice that the CRA had intentions to revoke some of GLGI's charities' charitable status and after he had received his first reassessment, he made the decision to continue participating in GLGI.

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Youle v Galloway, 2018 SKQB 211

Leurer, July 26, 2018 (QB17598)

Civil Procedure – Minutes of Settlement – Enforcement
Civil Procedure – Contempt
Family Law – Family Property – Minutes of Settlement

The parties separated in 2003. The parties had two sons, now aged 26 and 22 years of age. In 2016 they entered into Minutes of Settlement after a pre-trial settlement. Regarding child maintenance, the agreement specified that the respondent husband would pay $22,000 directly to the youngest son who was in his first year of a two-year business program to pay for his tuition and other expenses during the 2016 -2017 academic year but in August 2017, the parties would agree as to their share of the child's expenses for the second year of the program and failing agreement, an application could be made to the court. Another term of the agreement provided that each party would establish a trust for the benefit of the children. The respondent was to establish a trust and other testamentary documents such that each son would receive at least 25 percent of the respondent's 2015 corporate assets. In January 2017, the petitioner's application for an order compelling the respondent to complete the documents was successful. In August 2017, the court directed the respondent to establish the trust required by the provision in the agreement on or before December 2017. The respondent failed to meet the deadline. In March 2018, he delivered to the petitioner a copy of his will that contained a testamentary trust in favour of the two children. The petitioner argued that the will failed to fulfill the agreement and applied for orders that: 1) found the respondent in contempt of the August 2017 court order; and 2) compelled him to comply with the previous order and complete a trust as required by the agreement. She submitted that the agreement contemplated an inter vivos, not a testamentary trust. Further, there was a term in the respondent's will that made the gifts conditional

which was contrary to the intent of the covenant. The respondent applied for orders that: 3) fixed the parties' respective obligations regarding the youngest son's post-secondary expenses from August 2017 to April 2018. The respondent submitted that he had paid the amount stipulated for 2016-2017 but the parties could not agree as to how to share the expenses for the 2017-2018 year. The respondent said that the petitioner should share in the son's expenses in accordance with their respective incomes. On the basis of his income of $240,000 and the petitioner's of $190,000, they should share their son's expenses of $22,000 on a 56/44 basis; and 4) directing the registrar of the Information Services Corporation (ISC) to transfer title to the condominium unit from the petitioner's to the youngest son's name. The respondent had contributed $25,000 in 2012 to the son's purchase of the condominium, but its title had to be registered in the name of the petitioner because ISC would not put the property in the name of someone under the age of 18. The petitioner argued that the court did not have jurisdiction to make such an order because the condominium was not family property.

HELD: The court granted each of the applications in part. The court found with respect to the petitioner's application that: 1) the respondent was in contempt and he was ordered to pay solicitor-client costs of $3,000. He had not established the trust and provided a copy of the document to the petitioner by the date set out in the order; and 2) it could not decide the matter on a summary basis. It directed the parties to convene a conference to discuss whether it would be appropriate to direct a trial of the issue or whether the parties should commence a fresh action. With respect to the respondent's application, the court decided that: 3) it was appropriate for the son to be responsible for one third of his total expenses and the parties should share the remainder of his expenses for 2017-2018 on a pro rata basis according to their incomes; and 4) the condominium was not family property, and dismissed the portion of the application that pertained to it.

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B.J.L. v D.B.L., 2018 SKQB 213

Brown, August 2, 2018 (QB17601)

