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R v Gill, 2017 SKCA 76

Jackson Ottenbreit Ryan-Froslie, September 13, 2017 (CA17076)

Criminal Law – Assault – Aggravated Sexual Assault – Conviction – Appeal
Constitutional Law – Charter of Rights, Section 14

The appellant appealed his convictions for aggravated sexual assault and other charges on the grounds that his constitutional right to an interpreter as guaranteed by s. 14 of the Charter was breached and he was not able to fully participate in his trial as contemplated by s. 650 of the Criminal Code. The interpreter who had been selected was fluent in both Punjabi and English but had neither training nor experience in court interpretation. When the trial judge raised the issue of the interpreter's competence regarding the translation of legal terms, the defence and Crown counsel worked with him to create a lexicon to assist him. During the course of the trial, the appellant's wife testified from India. The defence brought a s. 14 Charter application on the basis that the interpretation of her testimony had not been complete. Rather than ordering a mistrial, the trial judge directed the witness to give her evidence again, utilizing a new interpreter. The issues were as follows: 1) whether the interpreter assistance provided met the standard set out in the Supreme Court decision in R v Tran; 2) whether the appellant waived his s. 14 right to interpreter assistance. The appellant identified a number of occasions when no interpreter assistance was provided and said that his s. 14 right had not been properly

waived; and 3) in the alternative, whether the remedy granted by the trial judge for the s. 14 breach pertaining to the testimony of the appellant's wife was appropriate.
HELD: The appeal was dismissed. The court found with respect to each issue that: 1) the trial judge had not erred in concluding that that interpreter was competent to provide interpreter assistance. The interpreter's lack of training and experience in translating legal jargon did not mean that he was incompetent to perform the task. The preparation of the lexicon had been a creative solution to the problem; 2) after examining the transcript, it concluded that the trial judge had not erred in finding proper waiver by the appellant in accordance with Tran; and 3) the trial judge had ordered an appropriate and creative remedy pursuant to s. 24 of the Charter.

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SEIU-West v Heartland Regional Health Authority, 2017 SKCA 84

Ottenbreit Caldwell Ryan-Froslie, October 3, 2017 (CA17084)

Administrative Law – Appeal – Arbitration
Administrative Law – Arbitration – Judicial Review – Standard of Review – Reasonableness

The appellant sought an order setting aside the judgment and order arising from judicial review of an arbitration decision. The appellant also asked the court to quash the arbitration decision, which dismissed 11 grievances. The parties disagreed as to whether the chambers judge correctly applied the standards of review.
HELD The appeal was dismissed with costs. The chambers judge correctly identified and applied the appropriate standards of review to the questions raised before him. His reasons were thorough and careful. He correctly found that there had been no breach of procedural fairness in the arbitration. He also correctly applied the standard of reasonableness in his review of the arbitration decision.

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Sun Country Regional Health Authority v Health Sciences Association of Saskatchewan, 2017 SKCA 86

Jackson Caldwell Schwann, October 11, 2017 (CA17086)

Labour Law – Arbitration – Judicial Review – Appeal

The applicant Regional Health Authority sought to set aside the decision of a Queen's Bench judge declining to intervene in the decision made by an arbitrator. The parties agreed that the standard of reasonableness applied to the judicial review. HELD: The appeal was dismissed. The court observed that the standard of review was reasonableness and the chambers judge committed no reversible error when applying that standard in his review of the arbitral decision. Although the court questioned the arbitrator's method of interpreting the collective agreement, it found that his reasons supported his interpretation and coherently explained why he had allowed the grievance. The chambers judge correctly concluded that the arbitrator's decision fell within the range of possible acceptable outcomes.

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R v Driscoll, 2017 SKPC 73

Gray, September 11, 2017 (PC17072)

Criminal Law – Motor Vehicle Offences – Impairing Driving – Refusal to Provide Breath Sample

The accused was charged with refusing to comply with a breath demand, contrary to s. 254(2) of the Criminal Code. After the accused had had six to eight drinks in a bar over a number of hours, she refused the bartender's offer to call a cab for her. When she left, driving her vehicle, the police were notified. An officer identified the vehicle and followed it for a period, during which time the accused's driving was unremarkable except for crossing the centreline briefly. A traffic stop was made and when the officer approached the accused, she was crying and said that she was in a lot of pain because of a hernia. The officer called an ambulance. The smell of alcohol coming from the accused was noted and she admitted she had just come from a bar and had had a little to drink. The officer made two ASD demands, but the accused responded that she needed medical attention. The officer arrested her and travelled with her in the ambulance. The accused continued to complain of pain during the trip and in the hospital. The paramedic who attended her testified that he was skeptical of the accused's complaint. The accused was discharged from the hospital within an hour. The accused testified that she had had hernia problems in the past and on the night in question experienced a very painful recurrence. She said that she did not provide a breath sample because she had too much acid reflux and knew how much pressure was required to

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provide a sample from a previous experience and that she was afraid that if she blew she might pass out. The accused advised that she waited a year after the incident before consulting a physician about her condition.
HELD: The accused was found guilty. The court found that the officer had grounds to form the requisite suspicion for a demand pursuant to s. 254(2) of the Code and that the accused had not complied. The accused had not established on a balance of probabilities that she had a reasonable excuse for not providing a breath sample.

