The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
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Barrington-Foote, August 26, 2020 (CA20105)

Criminal Law – Application for Court-Appointed Counsel

The appellant applied for appointment of counsel pursuant to s. 684(1) of the Criminal Code.
HELD: The application was granted. The court found that, in accordance with the test set out in R v Ermine: the appeal was arguable; the appellant's education, capacity and experience were not sufficient to enable her to present her case without legal assistance; and counsel would assist the court to deal effectively with the appeal. It rejected Court Services' position that the choice of counsel was within the discretion of the Minister and directed that the applicant and Court Services should try to find common ground. If they failed to agree on the selection of counsel, then the matter should be brought back to chambers.

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Barrington-Foote, August 28, 2020 (CA20106)

Civil Procedure – Appeal – Leave to Appeal

The appellant filed a notice of appeal in which he alleged that the chambers judge erred by granting an order to include a proposed class action which had been commenced in the Court of Queen's Bench in voluntary liquidation and dissolution proceedings relating to the respondent, Primewest. When the notice of appeal was filed, counsel for the respondent, KPMG, advised that their position was that leave to appeal was required. The appellant then filed a notice of motion in the Court of Appeal, applying for a declaration that leave to appeal the order was not required and, in the alternative, that leave be granted if it were required.
HELD: The application was dismissed. A chambers judge has the jurisdiction to decide an application for leave to appeal, but in this case, no such application had been made by either the appellant or the respondents. Therefore, the judge had no jurisdiction to grant the declaratory relief.

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R v Theodore, 2020 SKCA 107

Leurer Tholl Kalmakoff, September 2, 2020 (CA20107)

Criminal Law – Appeal – Adjournment

The three appellants were convicted of first-degree murder following trial and their appeals were scheduled to be heard by way of videoconference due to the safety risks posed by the COVID-19 pandemic. One of the appellants requested an adjournment of the appeal hearing to a date in the future when the current COVID concerns had abated so that he could attend the hearing process in person pursuant to s. 688(2) of the Criminal Code. Neither the Crown nor the other appellants joined in the request for adjournment.
HELD: The request for adjournment was denied. The right of an appellant in custody to personally attend at the hearing of an appeal is not an absolute right, and the court may order that if an appellant has access to legal advice, they may appear by means such as a videoconference. The court was satisfied that the fairness of the

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process would not be compromised by hearing this appeal by videoconferencing as it had been working very effectively to date, and in view of the health risks of the pandemic, it was appropriate to proceed in that way.

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R v Williams, 2020 SKCA 108

Whitmore Schwann Barrington-Foote, September 9, 2020 (CA20108)

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

The appellant pled guilty to one count of possession of methamphetamine for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. He was sentenced to three years' imprisonment and given credit of 108 days for time on remand. He appealed his sentence on the grounds that the sentencing judge erred: 1) by failing to hold a sentencing hearing as required by s. 724(3) of the Criminal Code to resolve conflicting facts pertinent to his role in the drug offence. In his pre-sentence report, the appellant had denied trafficking, and at the hearing of his guilty plea, he specifically stated that he pled guilty only to distributing the drug. The Crown had asserted that the appellant was a mid-level drug dealer, but the defence characterized his role differently, emphasizing that he had not sold the drugs for profit. Despite the conflict in positions, the judge did not conduct a sentencing hearing. The appellant also argued that the judge then relied upon unproven aggravating circumstances to impose sentence and then improperly found that the drugs could reach well over 200 people and that the offence was motivated by profit.
HELD: The appeal was allowed. The sentence was set aside and a new sentence of two years' imprisonment less credit for time on remand was substituted. The court found that the sentencing judge erred in principle by not holding an evidentiary hearing as required by s. 724(3)(a) of the Code and further erred in concluding that the appellant was a mid-level drug dealer without the Crown having proven that fact beyond a reasonable doubt. He further erred, in reliance on that finding, by making two additional findings of fact that were not grounded in the evidence.