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

The parties were married in 1998 and their children were born in 2000 and 2001 respectively. The petitioner wife was certified as a dental assistant in 1995 but worked only briefly during the marriage. She maintained that the respondent expected her to take care of the children almost exclusively while his responsibility was to support the family by

farming. He operated the farm as the sole shareholder, director and officer of a farming corporation. The oldest child developed a serious medical problem when she was three. The second child developed severe anxiety in public school. As a consequence, the petitioner devoted additional time to meeting the needs of the children and was unable to take on employment or schooling. The parties separated initially in 2005, reconciled in 2006, and separated again in 2008. After each separation, the parties executed interspousal agreements. In the 2008 iteration, the respondent was to pay child support at $3,500 per month and spousal support at $1,500 per month with a review scheduled in November 2013. The parties agreed that during that five-year period the petitioner would retrain to become self-sufficient. The agreement also recognized that the oldest child had been diagnosed with a serious illness that might require the petitioner to withdraw from school to care for her, in which case, the spousal support might continue beyond the five-year period. In 2015 the petitioner began studying part-time to become an administrative assistant, expecting to finish in 2019. She planned to work full-time after the children each finished high school. The petitioner testified that after she left the marriage, her standard of living dropped. For example, she was unable to afford holidays or to renovate her residence. The petitioner had initiated the review of support in the fall of 2013 as required by the agreement but the parties could not resolve the matter so she applied to the court. She acknowledged that after September 2014 when the court made an interim order of $10,500 in monthly support combined with $8,000 in annual child tax benefit payments, her income was in the range of $134,000 per year. The respondent took the position that as the marriage was of only 10 years duration, he had paid for spousal support for ten years which was too long. The parties had not lived a lavish lifestyle during the marriage and after they separated, the petitioner expanded her expenditures from $66,800 in needs annually to over $180,000 per year. The respondent denied that he insisted that the petitioner be a stay-at-home mother or that the children needed the amount of attention that the petitioner said was required. He argued that his income should be determined on the basis of line 150 of his income tax returns for the past year ($219,900) or the average of the three last years ($221,600) because his farming corporation was somewhat debt-laden he had taken less in dividend income in order to protect it. Each party tendered expert opinion evidence regarding the financial position of the corporation. The issues were: 1) what income was available for support purposes to each of the parties; 2) what level of child support was appropriate and for what period of time; 3) was the petitioner entitled to spousal support and if so, at what level and for what period of time.

HELD: The court found with respect to each issue that: 1) the petitioner's income was negligible and it attributed $15,000 per annum to her because she had demonstrated in the past that she was employable. The court assessed the pre-tax corporate income for the

previous six years and found that the total amount available for support was $390,000 annually. The court rejected the respondent's argument that the post-relationship increase in his income should not be considered because it had found that the success of the farming corporation had been due to the petitioner's commitment to caring for their children during and after the marriage; 2) child support in the range established by the Guidelines was applicable and it was set at $6,490 per month regardless of the fact that the income at issue exceeded $150,000. The amount was payable after November 2013 through to June 30, 2018. It would change at that point because the oldest child completed high school then. After that date, it would continue at $3,143 per month until the youngest child turned 18 in October 2019; and 3) the petitioner was entitled to spousal support on compensatory and non-compensatory grounds. The petitioner could not pursue career goals during her marriage, the periods of separation and reconciliation and after the relationship ended on a final basis, due to the needs of her children. The respondent's earning power was increased because the petitioner shouldered all of the child care responsibilities. The respondent's farm generated a great deal of income for him that gave him the means to pay support to the petitioner on a non-compensatory basis as well. The court concluded that although the income available was above $350,000, the Guidelines range was appropriate in this case because the family had not lived an extravagant lifestyle and based on their means and needs, spousal support should be set at $6,500 per month. That amount should be paid from November 2013 when the intention to proceed with a review of support was confirmed to July 2018 when the oldest child finished high school. The court determined that both child support and spousal support should be paid retroactively as described because the review had been initiated in 2013. Accounting for the payments already made by the respondent, he owed $42,450 and $132,500 respectively for child and spousal support.