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R v Dustyhorn, 2017 SKPC 78

Hinds, September 12, 2017 (PC17065)

Criminal Law – Driving/Care or Control with Excessive Alcohol – Impaired Driving – Presumption of Care and Control

The accused was found passed out in the driver's seat of a vehicle parked between the yellow lines in a parking lot. The vehicle was not running. The officer had to knock several times loudly to wake the accused. The accused had the car keys in his hand. Upon waking, the accused smelled of alcohol, had red, glassy eyes, was slurring his speech, was unsteady on his feet and said "who drove me?", "how did I get here?" and "he thought he had a driver". He was charged with having care or control of a motor vehicle while impaired by alcohol or a drug and while over .08.
HELD The accused was acquitted, there being reasonable doubt that he had de facto care or control of the vehicle. The accused rebutted the presumption of care and control despite being found in the driver's seat of the vehicle. The designated driver testified that he was, in fact, the designated driver for the evening and that he had only left for a period and had returned to drive the accused home. The accused did have the keys in his hand, which did pose some risk of danger, but the accused had no intent of driving. The accused was a credible witness and his statements to the officer on waking corroborated that he intended to have someone else drive him home. The officer's testimony that she found the accused heavily asleep corroborated the accused's testimony that he fell asleep after eating in his car while waiting for his designated driver to return to drive him home.

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R v Lommerse, 2017 SKQB 53

Megaw, January 3, 2017 (QB17309)

Criminal Law – Possession of Child Pornography – Validity of Search Warrant – Charter of Rights, Section 8

The accused was charged with the commission of sexual assault, sexual touching in relation to a 16-year-old and possession of child pornography. The accused came to police attention via a report by the complainant. She reported that the accused was often viewing a pornographic website while in her presence. The police prepared an information to obtain a search warrant (ITO). The ITO stated that the search would provide evidence of the accused's viewing of pornography in the presence of the complainant, bolstering the complainant's credibility. The ITO did not reference possession of child pornography. The ITO sought only a search of the "search history on the computer". The issued warrant authorized a search of the accused's computer and related devices and media, as well as documents pertaining to occupancy of the home and control of computer equipment. The complainant subsequently alleged that the accused had taken photos of her in the shower. The police did not amend the ITO to include a search for photos. The police executed the search and seized, inter alia, a laptop, an iPhone and CDs. The police delivered the material to a computer forensic specialist at the RCMP and requested a complete forensic search of the computer and phone to obtain a general search of the Internet history, pictures of the complainant and messages between the complainant and the accused. The police knew that the search of pictures was not included on the search warrant. The RCMP did not review the terms of the warrant prior to completing the examination and examined the entire contents of the laptop and phone. The accused submitted that his s. 8 Charter rights had been violated by the search and applied for exclusion of evidence pursuant to s. 24(2). The application proceeded by voir dire. The evidence was apparently located on either the accused's laptop or cell phone, but the nature of the evidence obtained was not disclosed at the voir dire. The following issues were raised: 1) What is the correct procedure to be used to challenge evidence seized pursuant to a search warrant; 2) Was the Crown able to call amplification evidence and have it considered in support of the search and seizure conducted; 3) Did the ITO set forth reasonable and probable grounds that the items sought were evidence with respect to the commission of an offence; 4) Did the ITO use boiler plate clauses;

5) Did the ITO establish reasonable and probable grounds that the items were likely to be found in the place to be searched; and 6) What was the extent of a search of a computer or computer device.
HELD: Evidence of the accused's search history was validly obtained. Other evidence was beyond the scope of the search warrant and obtained by violation of the accused's s. 8 rights. The court held: 1) There is a two-step inquiry to be made when real evidence is seized during a search. The first step is an inquiry into constitutionality, and the second is reached only after a constitutional infringement has been established. Both inquiries impose an onus on the person claiming infringement. The standard of proof is the balance of probabilities. Challenges to constitutionality of warranted searches may involve either or both a facial and a sub-facial attack on the authorizing warrant. The record examined on facial review is fixed: it is the ITO, not an amplified or enlarged record; 2) In attempting to enter evidence of the complainant's allegation that the accused took pictures of her in the shower, the Crown relied on an argument that the ends justified the means. This amplification evidence sought to allege a whole new offence and area of search. It was not admitted; 3) The point of this voir dire was not to determine admissibility of evidence outside of the search warrant context. There was no requirement that evidence sought in support of allegations made be directly connected to a complainant or the actual subject matter of a complaint; 4) The ITO did not use impermissible boiler plate clauses when read in its entirety. However, it did not set forth reasonable and probable grounds that text messages were evidence with respect to the commission of an offence; 5) The ITO provided sufficient description. It was reasonable to infer that search history meant search history of the accused with respect to the websites defined in the ITO. Further argument was required on whether text messages could be included; and 6) Police are not entitled to rummage through entire contents of a device searching for other evidence. The ITO sought only the search history.

