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Mortgages – Non-Purchase Money Mortgage

The Court of Queen's Bench limited the amount payable to the appellant (bank) from proceeds paid into court from the judicial sale of the mortgaged property of the respondent. The bank appealed. The statement of claim was issued approximately 20 months after the bank took its first step of the enforcement process. The respondent did not enter a defence and he was noted for default in November 2015. The first order nisi provided for an upset price of $196,000. When the realtor had access to the house for the first time it was found to be "destroyed" and a listing price of between $139,000 and $144,000 was recommended. The bank did not immediately seek an amendment to the first order nisi to change the upset price, nor did it list the property pursuant to the first order nisi. A second order nisi was granted on June 27, 2017 that set a one-day redemption period with a judgment against the respondent for $115,963.99 and an upset price of $115,200 with a listing period of 90 days. An offer to purchase was accepted in August 2017 for $140,000. An order confirming the sale was obtained. From the sale, $133,784.65 was paid into court. The bank applied for the full amount to be paid to it. The bank did not seek a personal judgment against the respondent. The chambers judge found that the bank was responsible for 24 months of delay in the 43-month long proceedings. He would only grant a deficiency judgment in the amount of principal, interest, and taxes, but not legal fees, to

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101035403 Saskatchewan Ltd. v Westview Holdings Ltd.

A.H. v Saskatchewan (Social Services)

A.L. v M.L.

December 31, 2015. Costs were fixed at $6,500 with disbursements fixed at $1,189.69. The issues were: 1) whether the chambers judge erred in finding that 24 months' delay was attributable to missteps by the bank; and 2) whether the chambers judge erred in allowing the bank to be paid only part of the interest and expenses.
HELD: The appeal was dismissed. The issues were determined as follows: 1) the bank too narrowly described the action taking only 26 months and asserting the chambers judge was wrong when he found it was 43 months. The appeal court concluded that the chambers judge's finding of fact that 24 months of delay was attributable to missteps by the bank was not a palpable and overriding error; and 2) the bank said that it was not seeking a deficiency judgment, but was instead seeking "payment out of court for the indebtedness owed to it, with a corresponding assessment and Order for payment out of the balance of the funds to be applied toward costs". The appeal court found that the bank misconstrued the chambers judge's references to a deficiency judgment. The chambers judge was found to have correctly understood the nature of the bank's application. The bank also said that the chambers judge erred in principle and law in limiting its recovery of principal, interest, and taxes, but did not say what the specific error in principle and law was. The bank also failed to explain why the chambers judge had no jurisdiction to make the order he did. The bank's final argument was to challenge the authority of the Queen's Bench judge to alter the contractual rights of a mortgagee in the context of the enforcement procedure itself. The chambers judge relied on the court's equitable jurisdiction to supervise the remedy of judicial sale. The appeal court did not find that the chambers judge made an error. The one dissenting judge also provided written reasons. The dissent found that the chambers judge erred in approaching the matter as if the bank were requesting a deficiency judgment and also erred in limiting its recovery of principal, interest and taxes under the mortgage. The bank's request in its application clearly did not seek a deficiency judgment in excess of the proceeds of the sale. The chambers judge used his equitable jurisdiction to reach back prior to the first order nisi for judicial sale to fix the amount owing under the mortgage to the bank as of December 31, 2015. The exercise of equitable discretion cannot ignore the terms of the mortgage contract. The Queen's Bench Rules were found to incorporate the terms of the mortgage in relation to interest, taxes, and various costs. The court fixed the amount owing at $105,773.46 with interest in the February 2016 order nisi. The equitable jurisdiction of a chambers judge does not allow it to reach back past the first order nisi to determine the rate and duration of interest prior to that. The dissent would have allowed the bank's appeal relating to the principal, interest and taxes up to the February 2016 order nisi.

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A.L. v M.L., 2019 SKCA 61

Jackson Caldwell Schwann, June 28, 2019 (CA19060)

Family Law – Custody and Access – Happy Parent-Happy Child Principle
Family Law – Custody and Access – Mobility Rights
Family Law – Division of Family Property – Determination of Property – Family Farm – Joint Land
Family Law – Division of Family Property – Determination of Property – Family Farm – Equipment
Family Law – Spousal Support – Duration of Spousal Support
Family Law – Spousal Support – Impute Income
Family Law – Spousal Support – Self-Sufficiency

The appellant appealed the Queen's Bench court decisions on mobility, spousal support, and division of family property. The parties married in 2003 and had three children, ages 14, 12, and 10 at trial. The respondent worked on the family farm. The appellant worked outside the home prior to the birth of the oldest child. She had taken an online course in local government administration. The appellant was primarily responsible for the children, especially during times that kept the respondent busy on the farm. The appellant was granted exclusive possession of the family home in December 2012. The appellant worked 35 hours per week at a local playschool but had not looked into work with any local government administration offices in the area to do her apprentice hours. From January 2013 to the time of trial, the appellant parented the children during the weekdays and the respondent parented on the weekends, which continued into Monday. Each party frequently saw the children when the other parent was caring for the children. The appellant began a new relationship with a man who farmed 245 kilometres from the parties' residences. At trial, the appellant sought an order naming her as primary parent and allowing her to move to her boyfriend's farm with the children. The trial judge determined that the parties were sharing the parenting of their children and the children were thriving. The trial judge concluded that it was not in the children's best interests to move with the appellant. The issues on appeal were: 1) whether the trial judge failed to appreciate the evidence concerning mobility and whether this caused him to err in his analysis of the issue; 2) whether the trial judge erred in his allocation of family property; and 3) whether the trial judge erred in law in relation to the amount and duration of spousal support by: a) erroneously imputing income to the appellant; and b) imposing a fixed term spousal support order of 6.5 years duration.
HELD: The appeal was dismissed. The issues were determined as follows: 1) the appeal court found that the trial judge did not ignore or misinterpret the evidence regarding the respondent's capacity to parent. The appellant also unsuccessfully argued that the trial judge erred by failing to find her to be the more competent parent, which she said was crucial to the overall custody and mobility analysis. The appeal court found that the trial judge identified the correct law

and considered the required factors for a mobility issue. The trial judge was also found to have considered the "happy parent-happy child" principle and concluded that it was one factor to consider in the broader child-centric assessment. The appeal court concluded that the trial judge did not err by more critically examining the appellant's employment in the area given she was the one that wanted to move. The respondent indicated that he wanted to stay in the area even after he and his mother sold the farm. The trial judge did not err in law or make a palpable and overriding error in relation to the facts with respect to the mobility issue; 2) the respondent was farming in a joint operation with his parents. His father died suddenly in 2015. There were three quarter sections of land in issue at trial. All three quarters were purchased in the 1990s by the respondent and his father and registered in their joint names. The purchase was financed by a mortgage secured by land owned by the father. The trial judge rejected the appellant's argument that the respondent had taken over the farm with his parents being landlords. The trial judge also rejected the position that the three joint quarters purchased by the respondent and his father were legally or beneficially owned by the respondent. The trial judge concluded that the farming operation was a 50/50 partnership between the respondent and his parents, with the equipment being jointly owned. The appeal court found that the trial judge did not err when making that conclusion. A resulting trust or presumption of advancement argument by the appellant was not successful, nor was an argument that there had been a generational shift of the farming operation. The trial judge's conclusions were found to have been made without error; and 3) a) the trial judge imputed an income of $22,298 to the appellant, which was full-time minimum wage at the time. The appellant did not offer any evidence at trial to contradict the evidence of the respondent that there were specific employment opportunities for the appellant in the area. The trial judge accepted the evidence of the respondent and his mother that they would provide childcare for the appellant if she had to work, resulting in lower childcare costs if she did not move; b) the respondent conceded that the appellant was entitled to spousal support on both a compensatory and non-compensatory basis. The trial judge concluded that spousal support should be paid for 6.5 years, 4.5 years of which had already been paid. The appellant argued that the trial judge erred because she would not be able to find suitable employment in the area and the trial judge erred by overemphasizing self-sufficiency. The appeal court agreed with the respondent's submissions that the trial record regarding job prospects in the area did not provide the appellant with the required evidentiary foundation for her argument that she would not be able to find suitable employment in the area. The trial judge's ruling fell within the range suggested by the Spousal Support Advisory Guidelines. The appeal court found that the trial judge did canvass all of the evidence of the parties pertaining to spousal support. The appeal court did not make an order as to costs.

