The Law Society of Saskatchewan Library's online newsletter
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Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Conviction – Appeal
Criminal Law – Expungement of Guilty Plea – Appeal

The self-represented appellant appealed his convictions and applied to adduce fresh evidence. The background to the appeal was that the appellant had pled guilty to possessing cannabis resin for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act and possessing firearms without a licence contrary to s. 91(1) of the Criminal Code. Before trial and after the preliminary inquiry, the appellant's counsel advised him that his chances of acquittal were slim, they agreed that a plea bargain with the Crown was appropriate and the appellant pleaded guilty to three charges of what was originally a 14-count indictment. Prior to the date set for sentencing, he retained new counsel and applied to expunge his guilty pleas. During the hearing, the appellant's new lawyer withdrew and he represented himself. The sentencing judge denied the application (see: 2017 SKQB 131) and sentenced him to a 12-month conditional sentence as recommended in a joint submission by the appellant's original counsel and the Crown. On appeal, the appellant alleged ineffective representation by his second lawyer, who represented him for part of the expungement application, related to the fairness of the expungement hearing. He argued that her ineffective assistance resulted in a miscarriage of justice. He sought to adduce fresh evidence in this regard. He also appealed his convictions and submitted that the judge erred in concluding that the appellant pleaded guilty to the possession for

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the purpose of trafficking and in finding that the pleas were voluntary and informed. He also argued that his first counsel's representation was ineffective because he had not raised certain defences on his behalf.
HELD: The conviction appeal was dismissed and the applications to adduce fresh evidence were denied. The court found that the appellant was not prejudiced by anything his second counsel had done or failed to do. Before she withdrew, his counsel had led evidence relevant to the issues at play in the expungement hearing. There was nothing in the record or in the fresh evidence the appellant sought to adduce that undermined this conclusion. Regarding the ground that the sentencing judge erred, the court found that the audio recording of the proceedings showed that the appellant had pleaded guilty. The judge's finding that the appellant's pleas were voluntary and informed was based upon his acceptance of the evidence provided by the appellant's first counsel that he was well aware of the Crown's case and made his decision accordingly. The proposed fresh evidence regarding this ground would not have affected the result.

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101280222 Saskatchewan Ltd. v Silver Star Salvage (1998) Ltd., 2019 SKCA 59

Richards Ryan-Froslie Schwann, June 26, 2019 (CA19058)

Civil Procedure – Interlocutory Injunction – Appeal

The appellant appealed the decision of a Queen's Bench judge in chambers to dismiss its application for an interim injunction. It had bought a business from the respondents in 2015 and the purchase agreement contained a negative covenant that placed restrictions after the sale regarding from whom the respondents could buy, or to whom sell, scrap metal. In 2016, the appellant formed the belief that the respondents were breaching the covenant. It brought an action against them in 2017 and made its unsuccessful application. The appellant argued that the judge erred in finding that: 1) the appellant had not provided an undertaking as to damages nor asked that the requirement for same be dispensed with and in consequently denying the injunction. It submitted that the subject was not raised by the respondents nor the judge at the hearing and thus it was denied the opportunity to respond. Furthermore, the judge incorrectly found the lack of an undertaking as a stand-alone reason to deny the injunction where it should have been considered as only one factor in determining the balance of convenience; 2) the appellant had not sought a permanent injunction by way of relief in its statement of claim as it had in fact requested an interim injunction; and 3) aside from its failure to provide an undertaking, it had not shown it would suffer irreparable harm. The judge found

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[Watch v Live Nation Entertainment Inc.]

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that it was difficult for the appellant to argue irreparable harm because a considerable amount of time had elapsed since the alleged breach of the covenant. The appellant argued that the judge failed to take into account that this injunction, intended to enforce a negative covenant, differed from other interim injunctions.
HELD: The appeal was dismissed. The court found that the appellant's application for an interim injunction could not have succeeded because it had not provided an undertaking. It found with respect to each ground that: 1) the appellant was wrong. The matter of an undertaking had been raised in chambers by the respondents and the appellant's counsel had not responded. However, the chambers judge had in fact erred in when he stated that the absence of an undertaking was no more than a factor in the assessment of the overall justice and equities of the situation; 2) the chambers judge had erred in denying the injunction on this basis because the appellant had made the required request in its pleadings; and 3) the judge erred because he failed to consider the decision in Sask. Water and then failed to give regard to the clear breach of a negative covenant while analyzing the issue of irreparable harm. The court reviewed the evolution of the law since its decisions in Sask. Water through to Potash Corp. It stated that in an application for an interim injunction to enforce a negative covenant, a judge should first assess the strength of the plaintiff's case. If a judge finds, at the least, that there is a serious issue to be tried, the judge must go on to consider the question of irreparable harm and the balance of convenience to ultimately focus on the overall equities and justice of the situation.

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Hansen v R, 2019 SKCA 60

Jackson Barrington-Foote Kalmakoff, June 3, 2019 (CA19059)

Statutes – Interpretation – Criminal Code, Section 662, Section 686
Criminal Law – Mischief – Conviction – Appeal

The self-represented appellant appealed his conviction for mischief over $5,000 contrary to s. 430(3) of the Criminal Code (see: 2019 SKQB 88). After he filed the appeal, the Crown conceded there was no admissible evidence proving the damaged property exceeded $5,000 in value, but there was evidence that it was under $5,000, and requested that the appeal be allowed and a conviction for the lesser offence be substituted. The appellant then appealed his sentence at the hearing and the court permitted him to amend his notice of appeal orally.
HELD: The court dismissed the appeal from conviction and substituted a conviction for mischief, contrary to s. 430(4) of the Code. It set aside the sentence of five months and imposed one of four months. The court found that pursuant to s. 662(1) of the Code,

it had the power under ss. 686(1)(b) and 686(3)(b) to convict an accused of a proven included offence and substitute a verdict and a sentence.