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Banbury v Westana Asset Management, 2018 SKQB 214

Danyliuk, July 30, 2018 (QB17599)

Statutes – Interpretation – Saskatchewan Farm Security Act, Section 48
Statutes – Interpretation – Farm Debt Mediation Act, Section 21

The applicants applied for a hearing pursuant to s. 50 of The Saskatchewan Farm Security Act (SFSA) after the respondent served them with a Notice of Intention to Take Possession of certain implements and equipment pursuant to s. 48 of the SFSA because the applicants had leased two implements from the respondent and had

fallen into arrears under the lease terms. In August 2017, the respondent served a notice under s. 60 of The Personal Property Security Act, 1993 plus a Notice of Intention to Enforce Security under the Bankruptcy and Insolvency Act. In January 2017, it served the s. 48 notice under the SFSA and in May 2018, it served a Notice of Intention to Enforce Security under the Farm Debt Mediation Act (FDMA). The respondent then informed the court that it acknowledged that prior notices served became invalid upon delivery of the notice under the SFSA and it advised that notices had been re-served upon the applicants. It applied to adjourn the matter sine die. The issues were: 1) whether the respondent properly served the mandatory statutory notices to entitle it to take possession of the implements; and 2) whether the matter should be adjourned.
HELD: The court found with respect to each issue that: 1) the respondent had not properly served the required statutory notices in the correct order and was not in a legal position to take possession of the implements. The Court of Appeal had decided in Chmil that notices under s. 21 of the FDMA must be served before the notice under s. 48 of the SFSA. As a result, the s. 48 SFSA notice was void in this case and the respondent could not effect seizure until it had complied with all the requirements of federal and provincial legislation beforehand; and 2) there was nothing to adjourn, as the s. 48 SFSA notice was a nullity.

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McCrea v McCrea, 2018 SKQB 215

Goebel, July 30, 2018 (QB17602)

Family Law – Spousal Support – Interim

The parties were married in 2005 and separated in 2017. The petitioner applied for interim spousal support of $800 per month retroactive to the date of separation. The respondent husband opposed the application on the ground that the petitioner had not established entitlement. The petitioner's claim was based solely on the disparity in income between the parties. During the course of the marriage, the petitioner's annual income was approximately $55,000 and the respondent's was between $89,000 and $93,000. At the time they separated, both parties worked in a retail business owned in part by the respondent. Following the separation, the petitioner had moved initially to a rental suite and found new employment with a comparable income. She later quit that position and moved into her new partner's home and started working for him at his fitness centre. The petitioner argued that she was entitled to interim spousal support because of the change in her lifestyle as she now had to work evenings and weekends.
HELD: The application was dismissed. The court found that on the

evidence presented by the petitioner, her needs were being met. The respondent continued to pay for the expenses related to the family home and was making payments on their line of credit.

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Sollows v Key First Nation, 2018 SKQB 217

Rothery, July 31, 2018 (QB17603)

Civil Procedure – Default Judgment – Application to Set Aside
Civil Procedure – Queen's Bench Rules, Rule 10-13

The plaintiff obtained a default judgment against the defendant, The Key First Nation, in the amount of $102,700 plus costs. The plaintiff had provided architectural services to the defendant. Counsel for the plaintiff sent a letter to the Chief in December 2017 demanding payment and further particulars were provided to him later in the month and again in early January 2018. On February 15, 2018 the plaintiff's statement of claim was served on a band councillor. After service and following a telephone conversation between counsel and the Chief, further particulars were provided to him and he was warned of the pending deadline to defend the action. The plaintiff noted the defendant for default on March 14, 2018 and took out default judgment on March 15. On March 21, counsel for the plaintiff received a letter from the defendant's law firm, advising that they had been retained to represent it and requesting that the action not be noted for default without reasonable notice. They were advised on March 22 by letter from the plaintiff's counsel that such an undertaking could not be given because judgment had already been entered. In this application, the defendant adduced evidence regarding an application made to the Federal Court by some band members in November 2017 for an order setting aside the election of the chief and councillors conducted on October 1, 2016. On March 21, 2018, the court annulled the election and ordered a new election. The court referred specifically to the misconduct of the Chief and the councillor with whom the plaintiff had been involved. Between March 21 and June 12, when the new election was held, the plaintiff was without a chief and councilors. The new Chief deposed that the new council had first learned of the default judgment on June 22. When the plaintiff's counsel was advised of same and refused to set aside the default judgment, the defendant applied to set aside the judgment pursuant to Queen's Bench rule 10-13 and sought leave to file a defence. The grounds for the application were that the judgment entered was greater than the amount due and upon the merits.
HELD: The application was granted. The judgment was set aside and the defendant given leave to file its statement of defence. The court