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R v Thome

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R v Speers, 2020 SKQB 199

Layh, August 13, 2020 (QB20185)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Refusal to Provide Breath Sample – Conviction – Appeal

The appellant appealed the Provincial Court judge's decision after trial to convict him of the offence of failing to provide a breath sample into an ASD without reasonable excuse contrary to s. 320.15(1) of the Criminal Code. The appellant and the RCMP officer who arrested him testified at a blended voir dire. The officer had stopped the appellant in his vehicle at 1:10 am because he had received a report that a vehicle was being driven erratically. The appellant admitted that he had had a few drinks earlier in the evening, and the officer made the ASD demand at 1:17 am and asked him to provide the sample in the police vehicle. He then read the standard demand from a card that did not contain the word "immediately" and prepared the ASD. He explained how to blow into the ASD, and the appellant's first attempt to do so failed. The officer testified that he believed the appellant was holding his breath, but the appellant said he did not blow because he had not heard the officer instruct him. After three more failed attempts, the ASD automatically shut off. The officer advised the appellant that he had to provide a further sample, but the appellant said he would not until he spoke to a lawyer. The officer informed him three times that he would be charged for his refusal. After reading the appellant his Charter rights, the officer waited until the tow truck arrived and then drove him to the detachment, arriving at 2:00 am. The grounds of appeal were that the trial judge erred in law: 1) by finding that the immediacy requirements of s. 320.27(2) of the Code were met during the: a) period of seven minutes between the stop and the demand. The appellant relied upon R v Billette; and b) period when the appellant made four attempts to provide a sample until he stated his refusal to provide a further sample. The officer had not recorded the times at which the appellant blew into the ASD; 2) by failing to require that the officer specifically tell the appellant to "immediately" provide a sample. The absence of the term from the officer's demand was fatal, and the appellant was not legally obliged to comply with the unlawful demand and could not be found guilty; and 3) by failing to find that his apparent refusal did not meet the necessary mens rea because his refusal was based on his wish to speak to legal counsel.
HELD: The appeal was dismissed. The court found concerning each ground that the trial judge had not erred: 1) in finding that: a) the immediacy requirement of s. 320.27(2) was met regarding the seven minutes between the stop and the demand. She correctly distinguished Billette because that decision was based on there being no evidence about the length of the delay in making the demand; and b) in concluding that the continuation of the testing was sufficiently timely, based upon information that the ASD would only time out after five minutes. Further, the officer had adequately explained the 43 minutes it took following the refusal to arrive at the detachment; 2) in finding that the appellant was obliged to immediately provide a sample of his breath

whether or not the officer expressly stated that he had to "immediately" comply with the demand. Subsection 320.27(2) creates a dual and independent obligation of an officer to make an immediate demand and a detainee's obligation to respond to it in like fashion, absent providing reasonable excuse in s. 320.15; and 3) in finding that the mens rea of the offence was proven beyond a reasonable doubt. The officer had advised him he was not allowed to contact a lawyer before providing the roadside sample and repeatedly informed him of the consequences of refusal to comply with the demand. While the appellant's misunderstanding of the law was the reason for his intentional refusal, it had not raised reasonable doubt regarding the mens rea.

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Novick v Schnitzler, 2020 SKQB 204

MacMillan-Brown, August 18, 2020 (QB20189)

Contract Law – Formation

The applicant applied to the court to determine how an estate asset, the proceeds of the sale of land in 2015 for $500,000, should be distributed. The land in question was owned by S.N., who died intestate in 1970. The deceased had six children. Letters of administration were granted to two of his sons, M.N. and L.N., in 1971, and the bulk of the estate was distributed except for the land. The deceased's six children agreed in 1978 that each of them would receive one-sixth share of the value of the land, but one daughter assigned her share to M.N. In his will, M.N. left his two-sixths share to L.N. with the residue to be divided between his three sisters. However, L.N. predeceased M.N. in 2008, and the former's will divided his estate equally between his three sons, one of whom made this application. He took the position that when M.N. died, his two-sixths share passed to L.N.'s estate. This position resulted in S.N.'s remaining children each receiving a one-sixth share and L.N.'s estate would receive a three-sixths share. The respondents, two of S.N.'s daughters and one son, felt that because L.N. predeceased M.N., the latter's share fell into the residue of his estate, which was to be divided equally amongst the three sisters. In 2014, letters of administration de bonis non were granted to the respondents for the purpose of completing his estate. The applicant offered to purchase the land that year for $180,000. His lawyer advised the respondent's lawyer that under s. 22 of The Wills Act, M.N.'s sons received his two-sixths share. The respondent's lawyer replied that the respondents agreed that assessment of the parties' interests was accurate. When the land was ultimately sold to another purchaser, the applicant and his brothers signed consents to the sale which were sent to the respondent's counsel on the trust condition that the proceeds of sale would be held until they were distributed in accordance with the shares described in the letter

