Case Mail

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Administrative Law – Appeal

101114386 Saskatchewan Ltd. v. Financial and Consumer Affairs Authority (Hearing Panel), 2013 SKCA 134 - Court of Appeal, Ottenbreit, December 13, 2013 (CA13134)

The personal applicant and a number of corporate applicants were involved in a hearing conducted by the respondent, the Financial and Consumer Affairs Authority, regarding violations of The Securities Act, 1988. The personal applicant appealed a decision of the hearing panel pursuant to s. 11(8) of the Act. The decision recommenced the hearing and required the applicants to submit written closing arguments based on evidence before the hearing panel to that date. The appeal requested a stay of the recommencement date, which had passed before the appeal was heard, and a stay of the whole proceedings. The personal applicant had already applied, in previous proceedings, to have the matter stayed and was not successful. The personal applicant relied on much the same evidence and grounds of appeal as in the former application. The personal applicant argued that she was possibly donating an organ to a family member and could therefore not continue in the hearing. The medical evidence did not disclose which family member or how urgent the matter was. HELD: The Court of Appeal applied the tripartite test and determined that it had not been met. The application was dismissed. The Court was not satisfied that the personal applicant would suffer irreparable harm medically or to her ability to participate fully in hearing. Also, the applicant's appeal in the case would not be prejudiced by not granting a stay. The appeal was an attempt for the same relief as in a previous application. The balance of convenience was found to lie in having the matter proceed.

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Bankruptcy and Insolvency – Discharge – Income Tax debt

Schira, Re (Bankrupt), 2014 SKQB 4 - Court of Queen's Bench, Thompson, January 15, 2014 (QB14003)

The bankrupt filed for bankruptcy because he owed $364,106.65 to the CRA for unpaid income tax debt. The CRA was the bankrupt's only creditor. The bankrupt had worked as an independent contractor and had not paid income tax as required. He said that this failure to pay resulted after his accountant misplaced two years of his business records. According to the bankrupt, when he realized the amount he owed to CRA, he felt the debt was insurmountable and applied for bankruptcy. The bankrupt admitted that he had spent extravagantly between 2005 and his assignment in bankruptcy and that he had made no effort to repay his debts to CRA. CRA had recovered some money, but only through garnishee. The bankrupt had no dependants and admitted that he was intentionally underemployed in an attempt to minimize the amount he would be ordered to pay back to CRA as part of his discharge from bankruptcy.

HELD: The integrity of the bankruptcy system requires that the bankrupt be forced to pay back a portion of his tax debt before being discharged. The bankrupt intentionally failed to pay back any of his debt and lived extravagantly. He admitted that he is purposely underemployed in an effort to avoid paying more income into his bankruptcy estate. As a result, income should be imputed in determining the appropriate condition of his discharge. The bankrupt was ordered to pay $18,000 by way of monthly payments of $500 to the trustee and must serve a 36-month suspension. The bankrupt has a right of repayment, but must serve the full term of his suspension.

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Bankruptcy – Application to Lift Bankruptcy Stays

Saskatchewan Crop Insurance Corp. v. Avramenko, 2014 SKQB 22 - Court of Queen's Bench, Mills, January 23, 2014 (QB14022)

The plaintiff sought to lift the statutory stay pursuant to ss. 6 and 9 of the Bankruptcy and Insolvency Act with respect to one of the defendants. The defendant's trustee did not oppose lifting the stay but the defendant did. The plaintiff claimed on the basis of fraud and breach of contract.

HELD: The plaintiff was not required to prove a prima facie case, but there must be sound reasons for lifting the stay. The Court noted that the plaintiff's fraud claim left much to be desired but that the breach of contract claim was not without merit. The Court found two reasons to allow the claim: 1) if the allegations of fraud were proven, the discharge of bankruptcy would not be a defence to the collection of the debt; and 2) there were a number of defendants in the action and there was no reason that the action could not continue against the other defendants. It would be prejudicial to the plaintiff to have to wait for the bankruptcy proceedings to conclude before proceeding in their action.

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Builders' Lien – Application to Dismiss
Builders' Lien – Claim for Deficiencies – Payment into Court
Builders' Lien – Discharge

Evolution Homes Ltd. v. Zupanich, 2014 SKQB 38 - Court of Queen's Bench, Rothery, February 4, 2014 (QB14040)

The applicants requested an order pursuant to s. 56(2) of The Builders' Lien Act vacating a lien against their property because there were no monies owing under a contract between them and the lienholder. Alternatively, the applicants suggested that if there was a lien that it be vacated without payment because they had no monies to pay it and the mortgagee would not advance any more funds with the lien on title. The applicants and respondents had a contract for the construction of a home with payment terms outlined. The applicants had a construction mortgage with the CIBC. During construction, an appraiser determined that the house was 46 percent complete ($411,268.50) but the CIBC only advanced $333,612 and that is all that the respondent received. The respondent stopped work on the project pending receipt of $97,054.41, the difference in what was received and an amount for extras. The applicants terminated the contract and the respondents registered the builders' lien. The

respondents filed a statement of claim and the applicants filed a statement of defence alleging no more money was owed and that they were not responsible for the extras because they had not signed off on them. The applicants counterclaimed for $200,000 to complete the project plus damages for deficiencies. The applicants argued that the respondent agreed to accept the monies as they were advanced from the CIBC. The CIBC used a calculation different than just a percentage of the mortgage based upon percentage complete.

HELD: The respondent was correct in expecting his next progress payment would be 46 percent of the total project. Therefore, $77,656.50 was due and owing to the respondent and the amount constitutes a lien pursuant to s. 22 of the Act. The extras also constituted a lienable interest because they were requested by the applicants. If the lien appeared to be valid, the Court said that it should order monies be paid into court to allow the lien to be vacated. The Court determined that it was reasonable for the applicants to pay the amount of the lien plus security for costs as calculated in s. 56(1) of the Act. The Court ordered that the applicant pay $97,054.91 plus $24,263.72 as security for costs into court.

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Civil Procedure – Addition of defendants
Civil Procedure – Amendment – Statement of Claim
Civil Procedure – Queen's Bench Rule 37, Rule 165

Pollock v. Sasktech Inspection Ltd., 2013 SKQB 409 - Court of Queen's Bench, Kovach, November 11, 2013 (QB13412)

The applicant sought to: 1) amend his statement of claim to include a claim for breach of contract; 2) amend his statement of claim to include a claim for an oppression remedy under s. 234 of The Business Corporations Act; and 3) to add proposed defendants. The proposed defendants were the shareholders, directors and officers of the defendant corporation. The plaintiff was employed by the defendant corporation and eventually purchased shares in the corporation and entered into the corporation's unanimous shareholders agreement ("USA"). In the spring of 2010 Acuren wanted to acquire the shares of the corporation; the offer was refused. In July 2010 the applicant's employment was terminated and his shares were redeemed. In December 2011 Acuren acquired the shares of the corporation. The original statement of claim alleged wrongful dismissal and raised issues with respect to the redemption of shares. The issues were as follows: 1) are the amendments outside the limitation period established by s. 5 of The Limitations Act; 2) if the amendments are statute barred, can they be allowed under s. 20 of the Act; and 3) do the amendments accord with the former Queen's Bench Rules.

HELD: The amendments were allowed. The Court determined the issues as follows: 1) whether the limitation period has expired depends on whether the applicant's oppression and breach of contract claims were based solely on his employment termination and share redemption or if they related to the sale to Acuren, which did not occur until December 20, 2011. The Court determined that it would only be fair to allow the applicant to amend his statement of claim. The defendants can raise the limitation period argument at trial; 2) s. 20 allows claims outside of the limitation period if the claim arises out of the same transaction or occurrence as the original claim and no party will suffer actual prejudice as a result of the amendment. The Court found that there only needed to be sufficient temporal and factual relationship between the original

and proposed claims and that there need not be a legal connection. The Court further found that there was a sufficient temporal and factual relationship because the termination of the applicant's employment and redemption of shares grounded both the original and amended claims. The original defendant would not be prejudiced because the only step taken was to file their statement of defence. Also, the proposed defendants would not be prejudiced because they were the operating minds of the existing defendant so were aware of the proceedings. Further, there was no evidence that the applicant was operating in bad faith. The applicant was found to meet the requirements of s. 20 and; 3) applying former Queen's Bench Rule 165, the Court concluded that the applicant did make out a prima facie case for oppression and breach of contract in the amended pleadings. Again, the Court noted that the existing defendant would not be prejudiced by the additional claims because they had only filed a statement of defence. The Court found that former Rules 37(2) and 165 applied with respect to the proposed new defendants. The applicant had to demonstrate that: a) the relief claimed arose out of the same series of transactions or occurrences as the original claim; or b) that the proposed causes of action involved a common question of fact or law. Because there was a prima facie case against the defendant, there was also one against its shareholders, directors and officers. The Court already found that the claims were out of the same series of transactions or occurrences as the original claim. Lastly, the Court concluded that the actions against the proposed defendants shared a common question of law as the actions against the existing defendants.