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Shinkaruk Enterprises Ltd. v Saskatoon (City), 2019 SKCA 62

Richards Caldwell Leurer, March 18, 2019 (CA19061)

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

The appellants appealed the decision of a Queen's Bench judge that struck their statement of claim on three grounds, including that it disclosed no reasonable cause of action (see: 2017 SKQB 9). The respondent, the City of Saskatoon, made an order pursuant to The Property Maintenance & Nuisance Abatement Bylaw, 2003 requiring the corporate defendant to deal with vehicles and garbage located on its property. The appellants claimed that they had filed a notice of appeal to contest the order and they were not given enough time to comply with it. The judge found that the order was posted on September 21, 2016 and sent by registered mail to the defendant. The notice indicated that the contravention had to be remedied by October 13, 2016. On October 25, the City removed the items from the property.
HELD: The appeal was dismissed. The court found that the trial judge had not erred in striking the claim on the basis that it disclosed no reasonable cause of action. Under s. 56 of the Bylaw, the order had to be appealed within 15 days of the date of the order, which in this case was October 6. The appellant's statement of claim alleged that they delivered their notice of appeal to the respondent on October 21. Thus, on the basis of the facts alleged in their claim, the appellants had no cause of action as it was based on their filing a notice of appeal within the applicable time period.

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Graham v R, 2019 SKCA 63

Richards Jackson Tholl, July 16, 2019 (CA19062)

Criminal Law – Assault – Sexual Assault – Conviction – Appeal

The appellant appealed his convictions of assault and sexual assault committed against the complainant in July 2015. Before the trial, the defence applied pursuant to s. 276 of the Criminal Code to adduce evidence of the complainant's prior sexual activity. The appellant deposed and testified that after they had ended an 18-month

relationship in 2014, the appellant later offered to help the complainant by allowing her to stay in his residence. She moved there in June 2015. He said that they had sexual relations on occasions when she had been drinking. In the voir dire, the appellant argued that this past sexual history was relevant to honest but mistaken belief in consent. The trial judge dismissed the application because the defence could not provide an explanation as to the purpose of the evidence and found that it was not relevant to any issue in dispute. At trial, the complainant and the appellant both testified regarding their version of events. The complainant said that after she and the appellant had been drinking, she went home alone, feeling intoxicated and unwell. She went into the bathroom but could not remember anything further until she was awakened by the appellant trying to have anal intercourse with her in his bed. She kicked him off the bed and left the house. The appellant said that when he arrived home, the complainant was asleep on the bathroom floor. He carried her to her bedroom and went to bed alone in his room. He was wakened later when the complainant crawled into his bed and initiated intercourse with him and then suddenly kicked him off the bed and left his bedroom. They had not communicated verbally during the period in which the alleged sexual assault took place. The trial judge found both parties to be credible, but after applying the test in R v D.W., he found that he did not believe the appellant's testimony because it contained too many inconsistencies and determined that the evidence had not raised a reasonable doubt regarding the charge of sexual assault. The appellant's grounds of appeal were that: 1) a miscarriage of justice had occurred through the ineffective assistance of trial counsel. The appellant raised eight issues regarding his former counsel's performance. The first four of his allegations relied upon the admission of fresh evidence. The fresh evidence sought to be admitted was the preliminary inquiry transcript, the video recording and an affidavit sworn by the appellant regarding his counsel's failure to make notes of the video statement; 2) the trial judge erred in denying his application to admit evidence of the complainant's prior sexual activity; 3) the trial judge erred in failing to consider honest but mistaken belief in communicated consent; and 4) the trial judge erred in drawing factual conclusions resulting in an unreasonable verdict.
HELD: The appeal was dismissed. The court found with regard to each ground of appeal that: 1) the appellant failed to meet the burden of establishing ineffective assistance of counsel. He had not demonstrated that his trial counsel's performance fell below the range of reasonable professional legal assistance and that a miscarriage of justice had occurred. The application to admit fresh evidence was thus denied; 2) the trial judge had not erred. The defence of honest but mistaken belief in communicated consent had not arisen on the facts. The appellant's version of events, as set out in his affidavit for the s. 276 application, deposed to facts that, if true, would have represented actual consent through conduct by the complainant, not a mistaken belief in communicated consent. The purpose for which the appellant sought to have the evidence

admitted was impermissible as he was attempting to infer that because the complainant had consented to sexual activity with him while intoxicated in the past, she was more like to have consented at the time of the offence; 3) the trial judge had not erred. There was no air of reality to the appellant's assertion of honest but mistaken belief. The appellant's evidence described unmistakable consent by conduct. This evidence was rejected by the judge and there was no other evidence that the appellant honestly but mistakenly believed the complainant had communicated her consent; and 4) the trial judge had not erred. The trial judge's findings were supported by the evidence.