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Bayer Inc. v Tluchak Estate, 2019 SKCA 64

Whitmore, July 25, 2019 (CA19063)

Civil Procedure – Class Actions – Certification – Appeal
Civil Procedure – Appeal – Leave to Appeal

The defendant, Bayer Inc., applied for leave to appeal the decision of a Queen's Bench judge in chambers to grant a certification order pursuant to s. 39(3)(a) of The Class Actions Act (see: 2018 SKQB 311). The judge found that there was a basis to conclude that there was a common issue regarding whether Bayer breached a duty of care in marketing Xarelto in Canada or in failing to provide a reasonable warning that it could cause serious and irreversible bleeding. The alleged breach related to the product monograph containing information as to indications, contraindications, etc. Among the defendant's grounds in the application were that: 1) the judge erred in concluding that the proposed failure to warn issue was appropriately certifiable under s. 6(1)(c) of the Act. The defendant argued that he had failed to certify a general causation common issue that was a necessary precondition to the certification of the failure to warn; and 2) the judge had erred by finding that a class action was the preferable procedure within the meaning of s. 6(1)(d) of the Act. The defendant submitted that the proposed appeal met the Rothmans test as it had sufficient merit and importance.
HELD: Leave to appeal was denied. The court found noted that in this case the Rothmans test must be applied within the context of a class action wherein the purpose of the certification stage is to determine whether it is appropriate for the claim to be prosecuted as a class action and is not meant to be a test of the merits of the action. In considering the first question, as to whether the proposed appeal was frivolous or predestined to fail, the court found that: 1) the judge had not erred in his conclusion that the proposed failure to warn could be certified and he had embedded any question of common causation into the more general question of breach of the duty to warn. The certification of a general causation common issue was not necessary in every duty to warn analysis, especially when the general propensity of the product to injure has been acknowledged by the manufacturer; and 2) this ground had no merit. The certification stage was not the place to perform an in-depth analysis of the plaintiff's case and the judge's decision on certification warranted deference, especially with respect to the preferability procedure. Regarding the second branch of the Rothmans test, the court found that the appeal of the certification order was not of overarching importance to these proceedings.

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Boychuk v Hampton, 2019 SKCA 65

Ottenbreit Whitmore Leurer, July 26, 2019 (CA19064)

Family Law – Division of Family Property – Jurisdiction
Statutes – Interpretation – Court Jurisdiction and Proceedings Transfer Act, Section 10

The appellant appealed the decision of a Queen's Bench judge that Saskatchewan was the appropriate forum for adjudication of the family property dispute between the parties (see: 2017 SKQB 220). They had cohabited in a common-law relationship for 13 years. After their separation, the respondent (petitioner) commenced an action in Saskatchewan claiming an equal division of the family home and an unequal division of family property. The appellant (respondent) commenced an action in Alberta a few months later and then brought an application to the Court of Queen's Bench in Saskatchewan to have the action transferred to Alberta. The judge found it difficult to establish where the parties resided at the time of the application and found that the only significant asset of the parties was a cottage in Saskatchewan. The respondent claimed the property was the family home, but the appellant disagreed. The judge reviewed s. 10 of The Court Jurisdiction and Proceedings Transfer Act and declined to transfer the matter to Alberta. He found that the Alberta Matrimonial Property Act only applied to married couples and not to common-law relationships, and concluded that the appellant would take the position that the respondent would not be entitled to any of the value of the cottage or other family property if the matter were transferred to Alberta. The appellant argued that the judge erred in his interpretation of ss. 10(2)(b) and 10(2)(f).
HELD: The appeal was dismissed. The court found that the chambers judge had erred in his interpretation but that his decision was correct. He erred in law when he considered ss. 10(2)(b) and 10(2)(f) of the Act as requiring him to compare the laws of Alberta and Saskatchewan for the purpose of assessing the relative substantive fairness of the applicable laws in those jurisdictions. However, the onus was on the appellant to show that the factors set out in s. 10(2) would favour Alberta as forum conveniens, and he had failed to do so. Given the facts found by the judge, Saskatchewan was the appropriate jurisdiction for this proceeding.

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Liquid Capital Prairie Corp. v Mainline Industrial Ltd. Partnership, 2019 SKCA 66

Ottenbreit Leurer Tholl, July 2, 2019 (CA19065)

Statutes – Interpretation – Builders' Lien Act, Section 70

The appellant appealed the decision of a Queen's Bench chambers judge that granted the application made pursuant to The Builders' Lien Act (BLA) by one of the respondents, a subcontractor, to have moneys held in court, representing the holdback, paid to it and the remaining subcontractors on a pro rata basis (see: 2018 SKQB 222). At the chambers hearing, the appellant argued that a contractor could, by assignment, deprive subcontractors and suppliers from access to the holdback maintained by an owner under the BLA. In this case, a general contractor, the respondent Mainline, had entered a "Full Factoring Agreement" with the appellant. Under the agreement, the appellant purchased Mainline's receivables. Mainline entered into a contract with Saskatchewan Power Corporation (SaskPower) whereby Mainline would act as a general contractor and it in turn hired the respondent subcontractors. Mainline issued invoices for work performed in relation to the contract with 10 percent deducted for the builders' lien holdback that SaskPower was required to maintain pursuant to s. 34 of the BLA. The appellant received from Mainline a copy of an invoice addressed to SaskPower in the total amount of $405,000 said to represent the receivable owing to Mainline by SaskPower in respect to the holdback. Mainline assigned the holdback receivable to the appellant in accordance with the factoring agreement. As a result of receiving notices of claims of lien from the respondent subcontractors and a claim by the appellant to the holdback, SaskPower paid the funds into court. The Minister of National Revenue also asserted priority to the holdback pursuant to the deemed trust provisions of s. 227 of the Income Tax Act (ITA). The respondent subcontractor then made its application for an order directing the funds be paid out to the subcontractors. The appellant opposed the application. The chambers judge rejected the appellant's argument that s. 70(2) should not extend to absolute assignments where the assignee had no remaining interest in the receivable. In the appeal, the appellant argued that the judge erred in granting priority to the holdback to the subcontractors and erred in his interpretation of ss. 70(2) and 15 of the BLA. It asserted that the terms "assignment" and "all general and special assignments" found in those provisions could not be interpreted to include absolute assignments, which interpretation they had acquired in this case.

HELD: The appeal was dismissed. The court found that the assignment given to the appellant was invalid as against the liens of the subcontractors. It interpreted the words in s. 70(2) in their ordinary and grammatical sense and found that the assignment made by Mainline to the appellant was not "valid as against any lien arising under" the BLA. After examining the purposes of the BLA, the court concluded that there was no reason to deviate from the ordinary meaning.

