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 18, No. 16 **August 15, 2016**

Subject Index

Callow v. West Vancouver School District No. 45, 2016 SKCA 25

Jackson Caldwell Ryan-Froslie, February 9, 2016 (CA16025)

Fulltext of oral judgment follows: [1] The appeal of Roger Callow, against the decision of Megaw J. in Callow v West Vancouver School District No 45, 2015 SKQB 308 (CanLII), is dismissed for the reasons set out in that decision. Costs are awarded against Mr. Callow in the amount of $3500, which encompasses the costs of the appeal proper and the costs reserved to the panel by Ottenbreit J.A. in his unpublished fiat dated 26 November 2015. Ottenbreit J.A. ordered the payment into Court of the sum of $8,000 as security for costs. Of the balance remaining after payment of costs in this Court, the respondent on this appeal is entitled to be paid $2,000, being the amount of costs ordered by Megaw J.

 Back to top

Phillips Legal Professional Corp. v. Vo, 2016 SKCA 50

Caldwell, April 1, 2016 (CA16050)

Civil Procedure – Appeal
Civil Procedure – Order – Mandamus
Civil Procedure – Queen's Bench Rules, Rule 11-22
Professions and Occupations – Lawyers – Fess – Taxation – Legal Profession Act, Section 67

– Autrefois Convict – Autrefois Acquit

Criminal Law – Sentencing – Dangerous Driving Causing Death

Criminal Law – Sentencing – Driving over .08

Criminal Law – Sentencing – Impaired Driving Causing Bodily Harm

Debtor and Creditor – Joint and Several

Employment Law – Commission – Non-payment

Family Law – Child Support

Family Law – Custody and Access – Adoptive Parents

Family Law – Custody and Access – Best Interests of Child

Family Law – Custody and Access – Interim – Variation

Family Law – Custody and Access – Variation

Family Law – Division of Family Property – Family Home

Family Law – Family Property – Division – Appeal

Family Law – Family Property – Interspousal Agreement – Family Home – Exclusive Possession

Family Law – Spousal Support – Determination of Income

Mortgage – Foreclosure – Leave to Commence Action – Costs

Wills and Estates – Capacity/Undue Influence

Cases by Name

Armstrong v. Armstrong

Bell v. Century 21 Dome Realty Inc.

The appellant appealed a judgment of the Court of Queen's Bench sitting on a review under rule 11-22 of The Queen's Bench Rules of an assessment of it's legal accounts pursuant to s. 67 of The Legal Profession Act, 1990. The appellant also sought production of an audio recording of the assessment hearing in the nature of mandamus. The appellant indicated that it would seek to enter the recording as fresh evidence on the appeal. The parties had each given the chambers judge different versions of what happened at the assessment. Therefore, the chambers judge asked the assessment officer what had transpired. It was not until the assessment officer issued her supplementary certificate that the parties learned the assessment hearing had been recorded. The appellant then asked the chambers judge's permission to have the audio recording transcribed; the chambers judge did not allow the recording, but let the appellant's representative listen to it. The chambers judge found no basis to interfere with the assessment officer's decision on the merits and awarded $15,000 in solicitor and client costs against the appellant on the basis of his evaluation of the appellant's motive for conducting the matter in the way it had and because he found the appellant's factual submissions to be "disingenuous". The appellant argued that the chambers judge erred in requesting and relying on a supplementary certificate of assessment and, in the alternative, in failing to obtain a transcript of the recording, or in the further alternative, in failing to seek and obtain input of counsel respecting the content of the questions to be directed to the assessor by the court.
HELD: The court found that the appellant's motion was incidental to an appeal pending. The court also found that it would not need a transcript to make the necessary assessments because the answers should all be apparent from the record as it stood. The production of the recording was not something that was clearly incidental to the appeal or a matter pending in the court. The recording did not involve the decision of the appeal on the merits. The motion was denied.