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R v Bird, 2019 SKPC 33

Schiefner, June 28, 2019 (PC19030)

Criminal Law – Weapons – Carrying a Concealed Weapon
Criminal Law – Weapons – Possession Dangerous to Public

The accused was charged with possession of a weapon for a dangerous purpose and carrying a concealed weapon. A motorist driving through downtown Prince Albert stopped at an intersection and observed the accused carrying a large knife that appeared to be a meat cleaver. He called the police and described where he had seen the accused and the colour and type of hooded shirt that he was wearing. Two officers responded to this complaint within a couple of minutes and observed a man in the same general area matching the description. Neither officer observed a knife. One officer decided to arrest the man, the accused, for investigative purposes. The accused did not comply with one officer's command that he remove his hands from the pocket of his hoody, but after the officer pointed his taser at him and repeated his command, he did so. The accused then assumed a submissive stance. The officer handcuffed him and informed him that he was under arrest for possession of a weapon. He was then searched and the constable found a meat cleaver inside the waistband of his pants. Both officers testified that they believed that the accused was concealing something and as he had been reported carrying a weapon, they thought their safety and public safety was at risk. The accused argued that: 1) his detention was unlawful because he was not promptly advised of the reason for it, and 2) the officer did not have objectively reasonable grounds to believe that he was committing an offence. The concomitant search of his person was therefore unlawful. He sought an order excluding the evidence obtained under s. 24(2) of the Charter because his detention and arrest were arbitrary and contrary to s. 9. A voir dire was conducted.
HELD: The court dismissed the Charter application because it was satisfied that that the detention, arrest and search of the accused

were lawful. The evidence from the voir dire was admissible at trial and the court found the accused guilty of both charges. The court was satisfied that the officers had sufficient grounds to either detain or arrest the accused because he matched the description provided by the motorist and was found in the same vicinity within a short time of the complaint being made. Their subjective belief that the accused was carrying a weapon was objectively reasonable. Under their authority to lawfully detain the accused for investigative purposes, the officers would have the authority to conduct a search for their safety and that of the public. The slight delay in advising him of why he was being detained was due to the circumstances and he was informed of the reason for his arrest within a minute after being handcuffed. The court regarded the meat cleaver carried by the accused as being within the definition of "weapon" in s. 2 of the Criminal Code because it found that it was intended as an object of intimidation with the potential to threaten or harm others. In refusing to remove his hands from his pocket, the accused demonstrated that he knew where the weapon was and concealed it contrary to s. 90 of the Criminal Code.

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R v Morin, 2019 SKPC 39

Schiefner, June 28, 2019 (PC19031)

Criminal Law – Motor Vehicle Offences – Leaving the Scene of an Accident

The accused was charged with two counts of leaving the scene of an accident contrary to s. 252 of the Criminal Code, two counts of impaired operation of a vehicle causing an accident resulting in bodily injuries and two counts of dangerous operation of vehicle causing bodily injuries. The accused's cousin testified at trial that she and the accused travelled in her vehicle from Saskatoon to Cumberland House. A third person was the designated driver because the witness and the accused planned to drink en route. Once they arrived in Cumberland, there was no evidence as to what, if anything, the accused drank during the one hour that the parties spent there, nor after they left to drive to Nipawin where they went to a bar. The witness was with another group of people and did not see what the accused drank. When they left the bar, the group proceeded back to Saskatoon in the early morning. The witness said that she was very intoxicated and when she realized that the accused was driving and not the designated driver, she made him stop the car and get out. She locked the doors, but the accused broke the driver's side window, got into the truck and pushed her out and then drove away alone in the direction of Prince Albert. She was able to contact the RCMP and report that her truck had been stolen. At approximately 5 am, two highway construction flagmen parked

their truck on the shoulder of the highway between Prince Albert and Nipawin. As they exited the truck, one of them noticed that another truck was driving toward them from the direction of Nipawin. It was not weaving and did not appear to be speeding. Neither of the men observed the vehicle drift across the highway and collide with their vehicle which in turn, hit them. Both were knocked down and injured. One victim glimpsed the driver of the other truck but identified the accused as the man who was driving the truck during the trial. While he was helping the other victim, the other driver left. An RCMP officer who came to the scene realized that the truck matched the description of the one reported stolen earlier and searched the area unsuccessfully to find the people, particularly the accused, who had been in it. Two other RCMP officers testified that that they had come upon the accused walking down a road approximately two kilometres from the accident scene. The officer said that they believed that the accused was impaired when they spoke to him as he smelled of alcohol.
HELD: The accused was found guilty of two counts of leaving the scene of an accident. He failed to stop and provide the required information and to offer assistance to the victims. The accused was found not guilty of the two counts of operating a motor vehicle while his ability to do so was impaired at the time of the collision and of the two counts of dangerous driving causing bodily injury. With respect to the first two counts, the court concluded that it could infer from the circumstantial evidence that the accused had the care and control of the truck and was the only person in it at the time of the collision and that he was aware of the accident, that the victims suffered injuries and that he left the scene in order to avoid civil or criminal liability. Regarding the remaining counts, the court found that the evidence was insufficient to prove that the accused was impaired and that although the accused's failure to confine his vehicle to his lane of traffic was dangerous, there was insufficient evidence to support the inference that the accused deliberately intended to create a danger to the public. Based upon the victim's observations of the oncoming truck, the accused was driving appropriately. Absent evidence of lack of sleep or intoxication, the court was not satisfied that the accused had the requisite mens rea to be convicted of dangerous driving.