found that the judgment should be set aside as a matter of right because it was in excess of the amount due. The judgment was also set aside on the merits. It found that the time between service of the statement of claim and the default judgment was not sufficiently long to prevent the defendant from defending the action. As well, the defendant had provided an arguable defence to the claim in that it pled in its proposed defence of non-compliance with s. 2(3)(b) of the Indian Act. The delay had not caused the plaintiff irreparable harm.

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Raymore Credit Union v Olson, 2018 SKQB 226

McMurtry, August 27, 2018 (QB17614)

Foreclosure – Farmland – Saskatchewan Farm Security Act
Foreclosure – Procedure – Commence an Action

The plaintiff sought to commence an action to foreclose on the defendant's equity of redemption in land. Therefore, the plaintiff requested an order pursuant to s. 11 of The Saskatchewan Farm Security Act (SFSA) declaring that s. 9(d) of the SFSA did not apply to the mortgage on the lands. The defendant argued that the mortgage was a nullity because the plaintiff did not obtain a proper non-owning spouse declaration in compliance with The Homesteads Act, 1989. He also argued that the plaintiff failed to obtain a home quarter waiver as required under s. 17 of the SFSA. The Farm Land Security Board (FLSB) concluded that there was no reasonable possibility that the defendant could meet his obligations under the mortgage because he did not have a reliable source of income. The plaintiff disagreed with the FLSB 's conclusion that the defendant was, nonetheless, making reasonable efforts to meet his obligations. The plaintiff further argued that the proper time to consider the defendant's arguments was in the course of the action, not before it had been commenced.
HELD: The appeal court reviewed relevant case law and concluded that the defendant must bring his objections regarding the validity of the mortgage within the course of the action, not prior to its commencement. The court did not find that s. 19 applied because the defendant did not deny the debt owing to the plaintiff; he denied the validity of the mortgage. It would be necessary for the matter to proceed to trial to determine those issues. The court accepted the FLSB's conclusion that there was no reasonable possibility the defendant could meet his obligations. The plaintiff was entitled to proceed with its action.

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Dupuis v Taschuk, 2018 SKQB 227

Leurer, August 28, 2018 (QB17615)

Family Law – Division of Family Property – Dissipation
Family Law – Division of Family Property – Exemptions
Family Law – Division of Family Property – Valuation
Family Law – Division of Family Property – Valuation Date

The parties married in 2001 and ceased cohabiting in 2008. The parties owned and operated various businesses through corporations during their time together. One corporation, a holding company (Hold Co.) managed and acquired rental properties. Another corporation was incorporated to operate a coffee shop (Coffee Co.). In 2005, the parties incorporated another company (Office Co.) as a vehicle for an investment in an office building. In 2007, another corporation (WC Co.) was incorporated with a third party to sell mobile homes and acquire real estate. The petition was issued in June 2010. There was incomplete financial information regarding the financial situation of the companies at or near the petition date. After the petition date, the applicant continued to operate Coffee Co. and draw a salary from the same. She planned to continue to own and operate Coffee Co. after the division of assets. The other corporations continued operation until their assets could be sold. The respondent drew a salary to manage those companies. A month after the petition, the respondent opened investment accounts and eventually transferred $443,000 into them. The respondent also withdrew $205,379.47 from the accounts but did not account for the money. When all accounts were eventually closed, only $62,890.37 remained. The issues were as follows: 1) what family property existed as of the petition date; 2) what value should be attributed to family property to be divided; and 3) what orders should be made to effect a distribution of family assets in accordance with the Act.
HELD: The issues were determined as follows: 1) the Act requires identification of the property at the time the application was made, the petition date. The investment account did not exist at that time. The court listed the property that did exist at the time; 2) the respondent argued that the investment losses were losses of the companies and therefore he did not have to account for them all. The court made several conclusions: a) the money invested came from the companies; and b) the respondent intended to invest on his own personal account and for his personal benefit only. The court concluded that the respondent owed Hold Co. the $443,000. The shares in the companies were the family assets, not the individual assets owned by the companies. The court concluded that, with respect to valuation date, it would determine a value of each disputed item of family property as of a date that best achieves the purposes of the Act. The court determined the date of valuation for the family property as follows: Hold Co. was