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Yashcheshen v University of Saskatchewan, 2019 SKCA 67

Richards Caldwell Leurer, July 30, 2019 (CA19066)

Constitutional Law – Charter of Rights, Section 15 – Appeal

The self-represented appellant appealed the decision of a Queen's Bench judge that denied her application that the admissions policy of the respondent, the College of Law of the University of Saskatchewan, violated her s. 15 Charter rights (see: 2018 SKQB 57). The admissions policy required all applicants to provide an LSAT score. The appellant advised the respondent in her application form that she was unable to take the LSAT because of the effect of Crohn's Disease. The respondent informed the appellant that it could not evaluate her application as it required an LSAT score for all admission applications. After submitting her application without the LSAT score, the appellant was told that she would not be offered a place. In her application to Queen's Bench, she asked for an order exempting her from the LSAT requirement and striking the requirement from the admissions policy as being invalid insofar as it affected her. The chambers judge found that the Charter did not apply to the respondent's admissions policy because the university was not governmental in nature and because the admissions policy did not further a government policy or program.
HELD: The appeal was dismissed. The court found that the Charter did not apply to the university.

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Saskatchewan (Employment Standards) v North Park Enterprises Inc., 2019 SKCA 69

Whitmore Ryan-Froslie Tholl, July 30, 2019 (CA19068)

Administrative Law – Procedural Fairness – Breach of Duty
Labour Law – Judicial Review – Labour Relations Board
Statutes – Interpretation – Saskatchewan Employment Act

The appellant, the Director of Employment Standards, appealed from the decision of the respondent, the Saskatchewan Labour Relations Board. The Director had issued a wage assessment against the respondent employer, North Park, and other related entities, requiring it to pay $6,500 to a former employee. The employer successfully appealed the assessment to an adjudicator, who reduced it. The appellant appealed the adjudicator's decision to the board and the board remitted the matter back to the adjudicator to deal with it in accordance with the directions provided. The appellant took issue with some of the directions, successfully applied for leave to appeal (see: 2018 SKCA 31) and appealed the

board's decision to the Court of Appeal pursuant to s. 4-10 of The Saskatchewan Employment Act, arguing that the respondent violated its duty of procedural fairness when it made findings and provided directions regarding three issues that were not before it. One of the issues identified by the appellant was that the board permitted the employee's spouse, acting as his advocate, to raise the timeliness of the employer's notice of appeal. The appellant had confirmed to the adjudicator at the commencement of the adjudication that the notice had been filed in time and the adjudicator accepted this representation. The employee had not challenged this at the adjudication nor did he appeal from the adjudication.
HELD: The appeal was allowed. The matter was remitted to the adjudicator with portions of the board's decision excised. The court found that the board had failed to meet its duty of procedural fairness by addressing the timeliness of the employer's notice of appeal that had not been in dispute before the adjudicator and so the matter was not properly put before the board. As a result, neither the appellant nor the employer had an opportunity to tender evidence at the adjudication or to respond to the issue at the hearing before the board.

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A.H. v Saskatchewan (Social Services), 2019 SKCA 70

Ottenbreit Caldwell Barrington-Foote, July 30, 2019 (CA19069)

Civil Procedure – Appeal – Moot

The appellant appealed the decision of a Queen's Bench judge in chambers to dismiss her application for mandamus. The Ministry of Social Service had applied to extend a protection order under s. 38(2) of The Child and Family Services Act respecting the child of the appellant and P.B. Before the application was heard, the Ministry advised the appellant that it intended to return the child to P.B. in Alberta, having determined the child "would not be in need of protection" if returned to his father. The appellant had applied to the court for assistance to have the child returned to Saskatchewan.
HELD: The appeal was dismissed because it was moot. There was no child protection litigation or dispute before the courts with respect to the child pursuant to the Act.

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101035403 Saskatchewan Ltd. v Westview Holdings Ltd., 2019 SKCA 71

Ottenbreit Caldwell Barrington-Foote, July 30, 2019 (CA19070)

Civil Procedure – Appeal – Standard of Review

The appellant appealed the decision of a Queen's Bench judge in chambers refusing to pay out funds that it had paid into court under The Builders' Lien Act. The judge found that he could not determine on the evidence before him whether a limitation period barred the respondent's claim to the funds and directed that the matter proceed summarily to a determination on its merits.
HELD: The appeal was dismissed. The court found that the appellant had not demonstrated that the judge had made a palpable or overriding error.

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Moyles v R, 2019 SKCA 72

Jackson Ryan-Froslie Barrington-Foote, July 30, 2019 (CA19071)

Constitutional Law – Charter of Rights, Section 8, Section 9, Section 10(b), Section 24(2) – Appeal
Criminal Law – Controlled Drugs and Substances Act – Importing Schedule VI Drugs – Conviction – Appeal
Criminal Law – Evidence – Search Warrant – Sufficiency

The appellant was convicted of importing gamma-butyrolactone (GBL) into Canada contrary to s. 6(1) of the Controlled Drugs and Substances Act (CDSA). The charges had arisen after Canada Border Services Agency had opened two boxes at the Vancouver airport that contained bottles of GBL. They were addressed to the appellant's residence in Estevan. Although GBL is not a controlled substance under the CDSA and it is not an offence to possess it or traffic in it, it is an offence under s. 6(1) to import or export GBL as it is classified as a Schedule VI drug. The Agency turned the boxes over to the RCMP in Regina and the integrated RCMP/Estevan police unit. They decided to use an investigatory technique known as "controlled delivery" involving the installation of alarms in the boxes that would be triggered when the boxes were opened. An undercover officer posing as a courier would deliver the boxes and when the alarm was activated, the police would enter the residence. The officer in charge swore two informations to obtain warrants (ITOs), stating that he had reasonable grounds to believe the appellant had committed or would commit importing contrary to s. 6(1), possession for the purpose of trafficking pursuant to s. 5(2) of the CDSA and conspiracy to commit those offences. One ITO requested a general warrant pursuant to s. 487.01 of the Criminal Code authorizing the police to conduct the controlled delivery and to enter and search the house only after a box alarm was triggered. The other ITO requested a s. 11 CDSA warrant authorizing entry, search and seizure. Both warrants were issued. The general warrant authorized the police to install and monitor the box alarms. It said

the police could not enter the residence until there were reasonable grounds to believe the appellant and/or unknown persons were or had been in actual possession of the boxes. However, it did not refer to the controlled delivery. The CDSA warrant authorized the police to enter the house at the times specified in the ITO. It did not refer to the delivery of the boxes at all. An undercover RCMP officer delivered the boxes and the appellant signed for them. When the alarm sounded, the police broke open the front door after receiving no response to their knock. The appellant was arrested and taken to a police vehicle while the police cleared the house. At 1:25 pm, he was advised of the reasons for his arrest and of his right to counsel and responded that he wanted a lawyer. The constable who transported him to the police station had been told not to facilitate the exercise of the appellant's right to counsel until the search was finished. The appellant was lodged in a cell at 1:43 pm. The police finished the search and left the house at 2:46 pm. They went for a meal and then had a debriefing. At 3:35 pm, the appellant was allowed to call duty counsel. After his conversation with a lawyer, the appellant provided a warned statement in which he admitted that the boxes belonged to him. At trial, the appellant, alleging that both warrants were invalid and that his ss. 8, 9 and 10(b) Charter rights had been violated, applied under s. 24(2) to exclude both the evidence seized from his residence and his warned statement. The investigating officer testified that the appellant had not been allowed to call a lawyer because there was a potential risk to the investigation: if a lawyer were aware of the proceedings, a tip-off might tip occur. He stated that delaying phone calls during searches of premises for drugs was an established practice. The trial judge found both warrants valid, but nonetheless conducted a s. 24(2) analysis of the alleged ss. 8 and 10(b) Charter breaches respectively. Regarding the s. 8 breach, the judge found after applying the Grant test, only with respect to the CDSA search, that the evidence from the search of the appellant's home should be admitted, as only the seriousness of the impact on the appellant of the search favoured exclusion. In applying the Grant test to the alleged s. 10(b) breach, the judge noted that the officer's reason for delaying the appellant's right to counsel was too speculative and the delay was unreasonable. Under the first factor, however, he found that the evidence should not be excluded because the constable acted in good faith. He then noted that although the impact of the breach was very stressful for the appellant, the police had ensured that he was not questioned before his interview and he was treated respectfully and thus the evidence would not be excluded on this basis. In his assessment of the third factor, the judge would not exclude the appellant's warned statement, because it would make it difficult to obtain a conviction. The grounds of appeal were: 1) the general warrant was invalid because it had not authorized the controlled delivery; 2) the CDSA warrant was invalid because it was a corresponding warrant to the general warrant; 3) the search of the house was a warrantless and illegal search that breached the appellant's s. 8 Charter rights; and 4) the judge erred in his s. 24(2)