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R v Superior General Partner Inc., 2019 SKPC 40

Henning, June 20, 2019 (PC19035)

Public Welfare Offence – Occupational Health and Safety

The corporate defendant was charged with breaches of ss. 12(a) and 12(b) of The Occupational Health and Safety Regulations, 1996, resulting in a serious injury to its employee contrary to ss. 3-78(g)

and 3-79 of The Saskatchewan Employment Act. The defendant operated a warehouse for drywall and other construction materials. The accident occurred while a flatbed semi-trailer unit was being unloaded. The flatbed was stacked with sheets of drywall. An employee was standing next to the trailer, assisting in unloading the sheets. A set of sheets attached to the ones being unloaded were pulled off, striking the employee on the head and causing him to suffer a severe concussion. He was wearing the normal safety gear at the time of the accident. He recovered from the injury. He testified that in his eight years of experience as an employee of the defendant, what had happened had not been anticipated and that he was not aware of it ever having happened before. He acknowledged that he had received training for the tasks he performed. The employee's supervisor, who had nine years of experience with receiving and shipping building materials, testified that if he had known that the sheets were attached, he would have approached the removal differently, but that it had never happened before. The employee responsible for occupational health and safety issues testified that the defendant's safety procedures included a full external safety audit every three years by the Saskatchewan Construction Safety Association plus yearly internal audits. The defendant published a detailed safety manual and kept records of employees' safety training. The unloading of the trailer in this case had been conducted in accordance with safety procedures. The witness said that in his 33 years of experience, he had never encountered another incident such as this one. Immediately after the accident, the defendant made changes to prevent future accidents. HELD: The charges were dismissed. The court found that the defendant had taken reasonable steps to ensure a safe working environment and to ensure that all employees complied with the procedures. The fact of the accident and the simplicity of the precautions that could have been taken and that were quickly adopted afterward was not proof of a failure to ensure a safe work environment. The defendant had established an extensive and up-to-date safety program with regular ongoing training that was audited. The employee had received specific training and was wearing the prescribed safety gear. None of the witnesses had encountered this type of accident before. If the court was wrong in concluding that the charges were not proven, then it would find that the defendant had met the requirements of due diligence and reasonable compliance for the same reasons.

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R v Green, 2019 SKPC 44

Kovatch, July 31, 2019 (PC19036)

Statutes – Interpretation – Natural Resources Transfer Agreement, Section 12

The two accused, Hill and Blair, were each charged with unlawfully hunting and Hill was charged with unlawfully carrying a loaded firearm contrary to The Wildlife Act, 1998. The trial proceeded on an agreed statement of facts that included that the accused were members of the Six Nations First Nation in Ontario. The Six Nations executed the Nanfan Treaty of 1701 and the accused claimed status as treaty Indians. In October 2018 they were hunting for food in Moose Mountain Provincial Park (park) and were charged with the offences described. The Crown conceded that certain Indian persons or treaty Indians had a right of access to, and the right to hunt within, the park. The issue was whether the accused were lawfully exercising a right to hunt for food under paragraph 12 of the Saskatchewan Natural Resources Transfer Agreement (NRTA). The defence argued that the court should apply the ordinary meaning of the words in paragraph 12, regardless of treaty rights, and determine that as the accuseds were Indians hunting for food within the province, they were protected by its provisions. The Crown argued that the purpose of paragraph 12 was to preserve and protect the Indians' treaty hunting rights. As the accused did not have prior existing treaty rights to hunt in Saskatchewan, they could not claim the right to hunt in Saskatchewan.
HELD: The accused were found not guilty of the charges because The Wildlife Act was not applicable to them. The court found that they were exercising a constitutional right granted to them pursuant to paragraph 12 of the Saskatchewan NRTA. It held that the section should be interpreted according to its ordinary meaning: Indian persons within the province have the right to hunt for food on all unoccupied Crown lands to which they have a right of access. The accused were Indian persons. The Crown conceded that they were hunting for food and that Indian persons had a right of access to the lands to hunt for food.

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R v Pastuch, 2019 SKQB 156

Elson, June 27, 2019 (QB19151)

Criminal Law – Fraud

The accused was charged with committing two offences between April 2006 and January 2013: defrauding investors by deceit, falsehood or other fraudulent means, contrary to s. 380(1)(a) of the Criminal Code and stealing money from investors, contrary to s. 334 of the Code. She was also charged with money laundering contrary to s. 462.31(1)(a) of the Code between January 2007 and January 2013. The allegations related to the investment of $5.5 million by more than 80 individuals or their closely-held companies from 2007 to 2009. The accused represented herself at trial after her application for a third court-appointed lawyer was denied (see: 2017 SKQB 211).