 Back to top

Whatcott v. Canadian Broadcasting Corp., 2016 SKCA 51

Ottenbreit Caldwell Herauf, April 1, 2016 (CA16051)

Civil Procedure – Appeal – Re-hearing – Court of Appeal Rules, Section 47(1)

The applicant applied pursuant to s. 47(1) of The Court of Appeal Rules for a re-hearing of his appeal. He argued that the appeal court should not have reduced his damages.
HELD: The Court of Appeal determined that the application did not disclose a special or unusual circumstance warranting a re-hearing of

Bias v. Scarrow

C. (D.R.) v. F. (A.D.)

Callow v. West Vancouver School District No. 45

CIBC Mortgages Inc. v. Whitesell

Cutts v. Phillips

Egware v. Egware

H. (S.) v. G. (W.)

Keast v. Keast

M. (D.) v. W. (R.)

McDougall Gauley LLP v. Judicial Centre of Swift Current (Sherriff)

O. (A.) v. E. (T.)

Phillips Legal Professional Corp. v. Vo

R. v. Berg

R. v. Fiegal

R. v. Gryba

R. v. Hartl

R. v. Higginbotham

R. v. Learning

R. v. Melin

R. v. Mooswa

R. v. Stonechild

R. v. Taylor

R. v. Taypotat

Starling v. Starling

Thomas v. Thomas

Viczko v. Choquette

Whatcott v. Canadian Broadcasting Corp.

Zatylny v. Kramer Ltd.

the appeal. The applicant was the one that applied for summary judgment and therefore he must be presumed to have put his best case forward on the issue of damages. The chambers judge erred in law and the damages awarded were thus reduced after an appeal by the respondent to the Court of Appeal.

 Back to top

Viczko v. Choquette, 2016 SKCA 52

Ottenbreit Herauf Whitmore, April 7, 2016 (CA16052)

Civil Procedure – Appeal
Civil Procedure – Queen's Bench Rules, Rule 7-5
Civil Procedure – Summary Judgment

The issue was whether the chambers judge erred in relying only of affidavit evidence where issues of good faith and credibility were at play in a summary judgment procedure. The testator had three children: the son was an appellant (the son's wife was the other appellant); a daughter was a respondent; and the other daughter was a respondent as executor for the testator's estate. In his will, the testator directed that his farmland be sold and the proceeds be distributed to the daughters. The land was appraised and the appellants agreed to pay the appraised amount. An agreement for sale was signed between the appellants and the executor for the estate without the other respondent's approval, that respondent being a beneficiary in the will. When the other respondent found out that the appellants were purchasing the land, she also expressed an interest in buying the land. The transfer to the appellant proceeded and was completed. The respondent executor did not obtain the other respondent's consent to the sale because the appellants told her that she did not have to because The Devolution of Real Property Act had been repealed. The appellants did not realize that it had been replaced by The Administration of Estates Act, which contained provisions requiring consent. The respondent commenced an application to have the land returned to the estate. The chambers judge determined that the respondent's consent was required under s. 50.5 of The Estates Act. Further, the chambers judge found that the appellants lacked good faith because they were wilfully blind to the requirement of consent, they thought the respondent might register an interest against title, and they requested removal of the condition that consent be obtained from the respondent. The chambers judge relied upon the court's equitable jurisdiction to override the title of purchasers. The transfer was found to be invalid and the chambers judge cancelled the title. The issues were as follows: 1) was summary judgment appropriate, fair, and just in the circumstances; 2) did the chambers judge err in concluding that the

may differ in style from those endorsed by the *Citation Guide for the Courts of Saskatchewan*.

appellants did not act in good faith; 3) was s. 50 of The Estates Act paramount when it conflicts with the explicit intention of the testator; 4) did the respondent have a beneficial interest in the land as described in s. 50.4 of The Estates Act; and 5) did the chambers judge err by vesting the land back in to the name of the executor of the estate.
HELD: The appeal was allowed and the matter was remitted back to the Court of Queen's Bench. The issues were analyzed as follows: 1) Queen's Bench rule 7-5(2)(b) allows a judge to weigh the evidence, evaluate the credibility of the deponent, and draw any reasonable inference from the evidence. Rule 7-5(3) allows a judge to order that oral evidence be presented. The chambers judge relied upon the correct law and he used quotes to accurately reflect what is meant by the absence of good faith. The chambers judge could not properly decide the question of wilful blindness and a lack of good faith on the basis of the affidavit evidence. The appeal court found that the finding of wilful blindness was controversial and evidence to support it was inconclusive at best. Because the finding was pivotal to the judge's conclusion, it was a genuine issue that required a trial or, at the very least, oral evidence. The remaining issues were not considered.