analysis relating to the breach of the appellant's s. 10(b) Charter rights. The defence requested that court should conduct the s. 24(2) analysis and should exclude the boxes, the items seized at the house and the warned statement and then quash the conviction and acquit the appellant.
HELD: The appeal was allowed. The court granted the Charter application and excluded the evidence. It then quashed the conviction and entered an acquittal. It found with respect to each ground that: 1) the general warrant did not authorize the controlled delivery and was invalid; 2) the CDSA warrant was valid because although it referred to the controlled delivery in the general warrant: that reference could be excised. There was no basis to interfere with the trial judge's decision; 3) the house search was authorized by the CDSA warrant; 4) the judge erred with respect to the first two tests in the Grant analysis in finding: i) that the constable acted in good faith after establishing that the length of delay violated the appellant's s. 10(b) Charter rights. The police acted unreasonably and negligently. The breach was serious and it was a systemic one; and ii) that the impact of the breach was minimal. It had a serious impact on the interests protected by s. 10(b). The court undertook its own s. 24(2) analysis regarding the evidence. It found that the trial judge failed to consider whether the controlled delivery breached s. 8 of the Charter. It found that the breaches by the police in relation to each of ss. 8 and 10(b) were sufficiently serious to favour the exclusion of the evidence as was the seriousness of the impact of the breaches on the appellant's rights. There was some reason to allow the evidence to be admitted under the third test of protecting society's interest in the adjudication of the charge, but concluded that the boxes, the house search items and the warned statement should be excluded because of the violations of ss. 8 and 10(b). While the court determined that some of the evidence was admissible, it was insufficient to support a conviction.

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Veolia Water Technologies, Inc. v K+S Potash Canada General Partnership, 2019 SKCA 73

Richards Ryan-Froslie Tholl, July 31, 2019 (CA19072)

Civil Procedure – Appeals
Statutes – Interpretation – Court of Appeal Act, 2000, Section 20
Statutes – Interpretation – Supreme Court Act, Section 65.1

The respondent, K+S Potash Canada, applied to overturn the decision of a Court of Appeal judge in chambers that prevented it from drawing on letters of credit pending the decision of the Supreme Court on the leave application made by the proposed appellant. In the chambers proceedings, the proposed appellant

applied pursuant to s. 65.1(2) of the Supreme Court Act for an order granting a stay of proceedings with respect to the Court of Appeal's decision (see: 2019 SKCA 25) because it intended to seek leave to appeal it and a delay in issuing the stay would result in a miscarriage of justice. The chambers judge granted the order on the basis that it would preserve the status quo in the litigation and thus the respondent was enjoined from drawing on the letters of credit. The respondents, relying upon s. 20(3) of The Court of Appeal Act, 2000 (CAA) and s. 65.1(3) of the Supreme Court Act (SCA), applied to vacate the stay order.
HELD: The application was dismissed. The court found that in the circumstances, neither of the provisions relied upon by the respondent were applicable and there was no basis for the application. The decision was not incidental to an appeal to the Court of Appeal as required by s. 20 of the CAA. There was no evidence that a material change in circumstances had occurred as required by s. 65.2(3) of the SCA.

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R v Johnson, 2019 SKPC 18

Kovatch, March 14, 2019 (PC19025)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Methamphetamine

The accused was charged with possession of methamphetamine and cocaine for the purpose of trafficking, breach of a recognizance by being outside of Alberta, possession of an identity document relating to another person, possession of a machete for a purpose dangerous to the public peace and possession of ammunition while prohibited by a s. 109 order. The charges arose out of a police stop of the vehicle the accused was driving. The officer searched her name and ascertained she was on a recognizance issued in Alberta that she was not to leave the province without the prior written permission of her probation officer. He placed her under arrest and moved her to the police cruiser. The passenger in the vehicle was then questioned and, as he seemed intoxicated and agitated, he too was moved to the police cruiser. The vehicle was searched and a significant volume of drugs in a bag was found in the front of the driver's seat. Inside the accused's purse, the police found a notebook and $800 in cash. The Certificate of Analyses confirmed that the drugs were methamphetamine and cocaine. An expert witness testified that the quantity and packaging indicated that the drugs were for resale and trafficking and that the notebook was a score sheet or drug ledger. The accused testified that she had used methamphetamine for 10 years and was an addict. The passenger in the vehicle was a friend of hers who often stayed at her house in Edmonton and together they would use meth that he brought with

him. Before the alleged offence, he had been at her residence when she learned that her grandmother in Manitoba was very ill and he offered to drive her there. She withdrew $900, representing her recent social assistance payment, from her bank account to pay for trip expenses. While they were returning from the visit, the accused took the wheel because her friend kept falling asleep while he was driving. When the police pulled her over, she wakened him and he started throwing things from the console in the front seat into her purse. She knew nothing about the drugs in the bag, nor the notebook in her purse or the weapons. During her cross-examination the accused testified that she didn't know how her friend made his living and how he could afford drugs. She agreed that the fact that her friend often drove around Alberta and beyond was consistent with him being a mule.
HELD: The accused was found guilty of possession of methamphetamine for the purpose of trafficking and of breaching the recognizance and possession of false identification and not guilty of all other charges. The court was unable to find beyond a reasonable doubt that that the accused knew that there were drugs or weapons in the vehicle. However, it was satisfied beyond a reasonable doubt that that she was willfully blind with respect to her friend's possession of crystal methamphetamine and should be convicted on the charge of possession of it for the purpose of trafficking.

