The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 17, No. 23 **December 1, 2015**

Subject Index

R. v. Tesser, 2013 SKPC 221

Scott, June 11, 2013 (PC13213)

Criminal Law – Defences – Charter of Rights, Section 9, Section 10(b), Section 24(2)
Criminal Law – Motor Vehicle Offences – Approved Screening Device – Grounds for Demand – Reasonable Suspicion
Criminal Law – Motor Vehicle Offences – Approved Screening Device – Proper Demand
Criminal Law – Motor Vehicle Offences – Refusal to Provide Breath Sample – Reasonable Excuse
Criminal Law – Motor Vehicle Offences – Roadside Screening Device – Refusal to Provide Breath Sample

The accused was charged with failing to provide a breath sample in an ASD contrary to s. 254(5) of the Criminal Code. The accused argued that his ss. 9 and 10 Charter rights were violated and therefore the evidence of his refusal should be excluded or a judicial stay should be entered. The accused also argued that the Crown had not proven beyond a reasonable doubt that he refused the officer's demands. The vehicle driven by the accused was stopped at 2:13 am for an expired registration. The officer noted alcohol coming from the accused's breath and made an ASD demand. The accused said he would decline two times, before being arrested and given his rights to counsel. At the detachment the accused called a law firm and the officer left a message. He did not ask to call any other lawyers. He was released at 12:50 pm the next day. The issues were: 1) did the officer have the requisite grounds to make an ASD demand; 2) did the officer make a proper

demand; 3) did the Crown prove beyond a reasonable doubt that the accused refused to provide a sample of his breath, and that he intended to do so; 4) did the accused have a reasonable excuse; 5) was there a breach of the accused's right to counsel under s. 10(b) of the Charter; and 6) was there a breach of the accused's s. 9 Charter right.
HELD: The issues were determined as follows: 1) the accused advised the officer that he had not been drinking even though he testified that he had wine with dinner and had a tray of drinks spilled on him. The officer's suspicion that the accused had alcohol in his body was found to be objectively reasonable. The officer was found to have the requisite suspicion that the accused had alcohol in his body and the suspicion was reasonable; 2) the officer's demand was also found to be proper even though the word "forthwith" was not in the demand and the words "accompany me" were in the demand when the accused was already in the police vehicle; 3) the court was not left with any reasonable doubt that the accused refused to provide a sample of his breath and intended to do so; 4) the accused indicated that he refused to provide a sample because he thought he was being asked to go to the detachment and he did not want the situation to drag on. The court held that the inconvenience of attending at the detachment was not a reasonable excuse; 5) the basis of the accused's argument that his right to counsel was breached arises out of circumstances at the detachment not at the roadside. There was no connection between the alleged breach and the charges. The accused was not entitled to a right to counsel at the roadside. The court concluded that right to counsel had not been breached in any event because the officer satisfied the informational and implementational obligations of the right; and 6) the accused was not released from the detachment sooner because he was from out of province and the officer in charge wanted him to appear before a justice of the peace and post bail. The court held that the accused was not arbitrarily detained. There was no evidence of malice or bad faith on the part of the officers. The court noted that even if there was an arbitrary detention a judicial stay would not have been granted nor would there have been a reduction of sentence.

 Back to top

R. v. Hahn, 2014 SKQB 76

Ottenbreit, March 14, 2014 (QB14432)

Criminal Law – Bail Review
Criminal Law – Defences – Charter of Rights, Section 7, Section 9, Section 11(e)
Criminal Law – Judicial Stay – Reasonable Apprehension of Bias

The accused was charged with harassment of a Queen's Bench judge

contrary to s. 264 of the Criminal Code. The accused applied for a judicial stay submitting that his ss. 7, 9, and 11(e) Charter rights were violated. The basis of the stay argument was that there was a reasonable apprehension of bias by the Chief Justice when he reviewed the order of the Provincial Court denying the accused bail on a charge contrary to s. 423.1 of the Criminal Code for intimidating the victim judge. After the preliminary inquiry, the accused was committed to stand trial on the harassment charge but was discharged on the intimidation charge. The accused argued that he obtained information after the preliminary inquiry that gave rise to a reasonable apprehension of bias respecting his bail review. The accused also argued that the friendship of the Chief Justice and the victim judge contributed to the bias. The accused further argued that his right to participate fully in the bail review hearing was restricted because the chief justice did not let him properly review disclosure or take his handcuffs off. He said his s. 7 Charter right was thus violated. The bail review hearing was also not properly conducted according to the accused. The accused submitted that because of the bias at the review the 67 days imprisonment that followed breached s. 9 of the Charter or was denial of bail without just cause under s. 11(e) of the Charter. He argued that this was an exceptional case where a stay was appropriate. The issues before the court were: 1) was the application an appeal or collateral attack of the bail review decision; 2) did the court otherwise have jurisdiction to hear the application; and 3) was a stay appropriate. HELD: The issues were analyzed as follows: 1) there is no appeal allowed from a determination made under s. 520 of the Criminal Code so the court could not review the decision for errors made. Further, the court concluded that it did not have jurisdiction to determine that the bail review decision was a nullity, whether there were grounds for a reasonable apprehension of bias or not. The court did, however, determine that the Charter determinations were not an appeal. Also, the application was not found to be a collateral attack on the decision of the Chief Justice; 2) the court held that it had jurisdiction to determine if it is appropriate to grant Charter relief for the consequences of previous judicial behaviour including reasonable apprehension of bias; and 3) the grounds for an apprehension of bias must be substantial. The court did not decide whether there was a reasonable apprehension of bias but assumed one to continue the analysis. The accused did not establish that his continued detention was because of the Charter breach. He was denied bail by the Provincial Court and applied for a review of that decision. The court concluded that proceeding to trial would not lend judicial condonation to the conduct arising from the circumstances as a whole. Also, the accused's argument that he could not properly prepare or conduct his bail review was not deserving of a stay. There were no exceptional circumstances warranting a stay.

 Back to top

R. v. Miller, 2014 SKQB 277

Elson, August 29, 2014 (QB14260)

Constitutional Law – Charter of Rights, Section 11(b)
Criminal Law – Assault – Sexual Assault

The accused applied to have the charges against him stayed under s. 24(1) of the Charter on the ground that his constitutional right to trial within a reasonable time under s. 11(b) had been violated. The accused had been charged in October 2010 with three counts, including sexual assault, sexual touching and luring by way of telecommunications, and had made his first appearance in Provincial Court in November 2010. During the almost four years since, there had been 38 consent adjournments, 28 before the Provincial Court and 10 at pre-trial conferences before the Court of Queen's Bench.
HELD: The court dismissed the application. It found that the delay had passed the minimum threshold of unreasonableness. It determined that the accused waived 16 months and 20 days of delay from April 2011 when his counsel was in a position to elect and schedule a preliminary inquiry but then requested adjournments until September 2012. Other waivers of time by the accused accounted for 27 months in total. Therefore, the court held that the remaining 20 months of delay was not unreasonable. In the event the court had made a mistake, it considered that because of the technological issues involving disclosure of computer data to defence counsel and forensic analysis of the accused's computer, the inherent delay would be extended four months beyond the Morin guidelines.

 Back to top

R. v. Donard, 2015 SKCA 83

Ottenbreit Herauf Whitmore, July 24, 2015 (CA15083)

Criminal Law – Evidence – Admissibility of Statement – Appeal

The appellant appealed his conviction for second degree murder. During the investigation by the RCMP regarding the offence, the appellant had provided four statements to the police before the victim's body was found a month afterwards, during which time the appellant had been remanded on an aggravated assault charge. When the RCMP found the body and the murder weapon, they went to the Prince Albert Correctional Centre where the appellant was being held and arrested him for murder. The officer read him his rights to counsel, gave the appropriate Charter warnings and the secondary warning

R. v. Weeres

SEIU-West v. Saskatchewan Association of Health Organizations

Spearing v. Leonard

Talash v. 604329 Saskatchewan Ltd. (c.o.b. Hyundai of Regina)

Trottier Estate, Re

regarding his earlier statements. The appellant was turned over to another officer, who transported him to the Prince Albert detachment. Upon arrival there, the appellant spoke to counsel and then was questioned by the same officer who had arrested him. He was advised by the officer that the victim's body had been recovered and that the RCMP had the statements of witnesses, the contents of which varied from the appellant's version of the incident. The appellant insisted that he was telling the truth about how he had killed the victim and it was necessary for him to admit what he had done, because God knew that what he did was wrong. At a voir dire before trial, the judge admitted this statement of the appellant, although he ruled the four earlier statements were inadmissible under the derived confessions rule (see: 2014 SKQB 275). Without this statement, the Crown's case was circumstantial. The appellant appealed on the grounds that the trial judge had erred: 1) in his application of the derived confessions rule by finding the appellant's fifth statement admissible; 2) in finding that statement to be voluntary despite the fact that the officer who had driven the appellant to the detachment from the Correctional Centre was not produced as a witness to testify as to the absence of threats, promises and inducements; and 3) in failing to give sufficient written reasons on the voir dire by neglecting to address the issue that the officer had not been produced as a witness.
HELD: The appeal was dismissed. The court found with respect to each ground that the trial judge had not erred because: 1) he had reviewed the statement given to the officer and how the officer had referred to earlier statements and found that the last statement was not a continuation of the earlier inadmissible statements. The appellant had not felt compelled or induced because of the previous statements but rather was motivated by religious beliefs; 2) there was no rule that every person in authority having had some contact with an accused had to be called in a voir dire; and 3) although he had not commented on the issue in his decision, it did not indicate that he had failed to consider it.