valued as of the trial date because it remained active after the petition date with the goal of liquidating its assets. The value of Hold Co. was found to be $1,880,997.98. The tax liability of paying the value to the parties was considered by the court. The court directed that the parties distribute the Hold Co. money, after taking into account the money the respondent had to repay. The parties would be given an opportunity to make submissions regarding the specific order to achieve the distribution; Office Co.'s asset was sold, and the court determined that the respondent was not responsible for the interest paid to Canada Revenue Agency for late payment of taxes even though he was managing the company; Coffee Co. remained to be an active business and both parties valued its assets as at petition date and recognized the need to discount the values by taxes. The court concluded that a fair value was half way between the parties' values, or $112,000; the parties each had homes with similar net value; a residential lot purchased by the respondent after the parties separated, but before the petition date for $35,500, was sold 12 days after the petition was issued for $57,528.88. The court accepted the sale value as the value of the asset; additional lots were also purchased based on speculation. The court ordered that the lots be divided equally between the parties unless they agreed to sell the lots and divide the proceeds; and the court also dealt with vehicles, household possessions, and bank accounts. The final order made by the court included terms that: the respondent was to repay Hold Co. and the parties were given leave to make submissions regarding how to effect the final division of the company; the money in Office Co. was to be divided equally; the respondent was entitled to an equalization payment of $28,618.45 after considering the parties' homes, bank accounts, the respondent's lot, and Coffee Co., which was to be paid in conjunction with the division of other assets. The other lots were to be divided equally and transferred accordingly. The court also found that each party had an exemption pursuant to s. 23 of the Act for investments. If the parties were unable to conclude matters in a consent judgment based on the decision of the court, the judge would hear further oral submissions, after a draft judgment and written submissions were filed.

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Leboldus v Kamboz, 2018 SKQB 228

Zarzeczny, August 28, 2018 (QB17616)

Civil Procedure - Costs
Civil Procedure – Pleadings – Application to Strike Statement of Claim – Want of Prosecution – Delay
Civil Procedure – Queen's Bench Rule 4-44

The defendants claimed pursuant to Rule 4-44 of The Queen's Bench Rules to have the plaintiff's claim dismissed for want of prosecution because the plaintiff failed to move his action forward on a timely basis, the delay being inordinate and inexcusable. The statement of claim was issued in April 2012 in relation to a motor vehicle accident that occurred in December 2010.
HELD: The court applied a three-step analysis to determine whether or not the application should be granted: 1) the defendant was successful in establishing that the delay in moving the case ahead was inordinate; 2) the delay was inexcusable; 3) the statement of defence contained an admission by the defendants that they were negligent in causing the accident, so liability was not in issue. The plaintiff had difficulty obtaining medical information and reports regarding injuries and treatment. The matter was almost to the pre-trial stage. The court concluded that the defendants had not suffered any or significant prejudice due to the delay. It would not serve the interests of justice to deny the plaintiff recovery he was entitled to. The application was dismissed. Costs of the application were awarded to the defendant. The court also issued a Scheduling Fiat outlining steps and timelines to be taken by each party.