related to the applicant's offer to purchase. The sale proceeded in 2015 and the proceeds remained in trust until 2019, when the respondent's lawyer advised the applicant's lawyer that they had come to disagree with the applicant's distribution position. The issues were: 1) whether a binding agreement had been reached between the parties relating to the distribution of the proceeds; 2) if not, which of the distribution positions would be correct in law; 3) what compensation should be paid to the respondents as administrators of the estate; and 3) how costs should be awarded.
HELD: The sale proceeds were to be divided and distributed in one-sixth shares to each of the surviving children of the deceased and his three grandsons. The court found with respect to each issued that: 1) there was a binding agreement. Although there was no consensus ad idem between the parties regarding the applicant's original description accompanying his offer to purchase, his position was later accepted by way of the trust letter under which the consents were provided to the respondents' lawyer. The trust conditions were accepted and no essential terms were left to be decided; 2) it was unnecessary to decide the question; and 3) compensation was set at $12,500 to be divided amongst the respondents as they chose. They had not provided any evidence to support their claim to a fee of $10,000 each; and 3) costs of $3,500 should be paid by the estate to the applicant.

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R v Angus, 2020 SKQB 205

Hildebrandt, August 18, 2020 (QB20190)

Criminal Law – Aboriginal Offender – Sentencing – Gladue Report – Application for Public Funding

The accused was convicted after trial of committing the offences of break and enter with intent to commit an indictable offence contrary to s. 318(1)(a) of the Criminal Code; sexual assault on a person under the age of 16 contrary to s. 272(2)(a.2); use of a firearm while committing an indictable offence and during flight contrary to s. 85(1)(a); discharge of a firearm with intent to prevent his arrest contrary to s. 244(1) and possession of a firearm contrary to s. 91(1) (see: 2020 SKQB 32). As the offender was Aboriginal, the court ordered that a Pre-Sentence Report (PSR) be prepared with consideration given to Gladue factors. The 11-page PSR contained information regarding the accused's personal and family history, including parental alcohol misuse, violence and emotional abuse. It also outlined his social relationships, substance use issues, education and employment history, criminal involvement, criminogenic risk assessment and available intervention strategies. Two pages of the PSR reviewed Gladue factors and described the accused's sense of dislocation from his

Aboriginal community and his desire to participate in traditional ceremonies, how his heritage had reduced his employment opportunities and his experience with racism. The author of the PSR advised that the accused was not forthcoming with her during the interview and had indicated that he wanted a Gladue Report to be undertaken. She noted that no response had been received from his mother, a residential school survivor, nor from his former partner, with whom he had had a ten-year relationship. The accused applied for government funding a full Gladue Report. In support of the application, a Gladue Report writer submitted in her affidavit that she would undertake "colonization research" to provide historical context and canvass availability of treatment facilities and programs, but did not indicate any deficiencies in the PSR. The defence argued that a publicly-funded Gladue Report was necessary in this case on the basis that: the PSR was inadequate and no supplemental PSR could compensate for it; sources other than the PSR, such as submissions of counsel, were not feasible because of the accused's Legal Aid counsel's time limitations; the 15-year sentence sought by the Crown was of great consequence to the accused; and there were no alternate sources of funding. The issue was whether there were specific and exceptional circumstances in this case that warranted the making of the order. HELD: The application was dismissed. The court found that although the PSR was adequate, it would order that a supplemental one be prepared before the sentencing hearing. It recommended that additional information be obtained from the accused's mother, other members of his family and his former partner. Details regarding his attendance at an Anglican day school could be obtained. It was incumbent upon the accused to adduce relevant evidence and for defense counsel to make submissions on his behalf. Although the sentence sought by the Crown required consideration of the accused's character and circumstances under s. 743.6(1.2) of the Code, the information already available about the accused did not justify ordering a Gladue Report as it had in R v Peepeetch, wherein the accused had a brain injury. The fact that the accused could not obtain funding for a Gladue Report itself did not make it imperative for the court to grant an order for a publicly-funded one.