 Back to top

Pederson v. Saskatchewan (Minister of Social Services), 2015 SKCA 87

Ottenbreit, August 5, 2015 (CA15087)

Civil Procedure – Appeal – Fresh Evidence
Civil Procedure – Appeal – Leave to Appeal – Extension of Time
Civil Procedure – Class Action – Certification
Civil Procedure – Class Action – Representative Plaintiff
Class Action – Leave to Appeal – Certification

The applicants sought leave to appeal the chambers decision that

dismissed their application for certification of a class action under The Class Actions Act. The claim alleged a failure by the respondents to prosecute civil remedies on behalf of children in foster care for the personal injuries, crimes, or torts suffered by them while in care. The leave to appeal was filed six days after the required 15-day period. The applicants also sought to file fresh evidence, an affidavit of a person proposing to be the representative plaintiff in the class action.
HELD: The application to extend the time for leave and leave were granted while the application to file fresh evidence was dismissed. The appeal court found that the appellants had an arguable case with sufficient merit. The six-day delay in filing was explained and the Court of Appeal held that, balancing all factors, the time extension for leave to file should be allowed. The appeal court then applied the Rothmans test to determine that leave should be granted. The appeal court reviewed the appellants' nine grounds of appeal and found the appellants had an arguable issue of sufficient merit on eight of the grounds. The eight grounds of appeal also passed the second branch of the Rothmans test because they were found to raise significant and important issues respecting causes of action and limitations, punitive damages as a common issue, and issues related to representative plaintiffs.

 Back to top

R. v. Echodh, 2015 SKPC 76

Robinson, June 2, 2015 (PC15094)

Regulatory Offence – Fisheries Act – Wasting
Regulatory Offence – Fisheries Act – Sentencing

The accused was charged with unlawfully wasting fish contrary to s. 92(c) of The Fishing Regulations. Conservation officers found discarded whole fish at the accused's four fishing sites. Over 60 pounds of fish filets were salvaged from the discarded fish. The accused testified that his fishing was cut short during that time because his employee was feeling ill and he had to take him back to the closest community for medical care. The accused had already arranged for a truck to take his fish so he had to meet the truck. He indicated that he would normally deliver some of the fish to community members and use some as bait.
HELD: The court found that the accused did not intend to take some of the whole fish to community members because they were mixed in with the offal from walleye fish. The court did not decide whether the accused could use the whole fish as bait pursuant to the regulations; there was more than enough walleye offal for bait. The defence of necessity also failed because the court noted that the accused could

have put the whole fish in a tub and covered them with snow before he had to take his employee for medical care. The accused was found guilty. The accused wasted over 50 fish and therefore he could be sentenced to the maximum penalty of $2,000. The court found that the maximum penalty would be unduly harsh notwithstanding the need for deterrence. The breach occurred over only two days and there was little financial gain in commercial fishing in northern Saskatchewan. The accused was sentenced to $500 plus an $80 surcharge. The accused's licence to fish on the northern lake was also revoked and he was prohibited from applying for or obtaining a licence to fish commercially on that lake for a period of one year. The revocation and prohibition were made pursuant to s. 29(2) of The Fisheries Act.

 Back to top

R. v. P. (T.J.), 2015 SKPC 97

Kovatch, June 29, 2015 (PC15106)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Driving/Care or Control with Excessive Alcohol
Criminal Law – Motor Vehicle Offences – Impaired Driving – Presumption of Care and Control – Rebuttal

The accused was charged with having care and control of a motor vehicle while he was impaired contrary to s. 258(1) of the Criminal Code. The defence conceded that the accused was impaired and the arresting officer was not required to testify. The accused, a 16-year-old high school student, was found by the officer in a parked car. The motor and lights were on and the driver's door was partially open. The accused was asleep in the driver's seat and his feet were on the pedals. After being wakened by the officer, the accused's foot hit the accelerator causing the motor's speed to increase. The accused then turned off the vehicle and the officer asked him to exit it and then arrested him. The accused testified that he and his friends went to a party nearby. The accused had arranged with one of his friends that the friend would drive to the party and once there would retain the keys because he would drive the group home. During the party, the accused had become ill and wanted to go home. His friends advised they would join him shortly but that he should go and start the car. The friend in possession of the keys had handed them back and the accused started the vehicle because it was a cold night. The accused then fell asleep but he could not recall for how long before the officer had wakened him. No evidence was led that any of the friends actually returned to the vehicle.
HELD: The accused was found guilty of the charge. The accused was found in the driver's seat and was therefore in care and control and he

gave evidence to rebut the presumption. The court accepted it but found that he was de facto in care and control. The evidence indicated that there was a realistic danger that the accused could set the vehicle in motion. Despite the accused's testimony that he had not intended to drive, his friend had returned his keys to him, which were found in the ignition with the vehicle running when found by the police.

 Back to top

R. v. Andrei, 2015 SKPC 103

Kovatch, July 15, 2015 (PC15107)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 10(a), Section 10(b)
Criminal Law – Motor Vehicle Offences – Evidence – Approved Screening Device

The accused was charged with impaired driving and driving while her blood alcohol level exceeded .08. As a result of a Charter application by the defence, a voir dire was held. The charges arose when the accused was stopped by an officer who observed a vehicle leaving the area where a number of bars were located. He noted that the vehicle was weaving slightly. He turned on his emergency lights to stop the vehicle and noted that the driver had a delayed reaction to the lights but then pulled over and stopped. When the officer spoke to the accused, he thought that she had a delayed or slow reaction to his request for her licence and registration. When asked whether she had had anything to drink, the accused advised that she had had three beers, whereupon the officer asked her to come with him to the police cruiser for an ASD test. Once in the cruiser, the officer could smell alcohol on the accused's breath and saw that her eyes were bloodshot. In cross-examination of the officer, the defence counsel suggested that he had not advised the accused of the reason for his request until the accused was in the cruiser, which the officer denied. The accused failed the ASD test. The officer then advised the accused of her Charter rights, read the standard breath demand and gave her the police warning. When asked if she wanted to call a lawyer at that time, the accused said no. The officer took the accused to the station and did not ask her again if she wanted to contact counsel. In the officer's Impaired Driving Investigation Report, he wrote that after being arrested and read the breath demand, the accused volunteered that she had had her last drink about 20 minutes before being stopped. The defence argued that: 1) the accused's s. 10(a) Charter right had been breached because she had not been given sufficient reason to leave her vehicle; 2) the officer did not have a lawful basis for the ASD demand; 3) the officer obtained

a false positive reading on the ASD. This would negate the validity of his Intoxilyzer demand and required him to administer the ASD test again; and 4) the accused's s. 10(b) right to counsel was violated when the officer failed to ask her again at the police station.
HELD: The application was dismissed. The court found with respect to the defence arguments that: 1) there was no breach of s. 10(a) of the Charter as the defence presented no evidence to the contrary; 2) the officer had a reasonable suspicion that the accused had alcohol in her body when he asked her to accompany him to the police cruiser. He confirmed the suspicion when he noted the smell of alcohol and her bloodshot eyes. The ASD demand was justified; 3) there was no evidence presented regarding the time of the accused's last drink, except for the hearsay evidence contained in the report. The ASD evidence itself has no evidentiary value. It only provides police officers with reasonable and probable grounds upon which they can make the Intoxilyzer demand. Here there was no evidence that the ASD result was inaccurate and should not have been relied upon; and 4) this argument had been raised previously by counsel in R. v. Mytroen and rejected. The officers were not required to take further steps regarding advising the accused of her rights at the police station.

 Back to top

R. v. Prevost, 2015 SKPC 105

Gray, July 27, 2015 (PC15093)

Criminal Law – Blood Alcohol Level Exceeding .08 – Breath Demand – Reasonable and Probable Grounds
Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 24(2)
Criminal Law – Impaired Driving

The accused was charged with driving while over .08 and with driving while his ability to do so was impaired by alcohol contrary to ss. 253(1)(b) and 253(1)(a) of the Criminal Code, respectively. He argued that evidence should be excluded because his ss. 8 and 9 Charter rights were violated. A conservation officer saw a vehicle swerving on a highway approximately six times. The conservation officer stopped the vehicle and the accused, the driver, had slurred speech and difficulty getting his licence out of his wallet. A smell of alcohol emanated from the vehicle. The only passenger appeared to be unconscious. The accused admitted to having a few beer so the officer went to his vehicle to call the RCMP. The accused was not advised that he was being detained nor was he given his rights. When the RCMP officer arrived the conservation officer advised him that the accused had been driving erratically and was intoxicated. He told the RCMP officer that there

was no need for an ASD because the accused would fail. The accused acknowledged to the RCMP officer that he should not have been driving. The officer concluded that this was from alcohol consumption. The accused was placed in the police vehicle and was read his rights and asked if he wanted to call a lawyer. The officer then read the accused the police warning and gave him the breath demand. The officer made the demand based on the conservation officer's account of the driving and his observations of the smell of alcohol, glassy bloodshot eyes, slurred words and the manner of walking. He admitted he may have been swerving while he was trying to wake up the passenger. The issues were as follows: 1) were there reasonable grounds for a s. 254(3) demand; 2) was there a violation of ss. 8 or 9 of the Charter; 3) if there was a Charter breach was exclusion of the Certificate of Analysis the appropriate remedy; and 4) were the elements of the charges established beyond a reasonable doubt. HELD: The issues were determined as follows: 1) the court was satisfied that the RCMP officer had a subjective belief that he had grounds to make the breath demand. The court also found that the grounds articulated by the RCMP officer objectively and reasonably supported the demand he made; 2) because the demand was founded on reasonable grounds, objectively verified, there was no violation of ss. 8 or 9 of the Charter; 3) the court noted that even if there was a Charter breach the Certificate of Analysis would not have been excluded. If there was a breach it would not have been serious. The effect on the accused was also not serious; he was inconvenienced to give samples. Also, societal interest in pursuing drinking and driving offences favoured admission of the evidence; and 4) the accused was found guilty of driving a vehicle while his blood alcohol level exceeded .08. The court was also satisfied beyond a reasonable doubt that the totality of the evidence established the ability of the accused to operate a motor vehicle was slightly impaired by alcohol. The accused was also found guilty of impaired driving.

 Back to top

Poole Properties Ltd. v. Stevens (c.o.b. Wiseguys Mattresses), 2015 SKPC 111

Agnew, July 22, 2015 (PC15091)

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

The plaintiff requested an adjournment of a trial in order to arrange for evidence because the plaintiff's counsel interpreted a statement in the defence differently than had the defendant. The defendant intended to call evidence, which the plaintiff felt contradicted the statement, and as

a result the plaintiff would have to call evidence for which it had not planned. The court granted the request for adjournment and invited the defendant to apply to amend his defence. The defendant then filed a draft amendment to the statement in question. The plaintiff objected to it on the ground that the amendment withdrew an admission.
HELD: The court allowed the application to amend the statement of defence. The defendant had met the requirements that the admission was inadvertent and that the amendment was necessary to determine the real issues in the litigation.