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R v Lommerse, 2017 SKQB 119

Megaw, April 26, 2017 (QB17310)

Criminal Law – Indictment and Information – Amendment

At the close of its case, the Crown applied to amend one count of an indictment. The indictment stated that the accused had child

pornography in his possession on October 25, 2013, but police seized his computer on June 1, 2013. The Crown sought to have the date amended to provide for a range from January 1, 2013, to June 1, 2013. The information for the charge was sworn on October 23, 2013, and it appeared that alleged possession date was entered in error. Counsel for the accused argued that the amendment would be prejudicial to the accused because of changes in the law between the relevant dates and because his cross-examination of Crown witnesses may have changed had the count been amended earlier.
HELD: The amendment was allowed. There was nothing in the preliminary hearing transcript, or the evidence presented at trial, to suggest that the date was anything other than an error. None of the witnesses referred to this date as being the possession date and none were cross-examined in respect of the date. All evidence before the court concerned the time frame for which the Crown sought the amendment. There was no concrete suggestion of what prejudice would occur if the amendment were permitted, or of what strategy would have changed.

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R v Lommerse, 2017 SKQB 123

Megaw, April 28, 2017 (QB17311)

Criminal Law – Child Pornography – Accessing
Criminal Law – Indictment and Information – Amendment

The accused applied for a directed verdict with respect to a charge of possession of child pornography. He submitted that the Crown failed to provide any evidence to establish possession of child pornography images located on his computer in the allocated space. The Crown opposed the application. Alternatively, the Crown sought to establish that accessing child pornography is an included offence of possession of child pornography. In the further alternative, the Crown sought to amend the indictment to include the offence of accessing child pornography.
HELD: The court directed a verdict of acquittal. There was no evidence that the accused was in possession of child pornography. The images that formed part of the evidence were contained solely in temporary Internet files. There was no evidence to suggest the accused was either aware of the presence of the images, or that he had available access to the images. The evidence confirmed that a computer's caching function is automatic and not indicative of any level of control or possession

by the accused. Accessing child pornography is a separate, distinct offence, not a lesser included offence of possession. It would be fundamentally unfair to the accused to amend the indictment following preliminary hearing, voir dire and the complete Crown case.

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R v Lavoie, 2017 SKQB 265

Dovell, September 11, 2017 (QB17280)

Criminal Law – Motor Vehicle Offences – Dangerous Driving Causing Death – Sentencing

The accused was found guilty of three counts of dangerous driving causing death, contrary to s. 249(4) of the Criminal Code, and one count of dangerous driving causing bodily harm, contrary to s. 249(3) of the Code. During his employment as a professional truck driver, the accused had driven into a construction zone on a highway and hit another vehicle that had been stopped. The three teenage occupants of the vehicle were killed and a flag person was severely injured as a result of the collision. The accused was sure that he had not been asleep at the time of the accident but felt that he had not been paying attention. He had not noticed any of the signs posted at 100-metre intervals after the start of the construction zone 1.6 km south of the accident. The accused was 41 years of age. He had obtained his A-1 driver's licence in 2009 and had a clean driving abstract. He was married and had three children. He had recently been diagnosed with mild sleep apnea. He expressed remorse to the victim's families and suffered from post-traumatic stress disorder.
HELD: The accused was sentenced to three years in imprisonment on the first count and three years concurrent for the second and third counts, and one year concurrent to the other counts on the fourth count. He was prohibited from operating a motor vehicle for five years and from possessing a firearm for 10 years after his release from imprisonment. The aggravating factors in the case were that the accused's inattentiveness caused the death of three people and severely injured another person. The impact of the children's deaths was devastating on their families. The accused was a professional driver and capable of exercising more skill and vigilance, especially when he was operating a semi-trailer truck in a construction zone. The mitigating factors were that the accused pled guilty and expressed profound remorse. He had not been

drinking and had a clear driving record. The accused was at low risk to re-offend.