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Civil Procedure – Application to Set Aside Noting for Default of Defence
Civil Procedure – Queen's Bench Rule 3-21
Statutes – Interpretation – Business Corporations Act, Section 275

Shinkaruk v. Neufeld Building Movers Ltd., 2013 SKQB 411 - Court of Queen's Bench, Scherman, November 20, 2013 (QB13413)

The applicants/defendants, a corporation and its shareholder/director, applied to set aside the noting of default of defence. The personal defendant argued that he misunderstood that a statement of defence had to be filed within 20 days; however, his affidavit did not explain the misunderstanding. The defendant did not contact counsel when he was noted for default; he only contacted counsel after being served with other documents in the proceeding. The plaintiff argued that the defendants took active steps to avoid service.

HELD: The defendants' application was successful. The principles to determine if the default should be set aside were analyzed as follows: 1) the defendants contacted the plaintiff's lawyer promptly after realizing they were noted for default. When it became apparent that the plaintiff would not agree to set aside the default, the application was brought in a timely manner; 2) the delay was satisfactorily explained. The defendant acknowledges that it was pure negligence on his part, but said that it was not wilful. Whether or not the defendants tried to evade service of the claim is not evidence that the delay in filing a defence was wilful. Also, the plaintiff acknowledged that a trial was likely necessary to discover who was actually responsible for the damage; 3) the draft defence plead an arguable defence; and 4) setting aside the default would not cause prejudice to the plaintiff. The Court did not find anything had occurred during the period of delay that would in any way compromise the plaintiff's ability to prosecute the action against the defendant. The plaintiff also argued that the corporate defendant could not

apply to set aside the defence because it was using a name different than the statement of claim and one that was not a registered corporation. The Court found the fact that the corporation changed its name and did not register it did not alleviate any obligation of the company under its registered name. Further, pursuant to s. 275 of The Business Corporations Act, an unregistered corporation is only precluded from participating in court proceedings regarding contracts. In this case the plaintiff also claimed in tort, which an unregistered corporation can defend in a Saskatchewan court.

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Civil Procedure – Pleadings – Amendments
Statutes – Interpretation – Limitations of Actions Act, Section 20
Civil Procedure – Parties – Third Party Claim

1348623 Alberta Ltd. v. Choubal, 2013 SKQB 439 - Court of Queen's Bench, Ryan-Froslie, December 13, 2013 (QB13438)

The defendants applied pursuant to Queen's Bench Rule 3-31 and s. 20 of The Limitations Act to add Jeanneau and his companies, Rescom Realty and RISA Management as third parties to the within action. The plaintiffs had commenced the action against the defendants and the proposed third parties for damages based on fraud and negligent misrepresentation alleged to have been by Jeanneau or through his companies regarding the sale of the defendants' apartment building to the plaintiff. The proposed third parties had acted as dual agent with respect to the sale. The plaintiff discontinued its action against the proposed third parties in December 2012 after they had filed a statement of defence, provided their statement as to documents and attended examination for discovery. The proposed third parties opposed this application on the basis that s. 20 of the Act did not apply to a third party claim and if it did, the Court should not permit the amendment of the pleadings.
HELD: The Court held that a third party claim may constitute an amendment to the original cause of action as contemplated by s. 20 of the Act. The Court found that the plaintiff's original claim and the third party claim related to the same transaction or occurrence: the sale of the building and the alleged misrepresentation made by Jeanneau. The proposed third parties were defendants in the original action and therefore they would not be prejudiced by the amendment to the pleadings.

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Civil Procedure – Pleadings – Application to Dismiss
Civil Procedure – Queen's Bench Rule 5-14, Rule 7-5
Civil Procedure – Summary Judgment

Harden v. Chang, 2013 SKQB 419 - Court of Queen's Bench, Gunn, November 22, 2013 (QB13404)

The defendants were two doctors and a health region. All defendants applied for an order dismissing the plaintiff's claim. The grounds for the application were that the plaintiff had not complied with orders requiring an updated statement as to documents and providing notices of expert witnesses. The defendants relied on Rule 5-14 of the Queen's Bench Rules, which require that an order of disclosure be complied with, and if it is not, a plaintiff's claim can be dismissed. They also relied on Rule 7-5, which

allows summary judgment if the Court is satisfied that there is no genuine issue requiring a trial with respect to the claim. The trial had been set and rescheduled three times. The plaintiff had three different lawyers representing her at different times throughout the proceedings but at the time of this application she did not have a lawyer. The plaintiff did not appear at the Chambers hearing on November 12, 2013.
HELD: The plaintiff was ordered to file an updated statement as to documents and she never did. On that basis alone the Court was prepared to order that the plaintiff's claim be dismissed. The Court noted that the original trial had been scheduled for a year after the pre-trial to allow the plaintiff to obtain expert evidence; this was never done and the trial was rescheduled two more times. The plaintiff did not provide any explanation for this failure. The Court concluded that the plaintiff could not prove her claim without medical evidence and her action was also dismissed on that basis.

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Civil Procedure – Queen's Bench Rule 1-3(3), Rule 7-1
Statutes – Interpretation – Business Corporations Act, Section 207
Corporation Law – Joint Venture

Wiebe v. 101105260 Saskatchewan Ltd., 2013 SKQB 440 - Court of Queen's Bench, Scherman, December 13, 2013 (QB13439)

The plaintiffs applied for an order giving relief under s. 207 of the Business Corporations Act, to dissolve a corporation that existed for the purpose of holding title to land in trust for joint venturers because of a disagreement between the venturers. The plaintiffs had formed a joint venture with the defendants to acquire land near Saskatoon that had subdivision potential. The intention was either to resell the land or develop it. The defendants had identified the opportunity and then sought investment from the plaintiffs. The joint venture agreement was signed in November 2007 and contained minimal provisions. It provided that the any decision with respect to the joint venture plans were to be made by persons holding in total at least 6663/9992 of the interests in the joint venture. The purchase price for the land was $1,117,750 and the plaintiffs had paid $1,017,750 and the defendants had paid $100,000. Under the terms of the agreement, the plaintiffs received 45 percent of the joint venture units and the 55 percent units were held by the defendants. The land had not been subdivided because the rural municipality instituted a freeze on new applications after the land was acquired. As a result, the land could not be sold for subdivision purposes. The plaintiffs stated that there was a deadlock because the defendants were not prepared to sell the land even though six years had passed since the joint venture was created. They want to sell the land to recover their investment and capture any gain. The plaintiffs also argued that there was a collateral agreement that the funds advanced to purchase would be in the nature of shareholder loans and that interest would be paid on such loans. The defendants refused to acknowledge any such agreement. The plaintiffs asked for an order for liquidations and dissolution of the trustee corporation and sale of the land and to find that there was an agreement that the joint venture would repay monies advanced for the purchase with interest, with the balance of any sale proceeds to be distributed in proportion to joint venture interests held.
HELD: The Court dismissed the application on the basis that it could not deal with the matter on a summary basis. The matter should proceed to trial. The Court held that there had not been any actions relating to the trustee corporation that effected a result that was oppressive within the meaning of s. 207(1)(a) of the Act and that it would not

be just and equitable within the meaning of s. 207(b) of the Act that the corporation be liquidated and dissolved. The remedies under the Act are not available to deal with a deadlock that arose within a contractual joint venture.