 Back to top

Thomas v. Thomas, 2016 SKCA 53

Jackson Ottenbreit Wilkinson, April 15, 2016 (CA16053)

Family Law – Family Property – Division – Appeal
Family Law – Spousal Support – Appeal

The appellant appealed portions of the Queen's Bench judge's decision dividing family property owned by him and the respondent and ordering spousal support for her (see: 2014 SKQB 153). He appealed on the grounds that the trial judge erred in: 1) evaluating the parties' stock trading accounts. The appellant argued that the value of his accounts should be reduced by the amount of capital gains income imputed for the purposes of the interim spousal support orders. It was unfair that the respondent received spousal support after January 2012 based on income from his stock trading accounts that was mitigated or erased by losses he suffered in the 2012 stock market crash. He contended that the respondent received the value of the same stock trading accounts by way of division of family property at trial and that this resulted in "double recovery" or "double-dipping" by her. He argued that his stock trading account should be reduced by $320,884 to compensate him for this alleged double recovery. That sum represented income imputed to him from January 1, 2012, to trial, less his employment income earned at his family's car dealership; 2) in his determination of the value of the parties' shares in their corporation. The trial judge

accepted the opinion evidence of the respondent's expert witness regarding the value of shares and disregarded the evidence of a purported arm's length sale of shares by another shareholder as establishing market value; 3) by exempting from division an inter-vivos gift to the respondent from her parents in the amount of $64,255; and 4) by awarding spousal support. The respondent was not entitled to support because although she had worked part-time during the marriage, she had been a nurse for 23 years and had not been required to work or contribute to the family business and had received substantial capital from the matrimonial property division to maintain her standard of living. The respondent cross-appealed on the ground that the trial judge had used neither the date of application nor the date of adjudication as the valuation date for the trading accounts. She argued that they should have been valued as at the date of application and the trial judge did not have the discretion to create a hybrid valuation of the parties' assets where, as in this case, information was available regarding the value of the asset at either date.
HELD: The appellant's appeal was dismissed with respect to the first, second and fourth ground and allowed with respect to the third. The court found with respect to each ground that: 1) the trial judge had not erred when he rejected the appellant's argument regarding double-dipping because he had not reduced the value of the appellant's trading accounts for the effect of the interim orders. The appellant had sufficient non-capital sources of income to pay the support. Regardless of the fact that he testified that he paid support from his accounts, his choice to do so was not determinative that double-dipping had occurred. The appellant's imputed sources of income for the purposes of interim spousal support was attributable to deemed income from the employer. The first interim order was based upon imputed income of $257,000 per year based upon a three-year average income. In the case of the second interim order, the chambers judge attributed $145,000 per year of employment income out of total imputed income of $175,000. The second order therefore reflected that the appellant's ability to pay had been reduced by over $100,000 due to the stock market crash. Both orders were based upon implicit findings that the appellant could have financed the support payments from employment income and not from an asset that eventually equalized as family property; 2) the trial judge had not erred because he outlined why he accepted the respondent's expert witness's evidence and explained why he distinguished the sale of the shares evidence; 3) the trial judge erred in his determination that the funds were exempt because they were an early inheritance. There was no basis for the judge to find that the money should not be divided equally under The Family Property Act. The court found that there was no evidence under s. 21(2) or s. 21(3)(e) that the gift should not be shared equally; and 4) and the standard of review in this matter did not permit the court to interfere with the finding that the entitlement to support had been established. There was evidence to support the findings made by the trial judge regarding the respondent's annual

income of $58,000 and the income imputed to the appellant of $175,000. The court found that the trial judge apparently rejected the appellant's position that the respondent should work full-time. Based upon the Guidelines, the trial judge correctly calculated the quantum of support. The court dismissed the respondent's cross-appeal. The trial judge's method of valuation took into account the value of the accounts each party built prior to adjudication, eliminated the effect of market forces to the extent possible and divided the funds that the parties actually had the benefit of. Given that the overall scheme of matrimonial property is to effect a fair division of a particular asset in the context of all the matrimonial property, this method made eminent sense from a legal and a practical point of view and is in keeping with the principles of the Act, the definition of value given in s. 2, and the jurisprudence.