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R v McKenzie, 2020 SKQB 206

Elson, August 20, 2020 (QB20191)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Care and Control – Conviction – Appeal

The appellant appealed his conviction after trial in Provincial Court for having care and control of a vehicle while impaired, contrary to s. 155(1) and s. 253(1)(a) of the Criminal Code. During the trial, a Crown witness testified that he observed the appellant in his parked vehicle at 3 am. He was concerned because the vehicle

was parked on an angle up on a snowbank with the lights on and the driver's door wide open. The appellant was not moving and was slouched behind the steering wheel. The witness tried to rouse the appellant for a minute before he responded, whereupon the witness phoned the police. He stated that he did not smell alcohol when he stood beside the open door. The police officer who responded to the call testified that the appellant did not respond to him when he tapped on the driver's side window, and so he opened the door and noticed a strong smell of alcohol. He asked the appellant to exit the vehicle and then noted that his eyes were watery and glassy. The appellant was able to produce his license and registration without fumbling, but had difficulty locating them in the vehicle, and then dropped his keys while searching. When the appellant walked to the police vehicle, the officer observed that he swayed when he walked and showed a wide stance in his gait. The officer then arrested the appellant for impaired care and control. The appellant appeared to understand his Charter rights and his speech was not slurred. In his oral judgment the trial judge described unusual decision-making on the part of the appellant, such as: the manner in which he parked his vehicle; leaving the door of it open and being difficult to waken; failing to respond to the officer knocking on the window and dropping his keys while searching for his registration. The judge found that although the evidence was circumstantial, on the basis of its totality, he was satisfied that the appellant was impaired by alcohol. The appellant's argument on appeal was that the trial judge's verdict was unreasonable and could not be supported by the evidence, thereby engaging s. 686(1)(a)(i) of the Criminal Code.
HELD: The appeal was allowed. The conviction was quashed and the appellant acquitted. The court found that it was not reasonable for the trial judge to conclude that the evidence, considered as a whole, excluded all reasonable alternatives to the finding that the appellant's ability to operate a vehicle was impaired. In the judge's findings of fact that the appellant: did not slur his words; did not fumble when looking for his licence; did not stagger when he walked; had glassy and watery eyes; had difficulty walking; presented with a strong smell of alcohol; parked in a snowbank with the door open; was found "passed out" and slouched in the driver's seat; did not respond to the officer; and dropped his keys in the truck, did not bridge the crucial distinction, as discussed in R v Andrews, between general signs of impairment and impairment of the appellant's ability to drive. In its decision to acquit the appellant rather than order a new trial, the court held that there were plausible explanations available to the judge regarding a number of the items of evidence.

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Krammer v Ackerman, 2020 SKQB 207

Megaw, August 20, 2020 (QB20192)

Civil Procedure – Queen's Bench Rules, Rule 15-38
Family Law – Child Support – Imputing Income – Disclosure of Financial Information

The parties had been embroiled in litigation for 10 years regarding the appropriate level of child support each of them were to pay in a shared custody arrangement. They each applied for an order varying the level of child support, but preliminary to that determination, they each sought disclosure of financial information from the other as well as from non-parties. In their most recent previous application for disclosure of financial information, the court had decided that income should be imputed to the respondent under s. 19 of the Guidelines, but declined to deal with the petitioner's argument that the respondent was diverting income to his wife because they worked through the same real estate brokerage. The court granted the respondent's application for disclosure from the petitioner regarding imputation of income to her because of income she might have earned through sales of items on Varagesale (see: 2017 SKQB 294). However, the issue of the petitioner's income was never set down for hearing after the decision. In these applications, the petitioner sought full income disclosure from the respondent and from the respondent's wife, her corporations, and any other companies in which she held shares. The petitioner alleged that the respondent and his wife were both involved in purchasing, renovating and reselling residential homes. The respondent's wife opposed such disclosure because she operated her own independent real estate business and because the issue was res judicata as a result of the 2017 decision. The respondent sought detailed income information from the petitioner including her resume, agreements, summary of hours worked monthly or annually, job applications, solicitation of business and a list of s. 7 expenses. He also sought full disclosure of the all items the petitioner may have sold on Varagesale over the last five year as well as a list of all vacations taken since 2015 and complaints that she had made about him to his professional association or the police going back to 2013. The respondent also applied for disclosure from the petitioner's boyfriend if the petitioner's application was successful regarding his wife.
HELD: Each of the parties' applications were granted in part. The court found with respect to the petitioner's requests that it would order the respondent to produce his personal income tax returns and financial statements and corporate tax returns for his professional real estate corporation from 2016 to 2019. Respecting disclosure from the respondent's wife, it held that the matter was not res judicata because the petitioner's request in this application was based on different evidence. The authority to order disclosure fell under Queen's Bench rule 15-38, regardless of the fact that there was no undue hardship claim being advanced. It ordered the respondent's wife to produce her personal income tax returns from 2017 to 2020 as well as the corporate tax returns and financial statements for the same period for the corporation through which she operated the selling of homes and rental of apartments. However, she was not required to provide information for all corporations in which she held shares, as that was over-reaching. The petitioner was ordered to provide a current resume, a list of s. 7 expenses and job applications, income tax returns from 2015 to 2020, monthly summary of hours

worked since 2016, sales from 2015 to 2020 of items sold over the value of $500, and vacations taken out of the country since 2015. The other requests were denied.