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R v Isherwood, 2017 SKQB 274

Popescul, September 14, 2017 (QB17264)

Criminal Law – Application for Court-appointed Counsel

The accused was charged with possession of drugs and possession of various other drugs for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. He applied for a court-appointed counsel and a stay of criminal proceedings until the appointment. The accused argued that he met the Rowbotham criteria because he was indigent and incapable of representing himself at trial due to the complexity of the case and his limited education. He submitted the letter in which he was denied Legal Aid. This letter had been prepared after the accused had terminated the services of a Legal Aid lawyer and requested that it provide him with another lawyer. Legal Aid refused, claiming that the termination was unreasonable. The Attorneys General for both Saskatchewan and Canada opposed the application on the ground that as the accused had terminated his relationship with the lawyer without reasonable explanation, he should be deemed to have elected to represent himself. After the applicant had testified at his application, the Attorney General (Canada) sought to call the Legal Aid lawyer who had been assigned to the accused to aid in determining whether the applicant's decision to terminate his services was reasonable. The applicant argued that he had not waived solicitor-client privilege and that there would be nothing legally relevant in his former lawyer's testimony.
HELD: The application was granted. The accused met the Rowbotham requirements. The court found that the accused's Legal Aid lawyer's testimony regarding the reasons for the termination of the relationship was irrelevant in the face of Legal Aid's continued decision to deny legal representation.

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Saskatchewan Government Insurance v Bear, 2017 SKQB 276

Chow, September 15, 2017 (QB17266)

Civil Procedure – Pleadings – Application to Strike – Want of Prosecution

The defendant applied to strike the plaintiff's claim pursuant to rule 4-44 of the Queen's Bench Rules. He alleged inordinate and inexcusable delay in prosecution of the claim. After serving a defence to counterclaim, the plaintiff took no further action on the matter for approximately 57 months. The plaintiff averred that the file was inadvertently overlooked.
HELD The plaintiff's claim was struck, with costs to the defendant. The delay was inordinate and clearly inexcusable. While there was no evidence of actual prejudice to the defendant, there would be impairment of the memory of witnesses. The claim was a private claim for recovery of damages. As such, it did not give rise to genuine issues of broader public importance.

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R v St. Cyr, 2017 SKQB 279

Chow, September 11, 2017 (QB17254)

Criminal Law – Evidence – Credibility

The accused was charged with 18 violations of the Criminal Code. He pled guilty to two of the charges and the Crown stayed two others. The complainants testified that three men had broken into their apartment by kicking in the door on the day in question. The intruders were masked and demanded money and jewelry. The accused was alleged to have been carrying a gun. At one point, when one of the complainants was alone with the accused, he threatened to shoot him if he moved and then expelled an unspent round from the handgun onto the floor. He and the other accused left the apartment carrying various items and drove away in a van, firing two shots as they fled. The complainants were drug dealers and had installed a surveillance camera in the apartment with the result that much of their testimony was confirmed by the video recording. The police found the unspent bullet on the floor and the empty casing in the alley behind the apartment. The complainants recognized one of the intruders and identified him (Haney) but were not able to identify the second and misidentified the third person. When the police arrested Haney, he gave a warned statement to the police in which he did not deny his involvement in the incident but claimed that he had been helping one of the complainants in a ruse to file a false insurance claim. He then identified the accused and another man as the other two intruders. The other

man testified as a witness for the Crown and he too identified the accused as the third intruder. During a search of the accused's trailer the police found a handgun, ammunition, the sweatshirt that the complainants had described as clothing worn by one of the intruders, and items of jewelry matching those taken from the apartment. The unspent bullet and the casing were established to have been used in the gun found. When the police located the van used in the incident, it contained other items stolen from the apartment. The van was owned by the accused's girlfriend. The accused elected to give evidence in his own defence. He testified that on the day in question he allowed Haney to borrow his girlfriend's van. While the van was gone and during the time period of the incident, he was at his girlfriend's house. He suggested that other people had access to the trailer and that the gun and ammunition belonged to Haney. He said that he was not aware of the existence of the stolen jewelry found in the trailer. The accused's girlfriend testified as a Crown witness and her testimony contradicted the accused's evidence that he had been with her at the relevant time.
HELD: The accused was found guilty of ten of the remaining offences with which he had been charged. The court reviewed issues related to the credibility of witnesses, such as the Vetrovec warning related to the testimony of the unsavoury witnesses (Haney and the other intruder), but in the end found that it did not believe the accused's evidence.

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Clark v Moose Jaw (City), 2017 SKQB 283

Brown, September 19, 2017 (QB17257)

Civil Procedure – Injunction

The plaintiffs brought an action against the defendant, the City of Moose Jaw, for damages caused to their property by the slumping of land. As the slumping was an ongoing process, the defendant provided notice to the plaintiffs that they had to vacate their property and demolish all structures by July 2017 due to the unsafe conditions. An order to comply was issued by the defendant pursuant to s. 17(4) of The Uniform Building and Accessibility Standards Act. The plaintiffs appealed the order to the Building and Accessibility Standards Appeal Board. The board revoked the requirement that the plaintiffs vacate and demolish from the date fixed in the order and changed the time period to the owner's earliest convenience given the unsafe conditions of the riverbank. The board determined that the

defendant's order was based upon a misinterpretation of its review of a 1980 geotechnical report concerning the site and its finding that urgency was imperative. The plaintiffs then applied for an injunction styled as a preservation order to prevent the defendant from moving forward on forcing the vacating of the plaintiffs' residences.
HELD: The application was adjourned for a period of one month. As neither the plaintiffs nor the defendant had provided any expert evidence at the application, the court could not make an open-ended injunctive order. The parties were to provide available evidence of risk and the timing of anticipated further slumping to inform the court in its decision-making.