The Crown's case consisted of the testimony of witnesses that included 56 of the investors and an expert in forensic accounting as well as the results of the investigation by the Commercial Crime unit of the RCMP and voluminous documentary evidence. The accused had advised multiple family members and friends, orally and later in writing, that she was trying to purchase the rights to computer software technology from a developer who was struggling. She said her plan was to continue the development of the technology to the point where it could be sold within a short time for a considerable profit. The Crown alleged that this representation was false and induced the individuals concerned to give their money to the accused to invest in this project. It provided evidence of many other representations made by the accused that were not true. The investors testified that they understood that any funds they invested with the accused would be devoted to projects for the development of computer software. Many of them testified that they understood their investments were guaranteed in that they believed that the accused and her company had provided sufficient security to cover the funds advanced by them. All but eight investors lost the entire principal of their investments. In addition to its allegation that the accused induced the investors to participate through deceit and falsehood, the Crown submitted that she expended the invested funds in ways not authorized by the investors. Between 2000 and 2009, the accused set up six companies in which she served as principal or director. These companies played different roles in the accused's operations. She also acquired 27 bank and credit card accounts that received, directly or indirectly, funds originating from investors. The expert witness testified as to the amounts received by the accused from investors and into which accounts they were deposited. She described the amounts that were transferred from investor deposit accounts to other personal and corporate accounts set up by the accused and then withdrawn and spent by the accused on such things as gambling, personal expenses, the purchase of a residence, mortgage payments and collectibles.
HELD: The accused was found guilty of all three counts. The court stayed the second and third charges. It found that the accused engaged in prohibited conduct that clearly fell within the categories of deceit and other fraudulent means. She intentionally misrepresented a variety of circumstances to the investors to encourage them either to provide funds or to maintain their investments and but for her deceit, her victims would not have made the relevant investments. The accused arranged for the diversion of more than $3 million of investors' funds to uses other than those for which they were ostensibly intended and for the accused's personal use. It was satisfied that the diversion of the investors' funds fell within the third category of prohibited conduct, that of other fraudulent means. The diversion also amounted to a conversion of funds to the accused's own use or to the use of another person and also constituted the offence of theft under s. 322 of the Code and a conversion of the proceeds of fraud within the definition of money laundering pursuant to s. 462.31 of the Code.

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McElravey v Healey, 2019 SKQB 157

Richmond, June 27, 2019 (QB19152)

Family Law – Division of Family Property
Civil Procedure – Queen's Bench Rules, Rule 3-2(2), Rule 15-1
Family Law – Spousal Support – Retroactive

The parties married in 2011 and were parents of a four-year-old daughter when they separated in 2013. They prepared and executed a separation agreement without counsel in April 2014. In it, the petitioner husband agreed to pay to the respondent: $71,800 to purchase her equity in the family home and assume the mortgage, child support of $600 per month, and 50 percent of extraordinary expenses. The agreement provided that each party should retain the bank accounts, investments and property in her or his possession. The petitioner stopped making the support payments at some point and defaulted on the mortgage and the respondent took possession of the home in March 2017. In July 2017, the child died as a result of a car accident. Various fundraising efforts were made following the accident and the respondent received the proceeds. Saskatchewan Government Insurance paid death benefits to the respondent which she placed in a separate estate account. In October 2017, the petitioner requested a divorce and equal division of the family home and property. The respondent filed an answer and counter-petition. She requested a divorce, sole custody, retroactive child support in the amount of $500 per month in accordance with the Guidelines and a lump sum for retroactive spousal support. She also asserted a claim under The Intestate Succession Act, 1996 (ISA) for a division of the deceased child's estate and claimed damages for assault and physical and mental infliction of suffering by the petitioner.
HELD: The divorce was granted. The court ordered an equal division of the family home as no extraordinary circumstances existed to justify an unequal division. The respondent was to retain the home and pay to the petitioner the value of his half of the equity in the home. Regarding the family property, the court found that there was an equal division of its value in terms of what was in each party's possession at the time of the petition. However, it exempted from the division the respondent's RRSP and the $9,000 in her bank account, comprised mainly of the donations she had received, on the basis that it would be unfair and inequitable to do so. Her claim for retroactive child support under the Guidelines was not allowed because the child had died before the application was brought, but the petitioner was ordered to pay retroactive child support and his share of expenses to the respondent pursuant to the terms of the agreement. The respondent's application for retroactive spousal support was dismissed because five years had elapsed since the

separation and the petitioner had only received notice of the claim upon filing of her counter-petition. The court found that the respondent could not claim for damages as she had not commenced an action as required by Queen's Bench Rule 3-2(2). Similarly, the respondent could not make a claim under the ISA through a petition. The parties agreed to the equal division of the child's death benefit, but the court ordered that the funds raised after the accident could not form part of the child's estate as she had died before the money was contributed.

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Goldade v Saskatchewan Apprenticeship and Trade Certification Commission, 2019 SKQB 158

Scherman, June 28, 2019 (QB19153)

Statutes – Interpretation – Apprenticeship and Trade Certification Act, 1999
Administrative Law – Appeal – Stay of Proceedings
Civil Procedure – Queen's Bench Rules, Rule 3-60
Professions and Occupations – Electrician – Suspension of Certification – Appeal

The applicant applied to the court to grant an interim stay of a decision by the Saskatchewan Apprenticeship and Trade Certification Commission suspending his certification as a journeyperson electrician in the province pending his appeal of that suspension to the Appeal Committee of the commission. The applicant had also requested a stay of the suspension pending the hearing and decision of the appeal. Although the committee's powers included granting the stay under The Apprenticeship and Trade Certification Act, 1999, it was unable to assemble and hear the stay application until mid-July at the earliest. The applicant submitted that if his suspension were not stayed immediately, he would lose his employment and his position as site supervisor for his employer and that would cause an adverse impact on the employer's project and the apprentices he supervised. Furthermore, if the suspension remained unstayed pending his appeal, it would cause harm to his reputation given the purported grounds of his suspension were fraud and misrepresentation in obtaining his certification. The commission opposed the application because the Act creates a complete code and the court should restrict itself to hearing appeals from decisions of the committee under s. 28 of the Act. The issues were: 1) whether the court had jurisdiction; and 2) if so, should the stay be granted?
HELD: The interim stay of the applicant's suspension was granted. The court found with respect to each issue that: 1) it had jurisdiction to make interim orders preserving the status quo of the parties as a superior court of original jurisdiction, as described in Queen's Bench

rule 3-60. The Act does not expressly or by implication eliminate that jurisdiction, at least in circumstances wherein the commission had not yet made a decision on a stay application; and 2) the applicant had met the three requirements of the test as to whether a stay should be granted: there was a serious issue to be tried and irreparable harm had been established. The balance of conveniences also favoured granting a stay because the applicant's employer, an established entity in the electrical trade, had a duty to ensure all appropriate standards were maintained in the work it performed and granting the stay would maintain the status quo.