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Birch Hills (Rural Municipality) v Birch Hills (Town), 2020 SKQB 208

Allbright, August 21, 2020 (QB20199)

Statutes – Interpretation – Uniform Building and Accessibility Standards Act

The appellant, Rural Municipality of Birch Hills, appealed from the decision of the Saskatchewan Building and Accessibility Standards Appeal Board pursuant to s. 19 of The Uniform Building and Accessibility Standards Act. The appellant had acquired a building permit from the respondent, the Town of Birch Hills, to build an uninsulated cold storage unit for its equipment. The respondent's building inspector indicated a number of deficiencies and he ordered certain changes, including that a wall be constructed adjacent to the property line with a specific fire resistance. The appellant requested a hearing before the board regarding the order. It made a motion to dismiss the order on the basis that it was invalid, as the edition of the National Building Code (NBC) in effect at the time of its issuance and throughout construction was the NBC of 2015 and not 2010 as cited in the order. The board found that as the wording of the relevant provisions in the NBC was the same in 2010 and 2015, the order was not invalid and the construction of the wall requiring specific fire resistance should be upheld. The provision in the 2010 NBC that applied to the building was effective because the wording of the 2015 NBC was the same. The appellant argued on appeal that the standard of review from administrative decisions was correctness, following Vavilov. It submitted that the order based upon the 2010 NBC rather than the 2015 replacement was invalid and could not have effect. If the order were determined to be valid, the appellant said that the section related to fire prevention measures did not apply to the building in question.
HELD: The appeal was dismissed. The court found that the order was valid. The board had not erred in its adjudication on the application of the appropriate iteration of the NBC. The relevant provisions of the 2010 and 2015 NBC were identical. It agreed as well with the board's interpretation of the provision regarding the requirements for fire prevention in the case of this specific building.

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Yashcheshen v Law School Admission Council Inc., 2020 SKQB 209

McCreary, August 26, 2020 (QB20193)

Civil Procedure – Queen's Bench Rules, Rule 3-14
Civil Procedure – Jurisdiction of the Court – Human Rights Complaint

The defendant, Law School Admission Council Inc. (LSAC), applied to have the plaintiff's claim struck pursuant to Queen's Bench rule 3-14 on the basis that the court lacked jurisdiction to hear the matters therein. The plaintiff alleged that LSAC discriminated against her by failing to reasonably accommodate her disability. HELD: The claim was struck. The court found that it lacked jurisdiction, as there is no independent civil action for such allegations outside a complaint filed under The Saskatchewan Human Rights Code. The plaintiff was required to follow the procedure set out in the Code for addressing such complaints before the court has jurisdiction to hear them.

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D.H. v C.H., 2020 SKQB 210

Richmond, August 26, 2020 (QB20194)

Family Law – Spousal Support – Interim

The petitioner applied for interim spousal support and child support. The respondent opposed only the claim for interim spousal support because it was barred by an agreement wherein the petitioner waived any claim for such support. The parties married in 2002. The respondent was earning $80,000 at the time, and the petitioner earned minimum wage. The respondent purchased a business in 2003 by borrowing funds. Because he had concerns about the relationship with the petitioner, he had an agreement prepared that the petitioner executed in 2003 in which she released any claim to his property, including the business. The following year, the parties agreed to separate. They signed another separation agreement in which the petitioner agreed to transfer her interest in the family home to the respondent, and he assumed all debts. She waived spousal support and child support for her child from a previous relationship. The agreement provided that it was to remain in force if the parties resumed cohabitation. They did reconcile shortly afterward and then had three children. The

respondent's business flourished, and the petitioner remained at home to care for the children. The parties separated again in 2019, and the petitioner issued a petition in 2020 requesting divorce, custody, access and support and equal division of the family home and property. The respondent argued that the 2004 separation agreement operated as a complete bar to spousal support, particularly as it provided for the resumption of cohabitation. The petitioner contended that she was in need, and the respondent had the ability to pay. She asserted that when she signed the 2004 agreement, she was vulnerable, had no knowledge of their finances and had not received disclosure of such information. Further, the agreement did not contemplate their future together and the fact that they would go on to have three children and that she would stay home with them for the remainder of the marriage. She had recently obtained her R.N. and was working in her first position.
HELD: The petitioner was granted interim spousal support and child support. The court reviewed the parties' circumstances at the times when the separation agreements were made, following the analysis set out in Evashenko v Evashenko. Although the first agreement was reasonable in light of the parties' circumstances at the time, it found that the petitioner had met the threshold of demonstrating a reasonable prospect of success that the second separation agreement would be impeached at trial as it did not address how the objectives of s. 15.2 of the Divorce Act would be met in the event of reconciliation and if the relationship endured and the parties had children. As well, the agreement no longer represented the parties' intentions. It determined the parties' respective incomes and set spousal support at the high end of the Guidelines' range at $2,346 per month, retroactive to March 2020.