 Back to top

Spearing v. Leonard, 2015 SKPC 115

Demong, August 4, 2015 (PC15095)

Civil Procedure – Evidence – Credibility
Torts – Motor Vehicle Accident – Liability

The plaintiff argued that the defendant backed up his van and struck the right side of the plaintiff's vehicle while it was parked at a gas station. The defendant argued that his vehicle was parked and the plaintiff's vehicle drove into the defendant's vehicle. The court had to decide on the credibility of the witnesses. The defendant argued that another driver was trying to get into the line for gas out of turn and the plaintiff ran into the defendant in an attempt to prevent this. The defendant conceded that he did not actually see another vehicle but was told about it by another guy. The plaintiff's daughter also testified that she heard a phone message from the defendant to the plaintiff asking to settle the matter.
HELD: The plaintiff's witnesses were found to be honest, straightforward, candid, and direct. The defendant's evidence was not found to be as reliable. The court was not impressed with the defendant's passenger's testimony; he testified in a halting and uncertain manner. The defendant's suggestion that there was a vehicle trying to get in line out of turn was found to be unreasonable. The court found that the defendant was in his vehicle immediately prior to the accident and decided to back up in order to get around a slow moving line of traffic and in doing so failed to see the plaintiff's vehicle. The defendant was found to be negligent and wholly responsible for the accident.

 Back to top

Talash v. 604329 Saskatchewan Ltd. (c.o.b. Hyundai of Regina), 2015

SKPC 120

Demong, August 12, 2015 (PC15096)

Consumer Protection Act – Breach – Substantial Character
Contracts – Breach – Consumer Protection Act
Contracts – Breach – Damages
Contracts – Breach – Rescission
Contracts – Interpretation

The plaintiff purchased a vehicle from the defendant vehicle dealership and argued that within days of the purchase he began to have mechanical problems with the vehicle. The plaintiff claimed damages for the faulty vehicle, the cost of a rental vehicle, the cost of his trade-in vehicle, income lost while waiting for repairs, interest, and costs. The plaintiff was a recent immigrant to Canada and the defendant's salesman also spoke the plaintiff's primary language. The plaintiff traded in a vehicle for the agreed upon price of $4,000. The plaintiff asserted that the salesman made an oral representation to him that he would be given a new vehicle if there were any problems with the purchased vehicle. The salesman testified that he had not given such indications to the plaintiff but rather advised him that the vehicle had a warranty so any problems would be fixed. The plaintiff took the vehicle home the day he purchased it rather than waiting for the final inspection as advised by the defendant. The plaintiff indicated that the service light went on the next day and he took the vehicle to the defendant. The plaintiff picked up his vehicle and few days later and the engine light went on again shortly thereafter. The plaintiff took the vehicle back to the defendant and demanded his money back. The defendant refused. The defendant maintained that the vehicle was only brought in once, being the second time. The defendant indicated that the problems with the vehicle were caused by the vehicle being driven erratically and causing undercarriage damage. The damage was not covered by warranty according to the defendant. The vehicle was finally repaired approximately a week after it was brought in. The plaintiff was given a loaner to use for almost half of that time. The plaintiff never returned for the vehicle.
HELD: The plaintiff's claim was dismissed without costs. The court concluded that the salesman did not provide an express oral representation to the effect that if, for any reason, the plaintiff was unhappy with the vehicle, or if the vehicle had problems, it could be exchanged or the plaintiff could get his money back. The plaintiff knew the vehicle had to go back into the shop at some point for the inspection so he knew he would be out of a vehicle for that day. Further, if the vehicle was being repaired for damages caused by the plaintiff he could not recover lost income for those days it was being repaired. If the damage was a pre-existing condition The Consumer Protection Act warranties may have come into play but did not necessarily allow for a rescission of the contract. The breach had to be substantial before the buyer is entitled to rescission. The court

concluded that the breach was not of a substantial character. The cost of the repair was less than 3 percent of the vehicle's cost and was completed in a few days. The plaintiff had no right in law to abandon the vehicle and demand the purchase price. The most the plaintiff could possibly be entitled to was $386.60 for loss of use and loss of income, however, the court would have to be satisfied that the problem with the vehicle was not caused by physical damage caused by the plaintiff. The court concluded that the plaintiff more likely than not caused physical damage to the vehicle while driving it in some manner for an extended period of time. The court exercised its discretion pursuant to s. 37 of the Act and declined to award costs because the claim was not frivolous or vexatious.

 Back to top

Polley v. All Nations' Healing Hospital Inc., 2015 SKPC 122

Demong, August 12, 2015 (PC15098)

Damages – General Damages – Special Damages
Torts – Negligence – Occupiers Liability

The plaintiff alleged that she suffered unspecified damage to her back, neck, and ribs when she slipped and fell on the sidewalk at the front entrance to the defendant's facility, a medical facility. She argued that the defendant knew or ought to have known of the slippery condition of the sidewalk and should have taken steps to remedy the unusual danger. Alternatively, she argued that the defendant should have taken steps to warn persons of the unusual danger. The defendant denied the unusual danger and argued that if there was snow and ice on the sidewalk in February this was a common experience and to be expected. Alternatively, the defendant argued it followed the prescribed snow and ice removal policy. The defendant alleged the injuries were either all or partly contributed to the plaintiff's negligence by failing to wear proper footwear and take reasonable care for her own safety. The defendant argued a further alternative that the plaintiff failed to take reasonable steps to mitigate her injuries, damages, and loss. The plaintiff had a diminished mental capacity and was suffering from incipient Alzheimer's disease. The plaintiff was restricted in terms of mobility prior to the accident. The plaintiff's husband indicated that she was wearing winter boots at the time of the accident. He also testified that employees of the defendant quickly shoveled the sidewalk and applied sand and deicer after the plaintiff's fall. The defendant's maintenance engineer testified and indicated that snow and ice removal was done on an as needed basis and he said he had never seen a written policy. The issues, pursuant to occupier's liability, were: 1) was there an unusual danger; 2) did the defendant

know of the unusual danger; 3) did the defendant take reasonable care to prevent damage to the plaintiff while she was on the premises; and 4) did the plaintiff use reasonable care for her safety.
HELD: The court found that there was between two and four inches of snow on the sidewalk and that it was snowing and windy at the time of the fall. Further, the plaintiff was found to be wearing winter boots. The court also found that there would be a slight accumulation of ice under the snow causing the conditions to be slippery for a person in the plaintiff's diminished physical condition. The court found that the defendant's employee attended to the sidewalk immediately following the accident with shovels, sand, and deicer to remove the slippery condition. The court took judicial notice of the fact that gravel and deicer create a less slippery surface. The issues were determined as follows: 1) the defendant medical facility knew or should have known that the class of its visitors could include those that are aged, and mentally or physically diminished, and that they could suffer from physical ailments diminishing their mobility. The plaintiff being a member of the physically limited invitee class could have reasonably assumed that the defendant would have taken steps to reduce the danger by 11:00 am. There was an unusual danger; 2) the defendant ought to have known of this unusual danger; 3) there was no reason given as to why nothing had been done to clear the sidewalk and the court concluded that the defendant failed to take reasonable steps to prevent damage to the plaintiff; and 4) the plaintiff was wearing winter boots and her husband was assisting her by holding onto her. She was found to act reasonably and prudently in taking care of her own safety. The defendant was negligent and entirely at fault for the plaintiff's injuries and loss. The plaintiff did not claim special damages and sought general damages of $2,000. The court concluded that $1,200 was a fair damage award to reflect a mild transitory soft-tissue-like injury that did not have long-term or lasting effects beyond two months.

 Back to top

R. v. Hahn, 2015 SKQB 88

Ottenbreit, March 31, 2015 (QB15217)

Criminal Law – Apprehension of Bias
Criminal Law – Judicial Disqualification

The accused applied for the Queen's Bench judge to disqualify himself from the upcoming jury trial. The accused argued for the disqualification for numerous reasons, including: the judge protected other judges; the judge ruled that another judge did not obstruct justice; and the judge rescued two other judges in applications. The accused essentially argued that the judge had an unreasonable

apprehension of bias because of previous rulings on the matter.
HELD: The court held that a reasonable and informed person would consider that the judge had no personal interest in the subject matter of the case. The accused already requested that a Queen's Bench judge not preside over the jury trial and therefore a Court of Appeal judge acting as a Queen's Bench judge was assigned to the case. A reasonable and informed person would also conclude that, given a judge's oath to office, other judges' involvement would not make the trial unfair. Further, the jury will decide the accused's guilt or innocence not the judge. The court was not satisfied that a reasonable and informed person looking at the totality of the circumstances of this matter would conclude that the judge was biased against the accused in the past or would in the future. The judge did not disqualify himself.

 Back to top

Jastrebske, Re (Bankrupt), 2015 SKQB 203

Thompson, July 8, 2015 (QB15215)

Bankruptcy and Insolvency – Trustee – Remuneration

The applicant trustee applied for an order increasing its remuneration, pursuant to s. 39(5) of the Bankruptcy and Insolvency Act (BIA), from the bankrupt's estate. An order for increased remuneration to the trustee had been declined on the first attempt. The trustee applied for a review of that order and it was determined that there was insufficient fresh evidence to support the application to review the decision. The second application for increased remuneration was for the period after the first application period.
HELD: The trustee had the onus of demonstrating that the amount claimed for remuneration was justified. The registrar noted that it is widely acknowledged that the 7.5 percent restriction on trustee fees is insufficient to compensate trustees for the work they perform in administering ordinary bankruptcy estates. The registrar was satisfied that the amounts claimed by the trustee for administration were administrative in character and fair and reasonable under the circumstances. An order was granted increasing the trustee's remuneration by $2,828.75.