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Civil Procedure – Questioning
Civil Procedure – Production of Documents
Civil Procedure – Queen's Bench Rule 5-6

Canadian National Railway Company v. Clarke Transport, 2013 SKQB 394 - Court of Queen's Bench, Scherman, November 1, 2013 (QB13392)

The plaintiff sued the defendant for breach of contract and in negligence for its alleged failure to properly load its product within a railcar owned by the plaintiff, causing the plaintiff's train to derail. The plaintiff applied for orders that the defendants: 1) answer certain questions, which they refused to answer on discovery; 2) provide answers now, based on their present knowledge, to questions that the defendant argued are best left to be answered on completion of their discovery of the plaintiff when they will have better information; and 3) provide proper answers to certain questions asked. In the case of 1), the defendants had refused to review its records regarding how it loaded over 400 railcars in the past and to review records such as invoices provided by the plaintiff pertaining to its claim for damages to answer the question of which ones it would acknowledge as related to the derailment and, finally, to provide the documents related to its insurance adjuster's sketch of the railcar. With respect to item 2), the defendant could not provide answers until the completion of discovery. With respect to 3), the plaintiff wanted the individual themselves to answer questions rather than have another person describe what they would say.
HELD: The Court held that the replacement of former Queen's Bench Rule 212 requiring the production of documents "relating" to any matter in question and Rule 222 permitting examination for discovery "touching" the matter in issue in the action by new Rules 5-6, 5-18 and 5-25, which use the phrase: "relevant to any matter in issue", showed the intention that the broad relevance test was no longer applicable. The test under the new Rules was whether the matter qualifies as being material to the action based upon the matter as pled and whether the evidence tends to prove or disprove the matter in issue. This inquiry must be balanced against the notion of proportionality set out in the foundational rules. The Court dismissed the application, excepting the requested order under 3) wherein the defendant would fulfill its undertaking to have certain employees provide responses. With respect to the rest of the relief requested under 1), which involved the undertaking that the defendant would search its records regarding the loading of railcars, the Court held that the as matter was not an issue in the action, based upon a review of the claim as pled. Having regard to proportionality under the new Rules, the defendant should not be required to answer the question in light of the effort and expense required versus the possible benefits. The Court held that the plaintiffs were not entitled to ask the defendants to review a binder containing hundreds of pages of invoices assembled by the plaintiff regarding its expenditures incurred as a result of the derailment in order for it to advise the plaintiff which invoices the defendant believed were not related to it. It was the plaintiff's burden to prove its damages and the defendant was not required to assist the plaintiff to do so. The plaintiff's requested undertaking for the defendant to provide any background documents and information that went into the preparation of sketch of the railcar in

question by the defendant's adjuster was also denied. The adjuster's file was subject to litigation privilege and unless it was tendered as evidence at trial, there was no implied waiver of that privilege. Regarding the plaintiff's request in 2), the Court agreed with the defendants that that plaintiff's request that the defendant answer questions now, rather than after it had completed questioning of the plaintiff, was premature. The defendant had not yet taken a position on the cause of the derailment and they would advise the plaintiff when they had developed one. Rule 5-31 makes it an ongoing obligation to correct answers and there was no evidence in this application that the rules had not been complied with. The Court awarded costs in the amount of $1,500 to the defendants due to the complexity of the application, requiring the submission of briefs of law and the amount of time taken to argue them matters in Chambers.

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Contract Law – Breach of Contract

Totter v. Mahussier, 2013 SKPC 203 - Provincial Court, Labach, December 27, 2013 (PC13195)

The plaintiff and defendant entered into a contract for the pouring of a foundation and concrete floor. The defendant had purchased a house that she intended to move onto the basement. When the house was set onto the basement that the plaintiff had built, the house was not level and the foundation was three inches longer than the house on one side. There were other issues with the basement floor. The defendant refused to pay the balance of the contract price, alleging that the plaintiff had breached the contract.

HELD: The contract that the parties entered into stipulated that the plaintiff was to pour a foundation and basement floor. The contract had nothing in it about how the work was to be carried out, but there is an implied term in the contract that the work would be carried out in a good and workmanlike manner. The test for workmanlike manner is fitness for purpose. The plaintiff completed the work that they were contracted to do. The plaintiff had requested drawings of the home, including the location of things like doors, windows, teleposts and support beams. The defendant acted as her own general contractor and provided the plaintiff with these drawings, based on her own measurements. The majority of the problems that the defendant encountered were the result of reliance on inaccurate measurements in these drawings. The house sat crooked on the new foundation because it had been taken off a crooked foundation. The plaintiff remedied the problem by shimming the foundation and applying spray foam insulation to the cracks. The plaintiffs did breach the contract by not ensuring that the toilet flange was flush with the basement floor and the floor around the drain was not done properly. The plaintiff is entitled to the balance owing under the contract and the defendant is entitled to reasonable costs to have the toilet flange and floor drain issues rectified. The total owing under the contract was $4,800. The plaintiff was granted judgment in the amount of $4,000. The plaintiff was entitled to interest on the outstanding balance because it was a specific term in the contract agreed to by the defendant.

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Contracts – Parole Evidence

Kenroc Building Materials Co. Ltd. V. Gypsum Drywall Residential (Regina) Ltd., 2013 SKPC 214 - Provincial Court, Demong, December 23, 2013 (PC13194)

The plaintiff brought a claim against the defendant company for recovery of $20,000, which was the balance owing to it for the price of goods sold and delivered to the defendant plus interest at 16 percent compounded monthly since 2009 in accordance with the rate of set forth under the terms of sale. The plaintiff also sued the individual defendants alleging that each of them personally guaranteed the debts of the company. At trial, the only issue remaining was whether the personal guarantee executed by Wayne Klock in a written agreement dated November 3, 2004, was binding on him and enforceable. The document indicated that it was a continuing guarantee until such time as the defendant gave written notice to make no further advance on the security of the guarantee. The defendant argued that the guarantee was intended for a one-year period and that this matter was discussed with and agreed to by the plaintiff at the time of execution. The defendant's position on this discussion was that there was a fundamental variation of the written guarantee, which granted to the defendant the right to unilaterally remove himself from the guarantee after the expiry of one year. The plaintiff denied that they entered into a secondary oral guarantee that invalidated or altered the written guarantee.
HELD: The Court held that the defendant was jointly and severally liable pursuant to the terms of the written guarantee. All of the defendants then were jointly and severally indebted to the plaintiff for the sum requested by the plaintiffs plus interest. It found that the oral evidence of the defendant could not be admitted because it was in violation of the parole evidence rule. If the rule did not apply, the Court found that even if the defendant had expressed the desire to be removed from the guarantee, it was on such indefinite terms that there would be no oral contract to consider.

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Criminal Law – Application to Expunge Guilty Plea
Criminal Law – Assault – Sexual Assault – Child Victim

R. v. S. (D.), 2013 SKPC 200 - Provincial Court, Cardinal, December 11, 2013 (PC13185)

The accused pled guilty to a charge of sexual assault, which occurred in 1977 when he was a youth. He applied to expunge the guilty plea on the basis that he did not recall the incident and did not wish to plead guilty. The accused initially pled not guilty and trial dates were set. Prior to the trial, the accused pled guilty with the assistance of a senior lawyer. During an interview for a pre-sentence report, the accused advised the probation officer that he did not recall the incident and did not want to plead guilty. During the expungement hearing, the accused appeared to understand the questions being asked and responded accordingly. The accused testified that he did tell his former lawyer that he wanted to plead guilty and he did not tell her that he did not recall committing the offence. He said he just wanted to get over with it. The accused had a criminal record and had pled guilty on previous occasions with the assistance of lawyers.
HELD: The application was dismissed. The accused had the onus, on a balance of probabilities, to prove his guilty pleas should be expunged. The fact that he had a highly experienced lawyer representing him was a significant factor. His lawyer at the time had 28 years at the bar with a practice in criminal law nearly all that time. The accused acknowledged that he was not pressured to make the guilty plea. The fact that the Court did not inquire as to whether the conditions set out in s. 606(1.1) were met

did not affect the validity of the plea as is noted in s. 606(1.2). The Court was not satisfied on a balance of probabilities that the guilty plea was not entered voluntarily or that it was equivocal or that he was not fully informed before the plea was entered.

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Criminal Law – Assault – Sexual Assault

R. v. Bramwell-Colyer, 2013 SKQB 388 - Court of Queen's Bench, Gerein, November 21, 2013 (QB13390)

The accused was charged with committing a sexual assault contrary to s. 271 of the Criminal Code. The complainant alleged that that she had not consented. The issue was credibility.
HELD: The Court found the accused not guilty.

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Criminal Law – Assault – Sexual Assault – Child Victim

R. v. G. (D.), 2013 SKQB 424 - Court of Queen's Bench, Scherman, November 29, 2013 (QB13430)

The accused was charged with having committed sexual assaults on two pre-teen girls on a number of occasions during July and August 2011. One complainant, JF testified that she met the accused, her uncle, while visiting her father's house. At various times during the course of the visit she alleged that the accused had kissed her, fondled her breasts and restrained her so that she could not escape. Once JF had returned home, her sister learned of the episodes and reported it to their mother. JF's mother reported the matter to the RCMP and statements were taken in August. JF gave a video-taped interview at the detachment in January 2012. The Court granted the application to admit the videotape as evidence at trial. Because JF was under 14 at the time of trial, the Court determined that JF was able to understand questions and had the capacity to testify pursuant to s. 16 of The Canada Evidence Act. The Court heard JF's testimony and found that although there were some deficiencies in her evidence as presented in the recording and at trial, the Court found that she was telling the truth. JF also identified the accused at trial without hesitation. The other complainant, JL, overheard her mother and JF's father discussing the allegations made by JF and then divulged that the accused had also kissed her and had slapped her butt. This complainant's video-taped interview with the RCMP was admitted and she was considered able to give evidence. The Court found that JL's evidence was imprecise but the Court was satisfied that she was telling the truth. However, her identification of the accused at the preliminary inquiry was questionable. The accused was the only person in the room who was wearing orange prison clothes. At trial, JL was unable to identify the accused.
HELD: The Court held that the accused was guilty of the offence against JF but not guilty of the offence involving JL because her identification of the accused was sufficiently problematic that the Court could not conclude beyond a reasonable doubt that the person she identified at the preliminary inquiry was the person who kissed her and slapped her butt.