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Green v Oliver, 2020 SKQB 211

Allbright, August 26, 2020 (QB20195)

Wills and Estates – Wills – Proof in Solemn Form
Civil Procedure – Queen’s Bench Rules, Rule 16-19, Rule 16-46

The applicants, grandchildren of the deceased testatrix, M.O., sought an order for her will to be proved in solemn form. The testatrix died in March 2019. In her last will, made in August 2018, the testatrix named the respondent, her son P.J.O., as executor, and left all of her property to him. In addition to the grandchildren’s application, the respondent’s application for grant of letters probate, made in in September 2019, was also heard. In that application, the value of the estate, comprised of bank accounts, was described as $30,000. However, in Part II of the Statement of Property, the application showed a bank account of $51,000 held

jointly with P.J.O. and real property valued at $3,526,600, transferred by the testatrix before death, but remaining unregistered until after death. In March 2019, one of the applicants filed a caveat against the estate on the grounds of undue influence. The caveat had been extended and it remained in place at the time of this application. The grounds for it included that there was a genuine issue as to whether the testatrix executed her August 2018 will under duress or under suspicious circumstances and whether she lacked capacity at that time. The testatrix had previously made two wills: one that left everything to P.J.O. and one that included bequests to her grandchildren. However, during 2018, she first executed a will in March in which she named P.J.O. her executor and directed that 60 percent of the value of her property be transferred in equal shares to P.J.O. and his four children and the remainder be transferred in equal shares to the applicants. The two wills executed in 2018 were prepared by different solicitors from the same law firm that usually acted on behalf of the testatrix. Their notes from meetings with her and affidavits were submitted to the court. They both attested that the testatrix had had capacity when they met with her. The lawyer who had prepared the August 2018 will deposed that she confirmed that she wanted her entire estate to go to P.J.O. and that she made this change to the will voluntarily. The applicants submitted there was a genuine issue to be tried with respect to capacity and undue influence. Their concerns included that the land transfers were dated 2016, and yet both wills purported to gift lands that the testatrix no longer owned and the transfers were not registered until after her death.
HELD: The application for requiring proof of the August 2018 will in solemn form was granted and a direction given for a trial be held. Letters probate would not issue until further order or the conclusion of the solemn form process. The court found that, based upon the lawyer's affidavits, the testatrix had capacity to execute the 2018 wills but that the applicants had met the initial burden of showing genuine issues to be tried in the matters of potential undue influence or suspicious circumstances.

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Rabobank Canada v Six Point Farms Limited, 2020 SKQB 212

Currie, August 28, 2020 (QB20196)

Statutes – Interpretation – Farm Debt Mediation Act, Section 21

The defendant applied for an order striking out the plaintiff's statement of claim on that basis that the action was a nullity. The plaintiff sued the defendant to recover funds that the plaintiff advanced to the defendant. Under s. 21(1) of the Farm Debt Mediation Act (FDMA), the plaintiff, a secured creditor, was required to serve the defendant with a Notice of Intent to Realize on Security. Pursuant to s. 21(2), it could only

commence its action after 15 days had elapsed from the date of such service. In this case, the plaintiff effected service by registered mail on April 9 and under s. 17 of the Farm Debt Mediation Regulations, service was deemed to be effected seven business days after the day on which the notice was sent. Therefore, under s. 21(2) of the Act, the plaintiff's action was barred until May 12, but the plaintiff commenced its action on May 6. The action was then null and void pursuant to s. 22 of the Act and should be struck. The plaintiff disputed the application of s. 17 of the Regulations and said that its service on the defendant by registered mail was effected pursuant to s. 269 of The Business Corporations Act. Under that section, service was effective when the document was accepted for registration at the post office, and 15 days meant that the action could be commenced on May 1.
HELD: The application was granted. The statement of claim was struck pursuant to Queen's Bench rule 7-9, and the action was dismissed. The court found that the plaintiff's interpretation of the requirements surrounding service by registered mail was not correct. The FDMA requires service of a notice and authorizes the Minister to issue regulations relating to the operation of the Act, including service of a notice under s. 17 of the Regulations. It clearly states that if a creditor wants to serve the notice by registered mail, it may do so on the basis that the service is deemed effective seven business days after the day on which the notice was sent. The defendant's request for solicitor-client costs was denied. The plaintiff was wrong, but its conduct in the action was not scandalous, outrageous or reprehensible.