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Dubois v Government of Saskatchewan, 2018 SKQB 241

Wilkinson, September 7, 2018 (QB17618)

Constitutional Law – Charter of Rights, Section 2(b), Section 9

The applicants, the Government of Saskatchewan and the Provincial Capital Commission, sought an order compelling the respondents, individuals involved in a protest entitled "Justice for our Stolen Children" and who occupied a portion of the grounds of the Wascana Centre Park, adjacent to the Legislature, to vacate, remove their belongings and cease their unlawful use of the land unless a permit or authorization was first obtained in accordance with the Commission's bylaws. If the respondents failed to comply, the applicants sought authorization to dismantle the camp with police assistance and remove the protesters and their belongings. Wascana is property of the Government and the Commission takes care of it and passes bylaws to regulate its use. The Commission permits events to be held in the park through an application. In February 2018, the respondent protesters began a round-the-clock occupation of a section of Wascana. They erected tipis and other structures and burned a continuous fire without having obtained a permit from the Commission. During that month the applicants served an eviction notice on the respondents, without success, and then in June 2018, the Government issued a trespass notice

pursuant to s. 3(1)(d) of The Trespass to Property Act that was also ignored. The Government then dismantled the camp and, during the process, the Regina police arrested and detained six protesters for four hours. The arrests were made for obstruction because the individuals refused to vacate the tipi, lashed themselves to the poles, and added logs to the fire. The detention was deemed necessary until the tipi could be removed because the protesters threatened to return immediately and demanded that the police dismantle the tipi in a culturally appropriate manner and to allow the sacred fire to expire rather than being extinguished. As soon as they were released, the protesters reconstituted the camp. The applicants then applied for and obtained leave to commence an action under The Recovery of Possession of Land Act (RPLA), but discontinued the action while talks were held with the protesters. The respondents brought an originating application in July 2018 that sought a declaration that their ss. 2(b) and 9 Charter rights had been unjustifiably infringed. They argued that s. 3 of the RPLA and certain provisions in the Commission's bylaws requiring prior approval for the erection of structures, prohibiting burning fires or overnight lodging were unconstitutional, relying upon their right to freedom of expression under s. 2(b) of the Charter. They also claimed that their s. 9 Charter rights had been violated by the police when they were unlawfully arrested and arbitrarily detained. The applicants then filed a second application under the RPLA for the orders described.
Responding to the Charter issues, the Government conceded that the protesters' activity had expressive content but their choice of method and location of the protest had effected a usurpation to the exclusion of the public at large. Regarding the alleged breach of s. 9, the protesters argued that they had been advised they were arrested for obstruction under s. 129 of the Code. As one of the elements of the offence, judicial proceedings, was not present, there was no lawful basis for arrest on such grounds.
HELD: The application of the Government and Commission was granted and the court made the requested orders. The respondent protesters' request for declaratory relief was dismissed. The court found that the protesters were engaged in an act of trespassing on government property. They failed to seek and obtain appropriate permissions for their encampment. With respect to whether the protesters' s. 2(b) rights had been unreasonably infringed by the Commission's bylaws, the court applied the test set out by the Supreme Court in Montréal v 2952-1366 Quebec and held that the occupation diminished the rights of all others to access the space and their enjoyment of their fundamental freedoms. Regarding the protesters' allegation that their s. 9 Charter rights had been violated, the court found that the arrests were lawful regardless of whether the protesters believed they were arrested for obstruction. The police had the power to arrest the protesters under s. 12 of The Trespass Act while they were engaged in acts of continuing trespass. The police detention of the protesters was not arbitrary given their actions.