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Perdikaris v Purdue Pharma, 2017 SKQB 287

Ball, September 22, 2017 (QB17272)

Class Action – Approval of Settlement
Class Action – Lawyers' Fees

The plaintiff applied for an order approving the fees requested by class counsel, approving a settlement agreement and approving a proposed payment to provincial health insurers. The settlement agreement was contingent on court approval in Saskatchewan, Ontario, Quebec and Nova Scotia and received approval in all jurisdictions other than Saskatchewan.
HELD The court did not approve the settlement agreement. The insurers are not parties to the agreement or members of the class. In Saskatchewan, their claim is governed by The Health Administration Act. Section 19(6) of the Act requires that the minister consent to any settlement that is for less than payment in full of the cost of health services. Class counsel was unable to provide an estimate of the amount to be received by the insurers and did not provide evidence of the insurers' consent to the settlement. The insurers did not receive notice of the application. Further, the structure of the agreement raised concerns about conflict of interest between class counsel's duty to class members and duty to the insurers. The specific provisions of the agreement also raised concerns about potential collusion between class counsel and the defendants. No decision on class counsel's legal fees should be made until the court is in a position to review and approve a settlement agreement and the court cannot make a decision on whether the settlement is fair and reasonable to the class members without making a determination on legal fees. Counsel may reapply for approval

of the agreement with supplementary material and notice to the insurers, may amend the agreement by removing the sections relating to the insurers and reapply for orders respecting fees and the remaining sections of the agreement or may return one or more of their motions for certification and other outstanding applications to a court of competent jurisdiction.

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C.M. v S.K., 2017 SKQB 289

Wilson, September 26, 2017 (QB17282)

Family Law – Family Property – Interspousal Agreement
Family Law – Custody and Access

The parties cohabited from 2007 to 2011 and then reconciled and resumed their relationship until 2013 when it ended. They had one child, nine years of age at the time of the trial. Since 2014, the parties had consented to and participated in an order of shared parenting where the child lived with each of them every other week. The petitioner father wanted to have primary or sole custody of the child, with the respondent to have specific access every second weekend. The respondent took the position that the existing arrangement should continue as it was in the best interests of the child. The petitioner expressed concern that the respondent had a drinking problem and was not looking after the child properly. The respondent denied that she did have such a problem, although there was evidence that both parties had abused alcohol and drugs during their relationship. The separation in 2011 occurred because the petitioner had assaulted the respondent and she continued to worry that he had ongoing issues with anger management. When the parties reconciled, they had signed a cohabitation agreement in which the respondent agreed that her share of the the equity in the family home would be set at 37 percent. The respondent said that the petitioner had coerced her into signing the document. He arranged that she should receive legal advice from the lawyer who had prepared the agreement and had been present when the lawyer advised her. The issues were as follows: 1) what parenting arrangement would be in the best interests of the child and if the parties' past conduct should be considered; 2) the amount of child support; and 3) whether there was a valid cohabitation agreement and, if so, how should the family property be divided.
HELD: The court found the following with respect to each issue: 1) the existing custody arrangement was in the best interests of

the child and ordered that the parties should have joint custody and the child should reside with each of them for alternating weeks. Although the court had concerns about both parents' capacity to parent based on past conduct, it determined that both were able to do so; 2) child support should be paid in accordance with s. 9 of the Federal Child Support Guidelines and the court applied a straight set-off approach. Based on each of the parties' incomes, the petitioner would pay $137 per month to the respondent; and 3) there was insufficient evidence presented by the respondent that she signed the agreement in oppressive circumstances. The agreement itself was not fundamentally flawed. Therefore, the court ordered that the respondent was to receive funds representing a 37 percent share of the equity in the family home after it was sold.

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Savoy v Savoy, 2017 SKQB 290

Megaw, September 26, 2017 (QB17274)

Family Law – Child Custody and Access – Variation – Change in Circumstance
Family Law – Spousal Support – Variation Orders – Non-compensatory – Need

The father applied to vary a final judgment in respect of custody, parenting and spousal maintenance. The parties had three children. The father was 74 and did not work outside the home. The mother was 44 and a medical doctor. Pursuant to the judgment, the mother had primary care of the children and the father had specified parenting time with the youngest. There was no order regarding parenting for the older children and no order for payment of child support. The mother paid the father non-compensatory spousal support. Since the judgment, the youngest child's school schedule had changed and one of the older children began living with the father.
HELD There was no material change in circumstances to warrant a variation of custody or of spousal support. A change in school schedule is not a material change in circumstances. The trial judge made no parenting order regarding the older children and there was no material change warranting alteration. There was not sufficient evidence to establish the father's needs, means, or other circumstances having changed in such a way as to be considered a material change in circumstances. His actual expenses had not increased and his pension income had increased. The items identified in the Thompson decision were

not present in this case.