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Brown v Schreiner, 2020 SKQB 213

Megaw, September 1, 2020 (QB20197)

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

The proposed respondents, grandparents of their deceased daughter's two children, applied for an order declaring them to be designated persons of sufficient interest pursuant to s. 6 of The Children's Law Act, 1997. Their father had killed the children's mother. As a result of earlier proceedings, the petitioners and respondents (the mother's sister and brother-in-law and the father's brother and sister-in-law, respectively) were designated persons of sufficient interest. After mediation, they entered into a parenting agreement whereby they would have joint custody of the children. The proposed respondents had supported the petitioners' application for custody. However, after the agreement was made, they felt that they had not been included in the process, and

the wrong result was achieved. The parties argued that the proposed respondents' application was an abuse of the court's process. They were trying to insert themselves into the litigation because they did not get the result they wanted.
HELD: The application was dismissed. The court found that the proposed respondents' relationship with the children had conformed to that of normal grandparents and had not extended to exercising parental control or decisions. Their application was not an abuse of process. They only sought to advance their concerns for the children.

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Marcoux v Tataquason, 2020 SKQB 214

Megaw, September 1, 2020 (QB20198)

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

The applicant applied for an order designating her a person of sufficient interest regarding two children, pursuant to s. 6 of The Children's Law Act, 1997. The background to the application was complicated: the applicant had been involved in a relationship with the mother of the petitioner father for a couple of years and during that time, the children had lived with them. The grandmother had the care of the children because their parents, the petitioner and the respondent, were not capable of looking after them. After their relationship ended, the applicant and the children's grandmother looked after the children on alternate weeks since 2018. During this period, the petitioner began living with his mother and was able to resume parenting of the children. At the applicant's request, he paid her $600 per month to her for their support.
HELD: The application was dismissed. The court found that the applicant's level of care and commitment and care of the children was not beyond that which would be considered by any caregiver.

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Fourney v Manson, 2020 SKQB 215

Danyliuk, September 2, 2020 (QB20200)

Civil Procedure – Queen's Bench Rules, Rule 7-2

The defendant applied for summary judgment to determine the issue of liability as between him and the plaintiffs. The plaintiffs had commenced an action against him because they alleged that while they were negotiating the purchase of his property, he made representations that were untrue, and there were serious defects with the property that they alleged had been concealed. The defendant argued that he was neither liable in contract nor in tort, but if he were, then any conduct or representation that may have given rise to liability on his part was undertaken on the advice of his realtor, the other defendant in the suit. He then issued a cross-claim against her. The parties filed a joint request for pre-trial conference in 2018. It was held in September 2019 and the presiding pre-trial judge directed that the matter be set down for trial, with both liability and damages identified as issues for trial. The defendant had not suggested at that time that the question of liability could be determined in any way other than by trial, and counsel for each of the parties advised that there would be no applications made prior to trial. On February 7, 2020, the plaintiffs asked the Chief Justice to make a case management order, but he declined to so on February 11, noting that the matter had been set down for trial. On February 12, the defendant filed a notice of application seeking summary judgment and an order directing the registrar to defer scheduling a trial. The next day, the registrar notified the parties that the dates for the ten-day trial had been scheduled for October. The defendant argued the wording in Queen's Bench rule 7-2(2) supported his position because the actual trial dates had not been set before he brought this application. The issue was whether a summary judgment application could be brought in an action wherein the parties had completed the pre-trial process and the pre-trial judge had directed the matter be set down for trial.
HELD: The application was dismissed. The court found that in these circumstances, the summary judgment application could not proceed. The matter had not been discussed at the pre-trial conference, the parties had agreed that no application would be made, and the plaintiff was entitled to proceed with trial preparation relying upon those facts. Furthermore, Queen's Bench rule 7-2 should not be interpreted in the manner suggested by the defendant. When a judge makes an order, it takes immediate effect the date it is pronounced, whereas the setting of trial dates is an administrative function.