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Criminal Law – Assault with Weapon
Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Joint Submission
Criminal Law – Sentencing – Long Term Offender

R. v. Keepness, 2013 SKQB 441 - Court of Queen's Bench, Barrington-Foote, December 17, 2013 (QB13426)

The accused pled guilty to two counts of assault with a weapon contrary to s. 267(b) of the Criminal Code. There was a joint submission that the accused should be: 1) designated as a long-term offender; 2) sentenced to three years imprisonment with 30 months credit for his 28 months served in remand; 3) subject to a long-term supervision order ("LTSO") for 10 years. The accused was a 28-year-old Aboriginal man first convicted of a criminal offence at 16 and since convicted of 25 offences. Ten of the convictions were for violent offences. In the last convictions the accused dragged his partner down by her hair and kicked her repeatedly in her back and legs and she suffered a fractured wrist, broken finger and cuts and bruises. He was raised on a reserve by his parents and he had four half-sisters and two half-brothers. He was exposed to alcohol use by his parents until he was 10. The accused had one daughter, but no evidence was presented that he had a relationship with her. He did not contribute his problems to his upbringing. The accused had a lengthy history with substance abuse and suffered from Fetal Alcohol Spectrum Disorder. A psychiatrist submitted that he functioned at a grade four or five level with respect to reading, writing, and math. The psychiatrist also concluded that the accused was a high risk to reoffend, especially against an intimate partner, but that he was treatable. The accused had undertaken some of the limited programming offered while in remand.
HELD: The Court accepted the joint submission and the accused was sentenced as suggested by the parties. The Court analyzed the long-term offender designation as follows: 1) the accused would be sentenced to in excess of two years with the appropriate range being 30 months to four years; 2) the Crown demonstrated that the accused engaged in a pattern of repetitive behaviour that showed a likelihood that he would cause injuring to other people; and 3) there was a reasonable possibility of eventual control of the risk in the community. The Court noted the change in perspective the accused appeared to have since 2008 and the supervision and services available through an LTSO. Further, an LTSO would allow placement in a facility for at least six months, would offer programming, and allow conditions and enforcement of them if necessary.

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Criminal Law – Controlled Drugs and Substances – Possession for the Purposes of Trafficking
Criminal Law – Defences – Charter of Rights, Section 8, Section 24
Criminal Law – Search and Seizure

R. v. Adeshina, 2013 SKQB 414 - Court of Queen's Bench, Acton, November 21, 2013 (QB13414)

The accused was charged with possessing in excess of three kilograms of cannabis marihuana for the purposes of trafficking contrary to s. 5(2) and 5(3)(a) of the Controlled Drugs and Substances Act and with possessing the proceeds of property

knowing it was obtained by the commission of an indictable offence, with a value less than $5,000, contrary to s. 354(1) of the Criminal Code. The accused was stopped for speeding. He was driving a rental vehicle and indicated he was travelling to Saskatoon for a five-day business trip although the rental contract was only for three days. The police discovered that the accused had outstanding warrants for driving an unregistered vehicle in Saskatchewan. A search of the accused revealed a white substance thought to be cocaine. The accused was arrested. An officer noted a smell of fresh marihuana in the vehicle and a search revealed 33 Ziploc bags totaling 7,692 grams of marihuana in a duffel bag. Two cell phones were also seized, one located in the vehicle right after the arrest of the accused and one located when the vehicle was searched pursuant to a search warrant. The phones were first checked for their contents almost two months after the traffic stop. The officer checking the cell phones had been away from work for almost a month in the interim. Once the officer checked the phones he sent them to the criminal investigation unit for further checks. There were 682 pages of data recovered from one of the phones. The accused argued that the information on the two cell phones be excluded pursuant to s. 24(2) of the Charter because his s. 8 Charter rights were breached. The accused argued that the searches were without warrant and therefore prima facie unreasonable and not properly incident to arrest.
HELD: The Court determined that the cursory review of the text messages and content on the LG phone when it was seized from the accused at the detachment was part of the search incidental to arrest. The subsequent review of the contents on the phones two months after the arrest and at the criminal investigation unit was determined to be too distant in time to be considered incidental to arrest and was a violation of the accused's s. 8 Charter rights. The Court noted support for that conclusion from a recent Supreme Court of Canada case. The Crown argued that the searches were authorized by the search warrant obtained for the vehicle; however, that search warrant was not provided to the Court and it was presumably a general warrant that did not specifically include cell phones. The Court applied s. 24(2) of the Charter as follows: 1) the Charter infringing conduct was not serious. The officer believed that he had the authority to search the one phone incident to arrest and the other phone pursuant to the search warrant of the vehicle; 2) a search of a cell phone is highly intrusive and in this case the police obtained more personal information than was appropriate.; and 3) the information retrieved from the cellphones was reliable and real evidence, which may weaken the Crown's case if not admitted. The Court noted that there is a clear societal interest in adjudicating trafficking cases on their merits, especially when such large quantities are involved. The Court concluded that, after balancing all factors, the evidence should not be excluded.

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Criminal Law – Defences – Charter of Rights, Section 10(b)
Evidence – Admissibility

R. v. Laliberte, 2013 SKPC 171 - Provincial Court, Campbell, October 17, 2013 (PC13159)

The accused was charged with impaired operation of a motor vehicle. The charge was based on evidence provided by two RCMP officers who had observed the accused driving by them on the highway at a speed much higher than the speed limit. They followed the accused's vehicle and when it stopped in the parking lot of a lounge, one of the officers asked the accused to show his licence and registration. It took the accused about two minutes to retrieve the documents. The officer noted that the

accused's eyes were bloodshot and asked him what he had been doing and the accused said that he had been at a party and he was going to the lounge for a drink. The officer asked the accused to get out of the car and the accused stumbled. The officer could smell alcohol. On the way to the police vehicle the accused stumbled and swayed. In the vehicle, he appeared to fall asleep. The officer then provided the accused with his s. 10(b) Charter rights. At the station, a camera recorded that the accused had trouble walking and hit his head on the wall. The officer testified that the accused threatened to urinate on the floor and when taken to a toilet, he urinated around it. At trial, the defence raised the issue that since some of the police observations had been made after the accused had been informed of his s. 10(b) rights, not all the observations were admissible.
HELD: The Court held that the officer's observations made after directing the accused to exit his vehicle and prior to the provision of the s. 10(b) rights were inadmissible as evidence of the accused's impairment. Based on the remaining evidence, the Court found the accused not guilty. There was no admissible evidence that would support the inference that the impairment was caused by alcohol as alleged on the charge.

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Criminal Law – Defences – Self-Defence – Appeal

R. v. Lines, 2013 SKCA 111 - Court of Appeal, Richards Jackson Ottenbreit, October 23, 2013 (CA13111)

The respondent was charged with assault causing bodily harm after he had been in an altercation with the victim, Stewart. He admitted striking the accused and kicking him in the head, but said that he had been acting in self-defence. The trial judge acquitted him on that basis. The Crown appealed the acquittal on the ground that the trial judge did not correctly identify and apply the essential elements of the defence of self-defence because he overlooked whether the respondent had provoked the assault and whether he had used more force than necessary.
HELD: The appeal was dismissed. The Court held that after reviewing the trial judge's reasons, it found that the trial judge had correctly reviewed the elements of provocation and necessary force.

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Criminal Law – Firearms – Disposition

R. v. Robertson, 2013 SKPC 199 - Provincial Court, Tomkins, December 3, 2013 (PC13180)

The Crown applied pursuant to s. 117.05 of the Criminal Code for an order for the disposition of a firearm seized from the accused. The accused lived with his mother and during an altercation, he put a box of ammunition for a rifle that he had recently purchased in front of her and asked her if she wanted him to kill himself. He then left the house to go to work. His mother called the police and advised them that she and the accused had a bad relationship and that the she thought that he was depressed but refused to obtain help. The officer passed the file to another officer who returned to the house and spoke to the accused. The accused was cooperative and showed the rifle and its ammunition to the officer. The rifle's trigger lock was on and the key stored in a location separate from it. He told the officer that he didn't think that he was suicidal

but that he was upset by his relationship with his mother. He agreed to attend a psychiatric assessment at the hospital. The psychiatrist released him after advising the officer that she had no concerns with the accused's mental health. The police seized the weapon without a warrant about three days after the investigation. The accused argued the police had had time to obtain a warrant and the seizure indicated that they had not believed that the circumstances were urgent.