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Gordon Estate v Regina Qu'Appelle Regional Health Authority, 2017 SKQB 291

Barrington-Foote, September 26, 2017 (QB17296)

Statute Interpretation – Health Information Protection Act

The applicant appealed a decision of a trustee of health care information pursuant to s. 50 of the Health Information Protection Act after the respondent did not comply with one of two recommendations made by The Information and Privacy Commission. The appeal sought disclosure of personal health information, including documents the commissioner said could be withheld. It also sought further search of the respondent's records, although the commissioner had recommended no further search. The parties made submissions on the scope of the appeal and on appeal procedure. The respondent submitted that the matters properly at issue had been previously determined by the court.
HELD One object of the Act is access to information. An interpretation of s. 50 that limits the scope of appeals only to explicit issues addressed in a commission recommendation or to a trustee's explicit response to a recommendation does not promote such object. The right to appeal extends to all aspects of a trustee's decision that are alleged to have resulted in a breach of its obligations under the Act. Section 50 provides for an appeal de novo, therefore, the court finds the facts and law. The court is not limited to the evidence on record. It can rely on affidavit evidence, has discretion to permit cross-examination on affidavits and can hear viva voce evidence. Given the scope of the appeal, the matter was not res judicata.

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Katsiris v Katsiris, 2017 SKQB 292

Layh, September 26, 2017 (QB17283)

Civil Procedure – Limitations Period
Contract – Breach – Promissory Estoppel

The defendant brought an application under Queen's Bench rule

7-2 for summary judgment to dismiss the petitioner's claim. The parties separated in 2006 and in 2007 signed an interspousal agreement in settlement of all marital issues. In it, the defendant provided that he would pay to the plaintiff the sum of $150,000 by April 2012 as an equalization of the value of the family home. He paid $50,000 but failed to make the final payment in time. The plaintiff issued a statement of claim in May 2015 alleging that in June 2013 the defendant had acknowledged the debt and offered to pay it by January 2014 as long as the plaintiff did not take legal action. She did not, but the defendant failed to pay. The plaintiff submitted that a new offer and acceptance took place in June 2013 that replaced the 2007 agreement, although she admitted that it was without consideration and the promise was gratuitous. In October 2015, the respondent defended the action, relying upon s. 5 of The Limitations Act. He then brought this application for summary judgment, challenging the merits of each of the petitioner's grounds of claim, including the expiry of the limitation period. In her affidavit in response, the petitioner requested the court to order that her claim was not statute-barred because, to her detriment, she had relied upon the respondent's promise to pay and allowed the limitation period of the original agreement to expire. Therefore, the defendant was estopped from relying upon the limitation period to escape his obligation to pay. The defendant argued that his promise was insufficiently unequivocal or specific to reasonably alter the legal relationship between the parties. In order for a promise to engage the doctrine of promissory estoppel, it must make reference to the limitation period.

HELD The application for summary judgment was granted on the basis that the claim was statute-barred. The court found that the appropriate test was whether the nature of the defendant's promise by express intention or reasonable inference effectively altered the legal relationship between the parties. The limitation period for the breach of the 2007 agreement had commenced in April 2012 and would expire in April 2014. The legal relationship after the June 2013 promise did not change that – the parties agreed that the defendant would pay by January 2014 if the petitioner refrained from legal action. The court found that the petitioner had not relied upon the promise to her detriment. The limitation period had started to run beforehand and the petitioner was not left in greater or lesser peril of the limitation period because of the respondent's broken promise. She had had time regardless to commence her action within the limitation period.

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Jardine v Saskatoon Police Service, 2017 SKQB 293

Barrington-Foote, September 26, 2017 (QB17275)

Civil Procedure – Queen's Bench Rules – Summary Judgment – Costs
Torts – Defamation – Defences – Qualified Privilege

The plaintiff sued several defendants. The court struck or granted summary judgment in favour of all but one defendant whom the plaintiff alleged had defamed him by making a false report to police. The court heard viva voce evidence to determine whether there was a genuine issue requiring trial.
HELD There was no genuine issue requiring trial. The defendant was awarded summary judgment. Statements made to police prior to commencement of judicial proceedings are protected by qualified privilege. At issue was whether the defendant made a false report to police and, if so, whether her dominant purpose was malicious. There was no evidence that her report to police was motivated by malice, ill-will or other improper motive. The plaintiff's claim could not succeed. The matter was sufficiently complex to justify costs on Column 2 of the Tariff. Solicitor-client costs were not appropriate. The plaintiff believed in his cause and that his case might succeed.