 Back to top

R. v. Taypotat, 2016 SKCA 54

Jackson Herauf Whitmore, April 14, 2016 (CA16054)

Criminal Law – Sentencing – Aboriginal Offenders
Criminal Law – Sentencing – Appeal
Criminal Law – Sentencing – Impaired Driving Causing Death
Criminal Law – Sentencing – Sentencing Principles

The appellant argued that his sentence was demonstrably unfit and that the sentencing judge made errors in the way he considered and applied the Gladue factors. The appellant was sentenced to 9.5 years for impaired driving causing death.
HELD: The sentencing judge was alive to the objectives and principles of sentencing, and the sentencing judge indicated the correct ones as being the primary goals of sentencing. The appeal court concluded that there was no reason to suggest that the sentencing judge did not carefully consider the Gladue factors. The sentence was within the appropriate range, which was eight to ten years.

 Back to top

R. v. Hartl, 2016 SKPC 26

Green, April 7, 2016 (PC16040)

Criminal Law – Motor Vehicle Offences – Driving Without Due Care
Traffic Safety Act – Motor Vehicle Offences – Driving Without Due Care

The accused was charged with driving without due care and attention

under s. 213(1) of The Traffic Safety Act. The charge arose after the accused had driven his truck with two grain trailers attached across a railroad crossing. An engineer who was driving a freight train saw the truck in the crossing and applied his emergency brakes, but the train struck the accused's vehicles. Visibility was good on the day of the collision and the crossing was marked with the standard white wooden crosses. The road on which the accused was driving crossed the tracks at an angle. A witness saw the accident and went to the aid of the accused. When asked if he had seen the train, the accused said that he had looked but he hadn't seen it. The witness testified that he was more careful when he crossed this intersection because of the angle of the intersection. The engineer and conductor testified that the train was travelling at approximately 38 miles per hour. The locomotive's headlights on the front were turned on and the whistle was blown approximately one quarter of a mile before the intersection and for 20 seconds before the collision. The only witness for the defence was the accused's son. He attended at the site of the accident one hour later and took pictures of the train, the derailed cars and his father's truck. He returned to the scene a year later and took pictures of the road and the crossing, which indicated that the angle of the road to the tracks was 60 degrees, making it difficult for the accused to look 90 degrees to the right to see a train coming from that direction. In addition, the noise inside the accused's semi-trailer cab would have made it difficult to hear outside noise.
HELD: The accused was found guilty. The court found that it was satisfied beyond a reasonable doubt when viewed objectively that the accused drove in a careless and inattentive manner and had not demonstrated on a balance of probabilities that he took reasonable care in the circumstances.

 Back to top

R. v. Fiegal, 2016 SKPC 46

Green, April 4, 2016 (PC16041)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Care or Control

The accused was charged with having the care or control of a vehicle while his ability to operate that vehicle was impaired and while he was over the legal limit of .08. The charges were laid after a series of encounters between the accused and an RCMP officer. The officer had visited the accused at his residence because a complainant had reported that the accused had driven his truck through the fields of his farm. The accused admitted to the driving complained of and although the accused seemed impaired, the officer decided not to pursue the

investigation. He left the accused's house but drove by it again twice. On the second occasion, he noticed that the accused was behind the steering wheel of his truck. He could not see where the accused's feet or legs were, and when he approached the vehicle, the accused had gotten out of it. He had the keys in his hand, was in bare feet and was not wearing a coat although it was cold and snowing. The officer arrested the accused and read the breath demand. At that time he could smell alcohol on the accused's breath and noted that his eyes were red. The accused did not demonstrate any difficulty walking or speaking. The breath samples indicated that the accused had a blood alcohol content over .08. The accused testified that because he had had a fight with his spouse, he had behaved like an idiot all day long and admitted that he had been belligerent when he spoke to the officer the first time. After the officer left, he went to his truck, put the keys in the ignition but did not start the engine and turned on the lights only to flash them defiantly at the officer as he drove by. He then returned to his house and later went back to his truck to look for his cell phone. He had no intention of driving and had only leaned into the truck with his head in and his hand on the wheel. The truck's emergency brake was on and it had a manual transmission so he would have had to release the brake and engage the clutch in order to move the truck. He had been drinking beer before the officer found him in the truck.
HELD: The accused was found not guilty of both charges. The court was satisfied that the accused was not involved in some use of the vehicle or some course of conduct associated with it that involved a risk of putting it in motion and that in the circumstances there was no realistic risk of danger to persons or property.