HELD: The Court dismissed the application and ordered that the rifle be returned to the accused. The Court found that the seizure without a warrant on the facts was not valid. The Court held that although it was without jurisdiction to hear the application because the seizure had not met the requirements of s. 117.04(2) of the Code and that neither of the parties had raised any Charter issues, it would apply the test whether there were legitimate concerns that the accused lacked the responsibility and discipline the law required of gun owners and that the evidence relied upon is at the date of hearing rather than at the time of application. Here the accused had not been found to be suicidal nor had he tried to commit suicide in the intervening period. Although he had had a poor relationship with his parent, there was no evidence as to the nature of the ongoing relationship to the present time. He had no criminal record and no reputation for violence. The accused had acquired the gun legally and stored it lawfully.

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Criminal Law – Fraud

R. v. Turanich, 2014 SKPC 7 - Provincial Court, Metivier, January 16, 2014 (PC14003)

The accused was charged with two counts of defrauding the complainant contrary to s. 380(1)(a). The complainant wanted to purchase a hair salon and start her own business. She was referred to the accused by a realtor whom she had employed in the purchase of her home. The accused's real estate licence was taken from him three years ago. The complainant testified that the accused described himself as a realtor and there was other evidence that supported her belief. The accused testified that he advised the complainant that he was no longer a realtor but worked as a consultant. The accused helped the complainant find a location at the University's USSU location and negotiate a lease. He requested and obtained from the complainant a cheque for $3,000 and later another cheque for $5,000. There was some dispute regarding the purpose of these cheques, such as whether they were provided as payment for the accused's services or as a deposit on the lease. The accused deposited both cheques into his personal account as payment for services.

HELD: The Court found the accused guilty on the second count. He was acquitted on the first count because although the Court did not believe the accused when he told the complainant that he was a consultant, the Crown had not proved that there was a deprivation suffered by the complainant as a result of the accused's deceit or falsehood. The complainant wrote the first cheque because the accused told her that USSU required the money, not because he was a realtor or in payment of his services as a realtor. With respect to the second count, the accused never paid the money to the USSU. The accused misled the complainant by indicating the amount required by the USSU and by failing to forward the funds to them.

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Criminal Law – Impaired Driving
Criminal Law – Driving over .08 – ASD Demand – Reasonable Suspicion – Forthwith

R. v. Goertzen, 2013 SKPC 211 - Provincial Court, Morgan, December 12, 2013 (PC13191)

The accused was stopped for speeding. When he pulled his vehicle over, he drove too far into the ditch and got stuck. The officer noted a moderate odour of liquor from the accused's breath. The officer asked the accused if he had been drinking. He initially denied it. The officer told him that there was no reason to lie about it because he could smell alcohol. The accused said okay. The issues before the Court were whether the officer had a reasonable suspicion to make the ASD demand, whether the ASD sample was taken forthwith and whether the accused's right to counsel was breached because of the time spent waiting at roadside for the ASD to arrive.
HELD: The accused was convicted of the .08 offence. No charter breaches were found. The fact the officer smelled liquor on the accused's breath was sufficient, on its own, to make the ASD demand reasonable. The officer who stopped the accused was not qualified to operate the ASD. He knew that a fellow officer, who was qualified to operate the ASD, was in the area. Immediately after forming the reasonable suspicion and making the demand, the arresting officer contacted the other officer to attend to administer the ASD. Although 12 minutes elapsed, the arresting officer fully expected the other officer to arrive promptly, which he did. A detainee's right to counsel is suspended pending the determination of the ASD result.

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Criminal Law – Motor Vehicle Offences – Impaired Driving
Criminal Law – Motor Vehicle Offences – Driving with a Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 8, Section9

R. v. Buckle, 2013 SKPC 185 - Provincial Court, Labach, November 5, 2013 (PC13166)

The accused was charged with impaired driving and driving while over .08. While the accused was driving on the highway, an RCMP officer happened to follow her vehicle. The officer noticed that the vehicle moved from the centreline to the shoulder at times and slowed and almost stopped but then kept going. Stopping the vehicle to check the registration, licence and sobriety of the accused, he noted the smell of alcohol coming from the vehicle. The accused said that she had not had a drink but that her passenger was inebriated and that that person was the source of the smell. The officer did not believe the accused's assertions and asked her if she would come back to the police vehicle. At that point she was detained. The officer noted that the accused's eyes were bloodshot and watery and face flushed and that he could smell alcohol on her breath. She then admitted to having had one drink whereupon the officer made an "informal" ASD demand on the accused. The officer checked the accused's licence and registration, made some notes and after an unknown period of time, he made the formal ASD demand. The accused failed the test and was then arrested for driving while over .08. He then read the breath demand and the right to counsel and the police warning. The accused said that she understood her rights and said that she wanted to speak to a particular lawyer. The accused asked the officer to retrieve her things from her car, including her cell phone. When they arrived at the police station, the accused was asked again if she wanted to call a lawyer and she said that she had changed her mind and would not contact one. She was reminded again by the officer but the accused said no and she was read a waiver, which she confirmed she understood the

right and her decision not to exercise it. The accused then provided breath samples that indicated that she was over .08. The accused testified that she had been driving nervously because she had seen the RCMP vehicle behind her car and that because she was wearing contact lenses, her eyes were red and watering. She also explained that she had wanted to contact a lawyer but failed to do so because she needed to contact her brother to get the name of his lawyer who had just defended him on similar charges. The accused was unwilling to reveal this to the officer. This information and other concerns that the accused had about contacting a lawyer were not conveyed to the officer. The defence argued that the accused's ss. 8, 9 and 10(b) Charter rights were violated and a s. 24(2) exclusion order requested if the breaches were proven. The first breach was alleged to have occurred when the officer failed to make the ASD demand forthwith or failed to perform the test forthwith, violating both ss. 8 and 9. The second alleged breach occurred when the accused's right to counsel was violated pursuant to s. 10(b). The defence also argued that there was insufficient evidence to prove that the accused's ability to operate a vehicle was impaired by alcohol.
HELD: The Court dismissed the application regarding the alleged breaches of s. 8 and s. 9 of the Charter. The accused was found not guilty of impaired driving. It found that the accused's Charter rights were breached because the officer's "informal ASD demand" was not a proper demand within the meaning of s. 254(2) of the Code and therefore the Court found that the demand was not made forthwith. The detention was arbitrary and there was an unlawful seizure of the accused's breath in breach of s. 8 and s. 9 of the Charter. However, using the Grant criteria, the Court held that the breaches were technical and the admission of the evidence would not bring the administration of justice into disrepute. The Court dismissed the application alleging that the accused's right to counsel was breached. The accused had not pursued her rights to speak to counsel with diligence. With respect to the evidence of impairment, the Court found that the accused's explanation regarding her driving coupled with the indicia of impairment noted by the officer had not satisfied it that the accused's ability to operate a motor vehicle was impaired and the accused was acquitted.

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Criminal Law – Motor Vehicle Offences – Impaired Driving – Sentencing – Curative Discharge

R. v. Smith, 2013 SKPC 180 - Provincial Court, Benison, November 4, 2013 (PC13169)

The accused pled guilty to a charge of operating a motor vehicle when his ability was impaired contrary to s. 253(1)(a) of the Criminal Code. He applied for a curative discharge pursuant to s. 255(5) of the Code. The accused was found asleep in his car after he had stopped at a rail crossing in March 2012. The accused had had three previous convictions for drinking and driving offences. After being charged with the present offence, the accused had sought help from an addictions counsellor. She testified that the accused had remained sober for the 18 months since the charge and that he was motivated to stay sober. The accused had also attended AA meetings three times each week and witnesses from his AA group testified on his behalf.
HELD: The Court granted the discharge. The accused had proven on the balance of probabilities that curative treatment was likely to succeed. The Court placed him on probation for two years.