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R v Ballantyne, 2019 SKPC 32

Beaton, July 15, 2019 (PC19033)

Criminal Law – Dangerous Offender Application
Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Indeterminate Sentence

The accused pled guilty to assault with a mace contrary to s. 267(a) of the Criminal Code. The court ordered an assessment pursuant to s. 752.1 of the Criminal Code. The Crown requested that the accused be found a dangerous offender and sentenced to an indeterminate period of custody. The accused argued that the required pattern of past behaviour had not been proven or, alternatively, that his risk would be reduced by the new Integrated Correctional Program Model (ICPM) that provides continuous programming. Dr. T. prepared the assessment. The accused submitted a Gladue report. His grandfather and grandmother both attended residential schools, they abused alcohol, and there was domestic violence. The accused was 32 years old. His mother was 16 when she had him and he was exposed to physical neglect, domestic violence, and alcohol abuse in her care. She supplied the accused with drugs and encouraged his drug use. The accused lived with various relatives and foster

families. He was under the care of a psychiatrist by the age of eight. The accused was aggressive, disruptive and threatening as a child. He had approximately 77 convictions, with violent offences including: assault; uttering threats; assault with a weapon; robbery; robbery with firearm; assault of peace officer; attempted robbery; aggravated assault; carrying a concealed weapon; and possession of a weapon. The predicate offence occurred when the accused was an inmate in a provincial correctional centre. The victim was also an inmate. The accused punched the victim with a closed fist and then swung the homemade mace at the victim's face. He then held the handle of a broken mop at the victim and correctional officers. The victim had cuts on his forehead and skin was broken on his nose. In the past, the accused's diagnoses included attention deficit hyperactivity disorder, partial fetal alcohol syndrome, antisocial personality disorder, and addictions to alcohol and cannabis. The accused participated in some programming but rarely finished it and he did not adhere to recommendations once released. The accused had numerous convictions for failing to abide by court orders. Dr. T. did not believe that the accused wanted to adapt and change his behaviours, which resulted in a low level of potential treatability for his risk-related psychiatric conditions. Dr. T. was not optimistic that the new ICPM programming would result in any substantial improvement in the accused's risk. If released in the community, Dr. T. said it was likely that the accused's risk of violence would be uncontrollable with parole supervision. His risk of violence in the community was towards the high-risk range. The accused did not testify but he did file a letter indicating that he wanted to make changes in his life and guaranteed that he would never harm another person.

HELD: The predicate offence was found to be a serious personal injury offence as defined by s. 752 of the Criminal Code. The accused's offending history was also found to reveal a pattern of repetitive, violent behaviour as noted in section 753(1)(a)(i). The court also found that the accused's offending history revealed a pattern of behaviour as required by s. 753(1)(a)(ii) of the Criminal Code. He showed a substantial degree of indifference respecting the reasonably foreseeable consequences of his behavior to other persons. The court accepted Dr. T.'s assessment that the accused minimized and justified his violent behaviours. It was also determined that the accused had a high likelihood of harmful recidivism. The court was convinced beyond a reasonable doubt that the accused constituted a threat to the life, safety, or physical or mental well-being of other persons given his past conduct, his high likelihood of harmful recidivism and the intractability of his violent conduct. The accused was found to be a dangerous offender. The court believed the accused's violent conduct to be intractable and did not believe that supervision by the federal parole system would be able to manage the accused's risk to reoffend violently. The consideration of Gladue factors was found to be warranted. The factors were found to play a minimal role given the accused's lack of desire to heal and given his release plan did not include Aboriginal-

centred programming. A determinate sentence was found not to be appropriate. The accused was sentenced to an indeterminate period of incarceration because lesser sentences would not adequately protect the public against the commission of murder or a serious personal injury offence.

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R v Yates, 2019 SKPC 41

Kovatch, July 18, 2019 (PC19034)

Barristers and Solicitors – Conflict of Interest – Application for Removal
Criminal Law – Sentencing – Joint Submission
Professional Responsibility – Conflict of Interest – Solicitor/Client Relationship
Professions and Occupations – Lawyers – Code of Conduct – Ethics
Professions and Occupations – Lawyers – Conflict of Interest
Professions and Occupations – Lawyers – Withdrawal

The two accused, A.Y. and K.G., were jointly charged with committing second degree murder. They each initially retained the services of two different lawyers. At the outset of the preliminary inquiry, Crown counsel presented the court with a new information, sworn just prior to court, charging both accused with manslaughter. The accused each entered guilty pleas to the new information. The second-degree murder charge was withdrawn. The court was advised that there would be a joint submission on sentencing and sentencing was adjourned to a few days later. At sentencing, counsel for A.Y. indicated that she received instructions to resile from the joint submission. The matter was adjourned. When proceedings resumed, Crown counsel indicated that the best option would be to lay a new information charging both accused with second degree murder. The Crown stayed the manslaughter information, but the guilty pleas remained on the manslaughter charge that it related to. Counsel for K.G. withdrew and his matter was adjourned to allow him to retain new counsel. The court impugned and questioned the integrity of A.Y.'s counsel. The matter was adjourned to allow counsel to make representations regarding the ethical propriety of her actions and for the court to consider whether she should be discharged as counsel for A.Y. On the adjourned date, A.Y.'s counsel indicated that to speak to allegations of breach of ethics, her client would have to waive solicitor/client privilege, which he would not do. She also indicated that the court was not the appropriate forum to discuss ethical issues, nor did it have jurisdiction to rule on her ethics. The issues were: 1) what was the jurisdiction of the court to review the ethics of counsel before the court? What kind of orders could the court make? 2) whether the conduct of counsel was contrary to the Code of Professional Conduct of the Law Society of

Saskatchewan, and thus unethical; and 3) whether the court should grant a remedy by discharging defence counsel.
HELD: The issues were discussed as follows: 1) The court agreed that it could not discipline counsel for unethical conduct. The court could also not discipline counsel on matters that arose on the stayed informations. The court could, however, prevent counsel from acting on a continuing matter, where there would be a continuing breach of ethics. The court could prevent counsel from acting if there was a reasonable likelihood counsel would face a conflict of interest; 2) clause 2.1-1 of the Code of Professional Conduct requires lawyers to discharge all of their responsibilities honourably and with integrity. Acting contrary to an agreement and undertaking is unethical. A.Y.'s counsel argued that the joint submission was not an agreement reached with counsel, therefore she did not violate ethics when she resiled from the agreement. The court did not agree because: a) the counsel clearly stated on two occasions that the arrangement was for a joint submission on sentence in exchange for the Crown accepting a guilty plea to a lesser included offence; and b) the court found that the agreement was binding on the counsel; it was adopted and crystalized because counsel agreed to follow the instructions. The court also found that s. 3.7-2 of the Code of Professional Conduct should have guided A.Y.'s counsel and obligated her to withdraw because to continue to act would be contrary to her ethics. The court concluded that defence counsel could not simply disregard its agreement because the client changed his mind. A.Y.'s counsel was found to have acted contrary to the Code of Professional Conduct when the joint submission was disregarded; 3) counsel should only be discharged or dismissed where allowing counsel to continue "would undermine public confidence in the administration of justice" or the court determined that the lawyer involved is in a conflict of interest. The court determined that there were compelling reasons and an order should be made to discharge counsel because: a) there were two breaches of the Code of Professional Conduct, one when there was a breach of an agreement and undertakings reached between counsel and another when counsel did not apply to withdraw; and b) precedents direct that counsel must be discharged if counsel is in a conflict because the guilty plea prevents her from effectively representing A.Y. and she cannot bring an application to expunge. The court ordered that counsel for A.Y. withdraw as legal counsel and that A.Y. retain new and independent counsel from an independent firm.