 Back to top

Halko v. Gerard, 2015 SKQB 211

Wilson, July 14, 2015 (QB15218)

Landlord and Tenant – Residential Tenancies Act – Tenancy Agreement – Appeal

The applicant landlord appealed the order of an Office of Residential Tenancies hearing officer. He was ordered to pay the respondent tenants the sum of $2,900. The applicant argued that the hearing officer erred in law in his determination that there was a tenancy agreement based on the evidence before him, thereby giving him jurisdiction to make the order and, alternatively, if there was a tenancy agreement, the officer erred in law and breached the duty of fairness by disregarding relevant facts and by awarding damages against the applicant when there was no evidence of same. The respondents had asked the applicant if they could rent a vacant farmhouse owned by him. As it required major repairs, the parties discussed that the respondents would provide labour for the renovation work at an hourly rate and the respondents gave the applicant a damage deposit of $600. They then moved into the property. At the hearing, the applicant took the position that he had advised the respondents that he would not make a formal rental agreement until the renovations were complete and when he had obtained the respondents' references. The respondents' evidence was that they began the renovations and during this time exchanged text messages with the applicant indicating that they had moved in and started renovating. About one month later, the applicant's wife informed the respondents that they were trespassing and were to leave within 48 hours. During their absence, the applicant moved the respondents' property to a trailer. Based upon the text messages, the hearing officer found that a tenancy agreement had been created as required by The Residential Tenancies Act. Therefore, the applicant had not acted with legal authority under ss. 58 or 68 of the Act when he entered the property and moved the respondents' belongings. Under s. 8 of the Act, the officer assessed whether the respondents had suffered losses as a result of the applicant's breach. The respondents claimed $4,500 for losses for items such as missing property, damaged property and moving expenses. They used photographs at the hearing as evidence of their losses. The officer determined some of the valuations presented were incorrect and lowered the amount claimed.

HELD: The appeal was dismissed. The court found that the hearing officer had not erred in law in finding that there had been a tenancy agreement. Based upon his assessment of the credibility of the parties, he accepted the respondents' evidence that showed a tenancy agreement had been reached. There was sufficient evidence on the record for the officer to reach his conclusion. There was evidence before the officer that allowed him to make his decision with respect to damages owing to the respondents. The officer found their testimony to be credible.

 Back to top

R. v. Suchan, 2015 SKQB 214

Gabrielson, July 15, 2015 (QB15219)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Conviction – Appeal
Criminal Law – Motor Vehicle Offences – Evidence

The appellant was convicted of the offence of driving while his blood alcohol was over .08 contrary to s. 253(1)(b). He appealed the conviction on the ground that the trial judge had erred in holding that the appellant had failed to provide evidence to the contrary pursuant to s. 258(1)(d.1) of the Criminal Code. At trial, the defence called an expert witness who testified regarding the absorption and elimination rate of alcohol. He stated that based upon the amount of alcohol that the appellant said he had consumed just before driving (bolus drinking), there would have been a delay such that the appellant's blood alcohol concentration could have been below .08 at the time of the operation of the motor vehicle. The Crown called an expert witness in rebuttal. Using the same hypothetical assumptions given by defence counsel to the other expert witness, the Crown's witness reached a different conclusion. The trial judge preferred the evidence of the latter witness and rejected the defence's expert witness evidence as scrambled and difficult to follow.
HELD: The appeal was dismissed. The "straddle" evidence provided by the defence's expert witness was intended to show that the accused's blood alcohol content could have been under the legal limit, although the blood test readings were over the legal limit. The trial judge rejected the evidence as not sufficiently convincing and was entitled to make that decision. The court found that there was evidence reasonably capable of supporting his conclusion that the appellant's blood alcohol content was over the legal limit at the time when he last drove his vehicle.

 Back to top

R. v. Metzger, 2015 SKQB 215

Schwann, July 14, 2015 (QB15208)

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

The appellant was convicted of the charge of driving with blood alcohol content exceeding the legal limit (see: 2014 SKPC 185). The appellant

appealed the conviction. The appellant's grounds of appeal included that the: 1) trial judge erred in holding that the certificate of qualified technician was admissible. At the trial, the officer's testimony had not indicated that he had compared the original certificate with the copy; and 2) trial judge erred in not excluding the evidence of the breath test as the demands made under ss. 254(2) and 253(3) were unlawful. The appellant argued that because the officer testified that he had formed the opinion that the appellant was impaired when he talked to him at the roadside, he was therefore required by law to proceed under s. 254(3) with a Breathalyzer demand. When he made instead the ASD demand, it was unlawful and therefore the appellant's ss. 8, 9 and 10(a) Charter rights had been violated. The appellant submitted that once an officer formed reasonable grounds to suspect an accused's ability to operate a vehicle was impaired for purposes of charges under s. 253 of the Code, the officer is precluded from making an ASD demand. HELD: The appeal was dismissed. The court found with respect to the grounds that: 1) the law in Saskatchewan established that the Crown was only required to go beyond the prima facie proof that the copy served pursuant to s. 258(7) of the Code was accurate if there was a challenge to its accuracy by an accused. In this case, the defence had not challenged the accuracy; and 2) the officer's manner of expressing himself in his testimony created confusion. There was evidence of his reasonable ground to suspect that the appellant had alcohol in his body, which could be objectively supported. There had been no finding by the trial judge that the officer used the ASD to elicit evidence. The defence had not provided any case authority in support of the proposition that an officer was precluded from making an ASD demand once they formed reasonable grounds to suspect that an accused's ability to operate a vehicle was impaired for the purposes of charges under s. 253 of the Code. The court found that the trial judge had not erred in concluding that the demand was lawful, which disposed of the appellant's Charter arguments.

 Back to top

Babey v. Greer, 2015 SKQB 219

Gunn, July 15, 2015 (QB15211)

Civil Procedure – Forum Conveniens
Civil Procedure – Jurisdiction of the Court
Civil Procedure – Queen's Bench Rule 3-14
Civil Procedure – Stay of Proceedings
Contract Law – Arbitration Clause
Contract Law – Breach
Contract Law – Forum Selection Clause
Contract Law – Interpretation

Torts – Fraudulent Misrepresentation
Torts – Negligent Misrepresentation

The applicants, defendants in the action, submitted that bifurcation of some of the issues raised in the respondents' statement of claim was necessary to determine if the Saskatchewan Court of Queen's Bench had jurisdiction to hear and determine all of the issues raised. The applicants applied pursuant to rule 3-14 of The Queen's Bench Rules for a determination that the court does not have jurisdiction. Alternatively, the applicants applied pursuant to s. 10 of The Court Jurisdiction and Proceedings Transfer Act (CJPTA) requesting the court to decline jurisdiction and, pursuant to s. 10 of The International Commercial Arbitration Act (ICAA), for a stay of the North Dakota claim. The applicants argued that the dispute between two of the named parties and the franchise operation in North Dakota should be determined in North Dakota. The applicants also argued that some of the claims were subject to an arbitration agreement between the parties. The respondent indicated that they relied on certain representations in the Licensed Business Partner Agreement (LBPA) to purchase the North Dakota franchise. They claimed the representations were not true. Specifically, the respondent claimed that pursuant to the LBPA the applicant implied that it was legally authorized to sell franchises in North Dakota and that was not true. The issues were: 1) did the court in Saskatchewan have territorial competence over the proceedings; 2) did North Dakota have exclusive jurisdiction over disputes, claims or other matters that arose from the LBPA and the North Dakota claim; 3) if the answer to 2 is yes, should the North Dakota claim be stayed or struck; and 4) if the answer to 2 is no, should the court nonetheless decline jurisdiction pursuant to the CJPTA or stay the action pursuant to the ICAA.
HELD: The issues were determined as follows: 1) the test for determining territorial competence is found in ss. 4 and 6 of the CJPTA. The court had territorial competence over the proceedings because the individual applicant resided in Saskatchewan and both of the corporate applicants had registered offices in Saskatchewan; 2) a clause in the LBPA provided that the agreement shall be governed and construed in accordance with the laws of North Dakota. The court found that the clause did not say that claims shall be brought in North Dakota and therefore North Dakota did not have exclusive jurisdiction over the claims; 3) this issue was not discussed due to the finding on issue 2; and 4) Saskatchewan had territorial competence, so to be successful the applicants had to show that the forum selection clause was valid, clear, and enforceable and that it applied to the cause of action before the court. The respondents' causes of action were: breach of contract; fraudulent misrepresentation; and negligent misrepresentation. The court was not satisfied that the forum selection clause was valid, clear, and enforceable. Nor was the court satisfied that the clause applied to all causes of action before the court, namely, the torts. Those claims were directed at proving the agreement was

void ab initio. The parties were sophisticated and could have included language to include all claims in the forum selection clause. The court went on to consider whether the respondents had shown a strong cause why the court should not give effect to the forum selection clause if it was valid, clear, and enforceable. If the forum selection clause was enforced there would be a multiplicity of proceedings and that was found to militate against its enforcement. The court held that the respondents showed strong cause why the forum selection clause should not be enforced. The applicants also argued that the claim should be stayed pursuant to the ICAA because of clause 16.3 of the LBPA that dealt with the arbitration. The applicants argued that the arbitration clause, which was much broader than the forum selection clause, referred to all disputes and acted to stay any court action in favour of arbitration. The respondents argued that the arbitration agreement did not apply because they were asserting that the LBPA was void ab initio. There were three applicants and three respondents but the arbitration agreement only applied to two parties. The court concluded that to give effect to the arbitration agreement would be to create a multiplicity of proceedings. The applications to decline jurisdiction and to stay the claim were dismissed.