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Criminal Law – Motor Vehicles Offences – Driving with a Blood Alcohol Level Exceeding .08 – Breathalzyer – Certificate Evidence
Criminal Law – Motor Vehicle Offences – Impaired Driving
Constitutional Law – Charter of Rights, Section 9

R. v. Cox, 2013 SKPC 187 - Provincial Court, Morgan, November 15, 2013 (PC13167)

The accused was charged with impaired driving and driving while his blood alcohol level exceeded .08. The accused had stopped at a convenience store where his conduct attracted the attention of two of its employees. They noticed that his speech was slurred and loud, he left the store without paying for his fuel and that he appeared to stagger and have trouble getting into his truck. They telephoned the police. An officer who received the notification saw the vehicle matched the description given in the alert and followed it. The truck was drifting from side to side. When the accused was stopped by the officer, he had trouble finding his licence and registration. The officer noted alcohol coming from the accused's breath. He also noted that his eyes were glassy and his speech slurred. The officer asked if the accused had had anything to drink and the accused said no but when challenged admitted that he had had a few. The officer asked the accused to leave his car and the officer noticed that the accused staggered. He advised him of his right to counsel and gave him the police warning and arranged to have the accused taken to the nearest community to take breath samples. When another officer arrived at the scene, he too noted that the accused was stumbling and unsteady and that his breath smelled of alcohol. The officers found two open beer cans in the vehicle. Counsel for the defence argued that some of the evidence of impairment was obtained by the arresting officer before the accused was informed by his right to counsel and should be excluded as compelled evidence obtained in violation of the accused's s. 9 Charter right. The second issue raised by the defence was that when the accused was leaving the police station, the officer who filled out the Notice of Intention to Produce Certificate at the bottom of the Certificate of Analysis had not reviewed the original document with the service copy given to the accused.
HELD: The Court found with respect to the first issue that the officer's observations after the accused was asked to leave his car were "routine" and incidental to the request that the officer was entitled to make. The observations were admissible as evidence on the issue of impairment. On the totality of the evidence and because the Court preferred the evidence of the officers and witnesses to that of the accused, the Court held that the accused was guilty of the charge of impairment. Regarding the second issue, the Court found that the officer had not compared the original Notice of Intention to Produce Certificate with the service copy given to the accused, which violated the requirements of s. 258(7) of the Code. Therefore there was doubt that a "true copy" was served and the Certificate of Analysis was not admissible to prove the second charge.

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Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Criminal Negligence Causing Death
Criminal Law – Sentencing – Failure to Remain at Scene of Accident
Criminal Law – Sentencing – Remand Time
Criminal Law – Sentencing – Sentencing Principles

Criminal Law – Sentencing – Theft of Motor Vehicle

R. v. McNabb, 2013 SKPC 208 - Provincial Court, Kalmakoff, December 10, 2013 (PC13188)

The accused pled guilty to four Criminal Code charges: 1) criminal negligence causing death (s. 220); 2) theft of a motor vehicle (s. 333.1(1)); 3) breach of probation (733.1(1)); and 4) failing to remain at the scene of an accident where death has resulted (s. 252(1.3)(b)). The accused stole a vehicle and he and his friend drove to his friend's house and smoked marihuana. They went and picked up the accused's girlfriend and a 26-ounce bottle of whiskey. They returned back to the accused's friend's house and drank the whiskey. Around noon the accused drove and his girlfriend and friend were passengers in an erratic drive through downtown Regina. He drove to a residential area and dropped off his girlfriend. The accused sped through a red light and struck a vehicle with a lone occupant who died. The deceased's vehicle crashed into two other vehicles. The accused and friend exited the stolen vehicle and ran from the scene and into a nearby house. The occupants of the house called the police. The accused was an Aboriginal man who was 22 years old at the time of sentencing and 21 at the time of the offence. He was raised by his grandmother and was diagnosed with Fetal Alcohol Spectrum Disorder. He had a lengthy criminal record with at least 33 convictions, 18 as an adult. Many of the previous convictions were for similar type offences. Six previous convictions were for stealing, occupying or driving stolen cars. At the time of the offence the accused was on probation and disqualified from driving. The Crown argued that 10 years or more incarceration with a lifetime driving prohibition was appropriate while the accused argued for a global sentence of five to six years less remand time.

HELD: The Court highlighted the importance of proportionality in sentencing. The offences contrary to s. 220 and s. 252(1.3)(b) were very serious and carried maximum sentences of life imprisonment. The circumstances of the offence were described as horrific by the Court and the harm caused by the offence was extremely serious. The degree of responsibility of the accused was also found to be at the upper end of the scale. The Court determined that rehabilitation was of low priority even though the accused was young. The primary considerations in sentencing were denunciation, deterrence and protection of the public. There were many aggravating circumstances; the accused's remorse, accepting responsibility, guilty plea, youth and family support were mitigating circumstances. Considering the principle of parity, the Court noted that the most similar case suggested an appropriate range of 7 to 12 years. Also, the only sanction the Court found appropriate was imprisonment. Given the accused's Aboriginal ancestry, particular attention to his circumstances were considered by the Court. The accused spent 291 days in remand and the Court considered it appropriate to give him 11 months credit for that time, which was a credit of just under 1.2:1. The Court imposed the following sentence: 1) for criminal negligence causing death (s. 220) the accused was sentenced to eight years imprisonment, with a credit of 11 months, and a 20-year driving prohibition; 2) for failing to remain at the scene (s. 253(1.3)(b)), one year consecutive; 3) for theft of motor vehicle (s. 333.1) one year consecutive; and 4) for breach of probation one year concurrent. An order to provide a DNA sample was also made.

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Criminal Law – Sentencing – Appeal

Statutes – Interpretation – Sex Offender Information Registration Act, Section 490.012

R. v. Whiting, 2013 SKCA 127 - Court of Appeal, Richards Ottenbreit Whitmore, December 3, 2013 (CA13127)

The respondent Whiting pled guilty to a sexual assault contrary to s. 271 of the Criminal Code. On February 27, 2013, he was sentenced to six months imprisonment but the trial judge declined to make an order under the Sex Offender Information Registration Act (SOIRA). The Crown appealed the sentencing judge's decision pursuant to s. 676(1)(b) of the Code. The issues were: 1) whether the sentencing judge erred in declining to make the order pursuant to s. 490.012 of the Code; and 2) if there was a right of appeal from that decision.
HELD: The Court allowed the appeal on both issues. The Court found: 1) with respect to the first issue, that the Code was amended on April 15, 2011, when the Protecting Victims from Sex Offender Act came into force. The amendments to s. 470.012 required the sentencing judge to make an order under SOIRA if the offence were a designated one. The Court held that Parliament intended the amendments to have immediate effect. Despite the fact that the accused committed the offence prior to the amendments making a SOIRA order mandatory came into effect, the amendments applied to him because he was not sentenced for the designated offence until after the amendments came into force; and 2) that there was no right of appeal of such orders pursuant to the amended version of s. 490.012 of the Code. However, the Court held that a right to appeal could be found under s. 676(1)(b) of the Code because it gives effect to the intention of Parliament to ensure that all sex offenders are put on the registry. In this case, the sentencing judge erred in not making the order that Parliament clearly intended he should make and it is an appropriate use of s. 676(1)(b) to find that an appeal does lie through it.

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Criminal Law – Sexual Assault – Child Victim

R. v. K. (D.W.), 2013 SKQB 421 - Court of Queen's Bench, Gerein, November 27, 2013 (QB13406)

The accused was charged with: 1) sexual assault contrary to s. 271 of the Criminal Code; and 2) touching a person under the age of 16 directly with his hand for a sexual purpose contrary to s. 151 of the Criminal Code. The complainant was nine years old at the time of the complaint. The accused was living in a residence with the complainant, her mother, and another tenant. The accused had his own bedroom. The accused was 39 years old at the time of the incident and said he had decided to sleep in the mother's bedroom because she was on the couch and there were Christmas decorations on his bed. The complainant was also in her mother's bed. The accused testified that he was not aware that the complainant was also in the bed. He said that when he realized she was in the bed, he moved her over and rubbed her thigh so that she would go back to sleep.
HELD: The Court concluded that there was reasonable doubt as to whether the touching was sexual in nature. The Court also noted that they believed the accused's testimony. The accused was found not guilty of both charges.

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Family Law – Child Support – Adult Child
Family Law – Child Support – Arrears
Family Law – Child Support – Retroactive
Family Law – Child Support – Section 7 Expenses
Family Law – Costs
Professions and Occupations – Lawyers – Duties