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Krammer (Ackerman) v Ackerman, 2017 SKQB 294

Megaw, September 27, 2017 (QB17276)

Family Law – Child Custody and Access – Variation – Change in Circumstance
Family Law – Child Support – Imputing Income
Family Law – Affidavits

The respondent sought a complete change to the current parenting arrangement, which had been determined by final order and had been in place for four years. He further sought to have income imputed to the petitioner on the bases of her ability to earn income, over-deduction of expenses from income and unreported income. Multiple affidavits were filed in respect of the issues raised. Both parties brought notices of objection to affidavit materials.
HELD The respondent was more successful on his notice of objection and was awarded costs of $500. There was no material change in circumstances justifying a change in parenting arrangements. Allegations of child abuse were not established

and allegations that the oldest child did not want to return to the petitioner's house did not constitute a material change in circumstance. Based on the present material, there was no reason to order a custody and access assessment. Pursuant to s. 96 of The Queen's Bench Act, 1998, and by the judge's own motion, the court ordered the parties to enroll the children in professional counselling services. The materials before the court were insufficient to determine the issues regarding the petitioner's income. It was appropriate that income issues be canvassed at a hearing.

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McKay v Boardwalk Reit Properties Holdings Ltd., 2017 SKQB 298

Turcotte, September 28, 2017 (QB17285)

Statutes – Interpretation – Residential Tenancies Act, 2006, Section 49

The plaintiff brought an action claiming damages against the defendant for pain and suffering arising out of an injury sustained by him when he tripped and fell on the sidewalk outside of his apartment building. The building was owned and managed by the defendant. The plaintiff was severely visually impaired. He had walked on the portion of the sidewalk many times before the incident without noticing a crack. On the day in question, he noticed that a child's bike was lying on the walk in front of him and he attempted to walk around it. His foot stepped into a V-shaped crack on the edge of the sidewalk, lost his balance and fell to the ground. His elbow was shattered and he was hospitalized for five days following surgery to repair the fracture. The sidewalk crack was described as being one inch deep and approximately two to three inches wide at its widest point. In an affidavit sworn by the defendant's employee in charge of its building and grounds maintenance, she described that the sidewalks were visually inspected each day by the landscaper in charge of the property. If a crack was seen, it would be sprayed with yellow paint. In this case, the manager deposed that the crack was not one that the defendant company would usually spray and would not require any immediate maintenance.
HELD: The action was dismissed. The court found that the plaintiff's tenancy was governed by s. 49(1) of The Residential Tenancies Act, 2006. The defendant owed a duty of care to its tenants to keep the common areas in a reasonably safe condition.

The defendant had met the standard of care in this case as it had a regular inspection and maintenance system in place to keep the premises in a good state of repair and fit for habitation, use and enjoyment by the tenants. The type of damage to the surface of the sidewalk in this case was common in the province and across the country and the obligation on landlords was not to maintain a sidewalk in a pristine and completely smooth state.

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Saskatchewan v Capitol Steel Corp., 2017 SKQB 302

Kalmakoff, October 3, 2017 (QB17287)

Contract Law – Arbitration Clause
Statutes – Interpretation – Arbitration Act, 1992, Section 18
Arbitration – Judicial Review

The applicant, the Government of Saskatchewan, applied to the court for review of decisions made by an arbitrator. The parties were involved in a dispute regarding the amount of damages to which the applicant was entitled after the respondent failed to provide materials in a timely fashion for a bridge construction project. Originally the contract between the parties provided for daily and lump sum liquidated damages, but the provisions were displaced after the parties entered into a mediation/arbitration agreement. If the matter could not be settled during the mediation process, the agreement made provision for arbitration and gave the arbitrator authority to hear and determine the matters under The Arbitration Act, 1992. The parties each submitted their positions regarding the dispute, and the respondent's was that the delays in delivery of the building materials were due to matters beyond its control. As the applicant refused to negotiate an extension after the respondent had informed it of the reason for the delay, the respondent argued that the refusal was a breach of an implied term of the contract. As a result, the fixed delivery date was not applicable, and its obligation was to deliver within a reasonable time and it did. Thus, the liquidated damage provisions in the contract were not triggered and it did not owe the applicant for liquidated damages. The applicant filed an objection to the arbitrator's jurisdiction to determine the matter. It argued that the respondent's position was a repudiation of the arbitration agreement and requested that the arbitrator rule on the question of jurisdiction before the matter proceeded further. The arbitrator adjourned the application, to be dealt with at the arbitration hearing if the matter was not settled at mediation.

The mediation did not lead to a settlement and the applicant renewed its objection and filed another motion asking for a ruling. The arbitrator stated that there had been no change in the circumstances since his first decision in which he had contemplated the failure of mediation. He directed that the date for the arbitration hearing be scheduled and that the jurisdiction issue be decided before it.
HELD: The application was dismissed. The court found that the arbitrator had not ruled on the applicant's objection as a preliminary question under s. 18(8) of the Act but left it to be determined prior to the commencement of the arbitration hearing. Therefore, s. 18(9) was not engaged and judicial review of the arbitrator's decision was not permitted at this stage.