 Back to top

Fontaine v. Canada (Attorney General), 2015 SKQB 220

Gabrielson, July 16, 2015 (QB15261)

Civil Procedure – Request for Directions – Residential School Settlement Agreement
Contracts – Formation – Consensus Ad Idem
Contracts – Interpretation

A request for directions application (RFD #2) was made with respect to a dispute concerning rights and obligations created by the Indian Residential Schools Settlement Agreement (IRSSA). The defendants argued that they entered into an enforceable settlement with the Attorney General of Canada (Canada) relating to its obligations under the IRSSA. Canada argued that there was not such an agreement. RFD #1 concerned relatively narrow issues concerning legal fees, deductions, and payment of the same. The defendant had offered payment to Canada in turn for releases. The defendants' counsel included a term that the release would cover all matters between the parties whereas Canada only wanted it to be with respect to RFD #1. Canada sent the release back to the defendants with changes made to reflect a release only with respect to RFD #1. The changes were not redlined nor did Canada advise the defendants of the significant change to the release. Neither party accepted the other's release terms

and therefore RFD #2 was commenced. The issue was whether there had been an enforceable settlement.
HELD: The court held that there was an enforceable settlement. There was a meeting of the minds with respect to the payment amount and that there would be a release. Canada argued that they agreed to the quantum of the payment and that the specifics of the release would be dealt with later. The court found Canada's position not to be a reasonable interpretation of what happened because it would be unlikely for a party to agree to pay a significant amount of money without knowing precisely what it was they were settling. The court found that the evidence established the parties were negotiating with respect to all matters at issue between them not just with respect to RFD #1. Further, it was determined that the final settlement was not conditional upon the execution of formal documentation. It was held that a reasonable bystander would have concluded that counsel had agreed the defendants would pay the money in exchange for the broad release. Also, the court found that a reasonable bystander would not have understood that the agreement was subject to approval by others at Canada. There is a legal presumption that counsel have their client's authority unless the contrary is clearly articulated. The court granted a declaration that there was a binding agreement between and among Canada and the defendants.

 Back to top

R. v. Miller, 2015 SKQB 221

Elson, July 17, 2015 (QB15212)

Criminal Law – Sentencing – Circumstances of Offender – Medical Condition
Criminal Law – Sentencing – Luring
Criminal Law – Sentencing – Pre-sentence Report
Criminal Law – Sentencing – Sentencing Principles
Criminal Law – Sentencing – Sexual Assault – Child Victim

The accused pled guilty to committing a sexual assault, contrary to s. 271 of the Criminal Code, and to luring a person under 14, contrary to s. 172.1(1)(a) of the Criminal Code. The complainant was 13 years old at the time of the offences and the accused was 19 and 20. The accused suffered from spina bifida that resulted in significant physical and other problems. The accused and the complainant met on a social media website and it eventually led to texting. The complainant lived with her grandparents and her grandfather died during the period of time her and the accused were communicating. The complainant and accused also met in person on a few occasions, including the night of the sexual assault. The Crown presented evidence from both federal and provincial correctional institutes to outline their ability to meet the

needs of the accused because of the difficulties he suffered as a result of spina bifida.
HELD: The aggravating factors were: the complainant was under 18, which was known to the accused; the planning and persistence; and the long-term effects on the complainant. The mitigating factors were: the relative youth of the accused; absence of a criminal record; the court was reasonably optimistic of rehabilitation; the accused had his life more or less back on track since the charges were laid; and the accused was truly remorseful for his actions. The court also considered the accused's argument that persons with spina bifida are behind in social maturity and he was more like a 17- or 18-year-old at the time of the offence. The pre-sentence report concluded that the accused was a medium risk to re-offend generally and was at the moderate to low level to reoffend sexually. The court found the risk assessments to be a somewhat mitigating factor. The court disagreed with the accused's suggestion of a suspended sentence followed by strict probation. The offence was a major sexual assault for which a non-custodial sentence would be demonstrably unfit. The principles of denunciation and general deterrence were found to require a period of incarceration. The Crown's suggestion of three years incarceration for the assault was found to be significantly disproportionate. A fair and appropriate sentence was a total imprisonment of 14 months. The accused was sentenced to 14 months incarceration on the sexual assault charge and nine months concurrent on the luring charge.

 Back to top

SEIU-West v. Saskatchewan Association of Health Organizations, 2015 SKQB 222

Laing, July 17, 2015 September 25, 2015 (corrigendum) (QB15220)

Administrative Law – Judicial Review – Labour Relations Board
Administrative Law – Judicial Review – Standard of Review – Reasonableness
Labour Law – Judicial Review – Labour Relations Board
Labour Law – Trade Union Act
Labour Law – Unfair Labour Practices – Good Faith Bargaining
Statutes – Interpretation – Trade Union Act, Section 11(1)(a), Section 11(1)(b), Section 11(1)(c)

The applicants, unions, sought judicial review of the Labour Relations Board decision that dismissed their application alleging unfair labour practices of the respondents during collective bargaining. The applicants argued unfair labour practices pursuant to ss. 11(1)(a), (b), (c), and (d) of The Trade Union Act. The applicants also argued that the board should have granted a substantive remedy for the unfair labour practice they did find. After the respondents tabled their first monetary

proposals they issued a press release outlining the general terms of its monetary proposals. Advertisements were also placed in daily and weekly newspapers and on radio. The advertisements were directed at advising the public that the offer made was competitive. The respondents eventually tabled what it referred to as its final offer and indicated the entire package had to be accepted in its entirety by March 31, 2010, or retroactive pay would cease. In its decision, the board reviewed all advertising communications of both parties. The board did acknowledge that the respondents had prepared a communication strategy to keep public opinion on its side. The respondents argued that amendments to s. 11(1)(a) to add the words "but nothing in this Act precludes an employer from communicating facts and its opinions to its employees" allowed it to communicate facts and opinions through public media and directly to the employees. The applicants argued that public media could not be used. Also, the applicants argued that communications directly with employees were intimidating, coercive and/or threatening. The board found that the majority of the content of the public communications was within the sphere of permissible communications. The board also did not accept the applicants' argument that s. 11(1)(b) was violated because the respondents were trying to persuade employees to accept its bargaining proposals and were encouraging members to demand a ratification vote that amounted to an open invitation to question their leadership's collective bargaining strategies. Further, the board did not accept the applicants' argument that the respondents' actions violated s. 11(1)(c) and was a breach of the duty to bargain in good faith. The board concluded that the respondents did not violate the provision. HELD: The court found that it was unreasonable for the board not to define the meaning of "fact and opinion" as used in s. 11(1)(a) because the definition was necessary to determine whether the respondents' communications fell within an allowable scope. The board's conclusion that the prohibited conduct was engaged only when an employee's free will was being compromised or expropriated was unreasonable. Further, the board did not define when such a threshold would be met or whether it was a subjective or objective test. The board did not identify the messages that were not in the majority and it did not contextualize the individual messages put out by the respondents as its own jurisprudence required it to do. The conclusion was unreasonable because there was no justification for it. The board's conclusion with respect to s. 11(1)(b) that the independence of the applicants was not adversely affected by the respondents' conduct was not unreasonable. The board's conclusion that the respondents did not fail to bargain collectively contrary to s. 11(1)(c) was not unreasonable. The board's conclusion that the respondents' communications were not direct bargaining with the employees contrary to s. 11(1)(c) was again a generic one. The purpose of the communication was to communicate as soon as possible and before the applicants could have meetings with their members. The purpose was not to communicate its facts and

opinions to employees and therefore it was unreasonable for the board to use s. 11(1)(a) as justification for its finding. The board should have addressed the respondents' communication strategy and its purpose along with jurisprudence before deciding that the respondents were not bargaining directly with employees. The court agreed with the board that the facts did not support the engagement of s. 11(1)(e). The court concluded that it was unreasonable for the board not to enter into an analysis of whether or not a substantive remedy could be awarded in the circumstances. The board's decision was set aside except for the portion finding that the respondents had breached s. 11(1)(a) by misrepresenting its retroactive pay communications. The board was ordered to reconsider its decision.
CORRIGENDUM dated September 25, 2015: [1] The first sentence in paragraph 74 is to be amended to add at the end of that sentence "and except insofar as the same dismissed all allegations by SGEU against the Government of Saskatchewan as the dismissal of those allegations was not challenged by any of the parties." The paragraph will therefore read:
>>>>[74] It is ordered that the reasons of the Labour Relations Board dated the 10th day of April, 2014, involving the parties to this matter and the Canadian Union of Public Employees is set aside except insofar as the same found SAHO had breached s. 11(1)(a) by misrepresenting its retroactive pay communications and except insofar as the same dismissed all allegations by SGEU against the Government of Saskatchewan as the dismissal of those allegations was not challenged by any of the parties. It is ordered that the board reconsider its decision in this matter taking into account the foregoing findings, and provide the parties with an opportunity to be heard before rendering a further decision in this matter.

 Back to top

M. (A.), Re, 2015 SKQB 223

Wilson, July 20, 2015 (QB15221)

Family Law – Child Protection – Permanent Order

The Ministry of Social Services sought a permanent order placing a five-year-old girl in the permanent care of the Ministry pursuant to s. 37(2) of The Child and Family Services Act. The child was apprehended when she was one year old because of concerns regarding the mother's alcohol addiction. The mother undertook treatment and the child returned to live with her for another year. She was then apprehended again in August 2011 because the Ministry discovered that her parents were living together. Both parents had severe alcohol problems and domestic abuse occurred. During the next

four years the child was cared for by foster parents. They testified that the child was healthy and without problems. They did not intend to adopt her. The mother had visited the child irregularly during this period and had come while inebriated. The Ministry had set up a schedule for twelve visits for the father but he had only seen the child twice and had not been in contact with her for two years. The mother and father were both informed of the hearing but neither attended. The father was telephoned and participated in the hearing. The Ministry and the Cree Nation Child and Family Services both recommended that a permanent order be made.
HELD: The court found that the child was in need of protection with respect to both of her parents. It then made a permanent order because it was an appropriate time for the child to be placed on the adoption list because of her young age.