B. (V.) v. B. (K.), 2013 SKQB 412 - Court of Queen's Bench, Dufour, November 20, 2013 (QB13424)

The petitioner quit his $60,000 per year job on the advice of his doctor to reduce stress. He accepted a lower paying, less stressful job. Two months after changing jobs the petitioner attempted suicide and then asked the respondent to suspend his obligation to pay child support. The respondent refused and requested child support based on the $60,000 per year income. The parties had two children prior to separation. Both children had graduated high school and the oldest had attended university unsuccessfully. The youngest daughter graduated high school and went to business college but quit after one month. The petitioner's doctor provided an affidavit outlining that the petitioner should not be working due to medical complications exacerbated by stress. The petitioner was living with his mother. The respondent sought: 1) retroactive s. 3 support for both children; 2) the petitioner's proportionate share of s. 7 expenses; 3) $16,652.47 that the petitioner paid into court to allow him to sell his house; and 4) $2,000 costs. The petitioner sought: 1) the $16,652.47 paid into court; 2) a declaration that neither child was a child of the marriage; 3) $60,000 income imputed to the respondent; 4) a suspension in his child support obligations; and 5) costs in the amount of $5,000.
HELD: The Court found that the respondent was not candid in her affidavits. Her application was dismissed. The onus was on the respondent to show that the children continued to be children of the marriage after they turned 18. The Court gave the oldest child the benefit of doubt and concluded that it was reasonable for her to go to university for the first year. At the end of the first year it was apparent that she should not continue and therefore she ceased to be a child of the marriage after the first year of university. The Court concluded that it was not reasonable for the youngest child to enroll in business college and she ceased to be a child of the marriage when she graduated from high school. It was determined that the petitioner paid $2,410 less in s. 3 child support than he should have. The respondent claimed retroactive s. 7 expenses, and in discussing the issue, the Court noted that the respondent demanded payment from the petitioner for expenses throughout that were not s. 7 expenses such as school fees. Further, some of the expenses demanded were inflated compared to the actual receipt. Larger expenses that were not s. 7 expenses were also claimed such as high school trips to Europe. The Court did not allow the cost of an expensive computer for the oldest child because there was no explanation as to why she needed such an expensive computer when her sister only got one for 25 percent of the cost. Further, the petitioner paid for $1,500 of orthodontic costs that were incurred after the child ceased being a child of the marriage. The Court concluded that the amount owed for s. 7 expenses could not be calculated because: 1) the respondent claimed for gross expenses not net expenses: and 2) the Court could not determine if income should be imputed to the respondent. In any event the Court noted that s. 7 arrears would not add up to much. The total amount of s. 3 and s. 7 child support arrears at issue was likely less than $4,000. The Court analyzed the following to determine whether an order should be made for payment of the arrears: 1) the respondent did not satisfactorily explain why she waited so long to make an application; 2) the petitioner was at fault for

not increasing child support when he made $20,000 more in 2008 but he was not to be blamed for not paying s. 7 expenses when they were demanded because they were often overstated and no receipts were provided; 3) the children were not deprived, as their mother had remarried a lawyer; 4) a retroactive award may cause hardship to the petitioner; and 5) the respondent did not consult the petitioner about s. 7 expenses before they were incurred. The Court found that it was not equitable to order the petitioner to pay retroactive child support. The respondent also had a Certificate of Pending Litigation registered on the title to the petitioner's home when he was selling it. The registration required an affidavit swearing that the title or interest in the land was called into question. An arrears in child support cannot call into question a title to land. The petitioner ended up paying the $16,652.47 into court so that his house sale could conclude. The Court ordered that the money paid into court be paid out to the petitioner. The Court also ordered that the petitioner's counsel advise the Court whether a hearing would be required to determine costs, noting that the respondent's various lawyers may also be responsible for some of the costs.

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

Holtzman v. Holtzman, 2013 SKQB 408 - Court of Queen's Bench, Elson, November 18, 2013 (QB13397)

The petitioner had been ordered 2011 to pay child support in the amount of $2,120 per month effective April 2011 for the support of his two children based upon income of $160,800. The judge had based this figure upon the petitioner's 2010 income and his corporation's financial statement as at January 2011. The petitioner brought this application to vary the support obligation because his income principally earned through his closely held corporation had been significantly reduced since the date of the previous order. The petitioner had originally worked for SaskTel and when he left his position, received a severance package wherein the payments were spread over a number of years. He then incorporated a consulting company of which he is the sole shareholder and director. He entered into a service contract with Sasktel, and between 2008 and May 2012, almost all of the petitioner's income had been drawn from the corporation in the form of salary and dividends. In May 2012, the petitioner's corporation lost any further contract work from SaskTel and he was unemployed until June 2013 when he was hired by another company at a salary of $120,000 per year. The petitioner's personal tax return for 2012 described employment income of $47,000 and a taxable dividend of $93,700. For 2013, the corporation's financial statement showed earnings at $27,200 reduced from $100,600 for 2012. No dividends were shown as paid out in the petitioner's personal return. The petitioner argued that his support obligations in 2011 and 2012 should be calculated from his personal tax returns and with regard to the corporation's financial statements only for the purpose of determining the increase in retained earnings from the previous year and adjusting for the usual office business deductions.
HELD: The Court varied the support payment by reducing it to $1,985 per month. The Court followed ss. 16, 17 and 18 of the Federal Child Support Guidelines, using the approach set out in G. (R.E.) v. G. (T.W.J.). A s. 16 determination of the petitioner's income did not reflect all the money that was available to him. Based upon that, the petitioner then had the onus to show that not all of his corporation's pre-tax income

should be attributed to him. In this case, there was no evidence regarding this point. However, the corporation had lost its contract with SaskTel and the petitioner had gained new employment, which indicated that the corporation was now unnecessary. If so, there would be no point in leaving any of the pre-tax income with it. The Court calculated the petitioner's 2012 income at $210,700, which included the corporation's pre-tax income, the petitioner's employment income, the net income from the corporation, his severance payment less business deductions. Using the same calculation method, the petitioner's 2013 income was found to be $77,000. Because of the fluctuation in the petitioner's income over the past four years, the Court applied s. 17 of the Guidelines and averaged his income at $149,500 for 2012 and 2013. The support obligation was set at $1,985 per month.

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Family Law – Child Support – Variation – Adult Children
Family Law – Maintenance Enforcement

Nernberg v. Nernberg, 2013 SKQB 402 - Court of Queen's Bench, Wilson, November 13, 2013 (QB13387)

The respondent father made an application for variation of a child support order granted by a Manitoba Queen's Bench judge in 2004. He had been ordered to pay the petitioner mother child support for the two children of the marriage in the sum of $349 per month. The respondent fell into arrears and as of September 2013 owed $18,900. The respondent applied for variation because neither of the children were children for the purposes of the Divorce Act. The oldest turned 18 in 2007 and the youngest became 18 in 2010. Both children were employed. The respondent requested that the Court make an order that the he was no longer required to provide support as well as an order fixing his arrears at $7,500 to be paid in monthly payments of $250 per month. The Manitoba Justice Department had provided a letter indicating that the petitioner supported the application. The petitioner and the proper Manitoba government agencies were served with notice of this hearing but had not appeared or filed any documentation.
HELD: The Court granted a provisional order on the requested terms, pursuant to s. 18(2) of the Divorce Act as it could not make a final order as the petitioner had not accepted the jurisdiction of the Court. It ordered that the petitioner be served with the provisional order.

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Family Law – Division of Family Property
Civil Procedure – Court of Appeal Rule 15(1) – Application to Lift Stay

Propp v. Propp, 2013 SKCA 126 - Court of Appeal, Richards, November 27, 2013 (CA13126)

The appellant sought an interim distribution of $100,000 from an amount of $992,000 held in the Court of Queen's Bench (see: 2012 SKQB 323). The funds represented the proceeds from the sale of farmland as part of the applicant and the respondent's division of family property. At trial, the respondent was awarded $407,000 and the appellant appealed against the size of the award. The respondent cross-appealed on

the basis that she should have been awarded $1,320,000. The appellant would like the interim distribution because he wants to purchase a house. He suggested that the same amount should be paid out to the respondent if she requested it.
HELD: The Court granted the order requested. It was in the nature of an application to lift the stay created by Rule 15(1) when the matter was appealed. The pay-out would not affect the respondent negatively or prejudice her appeal. She too could choose to have the same amount paid out to her.

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Family Law – Division of Family Property – Appeal – Debt
Family Law – Division of Family Property – Appeal – Unequal Division

Riben v. Riben, 2013 SKCA 114 - Court of Appeal, Richards Lane Caldwell, October 29, 2013 (CA13114)

The appellant and respondent were married for many years, throughout most of which they farmed successfully until the appellant's alcoholism led to severe debt. The appellant appealed the property division decision. The grounds of appeal were as follows: 1) tax arrears were incorrectly dealt with so that the respondent received double credit. The tax arrears were calculated as part of the general calculation used to determine income and then the appellant received his share of property subject to unpaid taxes. The respondent received credit for having paid those taxes; 2) the appellant was given credit for receiving government subsidies in 2010 without any evidence; 3) the respondent was given 100 percent credit for the farm debts when both parties were joint debtors.
HELD: The Court of Appeal concluded on the grounds as follows: 1) the appellant should have received his share of farmland property without any tax arrears; 2) no reversible error was made with respect to the 2010 subsidies. The inference that the appellant would receive a subsidy in 2010 was supported by the evidence; 3) the trial judge used her discretion to adjust the matrimonial property division for debts. The trial judge did not abuse the exercise of her discretion in this regard.