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Noga v Wawanesa Mutual Insurance Co., 2019 SKQB 160

MacMillan-Brown, July 9, 2019 (QB19157)

Civil Procedure – Mandatory Mediation
Civil Procedure – Summary Judgment

Insurance – Actions on Policy – Homeowner Policy
Insurance – Statutory Appraisal Process
Statutes – Interpretation – Saskatchewan Insurance Act

The defendant insurance company applied for summary judgment against the plaintiffs. The plaintiffs' claim against the defendant related to an insurance claim they made after a fire damaged their residence and its contents. The defendant argued that the plaintiffs were bound by the valuation decision made by an umpire after participating in a statutory appraisal process. A company hired by the defendant concluded that boxes located in the basement of the plaintiffs' home contained a significant amount of unopened makeup that was not damaged. The plaintiffs disagreed. The defendant provided a content assessment report to the plaintiffs detailing the personal property that had been damaged by the fire, the replacement equivalent, and the actual cash value of the items. The defendant issued a cheque to the plaintiffs in the amount of $8,393.86 as interim compensation. The plaintiffs did not cash the cheque. The plaintiffs initiated the appraisal process, thus invoking ss. 108 and 128.11 of The Saskatchewan Insurance Act. Each party appointed an appraiser to provide their respective valuations of the personal property in the home. The plaintiffs' appraiser concluded that the total settlement plus inflation was $255,028.46. The valuation included $23,502 for the makeup. It also included amounts for alternate accommodations, moving, and storage. The defendant's appraiser found a total replacement cost of the contents was $50,366.52. The makeup was not valued because it was sealed and undamaged according to the appraiser. Because of the difference, the appraisers appointed an umpire. The umpire concluded that the actual cash value of the contents was $82,671.69. The umpire's report included a valuation of $23,502.29 for the makeup. The defendant offered to pay the plaintiffs $62,996.15. They deducted the makeup, saying that it was unrecoverable because it was business goods. The plaintiffs disagreed with some of the umpire's findings, including that the makeup was for business use. The plaintiffs indicated that the application for summary judgment should be dismissed because the parties had not yet completed the mediation session mandated in s. 42 of The Queen's Bench Act, 1998.

HELD: The court disagreed with the defendant and decided that this was not an appropriate case for summary judgment. The court was satisfied that this was an appropriate case to postpone the mandatory mediation so that the court could decide on the summary judgment application. The statutory appraisal process was not found to be a substitute for mediation, as argued by the defendant. With respect to the analysis of the summary judgment application, the court concluded that there was a genuine issue for trial. The umpire's value of items is binding; however, that does not remove the right of the insured to challenge whether particular contents are covered under the policy. Coverage is not within the umpire's purview. The court found that it could not determine the

issue of personal versus business use with respect to the makeup on the summary judgment application. There were also other determinations beyond value that had to be made. For example, were accommodation expenses covered and required? The application for summary judgment was dismissed. Costs were ordered to be in the cause.

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Graham Design Builders LP v Black & McDonald Ltd., 2019 SKQB 161

Currie, July 9, 2019 (QB19158)

Arbitration – Appeal
Contract Law – Arbitration – Appeal – Leave to Appeal
Contract Law – Arbitration – Appeal – Question of Law
Statutes – Interpretation – Arbitration Act, section 42

The applicant applied, pursuant to s. 45(2) of The Arbitration Act, 1992 (Act), for leave to appeal parts of the decision of an arbitrator in a dispute with the respondent. The applicant was the construction manager and general contractor to build a hospital. The respondent was a subcontractor to the applicant. The parties used an Integrated Lean Project Delivery (ILPD) method that emphasizes teamwork and waste reduction. The project took longer to complete than planned and at a higher cost. The respondent incurred significantly greater project expenses than expected and the applicant refused to reimburse them for the increased cost. The respondent sought reimbursement through arbitration to resolve the dispute. The arbitrator awarded the respondent: $129,996.84 as reimbursement of its cost to complete the work; $1,439,872.29 for profit associated with the unpaid cost of the work; and interest on both amounts. The applicant objected to the arbitrator's decision in two respects: 1) the dates used in awarding interest. The arbitrator awarded interest starting 10 days after the date of each unpaid invoice rather than 30 days; and 2) the award of profit was argued to be a rewriting of the contract by the arbitrator. The applicant wanted to pursue the objections with an appeal, so it sought leave to appeal. The subcontract between the parties was a "Cost Plus a Fee Trade Partner Agreement" (TPA). The TPA referred to an Integrated Form of Agreement (IFOA), which was a contract among the owner, the application, that architect, and the engineer. The IFOA was part of the TPA pursuant to s. I.
HELD: The applicant can only appeal if the conditions set out in s. 45(2) of the Act are met, namely: 1) the question is a question of law; 2) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and 3) determination of the question of law at issue will significantly affect the rights of the parties. The court considered whether the questions were questions of law.

There were references to interest being paid in both “30 days” and to “otherwise in accordance with the Payment Protocol”. The arbitrator concluded the contract meant that payment was in accordance with the payment protocol, which he found to be within 10 days, and no later than 30 days. The arbitrator reconciled the ambiguous provisions. The arbitrator considered the factual matrix to make the determination. The court concluded that the interest question was one of mixed fact and law, not just one of law alone. The court determined it was thus not appropriate to grant leave to the applicant to appeal with respect to the interest question. The court then considered the profit award. There was no provision for increased profit unless there was a change order. The arbitrator found that the parties were not following the contracts and that the applicant imposed a different process for changes. The arbitrator found that s. 33.2 of the IFOA applied and the respondent was not precluded from receiving profit on its additional work. The factual matrix was found not to overwhelm the words of the contracts. The profit award question was also found to be a question of mixed fact and law. The applicant also argued that the arbitrator engaged in the arbitral equivalent of taking judicial notice, and that he did so incorrectly. The court found that the comments the applicant referred to in support of its contention were mere passing comments that did not form an effective part of the arbitrator’s decision on the profit award question. The applicant also argued that a question of law was established when the arbitrator considered the principles of waiver and acquiescence, neither of which were pleaded or argued. The arbitrator only referred to the principles in passing and he specifically noted that they did not form part of his decision. The profit award question was not a question of law and it was thus not appropriate to grant the applicant leave to appeal with respect to that question. The court continued, obiter, to determine the remaining two questions in s. 45(2). With respect to the interest question, the $30,000 to $40,000 in the large contract would not be important or significant. The interpretation of the ILPD contracts for perhaps the first time was attractive, however, much turned on the specific circumstances in this case relating to how the parties followed and neglected the contractual terms. Even if the interest question were found to be one of law, the court would not have allowed the appeal because it lacked significance and importance. The court would have concluded otherwise with respect to the profit question. The amount involved was over $1 million. Leave to appeal would have been granted on the profit award question, if the question had been found to be a question of law. Leave would have been granted because the matter was important to the parties and the determination would significantly affect the rights of the parties. The application was dismissed with costs.

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Tompson v Gerow-Scissons, 2019 SKQB 163

Scherman, July 10, 2019 (QB19159)

Civil Procedure – Injunctions
Civil Procedure – Originating Application
Injunctions – Interlocutory or Interim Injunctions
Injunctions – Permanent Injunctions
Injunctions – Quia Timet Injunctions
Municipal Law – Bylaw