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Hryciuk, Re (Bankrupt), 2019 SKQB 159

Thompson, July 8, 2019 (QB19154)

Statutes – Interpretation – Saskatchewan Farm Security Act, Section 66
Statutes – Interpretation – Bankruptcy and Insolvency Act, Section 67(1)(b)
Bankruptcy and Insolvency – Exemptions – Homestead

The debtor was discharged from bankruptcy. She assigned in bankruptcy in 2016 at the age of 83 as a consequence of an economic downturn that resulted in high input costs and low commodity prices in her farming operation. She claimed that her homestead was not property divisible among her creditors because it was exempt from execution under s. 67(1)(b) of the Bankruptcy and Insolvency Act (BIA) and pursuant to s. 66 of The Saskatchewan Farm Security Act (SFSA), homesteads are not subject to seizure under judgment enforcement in the province. One of the debtor's creditors, Richardson International (Richardson), challenged the claim on grounds that the bankrupt did not qualify as a "farmer" within the meaning of Part V of the SFSA on the date of bankruptcy and was therefore not entitled to the protection offered by s. 67(1)(b) of the BIA. Richardson submitted that the facts demonstrated that the debtor's role on the date of bankruptcy was limited to passive management in that she only provided bookkeeping and transportation of fuel and food to those farming. Her counsel acknowledged that her involvement in the farm operations had diminished as she aged, but her borrowing history showed her continued engagement in the family farm, as she was a principal debtor, co-signor and guarantor for many debts incurred in support of the family farm operation and such debt caused her bankruptcy. The parties agreed to submit the question to the registrar in bankruptcy for determination under s. 92(j) of the BIA. The issues were: 1) whether the debtor engaged in the business of farming within the meaning of the SFSA at the date of bankruptcy; and 2) if so, was the degree of her engagement sufficient to trigger

homestead protection?
HELD: The claim to the homestead exemption under s. 66 of the SFSA was allowed. The registrar found with respect to each issue that: 1) the debtor established that she was a farmer by applying the factors set out in the Queen's Bench decision in Naber Seed to the circumstances of this case, finding that she had been historically involved in the family farming operation, had permit books, applied for tax and fuel rebates and showed a long-term financial commitment to the farming operation; and 2) there was no evidence that the debtor had intent to sever her involvement in the farming operation and she was continuing to provide support and participate in it.

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Watch v Live Nation Entertainment Inc., 2019 SKQB 162

Mitchell, July 9, 2019 (QB19155)

Civil Procedure – Class Actions

The proposed plaintiff in a class action issued a statement of claim in March 2018 and amended the pleadings in September. The plaintiff's claim alleged deceptive marketing practices in respect of ticket sales for major concerts and events that were contrary to s. 36 of the Competition Act and The Consumer Protection and Business Practices Act. The amendments expanded the scope of the initial pleading to add "umbrella purchasers" – persons who purchase the relevant product from a company that is not involved in the alleged conspiracy, but included on the basis that the dominance of the impugned cartel escalated prices across the entire market. In December 2018, the prospective plaintiff requested the court to establish a filing schedule for various procedural steps to be taken in order for the certification hearing to proceed on an assigned date. The prospective defendants opposed the application. They argued that, since umbrella purchasers had been added, it would be appropriate to pause the proceeding until the Supreme Court released its reasons in Toshiba Corp. v Godfrey. The appeal had been heard in December 2018 and the decision reserved. At the date of this application, reasons had not been released. Counsel for the proposed plaintiff resisted the proposal, arguing that s. 4 of The Class Actions Act (CAA) required expedition.
HELD: The prospective plaintiff's application was granted. The court found that pursuant to s. 14 of the CAA and Queen's Bench rule 3-91, it had the power to arrange the conduct of class proceedings in order to ensure they are fairly and expeditiously determined and it ordered that it was fair, expeditious and in the interests of all parties that the matter should proceed to a scheduling conference. Unlike cases in other provinces where judges had paused the proceedings, this case was not as advanced procedurally,

thereby lessening the potential impact of the Supreme Court's decision on the parties. The court had delayed the decision to this point in the hope that the judgment would have been released. As it had not, the court feared that postponing the scheduling any longer would result in a certification hearing not occurring until 2021.