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Landlord and Tenant – Appeal – Residential Tenancies Act – Order of Possession
Residential Tenancies Act, Section 72 – Appeal – Order for Possession

Bowler v. Sabine, 2013 SKQB 426 - Court of Queen's Bench, Dawson, December 3, 2013 (QB13409)

The appellant tenant appealed the decision of the hearing officer of the Office of the Residential Tenancies, which ordered that he give up possession of the premises to the landlord. The hearing officer found that the tenant and landlord had an agreement whereby rent would be reduced in return for the tenant providing services to the landlord. The hearing officer further found that the landlord had given notice to end the employment relationship and the tenancy had ended. The Residential Tenancies Act provides for appeal on questions of law or jurisdiction.
HELD: The appeal was dismissed. The tenant's grounds of appeal were all questions of fact and therefore the Court had no authority to determine those issues. There was evidence to support the hearing officer's factual determinations.

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Landlord and Tenant – Appeal – Residential Tenancies Act – Time to File

Asheshe v. Petkau, 2013 SKQB 433 - Court of Queen's Bench, Elson, December 31, 2013 (QB13433)

The appeal is from a decision of the hearing officer dated September 23, 2013. The notice of appeal was filed on November 7, 2013. The issue was whether the Court had jurisdiction to hear the appeal in light of the late filing of the Notice of Appeal.
HELD: The Court has no jurisdiction to hear the appeal. Section 72(1) makes it clear that the 30-day time limit runs from the date of the decision or order, not from the date that the appellants become aware of it. There is no provision in the Act to that would permit the Court any discretion to extend the time for appeal under s. 72(1).

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Mortgages – Foreclosure – Order Nisi
Statutes – Interpretation – Interest Act

North Star Fertilizers Ltd. v. Gel, 2014 SKQB 25 - Court of Queen's Bench, Laing, January 24, 2014 (QB14032)

The plaintiff applied for summary judgment to fix the amount owing pursuant to a collateral mortgage granted by two of the defendants. The plaintiffs also requested that the Court issue a decree nisi for sale of the land secured by the mortgage. The defendants were the two mortgagors and three security holders registered on the title subsequent to the mortgage. The parties agreed that the Court should make a summary judgment and the only issue was the application of s. 8 of the Interest Act. The collateral mortgage was payable at an interest rate of 18 percent per annum. An agreement provided for interest payable at 18 percent per annum only upon default of payment. A prior agreement had required interest at an annual rate of 26.8 percent. The mortgagors argued that no interest was payable because the interest rate offended s. 8 by requiring greater interest on money in arrears.
HELD: The Court concluded that the agreement did not offend s. 8 of the Act. The agreement providing interest payable only on default was an agreement providing for forgiveness of interest otherwise payable by only charging interest upon default of payment not increasing interest on money in arrears. The Court also issued the decree nisi.

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Statutes – Interpretation – The Cities Act, Section 307
Limitation of Actions – Actions Against Municipality

Herle v. Lalonde, 2013 SKCA 131 - Court of Appeal, Ottenbreit Caldwell Herauf, December 9, 2013 (CA13131)

Rogers had been injured as a result of a collision in June 2003 when a transit bus owned by the City of Regina and operated by its employee had hit him on his motorcycle. He retained the appellant Herle as his lawyer and the appellant issued a

claim against the city and its employee pursuant to s. 103 of The Automobile Accident Insurance Act in May 2004, believing that the applicable limitation period was two years pursuant to s. 88(1)(a) of The Highway Traffic Act (HTA). He further believed that Rogers would have a further six months to serve the claim pursuant to Queen's Bench Rule 16. The claim was served in July 2004, which was one year and 43 days after the accident. The defence to the claim was that the city was not liable by virtue of s. 307(1) of The Cities Act (CA) which required that a claim against it be issued and served within one year. Rogers then added the appellant as a defendant to his claim for alleged negligence regarding the applicable limitation period. Herle defended on the ground that the s. 307 did not bar the claim because the limitation period provided in the HTA applied. Herle then made a Rule 188 application to determine which legislative provision governed. The Chambers judge held that s. 307 of the CA governed based on the Court of Appeal's decision in Platana v. Saskatoon (City) (see: 2012 SKQB 149). Herle appealed this decision on the ground that the Chambers judge erred by finding that she was bound by Platana. The appellant argued that Platana was not applicable because it involved a conflict between a statute and a rule of court. In this case, the conflict was between two statutes and The Highway Traffic Act should prevail because it is the more specific legislation. On the basis of policy too, as the less restrictive limitation statute, it should govern. Alternatively, the appellant argued that Platana was wrongly decided.

HELD: The Court dismissed the appeal. The Chambers judge had not erred in making her determination. The Court held that, as it had in Platana, that s. 307 of the CA was intended by the Legislature to be a special limitation period for municipalities. It is specific legislation to which s. 88 of the HTA must yield. The Court held that there had been no basis established for finding that Platana had been wrongly decided.

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Statutes – Interpretation – The Traffic Safety Act, Section 200
Criminal Law – Appeal – Summary Conviction Appeal

R. v. Clark, 2013 SKQB 413 - Court of Queen's Bench, McMurtry, November 20, 2013 (QB13398)

The appellant was found guilty after trial on a charge of exceeding the posted speed limit. He was travelling in a school zone when a police officer measured the appellant's vehicle speed in front of school at 60 km/h in violation of Regina Bylaw No. 9900, s. 10(1)(b), which designated the limit at 40 km/h. The appellant appealed his conviction because he had not seen a sign posting that there was school zone on that part of the street.

HELD: The Court dismissed the appeal. The Bylaw had to be read with ss. 199(1)(b) and 200 of The Traffic Safety Act. The effect of s. 200 is to create a school zone in the area between school zone signs, regardless of whether there is a sign at every applicable intersection. The evidence here established that the appellant's speed was measured in front of a school and it was unnecessary to establish the other boundaries of the school zone. The justice of the peace had not erred by failing to consider whether there was a sign at every point of entry into the school zone.

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Statutes – Interpretation – Youth Criminal Justice Act, Section 19
Youth Criminal Justice Act – Sentence Review

R. v. O. (J.E.), 2013 SKPC 190 - Provincial Court, Morgan, November 27, 2013 (PC13175)

JEO was convicted of aggravated assault when he was seventeen-and-a-half years old. His sentence was appealed by the Crown and the Court of Appeal changed the term in custody and in supervision (see: 2013 SKCA 82). Based on the original sentence, JEO would have been released from custody in August 2013. The Court of Appeal decision had the effect of extending JEO's release date to January 2014 with the community supervision portion following expiring in June 2014. The Provincial Director initiated an optional review under s. 94 of The Youth Criminal Justice Act. A report prepared by a Community Youth Worker recommended that JEO be released into community supervision at this time subject to a number of conditions. The Crown took the position that the sentence should be confirmed because of the violence of the original offence and because JEO remained at a Level 5 risk to reoffend as well as other concerns regarding JEO and gang recruitment by him. The defence argued that JEO had made exceptional progress while in custody and that he would be better able to continue his rehabilitation in the community under conditional supervision. JEO's employer had given him a strong letter of support and the psychologist who had been treating him provided a letter of recommendation supporting his release.
HELD: The Court held that the preconditions for undertaking the review had been met and found that JEO had made significant progress and the prospects of him continuing the rehabilitative process would now be better met in the community. He would be released from custody and placed under conditional supervision for the remainder of his youth sentence pursuant to s. 94(19)(b), subject to conditions regarding his residence, his attendance at school, attendance in treatment programs, employment, prohibitions regarding possession and use of drugs and alcohol.

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Wills and Estates – Executor – Accounting
Wills and Estates – Trustee
Wills and Estates – Laches

Gottselig Estate v. Gottselig Estate, 2014 SKQB 20 - Court of Queen's Bench, Barrington-Foote, January 21, 2014 (QB14016)

The respondent was appointed executor of her mother's estate in 1980. The respondent and her brother were named as the sole beneficiaries of the estate. The applicant is the widow of the brother. The estate consisted of a small amount of personal property, some money in bank accounts and investments and a house. The testatrix's will provided that the respondent and her brother were to share in the estate in equal shares. The respondent paid her brother half of the money and investments that comprised the estate. However, the respondent did not pay her brother for his share of the house from the estate. Instead, she transferred the house into her name as sole owner in 1985. The respondent advised her brother she was doing this and he did not object. Thereafter, the respondent made a partial payment to her brother of his share of the value of the house. The respondent acknowledges that she never paid her brother the full amount owing to him for his share of the house, but says her brother never demanded that she sell the house or demanded payment. The applicant says the respondent breached her duties as an executor and a trustee. The applicant claims the

respondent breached these duties by failing to provide an accounting and by failing as a trustee.

HELD: The respondent did not become a trustee immediately upon being named executor of her mother's estate, but she did become a trustee when she transferred the house into her own name. The claim was dismissed as being statute barred. The claim also fails on the basis of the doctrine of laches. It is reasonable to infer, due to the brother's failure to pursue the issue, that the brother decided that his sister was in a difficult financial circumstance and should keep the house and pay him nothing. There was acquiescence within the meaning of the law.

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