The applicant filed an originating application without specifying the relief sought. The applicant's affidavit referred to seeking an injunction against his neighbour's utility plan for their garage suite. The respondents were the applicant's neighbours and the City. The personal respondents were developing a garage suite in the backyard of their property that required water and sewer connections. The applicant thought that the installation of the water and sewer connection would involve a trespass or other damage to his property. The application had a number of problems: 1) it was not clear whether the applicant sought an interim or permanent injunction; 2) the applicant's evidence and submissions did not focus on the requirements at law to obtain an injunction; 3) no trespass or other legal wrong affecting the applicant had occurred; and 4) there were procedural issues, because the claim was commenced by originating notice rather than by statement of claim. The required undertaking as to damages was also not filed. When the applicant first learned of his neighbours' two-story garage project, they told him that all permits had been acquired when they had not been. The permits were eventually approved by the City. The plans included engineer-sealed plans for mechanical services to the garage suite. The applicant was unsuccessful in obtaining the utility plan from the City pursuant to The Local Authority Freedom of Information and Protection of Privacy Act. The applicant was concerned with damage during installation or during future maintenance and repair. The applicant, who has significant directional drilling experience, was of the opinion that the installation would not be possible without encroaching on his property underground. The City disagreed that its regulations required a three-metre separation between the utility lines and structures on the property to provide space for construction and maintenance. The City indicated that the guideline was not a regulation and it did not apply to underground utility connections on private property. According to the City, there was no minimum required setback from neighbouring property lines other than the service connections were not allowed to encroach on neighbouring property.
HELD: There are three types of injunctions: 1) interlocutory or interim; 2) permanent; and 3) quia timet. The court found that the refusal of the City to share the details of the engineered utility plan with the applicant was inexplicable and the antithesis of freedom of information. The application for the injunction against the personal

respondents and the City was nonetheless dismissed because the requirements at law for an injunction did not exist. The applicant sought a quia timet injunction to restrain a breach of legal rights that he feared would occur. He effectively requested a form of permanent injunction. To obtain a quia timet injunction, the test for interlocutory injunction must be met with the additional requirement of showing that there is a strong probability that the feared conduct and resulting damage will in fact occur. There was not a serious issue to be tried as to whether a legal wrong had occurred. The court was not satisfied that the perceived harm was harm that met the criteria of being irremediable. The balance of convenience tests favoured not intervening by way of injunction. The court also discussed the procedural problems. An originating application can only be used for certain types of actions, generally those capable of summary determination. The interpretation of a municipal bylaw is such an action, but this application involved not only the interpretation of the bylaw but the fear that it would not be complied with. The application should have been commenced by statement of claim and thus no action was properly commenced. The court did not award costs because the respondents' inappropriate conduct was significantly responsible for the matter ending up before the court. The City's refusal to provide information also contributed to the applicant's frustration.

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Duckworth v Duckworth, 2019 SKQB 165

Tholl (ex officio), July 11, 2019 (QB19160)

Family Law – Division of Family Property – Valuation
Family Law – Spousal Support

The parties married in 1994. From 1993 to 2010, they lived together on their ranch. In 2010, the petitioner wife moved to Moose Jaw with the couple's two daughters, then aged 14 and 10. The respondent incorporated the ranch in 2012, becoming its sole officer and shareholder. In 2013, the petitioner issued a petition for divorce, equal division of family property, child support (composed of ongoing support for the youngest daughter who had just completed her first year of university and a retroactive adjustment of ss. 3 and 7 child support for both daughters retroactive to 2013) and spousal support. In 2016, the petitioner applied for interim spousal support, interim ongoing child support and retroactively adjusted child support. The court ordered that the respondent pay $491 per month for the youngest daughter's support but declined to order other interim relief without prejudice to the petitioner's ability to seek retroactive child and spousal support at trial. Regarding the family property, the issues between the parties were: 1) the date of valuation. The petitioner argued that the date of adjudication should

be used because the value of the farm assets had increased due to market forces. The respondent submitted that the application date should be used because the change in the farm's value resulted from his efforts over the period since the petition was issued; and 2) the value of the farmland, the quantity and valuation of the livestock and the inventory of farm equipment and its valuation. The parties tendered conflicting expert evidence. The expert retained by the petitioner suggested the value of the shares in the corporation as of petition date at between $1,150,000 and $1,400,000. He appraised the land at $1,317,000. The respondent said that that the petitioner's expert's assumptions regarding values for the land, livestock, etc. were materially wrong. His expert opined that the land's value was $865,900. There was much uncertainty in the evidence regarding the quantity of livestock because of the character of the annual fluctuations in their numbers. The evidence regarding the existence and value of the farm equipment was similarly problematic. The parties agreed that the respondent would continue to pay ongoing support for the youngest daughter while she attended university, but there was some dispute regarding retroactive child support; and 3) was the petitioner entitled to spousal support?
HELD: The petitioner's application was granted in part. The court granted a divorce, and it ordered an equal division of family property, payment by the respondent of some retroactive child support and ongoing support for the youngest daughter while she attended university. It declined to order spousal support. It found with respect to each issue that: 1) it chose the date of application as appropriate under s. 2 of The Family Property Act. The change in value was not only due to market forces but to the efforts of the respondent during the lengthy period after the parties separated. Further, the parties had not submitted sufficient expert evidence regarding value at the time of adjudication; 2) it preferred the respondent's expert witness' valuation of the land because the appraisal of it by the petitioner's expert was based on it being arable when in fact it was pasture land. The court established the approximate number of cattle and their value at the time of the petition and what farm equipment was in existence then and its value. When the debts of the corporation were taken into account, the total value of its shares was $622,450. The respondent was ordered to pay to the petitioner an equalization amount of $237,900; and 3) the petitioner was not entitled to spousal support on either a compensatory or non-compensatory basis. There was no evidence that she had been detrimentally affected by the marriage as she had obtained her business degree during the relationship and had worked full-time in her chosen field since 2003. Both parties contributed to the family's economic well-being and neither had obtained an economic advantage at the other's expense. The petitioner had had sufficient income to meet her needs since the separation.

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Law Society of Saskatchewan v Zielke, 2019 SKQB 166

Scherman, July 11, 2019 (QB19161)

Injunctions – Professional Associations
Professions and Occupations – Barristers and Solicitors – Fees – Agents
Statutes – Interpretation – Criminal Code
Statutes – Interpretation – Legal Profession Act, 1990
Statutes – Interpretation – Small Claims Act, 2016
Statutes – Interpretation – Summary Offence Procedure Act

The applicant, the Law Society of Saskatchewan, sought an order restraining the respondent from various activities that it said related to the practice of law. The respondent acknowledged that he was representing individuals for a fee in traffic court, small claims court, and other tribunals. He indicates that legislation permitted him to act as an agent and there was no prohibition on an agent acting for a fee. He relied on the Summary Offences Procedure Act, 1990 (SOPA), ss. 14 and 15; The Small Claims Act, 2016 (SCA), s. 12 and 33; and the Criminal Code s. 800. The Law Society relied on The Legal Profession Act, 1990 (LPA), s. 30. The respondent argued that there was conflict between the LPA and each of the provisions he relied on and that such conflict should be determined in his favour. The Law Society argued that there was no conflict between the LPA and the other statutes, thus eliminating the need to rely on the paramountcy doctrine. The Law Society further argued that the presumption of coherence in statutory interpretation results in each provision operating without coming into conflict with any other. The issues were: 1) whether the provisions of SOPA and SCA prevailed over the prohibition in the LPA against nonlawyers charging a fee; 2) whether there was a conflict between s. 800 of the Criminal Code and the LPA that engaged the principle of paramountcy; and 3) whether the Law Society was entitled to the injunction it sought.
HELD: The issues were determined as follows: 1) the provisions of SOPA and SCA permitting individuals to have agents assist or represent them should not be read as having an implicit intention that this agent can charge a fee for such representation. The only harmonized interpretation consistent with the presumption of each statute is that nonlawyers cannot charge fees for their services. The express provisions of each of the provincial statutes can operate without conflict. There would only be a conflict if SOPA explicitly allowed agents to charge fees. Also, just because the SCA was enacted after the LPA does not mean that fees can be charged. When provisions are enacted the legislature is presumed to be fully aware of all of its other statutory enactments so as to avoid conflict in interpretation; 2) the Criminal Code in no way seeks to legislate as to who may practice law and who may charge fees for practicing law. Paramountcy is to be narrowly construed and harmonious

interpretations are to be pursued. The court did not find a conflict between the provisions of s. 800 of the Criminal Code and the LPA; and 3) s. 82 of the LPA gives the Law Society the express right to obtain injunctions to ensure persons do not act in contravention of the Act. The threshold requirement for an injunction restraining an unauthorized person from practicing law is low. The court was satisfied that the respondent was acting contrary to s. 30 of the LPA. The Law Society was entitled to an injunction.