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Iron Bridge Estates Inc. v Somerset Farms Ltd., 2019 SKQB 164

Megaw, July 10, 2019 (QB19156)

Statutes – Interpretation – Builders' Lien Act, Section 55
Civil Procedure – Queen's Bench Rules, Rule 3-72(2)

The plaintiff brought an action against the corporate defendant, Somerset, in May 2014, claiming that it had breached an agreement. The plaintiff was developing a residential subdivision while the defendants were considering the development of a condominium on land adjoining the subdivision. When the plaintiff learned that the City of Moose Jaw would only approve one lift station to service both proposed developments, its representative and representatives of the defendants met to discuss the service with city officials and engineers. As a result of the discussions, the plaintiff alleged that Somerset agreed to pay 40 percent of the total cost of the lift station, which was $135,000. The defendant did not pay that amount and in March 2014, the plaintiff registered a claim of lien pursuant to The Builders' Lien Act against the lands of the defendant, Somerset, and then issued its statement of claim. The parties proceeded to mandatory mediation but no further steps were taken. The officer of the plaintiff deposed that the action had not proceeded because following the mediation session, the representative of Somerset said that he would be in touch to settle the matter and so the plaintiff did not proceed with the litigation. The officer of both of the defendant corporations stated in his affidavit that he had not agreed to anything after the mediation session. Somerset applied for an order pursuant to s. 55(1) of the Act, dismissing the builders' lien. The plaintiff then applied for summary judgment against the defendants for $135,000 and for an order amending the statement of claim to add the second corporate defendant, Spring Creek, and an order extending the time to set the matter down for trial pursuant to s. 55(2) of the Act. The issues were whether the court should: 1) extend the time for proceeding with the builders' lien claim; 2) grant an order for summary judgment; and 3) allow the proposed amendments to the statement of claim.
HELD: The defendant's application was granted and the plaintiff's lien was struck. The plaintiff's application for summary judgment was dismissed. The plaintiff's application to amend its statement of claim was granted. The court found with respect to each issue that:

1) it could not find that there was any agreement between the parties to hold the matter in abeyance. The plaintiff's delay was unreasonable and unjustified and s. 55(3) of the Act could not be used in these circumstances to extend the time; 2) the parties should proceed to trial. The evidence presented was insufficient and the parties' versions of whether they had agreed to share the costs of the lift station were at variance with one another; and 3) it would permit the amendment of the plaintiff's claim pursuant to Queen's Bench rule 3-72(2) to ensure the real issues were before the court for determination.

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Lanigan v Candle Lake (Resort Village), 2019 SKQB 167

Scherman, July 12, 2019 (QB19167)

Statutes – Interpretation – The Municipalities Act, Section 343, Section 345

The defendant, the Resort Village of Candle Lake, applied for summary judgment dismissing the claim of the plaintiff on the grounds that either or both ss. 343 and 345 of The Municipalities Act provided a complete defence to the claim. In June 2014, the plaintiff had fallen into a drainage ditch and culvert while he was walking along it, trimming the grass. The ditch had been constructed by the defendant two years earlier to provide drainage of surface waters in the area of the village. The ditch and culvert were within the defendant's property, being a road allowance for a roadway adjacent to the plaintiff's property.
HELD: The application for summary judgment was granted and the plaintiff's claim was dismissed. There was no genuine issue to be tried and the court could make its determination based upon the affidavit evidence before it. The court reviewed ss. 343(1.1) and 343(7) of the Act and said that if the ditch and culvert could be considered a "public place", there was no evidence that the ditch was not in a reasonable state of repair and the plaintiff had not provided any evidence, and had no memory of, the standard of care he was exercising at the time of the accident. Under s. 345 of the Act, the defendant was not liable for any damage caused by the ditch as constructed or by reason of the absence of any fence or barrier to prevent access to it.

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Aussant v Viterra Inc., 2019 SKQB 169

Layh, July 16, 2019 (QB19163)

Civil Procedure – Interlocutory Injunction

The plaintiffs applied for an injunction enjoining the defendant from further construction. They had alleged the tort of nuisance in their statement of claim, asserting that dust and noise emanating from the defendant's construction project had lessened their enjoyment of their land and diminished its value. In supporting affidavits regarding the application, the plaintiffs also stated that the construction would change the view from their house. The plaintiffs built their residence and commercial property on the property in 2006 and the defendant had operated a grain terminal facility on its adjacent property since 1998. The CPR main line bordered the south sides of each property. In January 2019, the defendant began upgrading its terminal including the construction of a loop rail track to accommodate better loading of rail cars. The defendant questioned the legitimacy of the plaintiffs' concerns about dust and noise. It submitted that most of the phase of the construction causing dust had been completed by the time of the hearing. Furthermore, the plaintiffs had not submitted an undertaking as to damages.
HELD: The application was dismissed. The court found that the plaintiffs had not met the requirements for granting an injunction. They had not shown that: 1) there was a serious issue to be tried. The plaintiffs held grievances against the defendant's project, but they did not support their claim in nuisance. Further, the disruption of noise and dust had ended; 2) the harm was irreparable and they could not be compensated in damages; 3) the balance of convenience was in their favour. The consequences to the defendant if the court stopped the defendant's project were high. As well, the plaintiffs' failure to provide an undertaking as to damages or apply to the court to waive the requirement was fatal to their application, following the Court of Appeal's decision in Silver Star Salvage.

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Rock Ridge RV Resort Ltd. v Close, 2019 SKQB 171 SUBJECT
Corporation Law – Shareholders/Directors – Determination of Status

Megaw, July 19, 2019 (QB19164)