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MCAP Service Corporation v Kostiuk, 2020 SKQB 217

Danyliuk, September 2, 2020 (QB20201)

Wills and Estates – Intestacy – Application for Appointment of Administrator ad Litem
Civil Procedure – Queen's Bench Rules, Rule 2-26

The applicant sought an order appointing the respondent as the administrator ad litem of the estate of her son, who died in September 2019. He died intestate, leaving no personal representative and an insolvent estate. He had secured a loan with a mortgage on his property in 2016 and defaulted on the loan, and the amount now owed was $164,600. The applicant wanted to seek leave to commence foreclosure proceedings, but needed a party opposite to serve. The respondent had made payments on behalf of her son after his death without the possibility of reimbursement, but refused to consent to the appointment unless the applicant would agree to pay her estimated legal fees of $2,500. The applicant advised that it would not pay her lawyer. It relied on s. 33 of The Queen's Bench Act, 1998 in making this application and acknowledged that Queen's Bench rule 2-26(2) prohibits the appointment of an administrator ad litem without the person's consent. It argued that the court should follow Gardewine v Royal & Sun Alliance Insurance, in which the court made the appointment even though the defendant insurance companies had not consented.
HELD: The application was dismissed. The court found that subsequent jurisprudence on the topic had lessened the strength of Gardewine as an authority, and it could be distinguished in any case on the basis that the defendant corporate insurers had been in a legal contractual relationship with the deceased. Without obtaining the appointment, the plaintiff could not have pursued the action. In this case, the applicant had other options, including to seek appointment of a corporate trustee. Further, the equities did not favour the applicant, as the respondent would have to incur costs to facilitate the applicant's pursuit of its legal rights.

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R v Thome, 2020 SKPC 36

Jackson, September 8, 2020 (PC20029)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 7, Section 8, Section 9, Section 10(b)

The accused was charged with driving while her blood alcohol content exceeded .08. The defence brought a Charter application and a blended voir dire and trial was held. The Crown called the arresting officer and the defence elected to call no evidence. An RCMP officer had been dispatched to a local store to deal with a disturbance there. When he arrived at the parking lot, he noticed a truck leaving the lot and the accused was

the driver. A witness at the store advised him that the driver of the truck had been involved in the disturbance, so the officer followed the truck and initiated a traffic stop. He testified that he had done so as part of his investigation of the disturbance and for no other reason. The driver appeared to be very talkative. She avoided eye contact with him, but had glossy bloodshot eyes. She advised that she had not been drinking. Although he could not smell alcohol, he decided that she might have been under the influence of some intoxicating drug and commenced an impaired driving investigation. After the accused failed the ASD test, the officer arrested her and made the formal breath demand, read her the police caution and gave her right to counsel. She answered: "I'm OK right now" to the question whether she wished to contact a lawyer. The officer testified that he took this mean she did not want to retain counsel and never revisited the right with her, nor did she ever request to speak to a lawyer. The breath samples showed 140 milligrams percent alcohol in her blood and the certificate of qualified technician was entered as an exhibit. The defence raised as issues that the officer: 1) had not had lawful authority to stop the accused's vehicle and breached her ss. 8 and 9 Charter rights; 2) had breached the accused's s. 7 Charter right by demanding an ASD sample pursuant to s. 320.27(2) of the Criminal Code rather than a drug screening demand under s. 320.27(1)(c) of the Code; and 3) breached the accused's s. 10(b) rights by failing to revisit her right to counsel after her initial response.
HELD: The Charter application was dismissed. The accused was found guilty. The court found that the officer had: 1) the lawful authority to stop the accused's vehicle as a result of the investigation he was conducting. As well, s. 209.1(1) of The Traffic Safety Act provided him lawful authority to stop because he was in the lawful execution of his duty at the time. There was no breach of ss. 8 or 9 of the Charter; 2) not breached the accused's s. 7 Charter rights when he made the ASD demand rather than making a drug screening demand. The language of s. 320.27(2) authorizes the breath demand irrespective of any suspicion of alcohol ingestion, and the officer was utilizing the ASD to eliminate the possibility of alcohol impairment. The new provision in the Code was meant to enlarge investigative opportunities to combat impaired driving, not restrict them; and 3) not breached the accused's s. 10(b) Charter rights. There was no evidence that the accused did not understand her rights. Her response to the inquiry whether she wanted to consult a lawyer was not sufficient to invoke rights to counsel and must be taken to mean that she did not want a lawyer, and thus no further implementation duties on the part of the officer were triggered.

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