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R v Thalheimer, 2019 SKQB 168

MacMillan-Brown, July 16, 2019 (QB19162)

Criminal Law – Motor Vehicle Offences – Dangerous Driving Causing Death

The accused was charged with dangerous driving causing death contrary to s. 249(4) of the Criminal Code. While driving home around midnight in July 2016, the accused's vehicle struck a CN train car at a crossing. He was seriously injured and his wife was killed in the collision. Three reflective signs were posted on the road just before the crossing. The first indicated that the speed limit was 50 km per hour, the second was an angled train crossing sign located approximately 190 metres before the crossing and the third was a train crossing sign located approximately 73 metres before the crossing. There were no witnesses and the accused could neither recall his speed, nor seeing the train as he approached the crossing, nor could he remember the collision. There was no evidence that he had been drinking. The Crown contended that the accused was driving an excessive speed of 127 km per hour just three seconds prior to impact and he did not brake until two seconds beforehand. His excessive speed constituted dangerous driving. It called an RCMP officer with expertise as a collision reconstructionist and he was qualified as an expert witness. The officer testified that he could not conduct a physical speed analysis based upon tire marks at the area of impact, but after retrieving the complete data from the vehicles' event data recorder (EDR), he testified that the accused was driving at 123 km per hour between the fifth and fourth seconds before impact and began to brake between two and three seconds beforehand, decreasing the speed to 93 km per hour when the collision occurred. If the accused had been driving at the speed limit, he would have been able to come to a complete stop had he braked at the railway crossing sign closest to the tracks. The accused testified that he had lived in the area for 30 years and had driven over the crossing many times and had never had to stop before for a train at that crossing. He described the road as difficult to drive because it was graveled and argued that he could not have been speeding because it was impossible to do so because of the road

condition.
HELD: The accused was found guilty. The court found that the accused was a credible witness, but that his evidence was not reliable and did not raise a reasonable doubt regarding his speed. It accepted the evidence provided by the expert witness that the accused was driving at the speeds recorded by the EDR. The Crown had proven the actus reus of the offence: the accused was driving in a manner dangerous to the public because he passed three signs warning him of the tracks and was unable to stop to avoid the collision because of his excessive speed. The court was satisfied that the Crown had proven that the accused had the mens rea required of the offence because a reasonable driver travelling on that road would have recognized the warning signs and would have been prepared to stop. The accused's speed of driving was a marked departure from the standard of care that a reasonable driver would have observed in his circumstances.

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Hammett v Mullin, 2019 SKQB 175

Brown, July 23, 2019 (QB19170)

Family Law – Custody and Access – Person of Sufficient Interest
Statutes – Interpretation – Children's Law Act, 1997, Section 6

The applicant applied to be declared a person of sufficient interest regarding his five-year-old stepson pursuant to s. 6 of The Children's Law Act, 1997. The applicant had lived with the petitioner for nine years and the child had had his primary residence with them since his birth in 2014. The applicant's application was motivated by his desire to be given party status in the upcoming trial between the petitioner and the respondent, the child's biological parents, to decide the issues of custody and access. He desired to be able to participate fully in the trial including being in the courtroom for its duration rather than being forced to remain outside prior to providing his testimony. The respondent opposed the application. He argued that it was not necessary nor appropriate and had the potential to skew the fairness of the trial. The evidence provided by the petitioner and the applicant were critical to the issues and would prejudice him in putting forward his case if they were both allowed to hear the other's evidence and potentially confirm it.
HELD: The application was denied. The court found that the applicant satisfied the first step of the two-step inquiry established in D.L.C. v G.E.S. regarding applications under s. 6 of the Act as he had a close, long-term relationship with the child. However, the applicant was not being denied access to the child. The purpose of his application was not consistent with the intent of s. 6 of the Act. Designation of a person as "having sufficient interest" is intended to

ensure that someone with a close connection to a child is not without recourse should it be shown to be in the best interests of the child that that person should continue to have access. The provision was not intended to be used to enable a stepparent to gain greater access to the trial proceedings involving a stepchild without the corresponding issue of their access being present. If the applicant's evidence at trial appeared to be influenced or in some way tainted though his hearing of the petitioner's evidence first, it would harm the child's best interests because it would interfere with the court coming to a fair and objective conclusion regarding custody, access and parenting.

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Bachynski v Cale, 2019 SKQB 176

Brown, July 23, 2019 (QB19171)

Statutes – Interpretation – Family Maintenance Act, 1997, Section 2, Section 3

The applicant sought child support pursuant to The Family Maintenance Act, 1997. The parties had two children. The youngest child lived with the respondent. The oldest child, a 17-year-old daughter, had lived with the applicant until October 2018, but then moved to Winnipeg to live with her boyfriend. There was some evidence that she was enrolled in a high school distance-learning class and that she might go back to school full-time in the fall. The applicant averred that she had provided $180 to $200 per month to the daughter, but the evidence had not confirmed these payments. The respondent argued that he should not be responsible for the child because she had become independent from the applicant. The applicant's income was $35,200 in 2018 and $33,800 in 2017 and the respondent's income for was $35,300 in 2017 and $51,200 in 2018. If the respondent was responsible for support during 2017, the Guidelines establish a monthly payment of $278 and $416 per month for 2018.
HELD: The application for child support was granted on an interim basis. The court found that under ss. 2 and 3 of the Act, there was an obligation to provide maintenance for a child under the age of 18 and in this case, the child qualified. However, it was unclear whether the payment of support in this case would meet the purpose underlying the provision. Because of the paucity of evidence regarding the child's current situation and whether she would return to school full-time, the court ordered the respondent to pay interim support to the respondent. The applicant was to provide proof of what she was actually doing for or providing to the child in terms of financial support on a monthly basis.

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Stick v Onion Lake Cree Nation, 2019 SKQB 178

McCreary, July 24, 2019 (QB19172)

Civil Procedure – Contempt
Statutes – Interpretation – First Nations Financial Transparency Act, Section 7, Section 8

The applicants applied for an order finding the respondent, the Onion Lake First Nation, in contempt for failing to comply with an order of the Court of Queen's Bench made in 2017. The earlier order had been granted to the applicants to compel the respondent to disclose certain 2015 and 2016 financial documents in accordance with ss. 7 and 8 of the First Nations Financial Transparency Act and the Indian Bands Revenue Moneys Regulations (see: 2017 SKQB 176). The respondent's appeal of the order was dismissed (see: 2018 SKCA 20). The respondent posted its 2015 and 2016 audited financial statements and documents on the internet as required but had not published anything since nor provided the applicants with the financial documents requested.
HELD: The application was granted. The court ordered that the respondent was in contempt of the 2017 order and fined it $10,000. The contempt would be purged if it published specified financial documents on its website or elsewhere on the internet within 30 days. The court found that the order and ss. 7 and 8 of the Act both established an ongoing obligation on the respondent to provide the information in the financial years following 2016. The respondent was in contempt because the terms of the order had been clear and it had had notice of the order, since it had appealed it. Finally, the evidence demonstrated that the respondent failed to comply with its obligation to provide and publish disclosure for the 2017 and 2018 financial years.

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