The applicant brought an originating application pursuant to s. 234 of The Business Corporations Act (BCA) and The Securities Transfer Act (STA) against the corporate respondent, Rock Ridge RV Resort (resort). The applicant and his uncle and brother began working together in 2009 to develop the resort. When it was incorporated, the applicant, his brother, his uncle acting in his capacity as trustee for a family trust and one other person received shares. The evidence provided by the affidavits of the resort's lawyer and the other shareholders showed that there had been multiple mistakes and misunderstandings between 2009 and the date of this application as

to the number of shares held by the applicant. Regardless, the corporate registry continued to recognize the applicant as a shareholder. In 2011, the applicant sent an email to the resort's lawyer that he was resigning as Vice President and would be removed as a director. He said that he had not signed the share sale or forms but would do so upon receipt of same from the lawyer. He indicated that his 15 shares be allocated by the trust to his brother or the other individual who was an officer and director of the resort. No action was ever taken by the resort with regard to the applicant's purported resignation or with regard to his shareholding. The applicant had no further involvement with the resort. In 2015, the resort's lawyer forwarded documents to the applicant to be signed by him to complete a sale and transfer of his shares. The applicant refused to sign them. An action was commenced by the resort and it applied for a declaratory order respecting the bar of any claim that might be made by the applicant and whether he was a director and shareholder. The applicant responded with his own application in 2017 that sought orders under s. 234 of the BCA and the STA and a declaration that he continued to be a shareholder and director of the resort. The court determined that the issue of the status of the applicant (then the respondent) as a shareholder and director of the resort be determined by a viva voce hearing (see: 2017 SKQB 170). The recommendation was not followed: the resort did not proceed with its originating application and apparently abandoned it. The court noted that before it could determine the nature of the relief sought, there were two preliminary issues to resolve: 1) whether the applicant was a shareholder of the resort; and 2) if so, whether he effectively disposed of those shareholdings or continued to be a shareholder.
HELD: The court found with respect to each issue that: 1) the applicant was a shareholder; and 2) it was unable to conclude an effective transfer of the applicant's shareholding had occurred in this case, based on the contents of the applicant's email and because no steps had ever been taken to complete a transfer of shares.

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J.J.B. v S.J.B., 2019 SKQB 172

Robertson, July 19, 2019 (QB19165)

Family Law – Custody and Access – Interim – Variation

The petitioner mother applied for a variation of the interim custody order made by a Queen's Bench judge in 2014. The order specified that the petitioner and respondent would have joint interim custody and confirmed the existing alternating residence of the children with each parent. The court gave leave to the parties to apply for variation if the spirit and intent of the order were not maintained and if there were evidence of emotional or psychological harm

caused primarily by one of the parents. Each parent was to avoid denigrating the other. At some point after the order was made, two of the children, aged 17 and 12 respectively, began residing only with the petitioner and the other two, J.R. (a 10-year-old daughter) and B.S. (a 15-year-old son) to live solely with the respondent. The petitioner alleged that the two children living with the respondent were resisting spending time with her because of the respondent's actions to alienate them from her. She submitted evidence that the respondent had disparaged her and her morality because she separated and divorced him and later remarried. The petitioner requested the interim order to be varied to provide that: primary residence of J.R. be with her and supervised access for the respondent for a transitional period, subject to review, to determine a time to resume the alternating parenting arrangement; immediate specified access to B.S.; and police enforcement under s. 24 of The Children's Law Act, 1997 if the respondent failed to return J.R. to the petitioner at the end of his parenting time. The respondent opposed the application and proposed the shared parenting arrangement of the two youngest children. He requested pre-trial conference with a Voices of the Children report ordered for J.M. and J.R.
HELD: The petitioner's application was granted in part. The court found that the criteria provided by the judge in the interim order that would permit revisiting it had been met because the respondent had disparaged the petitioner and thereby contributed to the alienation of J.R. from the petitioner. The court ordered that J.R. should reside with the petitioner for the month following the judgment followed by the resumption of the shared parenting arrangement on an alternating weekly basis. The respondent was ordered to provide reasonable and generous access to B.S. to the petitioner. It was his responsibility as custodial parent to facilitate access. The petitioner's application for police enforcement was denied as without grounds, as s. 24 does not authorize an order just in case there might be need in the future. The court granted the respondent's request for a pre-trial conference, but it declined to order a Voices of the Children report because J.R. was below the age recommended for such a report.

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Westfield Twins Condominium Corp. v Wilchuck, 2019 SKQB 173

Robertson, July 19, 2019 (QB19166)

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

The plaintiff brought an application pursuant to Queen's Bench rule 7-9 to strike the defendant's statement of defence on the ground that it was an abuse of process. The defendant applied to strike the

plaintiff's claim. The plaintiff was a condominium corporation operating under The Condominium Property Act, 1993 and the defendant owned one condominium unit in the plaintiff's complex. In November 2018, the plaintiff obtained leave to commence an action against the defendant pursuant to subsection 3(2) of The Land Contracts (Actions) Act, seeking judgment against him, foreclosure for the lien of arrears on his unit, sale and immediate possession of it and appointment of a receiver for the rents, issues and profits. It issued its statement of claim in February 2019 that identified arrears of common and/or reserve fund condominium fees as the basis for its claim. In the defendant's statement of defence, he asserted that he did not owe the plaintiff any money. Prior to this application, there had been other proceedings between the parties: in January 2018, a judge had dismissed an application by the defendant for an oppression remedy under s. 92.2 of the Act; and the plaintiff's application to strike the defendant's statement of claim as an abuse of process had been granted in April 2018. The Court of Appeal then dismissed the defendant's appeal against the order in December 2018.
HELD: The plaintiff's application was granted and the defendant's application was dismissed. The court rejected the defendant's defence because the monies claimed were statutorily authorized levies that the plaintiff was obliged to impose and collect and the defendant was obliged to pay. The issue of whether the plaintiff had the authority to impose the fees had been adjudicated in the previous proceedings and his statement of defence was thus an abuse of process. The court awarded judgment for the debt identified by the plaintiff in the amount of $12,300 and ordered that it could proceed with its foreclosure action.

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