 Back to top

King v. McSymytz, 2015 SKQB 224

Wilson, July 21, 2015 (QB15222)

Family Law – Custody and Access – Variation
Family Law – Child Support – Variation

The petitioner mother applied to vary an earlier judgment in which the court ordered that the two children of the marriage should have their primary residence with the respondent in Nipawin (see: 2014 SKQB 33). The judgment issued after trial because the petitioner, who then had primary care of the two daughters, wanted to relocate to Saskatoon for employment purposes. When the children were aged 12 and 10, a Children's Voices Report was prepared. The trial judge stated that the wishes of the older child could be given some weight but those of the 10-year-old could not be given too much weight. She determined that it would be in the best interests of the children to reside primarily with the respondent in Nipawin and for the petitioner to have access every second weekend. The petitioner was ordered to pay $734 per month in child support. The petitioner brought the application to vary on the basis that since the first order was made, she had started her own business that she could conduct for one week in Saskatoon where she resided with her partner and for one week in Nipawin where she had rented accommodation. The wishes of the children, now aged 14 and 12, indicated in a Children's Voices Report, were that they would like to alter the present situation. The oldest daughter stated that she would prefer to live with the respondent and his partner and have parenting time with her mother every second weekend. The younger daughter expressed a wish to reside with her parents on alternating weeks so that she could live with the petitioner during the week that

she was in Nipawin coincident with the week that the respondent was away working in a mine in northern Saskatchewan. The petitioner took the position that the parties would share parenting on an equal basis of one week on, one week off due to the change in her employment circumstances and that the children's wishes be taken seriously. The respondent resisted on the ground that as the same matter had been before the court in 2014, it was res judicata. He also indicated that he believed the petitioner had pressured the youngest child into stating her preference to change the parenting arrangement. Evidence of the annual incomes of the parties was presented in order to establish child support.

HELD: The court allowed the application. It found that the matter was not res judicata as the trial had been concerned with a mobility application. In this case, the petitioner was requesting a variation and found that the petitioner had met the threshold of demonstrating a material change in the circumstances affecting the children. The petitioner's ability to reside in Nipawin every other week allowed for a reconsideration of the parenting arrangement and the weight to be placed on the children's wishes had increased significantly. It was in the best interests of the youngest daughter to spend more time with her mother and the court ordered that she would reside with each parent for one week and the oldest daughter would continue to reside with the respondent and have parenting time with the petitioner every second weekend. The court determined the amount of child support on the two-step analysis. On the basis of the annual income of the petitioner in 2015, the court found that she should pay $360 per month for the oldest child and the same amount for the youngest child and due to the shared parenting of the latter, the respondent would pay $1,203 per month. The set-off amount of support, which would then be payable by the respondent to the petitioner, would be $843 per month. The court ordered that, for the sake of convenience, only one payment of $483 per month should be made from the respondent to the petitioner. The court ordered that the respondent pay 76 percent of s. 7 expenses. The respondent was ordered to pay $1,000 as his share of the cost of the Children's Voices Report and costs of $500 for the proceeding.

 Back to top

Jans v. Jans, 2015 SKQB 226

Barrington-Foote, July 22, 2015 October 19, 2015 (corrigendum) (QB15214)

Civil Procedure – Affidavits – Admissibility
Civil Procedure – Evidence – Admissibility
Civil Procedure – Queen's Bench Rule 5-34, Rule 9-16, Rule 9-19

The plaintiff claimed an interest in the assets of a large ranch that were transferred to his father, his brother, and a numbered company. The plaintiff's father passed away during an adjournment of the trial and therefore the parties applied to tender his out of court statements into the proceedings as follows: 1) the executor, defendant, applied pursuant to rule 9-19(2) of The Queen's Bench Rules to read in an affidavit sworn by the deceased at an interlocutory application; 2) all defendants applied pursuant to rule 9-16 to read in portions of the transcript of questioning of the deceased; and 3) if the application in 2 was granted the plaintiff applied pursuant to rule 5-34, rule 9-16, or the inherent jurisdiction of the court to read in portions of the transcript of the deceased and, if necessary, to re-open his case for that purpose. HELD: The court dealt with the issues as follows: 1) the deceased's affidavit contained controversial evidence that would call for cross-examination. Rule 9-19(2), although not referring to the death of a witness, was drafted broadly and could allow the court discretion to admit affidavits at any time for any reason the court considered sufficient. The affidavit evidence of a deceased person would have to be necessary and meet the threshold for reliability. The court must consider all relevant factors. The court declined to admit the bulk of the affidavit because it did not meet the reliability requirement. Also, a large part of the affidavit was of little or no significance in relation to the material issues in the action. The only portions of the affidavit that were admitted were those small portions relating to uncontentious facts; 2) the court held that rule 9-16 should be applied so that read-ins are not permitted merely because the party who was questioned has died. The risk of prejudice has to be balanced against the benefit of having all relevant evidence. The particular evidence must be considered. The evidence the defendants wanted admitted related to important issues in the action. There were also gaps and significant conflicts in the other evidence available. The defendants' application to read in the portion of the transcript identified by them was granted by the court; and 3) the plaintiff argued that further read-ins were required to explain and provide context to the defendants' read-ins. He argued that the further evidence was required as a matter of trial fairness. The court held that rule 5-34 did not apply to the explanatory read-ins because rule 5-34 only applies to transcripts of questioning of the opposite party. The explanatory read-ins could be admitted pursuant to rule 9-16 though because that rule extends not only to an application by the representative of the party who has died. The court also held that the explanatory read-ins could be admitted pursuant to the principle exception to the hearsay rule. The court also agreed with the defendants that the read-ins requested by the plaintiff could only be admitted if he was permitted to reopen his case. The court concluded that the plaintiff should be allowed to reopen his case to provide explanatory read-ins pursuant to rule 9-16. The read-ins were important and necessary and would bolster trial fairness. There were additional read-ins that the plaintiff sought to enter because the

evidence was not led in chief. The evidence was not led in chief because he did not think it was necessary to do so knowing he could cross-examine the deceased on the information. Unfortunately the witness passed away. The court held that the additional read-ins would not result in unfair surprise, prejudice, or confusion to the defendants. The plaintiff was allowed to reopen his case to admit the additional read-ins.
CORRIGENDUM dated October 19, 2015: [1] The following portion of paragraph 12 shall be deleted:
>>>The applicant relied on Ontario Rule 53.02(1), which, on the face of it, covered similar ground to Saskatchewan Rules 9-19(2)(a) and (b). That rule was as follows:
>>>>>53.02 (1) Before or at the trial of an action, the court may make an order allowing the evidence of a witness or proof of a particular fact or document to be given by affidavit, unless an adverse party reasonably requires the attendance of the deponent at trial for cross-examination.
[2] The portion deleted shall be replaced with the following:
>>>As in Tulshi, the applicant relied on Ontario Rule 53.02.
[3] The words "fact that" shall be added before "the trial judge" in paragraph 37.

 Back to top

R. v. Karuranga, 2015 SKQB 227

Elson, July 23, 2015 (QB15235)

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

The accused was charged with possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. The accused agreed that whoever possessed the cocaine did so for the purposes of trafficking. Six officers were involved in the surveillance of a residence. Three men were observed leaving the residence on separate occasions and returning after a short interaction. The officers obtained a search warrant and when executed there were three occupants of the residence. None of the occupants was wearing the same clothes as observed by the officers on surveillance. The accused was sitting at a table that had a cell phone and a phone box containing cocaine on it. While in the residence, an officer answered a cell phone and set up a meeting with someone looking to buy cocaine. The officers did not inquire as to who owned the cell phones nor did they determine who was paying rent for the residences or who was living there on a permanent basis.
HELD: The accused was found not guilty. The court was suspicious of the accused's involvement but held that the Crown did not find that

the evidence, taken as a whole, was sufficient to support the necessary inference. The Crown placed too much relevance on the proximity of the accused in the residence to the phone box that contained cocaine and the cell phone that the officer answered. The court noted the following: 1) there was no evidence proving the accused knew the contents of the phone box; 2) there was no evidence to determine the cell phone belonged to the accused; 3) there was no fingerprint evidence; 4) there was no evidence that the accused was the one participating in the transactions viewed on surveillance; 5) there was no evidence from the other occupants to connect the accused to the cocaine or cell phone and; 6) there was no evidence that the accused was sitting at the table for a purpose related to the cocaine or cell phone.

 Back to top

Trottier Estate, Re, 2015 SKQB 228

Schwann, July 29, 2015 (QB15216)

Civil Procedure – Costs
Civil Procedure – Queen's Bench Rule 11
Statutes – Interpretation – The Wills Act, 1996, Section 17(3)
Wills and Estates – Will – Interpretation

Two applications were brought concerning the validity of the last will and testament of the deceased executed on August 13, 1998. The administrator of the estate, the deceased's only son, applied pursuant to s. 46.4 of The Administration of Estates Act for the opinion, advice, and direction of the court with regard to the will and specifically whether the 1998 will was revoked by operation of s. 17 of The Wills Act, 1996. The second application was brought by one of the deceased's daughters. She sought a declaration that the 1998 will was valid and binding. The applicants were children from the deceased's first marriage. The deceased was also survived by his second wife whom he began dating in 1997 and commenced cohabitation with in August or September 1998. They were married several weeks before the deceased's passing in 2012. The only will originally before the court was one executed in 1997 where the deceased gave all of his property to his children. Because the testator later married, it was agreed that the 1997 will was revoked and the deceased's estate was going to be administered as if the deceased died intestate. Unbeknownst to the deceased's children, the wife knew of the 1998 will as early as November 2012. The issues were: 1) was vive voce evidence required in order to determine the validity of the 1998 will; 2) was the 1998 will revoked after the deceased and his wife cohabited continuously in a spousal relationship for two years or more; 3) was the 1998 will

revoked by the marriage of the testator; and 4) was the daughter entitled to solicitor-client costs from the wife.
HELD: The parties agreed that the deceased and his wife had cohabited for two years in August or September 2000. The legislation at that time directed that the marriage, but not cohabitation of a testator, revoked a will. In November 2001 the legislation was amended to include cohabitation of two years. There was no mention of retroactive application in the amendment. The court determined the issues as follows: 1) the court was satisfied that the applications could be resolved on the basis of affidavit evidence alone; 2) the 1998 will was not revoked by the two-year spousal relationship with his wife. The two years of cohabitation occurred after the 1998 will was made but before the 2001 legislative amendments; 3) section 17(3) of the Act indicates that the revocation of a will by marriage does not apply where the testator marries a person he was cohabiting with for two years. The court first examined the ordinary meaning of the words in s. 17(3) and found that they fit the circumstances of the deceased and his wife. The Act is, however, ambiguous as to the proximity or timing of the cohabitation relative to the execution of the will. The most plausible interpretation of s. 17(3) was that it applied to those situations where the will was made after the couple cohabited for two years but before they were married. To interpret the section differently would be to create legal differences between married and common law couples when the legislators were attempting to put them on equal footing with the amendments. The 1998 will was revoked by the 2012 marriage; and 4) the court had discretion with respect to costs pursuant to rule 11 of the Queen's Bench Rules. The court did not order solicitor-client costs against the wife for many reasons. The court followed the general rule and ordered solicitor-client costs from the estate.