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Coates v Coates, 2017 SKQB 303

Acton, October 3, 2017 (QB17291)

Wills and Estates – Estate Planning – Transfer of Land

The plaintiff and her deceased husband owned six quarters of farmland. In 2010 they entered into an estate planning agreement with their four children that established that the parents were joint tenants and placed the farmland in joint names with the children. Upon the death of the last surviving parent, the property would belong to the children unless the last surviving parent's will provided otherwise. It further stipulated that there was no disposition of any interest in the property at the time, and the children held the title on those conditions. All children signed the agreement. After the plaintiff's husband died in 2011, judgments were registered against the titles to the family property. The judgments were against the defendant, one of the plaintiff's four children. The plaintiff paid the debts but the defendant continued to display financial mismanagement. To prevent further dissipation, the plaintiff asked all of her children to transfer titles to the lands back into her sole name. Only the defendant refused, and she commenced this action to have his interest in the lands transferred to her. The issue was whether the doctrine of resulting trust applied to the lands.
HELD: The court ordered the Registrar of Titles to transfer title to the six quarters into the name of the plaintiff as sole owner under s. 109 of The Land Titles Act, 2000. It found that the estate planning agreement clearly indicated that the defendant did not have a current vested interest in the farmland, and the plaintiff had proven the existence of a resulting trust because the

agreement established a lack of donative intent. The plaintiff's purpose was to preserve the farmlands for inheritance by her children and that would only be possible by being able to avoid registration of further writs against her property respecting the debts of any of her children.

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L.M.M., Re, 2017 SKQB 305

Elson, October 4, 2017 (QB17289)

Family Law – Child in Need of Apprehension
Statutes – Interpretation – Child and Family Services Act, Section 61

The applicant agency, Touchwood Child and Family Services Inc., sought a temporary order pursuant to s. 11(b) of The Child and Family Services Act (CFSA) that the three children of A.K. were in need of protection and that it be given custody of them. The agency had apprehended the children in April 2015 and provided care and services to them ever since. It was acting under an agreement made between its representatives and the Minister of Social Service under s. 61 of the CFSA for the former to assume, as a First Nations agency, a direct role and responsibility in child welfare services for the members of Touchwood First Nations resident on-reserve. Counsel for the applicant and for A.K. submitted that pursuant to the agreement, the applicant should have custody of the children as it was responsible for administering the CFSA in this instance. The respondent argued that neither the agreement nor the relevant provisions of the CFSA permitted the court to place custody of children in need of protection with an entity such as the applicant.
HELD: The application was granted but the order changed so that the children were placed in the custody of the Minister of Social Services. The court found that in the specific circumstances of this case the wording of the agreement did not delegate to the applicant any power or authority to assume custody of a child in need of protection.

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Canadian Natural Resources Ltd. v Rife Resources Ltd., 2017 SKQB 307

Currie, October 11, 2017 (QB17292)

Real Property – Lease – Oil and Gas Lease

The applicant applied for a declaration that an oil and gas lease that it had entered into with the defendants as lessors in December 1999 continued in force. The respondents applied for a declaration that the lease was terminated. The habendum clause provided for a 10-year primary term, but the lease would continue in effect after expiration of the primary term as long as there was continuous production, drilling or working on the lands. The parties agreed to extend the primary term to December 2011, and at that date, two wells on the land remained in production. The applicant applied to the Ministry of Energy and Resources in 2011 for approval of concurrent production because the wells began producing natural gas in excess of the gas to oil ratio permitted by provincial regulation. The Ministry informed the applicant in April 2012 that the application was not approved and ordered it to shut-in both wells pending further review. The applicant complied but also drilled other wells on the lands. They had both ceased production by February 2014 and no further drilling or re-working operations had been undertaken since. The defendants said that the lease expired at that date as a result. On that basis they had triggered the notice to lapse procedure under The Land Titles Act, 2000, whereby the applicant's caveats would be discharged. The applicant argued that the caveats continued in force. Although leased substances were no longer being produced from the lands, the two original wells were capable of production. The fact they were not was because of the Ministry's order, a cause beyond the applicant's reasonable control so that the lease continued in force by operation of a clause in the lease that deemed production if such an event occurred.

HELD The plaintiff's application for a declaration was dismissed and the defendants' application was granted. The court found that the purpose of the deeming provision was to protect the lessee if some event beyond its control occurred. It would allow the lessee time to resolve issues and resume production under the lease. In this case, the shut-in of the wells happened as a result of a cause beyond the applicant's reasonable control. After February 2014, though, the order ceased to operate as a cause under the deeming provision. The effect of the Ministry's order was of indefinite duration and was not the kind of intervening cause for which the provision was intended. The lease continued in force to the end of February 2014 by virtue of the applicant's other operations on the land.

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