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Mezzo v Thiessen, 2018 SKQB 243

Scherman, September 10, 2018 (QB17619)

Landlord and Tenant – Residential Lease – Termination – Fundamental Breach
Contract Law – Breach

The applicants filed an originating application that sought to have a lease between them and the defendants declared at an end on the grounds of fundamental breach by the defendants. The defendants responded that the agreement was not one of lease but rather an agreement for sale (AFS) of the land in question and that there were no grounds to terminate the AFS nor the alleged lease. The applicants described that they agreed to the defendants moving on to a portion of a quarter section of their land and building a residence that could be moved. Construction began in spring 2017 and the defendants moved into the building in July and began paying $1,000 per month in September. The applicants claimed that the payments were rent and the defendants stated that they were purchase price installments. In January 2018, the parties signed a document entitled "residential lease agreement with option to purchase". It was poorly drafted but described the applicants as the landlord and the defendants as the tenant and provided a lease term of two years in respect of 15 acres of the quarter section. A rent of $994 was to be paid monthly and if the tenant was not in default in the performance of any terms of the lease, the tenant would have an option to purchase the property for $23,856. The defendants admitted that they signed a document in January 2018 but argued that it was another document, which they expected to reflect an oral agreement they had with the applicants to purchase the property over time. They alleged that the applicants altered the document that they signed and put a different one into evidence. After January the relationship between the parties deteriorated. The applicants alleged that the defendants placed their horses on lands outside of the leased portion and took steps to keep the applicants from gaining access. They threatened the applicants when they came onto their own lands. One of the defendants assaulted one of the applicants when he was working on a building on his own property. In fact, that defendant had been charged with nine offences committed against the applicants between February and August of 2018.
HELD: The application was granted. The court ordered that the lease be terminated and the defendants have no further interest in the land. The court found that the defendants owned the building and were given 90 days to remove it. They were given relief from forfeiture for a period of one month but after that time they must vacate the property. The court

found that the defendants had executed the document submitted into evidence by the applicants and it had not been altered. As the requirements of The Statute of Frauds had not been met by the defendants, there was no existing enforceable contract to purchase the subject lands from the applicants. Neither the construction of the residence or the monthly payment of money was unequivocally related to a contract to purchase land as opposed to a lease of land, particularly when the residence was constructed before the agreement in writing was executed. The defendants' actions in impeding the applicants' rights to enjoy the use and benefit of the remainder of their land constituted fundamental breaches and the applicants had made it clear to the defendants that they were treating the lease as terminated.

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Wilson v Adams Estate, 2018 SKQB 245

Kalmakoff, September 12, 2018 (QB17620)

Wills and Estates – Testamentary Capacity
Civil Procedure – Queen's Bench Rules, Rule 16-46, Rule 16-47
Real Property – Certificate of Pending Litigation – Discharge

The plaintiff applied for a declaration that the will of the deceased testatrix was invalid and an order revoking the grant of probate made to the defendant in his capacity of executor of the deceased's estate. In the alternative, he sought an order requiring the defendant to prove the will in solemn form and directing a trial. Other relief sought included a preservation order to prevent that nothing be done under the grant of probate pending the outcome of this application and for solicitor-client costs to be paid by the estate. The defendants sought an order vacating certificates of pending litigation registered by the plaintiff against certain parcels of land owned by a corporation of which the testatrix was the only shareholder. They also sought an order permitting the defendants to use certain proceeds currently held in trust to pays debts owed to the Canada Revenue Agency by the estate. The testatrix died in 2016 at the age of 93, unmarried and without issue. She had one brother but whether he was still alive was unknown. She or her corporation owned 28 sections of land and 500 head of cattle at the time of her death. The plaintiff was the testatrix's neighbour and friend and began working for her in 1975. In 2011, he alleged that he agreed to work for her ranching operation full-time, including caring for the entire cattle herd, on the basis that he would receive $1,000 per month to cover his expenses and that he would inherit the ranching operation. The testatrix advised the plaintiff in 2013 that she had put the agreement's terms in writing but it had not been found. The plaintiff argued that absent such agreement, he would not have continued to work for such