 Back to top

R. v. Weeres, 2015 SKQB 229

McMurtry, July 30, 2015 (QB15223)

Criminal Law – Fraud
Criminal Law – Laundering Proceeds of Crime

The accused was charged with one count of fraud, contrary to s. 380(1) of the Criminal Code, and one count of laundering the proceeds of fraud, contrary to s. 462.31(1)(a) of the Code. The accused created and marketed a software program as a vehicle to defraud investors of more than $650,000. He implemented a scheme whereby he hired a number of people to sell the software to their friends and family in units or packages so that the units could be sold to large retail customers. The purchasers bought each unit for $30 and were told that when the unit

was sold to a retail customer, the purchaser would receive $60 within ten to twelve months of that sale. The accused drafted the purchase agreements and they specified that the purchase was buying a certain number of units of the software from a distribution company. Each of these companies had been set up by the accused, although he had no control over any of them as a director, owner or officer. His name did not appear on any bank documents related to the companies' accounts. There were no records or ledgers to account for the bank transactions or the transactions with purchasers. The purchasers testified that they believed the purchase money would be used to manufacture and/or market the software units that they had purchased. The funds in fact ended up in bank accounts controlled by the accused and the bulk of the money was used by the accused and his family for their own purposes. The accused asserted that he was selling the software as a business opportunity not an investment and what had occurred was simply a failed business venture. The purchase agreements allowed the purchaser an option to take possession of their inventory if their units were not sold but none of the purchasers chose to do so and opted to leave the software with the distribution companies when sales did not occur. The purchasers were only entitled to money upon the sale of the software, and for reasons beyond his control the accused was unable to sell it. He acknowledged that he used purchase monies to live on but argued that he was entitled to any money generated by his product. The people involved in the business (his spouse and son, for example) deserved reasonable compensation for their efforts. The Crown argued that the purchasers were not purchasing anything because the product did not exist at the time of purchase. They invested in the software business believing that their funds would create inventory for the company to sell. When 2,000 units were produced in 2003, the accused had no reason to continue to pursue purchasers as the money was not needed to create inventory because there were no sales. The only reason to continue to collect money from purchasers was to use it for other reasons. This was a fraud on the purchasers. Because the accused concealed the money in accounts under different names, he engaged in laundering the proceeds of his fraudulent activity.

HELD: The accused was found guilty on both counts. The court held that the accused committed continuous acts of fraud and deceit when he took purchasers' money for a purpose other than the manufacture and sale of the software. The court found that the accused intended to defraud the purchasers and that he knew the monies in the distribution companies' accounts were the funds from the purchasers and that the Crown had proven beyond a reasonable doubt that the accused intended to convert the purchasers' money.

 Back to top

Klapak v. Minty, 2015 SKQB 230

Goebel, July 30, 2015 (QB15231)

Family Law – Child Support – Section 7 Expenses
Family Law – Custody and Access – Children Born Outside of Marriage
Family Law – Custody and Access – Mobility Rights
Family Law – Custody and Access – Variation
Family Law – Transfer Judicial Centre

The parties were never married and had two children together. A final order was granted by agreement after pre-trial in 2013. The parties both brought applications to vary the judgment. The respondent sought approval to move with the children to a town 28 kilometers away. The petitioner argued that the move would result in a significant change in the environment for the children and would require more effort on his part to participate in their day-to-day lives. He also said that the employment schedules of both parties changed since the final order, which impacted their availability to parent. The petitioner's work had decreased from 60 hours per week to 40 hours per week with no weekend work. The respondent had also obtained full-time employment; she was unemployed at the time of the final order. The respondent also argued that the final judgment was only intended to apply while the children were very young and that clause 14 of the judgment provided for a review of the parenting arrangement. The issues were: 1) whether the parenting judgment should be varied; 2) what child support was payable pursuant to the child support order; 3) should the child support order be varied to provide for a fixed monthly payment relating to daycare costs for 2015 and into the future; and 4) should the matter be transferred.
HELD: The court decided the issues as follows: 1) the respondent's move would not materially affect the petitioner's parenting time nor disrupt contact between the children and others. The court found that it was reasonable for the respondent to want the children to attend daycare and school in the community she worked in. The respondent's change of residence was not a material change. The court also did not find a material change because of the change in work schedules. The court was satisfied that the final judgment was structured upon the children being young and the petitioner demonstrated that there was a material change in the circumstances since the judgment was rendered in 2013. A significant change to the parenting arrangement was not found to be required to meet the needs of the children. The court stayed the application pending the parties' participation in the high conflict mediation program. If they could not reach an agreement as to parenting time, either may apply to the court. Because the court found a material change it did not consider whether the judgment provided for a review in clause 14; 2) the adjustment clause in the judgment provided for exchange of information every year and anticipated a lag time calculation being used each spring to calculate ongoing support. The court determined the petitioner's child support obligation based

on the Federal Child Support Guidelines; 3) the parties had significant conflict regarding the exchange of daycare receipts so the court ordered that the petitioner pay a set amount each month for daycare and that the amounts would be reconciled each year; and 4) the court did not transfer the matter because there were no property interests and neither party resided in either judicial centre being advanced. The application could be brought back on 14 days' notice if it appeared necessary to direct the matter to a pre-trial or hearing.

 Back to top

Bethshan Holding Ltd. v. Nueva Era Design & Construction Management, Inc., 2015 SKQB 231

Barrington-Foote, August 4, 2015 (QB15224)

Builders' Lien – Holdback
Builders' Lien – Discharge
Builders' Lien – Order to Vacate – Builders' Lien Act, Section 60
Statutes – Interpretation – Builder's Lien Act, Section 56, Section 57, Section 60

The applicant applied pursuant to s. 57 of The Builders' Lien Act for orders that: 1) the amount of the holdback pursuant to s. 34(1) in relation to respondent N. was $153,500; 2) the holdback be paid into court; and 3) the registration of the claims of lien and written notices of lien of all respondents be vacated, with respondent N.'s being vacated pursuant to s. 60 of the Act. The applicant contracted with respondent N. to design and build a building. The work started but the contract was terminated before its completion. The lien of respondent N. was $478,000 and the liens of the other respondents totaled $496,247.29. The contract price and whether the parties agreed to an increase was a key issue. The original contract price was $1.8 million and the applicants made payments totaling $1,535,000. The applicants argued that the price had not increased and tendered a document provided by respondent N. shortly before the contract was terminated that did not indicate any price increases. Respondent N. submitted they had just not gotten around to including the price increases in the document. The applicant asserted that they had overpaid on the contract because according to respondent N. only $300,000 in work was required to complete the work and the applicant paid $1,535,000 of the $1.8 million contract. Therefore, the applicant argued that respondent N.'s lien should be vacated pursuant to s. 60. Further, they argued that the holdback should be $153,500 being 10 percent of the payments made on the contract. Respondent N. argued that the contract price and lien amounts should be determined at trial.
HELD: The application was dismissed with costs. Section 57 has

limited scope and deals only with holdback. If an owner seeks to vacate a lien and owes more than the holdback, an application pursuant to s. 56(2) is required. The court also determined that a lien can only be vacated pursuant to s. 60 in extraordinary circumstances. The court also found, however, that there was evidence the parties agreed to change the scope of work and therefore the contract price. The court was not convinced that it had respondent N.'s best evidence. The court was therefore not prepared to summarily determine the contract price and thus could not conclude that respondent N.'s claim of lien was spurious, grossly inaccurate or grossly exaggerated. The court did not vacate respondent N.'s lien pursuant to s. 60 of the Act. Thus, the court was also unable to grant the applicant relief pursuant to s. 57. The applicant should have at least applied pursuant to s. 56(2) in the alternative.

 Back to top

International Brotherhood of Electrical Workers, Local 2038 v. Clean Harbors Industrial Services Canada Inc., 2015 SKQB 232

Schwann, August 5, 2015 (QB15252)

Administrative Law – Judicial Review – Labour Relations Board
Labour Law – Labour Relations Board – Certification Application – Representational Vote

The International Brotherhood of Electrical Workers union applied for judicial review of a decision of the Saskatchewan Labour Relations Board (SLRB). The union had applied to be certified as the bargaining agent for a standard "Newbery unit" of electrical workers at a potash mining site who were employed there by Clean Harbors Industrial Services Canada. Clean Harbors replied that it was not the true employer at that site but rather that BCT, one of its subsidiaries, was the employer. The SLRB directed a pre-hearing representational vote to be undertaken by mail-in ballots. Voting packages were mailed to eight workers. The union then filed two unfair labour practices with the SLRB: the first took issue with the termination of one of the workers and the second with an improper workplace practice and the termination of two other workers. At the time of the representational vote, BCT had four workers registered in the electrical trade in Alberta, none of whom were registered with the Saskatchewan Apprenticeship and Trade Certification Commission, established by The Apprenticeship and Trade Certification Act, 1999 (ATCA).The other four workers hired to work at the site were registered and certified to work in the trade in Saskatchewan pursuant to ATCA. The employment status of eight workers was an issue before the SLRB for voting eligibility purposes. The applicant argued that the SLRB erred

in: 1) deciding that BCT was the proper employer for the purposes of the representational vote and the certification application; 2) determining that the Alberta employees should be included in the bargaining unit for voting purposes in a compulsory trade in Saskatchewan because of s. 38 of ATCA; and 3) dismissing the union's unfair labour practice application related to the termination of three workers.
HELD: The court dismissed the union's application. It held that the applicable standard of review was reasonableness. The court rejected the union's argument that the SLRB interpreted the ATCA, (a statute beyond its core area of expertise) in reaching its decision and that as a result, its decisions should be judged on the standard of correctness. With respect to the issues, the court found that: 1) the SLRB's reasoning was transparent and it considered the entire employment contract and weighed the evidence in the appropriate manner. It's conclusion regarding BCT fell within a range of reasonable outcomes; 2) the SLRB heard evidence from the commission that out-of-province apprentices were not required to register in Saskatchewan so long as they were registered in another province. The SLRB has exclusive jurisdiction to determine voter eligibility and neither The Trade Union Act nor The Saskatchewan Employment Act stipulated factors that the SLRB must take into consideration in making the determination. The approach taken by the SLRB was reasonable; and 3) regarding the unfair labour practice allegations, the SLRB concluded that the employer had discharged the burden of demonstrating good and sufficient reasons for their termination of the employees and on the evidence was unable to infer an anti-union animus. The SLRB had not failed to consider relevant evidence or misinterpreted it. It explained its conclusions in a clear and transparent manner and the decision fell with a range of possible acceptable outcomes.

 Back to top

Mental Health, C.H.R. (Regional Director) v. C. (W.), 2015 SKQB 233

Brown, July 24, 2015 (QB15225)

Mental Health Services Act – In-patient Detention, Section 24.1

The applicant applied for an order pursuant to s. 24.1 of The Mental Health Services Act for the involuntary committal of the respondent to the Saskatchewan Hospital for a period not exceeding one year. The respondent suffers from extreme bipolar affective disorder and attention deficit hyperactivity disorder. His ability to function is worse when using alcohol and drugs and he has been dependent on committal to institutional settings for the past two years to ensure he was not able to access drugs and alcohol. The committal also ensured

the respondent was taking his prescribed medications that was necessary for his ability to function. During an unsupervised pass from the facility, the respondent used cocaine. One of the respondent's previous psychiatrists testified that it had been impossible to keep the respondent well and functioning in the community for any appreciable length of time. In the psychiatrist's opinion the in-patient program sought would provide the greatest opportunity for the respondent to receive the intensive treatment and vocational rehabilitation required to ultimately function in the community without risk of harm to himself or others. The psychiatrist also explained how it takes longer for the respondent to recover from each relapse in the community and may eventually not occur. The psychiatrist indicated that the key was for longer term in-patient treatment. The respondent argued that he could function in the community despite his campaigning for continued marijuana use. The respondent has also become aggressive in community settings and had expressed an intention to end his life. The issue was whether the five criteria of s. 24.1 of the Act had been met.

HELD: The court found that the respondent met all of the criteria of s. 24.1 of the Act as follows: 1) the respondent was suffering from a mental disorder that required treatment or care and supervision that could only be provided at a long-term in-patient facility. The Saskatchewan Hospital had the necessary facilities and programming for the respondent; 2) the respondent was unable to fully understand and make informed decisions regarding his need for treatment or care and supervision; 3) the respondent harmed himself and acted aggressively to community members and caregivers; 4) the respondent had been detained continuously as an in-patient since April 15, 2015, which was more than the 60 required days; and 5) the respondent suffered from a severely disabling continuing mental disorder likely to persist for a period of longer than 21 days, notwithstanding treatment was being provided. The court ordered that the respondent be detained at the Saskatchewan Hospital for a period of up to one year, for the purpose of treatment or care and supervision.

 Back to top

Phillips Legal Professional Corp. v. Thao, 2015 SKQB 248

Ball, August 18, 2015 September 9, 2015 (corrigendum) (QB15240)

Professions and Occupations – Lawyers – Fees – Assessment – Appeal

The appellant law corporation appealed a Certificate of Assessment directing it to refund the sum of $23,500 for legal fees paid to it by a former client. The lawyer for the appellant was the lawyer practicing as the professional corporation. The background to the dispute was

described in the application brought by the client to the court to extend the time for assessment of the lawyer's accounts pursuant to s. 67 of The Legal Profession Act, 1990 (see: 2014 SKQB 149). The assessment and the appeal of the assessment were governed by Queen's Bench rules 11-22 and 11-23. The assessment was conducted by the local registrar acting in her capacity as assessment officer. The applicant's notice of appeal of the assessment included numerous alleged errors on the part of the assessment officer. The lawyer representing the former client responded that the applicant's claims were blatant misrepresentations of what had happened at the assessment hearing. As a result, the court issued an interim order directing the assessment officer to provide the court with a supplementary Certificate of Assessment answering specific questions. The officer supplied the answers requested and refuted the applicant's grounds.
HELD: The court confirmed the Certificate of Assessment as a reasonable exercise of the discretion conferred upon the assessment officer by s. 67 of the Act. It rejected the applicant's ground of appeal. The court found that it would be appropriate to order solicitor-client costs. The court noted that the appellant's lawyer was not representing the interests of a client but acting as an individual representing his own financial interests. He had prolonged and added great expense to the assessment process and the costs incurred by his former client were the result of the lawyer's conduct on this appeal. The court ordered the lawyer to pay solicitor and client costs of the application for an assessment fixed at $7,500 and of the assessment appeal fixed at $7,500.
CORRIGENDUM dated September 9, 2015: [1] A typographical error was noted in para. 37 of the judgment dated August 18, 2015 and accordingly, is amended to read as follows:
>>>>[37] Vogel's response was that the Supplementary Certificate of Assessment confirmed Phillips had flagrantly misrepresented what had occurred during the assessment process.
[2] The remainder of the judgment will remain the same.

 Back to top

Lynco Construction Ltd., Re (Bankrupt), 2015 SKQB 254

Rothery, August 26, 2015 (QB15268)

Bankruptcy and Insolvency – Application for Bankruptcy Order
Civil Procedure – Costs – Solicitor-Client Costs

The applicant, a Saskatchewan corporation, has been embroiled in multiple lawsuits with Lynco Construction both in Alberta and Saskatchewan. In this application, Jico applied for a bankruptcy order against Lynco on the basis that the latter owed Jico a debt in excess of $1,000 pursuant to s. 43 of the Bankruptcy and Insolvency Act. It also

alleged that Lynco had committed an act of bankruptcy pursuant to s. 42(1)(b) of the Act within the six months preceding the application, alleging that it had made a fraudulent gift or transfer of its property to another corporation and, pursuant to s. 42(1)(g), had transferred assets to the other corporation for inadequate consideration. Lynco asserted that it owed nothing to Jico as the alleged debt relied upon by Jico related to unpaid rental payments that were statute-barred by s. 5 of The Limitations Act. It also defended its business dealings with the other corporation as part of the restructuring of its business and any transfers were made at fair market value. Lynco argued that Jico brought the application for an improper purpose and it ought to be dismissed under s. 43(7) of the BIA and costs awarded to Lynco on a solicitor-client basis.

HELD: The court dismissed the application. Jico's claim against Lynco was statute-barred by s. 5 of The Limitations Act and therefore did not have a claim provable in bankruptcy, as required by s. 43(1)(a) of the BIA. Jico had not provided any evidence to substantiate its allegation that Lynco transferred any assets with the intent to defraud or defeat its creditors. If Jico had obtained a bankruptcy order against Lynco, it would stay its Alberta action against Jico and would have also eliminated Lynco as a business competitor to the business set up by one of the directors of Jico. Even if Jico could prove it was a creditor of Lynco, the assets were subject to a prior security interest and Jico could avail itself of s. 66 of The Personal Property Security Act, 1992. These reasons comprised sufficient cause to dismiss the application and to find that it was brought for an improper purpose. The court ordered solicitor-client costs against Jico for this and other reprehensible behaviour.

 Back to top

Hallmark Place Condominium Corporation v. McKenzie, 2015 SKQB 260

Smith, August 31, 2015 (QB15269)

Statutes – Interpretation – Condominium Property Act, 1993, Section 54, Section 63
Civil Procedure – Costs – Solicitor-Client Costs

The plaintiff was granted summary judgment against the defendants in the amount of $38,422, representing unpaid condominium fees dating from August 2008 to the time of judgment. The dispute had arisen because the condominium where the defendant resided, which was owned by the defendant corporation, was continuously damaged by water seepage from 2005 to 2012. They took the position that the plaintiff was responsible for the entire cost of repairs even if they had involved improvements, regardless of s. 65(2) of The Condominium

Property Act. In 2008, the defendant informed the plaintiff that he would not be paying his condominium fees in order to offset the cost of repairs done by him. The plaintiffs sued in 2014 and the defendants issued a counterclaim for the water damage. After judgment for the plaintiffs was given, the court adjourned the issue of costs sine die in the hope that the parties could reach agreement as to costs. As they could not, the plaintiff made this application and argued that as it had paid its law firm $25,400 in dealing with the defendants, it sought 100 percent recovery of those costs plus solicitor-client costs of the application. The plaintiff relied upon s. 63 of the Act and on a provision in the condominium's bylaws that stated if an owner was in violation of the bylaws, the costs of correcting or remedying the owner's infraction would be charged to the owner and become part of the assessment. In addition, it argued that the defendants were in breach of the statutory duty under s. 54(3)(b) of the Act and knowingly continued to be for an extended time. It would be a gross injustice to other unitholders not to be reimbursed for 100 percent of the monies it expended in recovery of the defendants' condominium fees. Solicitor costs were warranted because of the scandalous and reprehensible conduct of the defendants. The defendants argued that the plaintiff prolonged the litigation and failed to address the damage to the unit in a timely and effective manner so that the payments were withheld as an act of desperation. They also argued that the legal fees did not relate directly to the collection of condominium fees but to the time spent dealing with the defendants' counterclaim. Finally, the defendants invoked the doctrine of proportionality, arguing that to maintain an award of costs in the amount suggested to collect a debt of $38,400 was not reasonable.

HELD: The court awarded costs to the plaintiff in the amount of $20,300. The court did not find the defendants' conduct of the litigation to be outrageous or reprehensible. However, it held that in a condominium owner defaulted on a statutory duty under the Act or a bylaw obligation in a condominium corporation context, the condominium corporation should prima facie be entitled to a complete indemnity. The presumption here was rebutted because a portion of the legal fees related to the counterclaim. The court found that the expenditures related to the size of the claim had some badges of being an affront to proportionality. The plaintiff's recovery should be limited to 80 percent of the expenditure, which also included the costs of the application.

Back to top