low payment. In 2011, the testatrix suffered a heart attack and during her hospitalization, her long-time lawyer met with her about making a will. The lawyer said that he had held power of attorney (POA) for the testator since 2008, but when he met with her in the hospital, she indicated that wanted the defendant to be appointed instead but was undecided about how her estate should be divided. The lawyer prepared a draft will for the testatrix's consideration, appointing the defendant as executor and granting him significant discretion in the distribution of the estate. The will provided instructions that because the defendant knew that certain persons were not to benefit and others who had been trustworthy and loyal to the testatrix should, he should use his best judgment to ensure that the latter receive some portion as he deemed fit. The lawyer advised the testatrix of the risks of such a will, but she signed it. In the years following her execution of the will, the testatrix expressed uncertainty about her affairs at certain times and discussed removing the defendant as her POA with the lawyer but never made any changes. Letters probate were granted in March 2017. The plaintiff filed his statement of claim in September 2017 and then registered certificates of pending litigation against the estate's lands in November. Various witnesses deposed that the testatrix and the plaintiff had had a close and loving relationship with the plaintiff and she had indicated orally that she would take care of him after her death. HELD: The plaintiff's application to have the will proved in solemn form and a trial held for the purpose was granted pursuant to Queen's Bench rule 16-46. His application under rule 16-47 to revoke the grant of probate was deferred pending disposition of the trial. His request for a preservation order was granted but modified so that the executor could obtain loans and pay any debts owed by the estate as they came due. The executor was also directed to apply to the registrar of titles to vacate the certificates of pending litigation. The court found that although the plaintiff did not have standing under Queen's Bench rule 16-47 to apply for revocation of the grant of probate, he did have standing under rule 16-46 because he "may" be interested in the estate. He had succeeded in demonstrating that there was a genuine issue for trial regarding the testatrix's testamentary capacity because when she executed her will she had recently suffered a heart attack. At that time, she did not seem to be able to deal with the question of how her ranching operation would continue after her death, a matter of utmost importance to her. She also failed to refer to any family members. There was evidence that the executor named by the testatrix had not been much more than an acquaintance of hers prior to the drafting of the will. The court vacated the certificates of pending litigation under s. 47(1)(d) of The Queen's Bench Act, because they caused prejudice and hardship to the estate, particularly in regard to the debt accruing to the CRA. The plaintiff was ordered to pay costs on a party and party basis to the defendants, calculated on column 2, with respect to the defendants' application. As the plaintiff was successful in his application, costs were awarded to each party on a reasonable solicitor-

and-client basis and to be paid out of the estate.

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McCrimmon v Northwest Tile Inc., 2018 SKQB 246

Leurer, September 14, 2018 (QB17621)

Statutes – Interpretation – Business Corporations Act, Section 278

The appellant and the respondents each appealed from the decision of a Provincial Court judge regarding the respondents' claim for the costs of remediation for defective work performed by the appellant (see: 2017 SKPC 21). The appellant was the sole shareholder, officer and director of Northwest Tile. The respondents contacted the appellant with respect to doing work in their home. After they had executed a contract with Northwest Tile and while work was still being done, the corporation was struck from the corporate registry because it failed to re-register. Based on the evidence, the trial judge concluded that the respondents knew or ought to have known that they were contracting with Northwest Tile and that it was solely liable for deficiencies that arose by virtue of the defective work performed prior to the lapse in registration. He determined that the appellant was jointly and severally liable with Northwest Tile for defective work performed after that date. A precise allocation of the judgment allocation did not occur pending the outcome of this appeal. The appellant's ground of appeal was that the trial judge erred in imposing personal liability for any portion of the deficiencies. The respondents cross-appealed, arguing that the appellant should be liable with Northwest for the entirety of the judgment amount.
HELD: The appellant's appeal was allowed and the respondents' cross-appeal dismissed. The court found that the trial judge erred in law in imposing personal liability on the appellant on the basis of the simple lapse in registration of the company. Simple non-registration under The Business Corporations Act does not invalidate actions of a corporation or turn them into actions of its principals. The contract entered into before Northwest Tiles' registration lapsed remained its liability.

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