 Back to top

R. v. Learning, 2016 SKPC 53

Beaton, April 14, 2016 (PC16043)

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

The accused was charged with having possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. The accused was arrested in British Columbia while he was driving a van that had been under surveillance by the RCMP for a number of days. The RCMP had arranged with an informant, T.M., who had been involved in the importation of cocaine from California to Canada at remote border locations in southwest Saskatchewan, to act as their agent in exchange for immunity. T.M. informed them that he would be transferring cocaine to a courier at a specific location and the RCMP substituted sham cocaine in which they inserted a tracking

device. The courier's van was identified by the agent and the RCMP had it under surveillance as it was driven from Alberta to Saskatchewan and took a photograph of the driver. The photo was of the accused. He was the only occupant of the vehicle. He was observed purchasing a cell phone before the meeting. The transfer then occurred and was witnessed by officers. However, it was too dark for them to see the courier. The agent testified at the accused's trial and provided a general description of the man to whom he had given the drugs. The conversation was recorded and the accused showed the agent a hand-drawn map he had used to locate the meeting spot and told him that he was out of gas and would be driving to Medicine Hat. The agent identified the accused in the courtroom because he had been shown the photograph before the trial. The courier then drove to a gas station after the transfer and stopped at motel in Medicine Hat. When the police stopped the van in BC, they found the sham cocaine in a locked container inside the vehicle, a map matching the one shown to the agent, the gas station receipt, a motel receipt and registration in the name of the accused. There was other circumstantial evidence submitted by the Crown that the courier in question was the accused. The defence argued that the Crown had not proven that the accused was the courier and that the agent's identification should be given no weight because he had been shown the police photograph. Because the light was so poor at the time of the meeting, the agent could not provide anything but a general description. The police could not prove that the accused was the driver of the van other than when it was stopped, nor could they prove that the accused had knowledge of the cocaine in the van.
HELD: The accused was found guilty. The court found the agent to be a credible witness and accepted his identification testimony, despite the potential influence of the photograph. Based on the whole of the evidence, the court concluded that the accused was the courier and had possession of cocaine for the purpose of trafficking.

 Back to top

R. v. Berg, 2016 SKPC 55

Kovatch, April 18, 2016 (PC16042)

Criminal Law – Assault – Assault with a Weapon
Criminal Law – Evidence – Beyond a Reasonable Doubt
Criminal Law – Evidence – Credibility

The accused was charged with assault with a weapon, a video game controller, on his young child. The issue was whether the Crown proved the charge against the accused beyond a reasonable doubt. An officer testified that the child had sustained significant injuries. A

photograph book of the injuries was entered by consent. The child's mother and the accused gave statements. The accused conceded that his videotaped statement was voluntarily given. The accused said that he noticed the bruises on his daughter when he changed her diaper, but that he had not noticed them prior to that. He indicated that he showed the bruises to the babysitter when she arrived and told her to take the child to the hospital if they got any worse. He denied knowing anything about the bruises but did acknowledge that it looked like she was struck with an object. The accused eventually admitted to becoming frustrated and snapping when the child was crying. He said he hit the child with the controller when she would not stop crying. At trial the accused denied causing the injuries to his daughter. He also said that the child's mother had been physically aggressive with him previously. The babysitter testified that the child was crying when she arrived and stopped when the child was passed to her by the accused. The babysitter took the child to the hospital.
HELD: The court considered all of the evidence and was unable to accept any of the evidence presented by the accused. The court substantially accepted the evidence of the Crown and had no reasonable doubt. The accused was found guilty as charged. The accused admitted his guilt for the assault in the statement given to the police. The court found that the officer did not apply any excessive pressure to the accused that would have caused him to confess. The court found the evidence of the babysitter to be very influential. Her evidence was consistent with the mother not having committed the assault and was generally consistent with the accused having committed the assault. The court highlighted a number of points made by the accused that further pointed to his guilt. The court found the accused's indication that he fell asleep for 45 minutes while the child was in her high chair to be unlikely. The accused was concerned that all the evidence pointed to him. The court said that this did not make sense coming from the parent of an injured child if the parent had no part in causing the injury. It was also unlikely that the mother caused the injuries and the accused slept through it all. The admission made in the statement to the officer was also plausible.

 Back to top

R. v. Melin, 2016 SKPC 56

Bazin, April 25, 2016 (PC16047)

Criminal Law – Sentencing – Driving over .08

The accused pled guilty to driving while over .08 contrary to s. 253(1)(b) of the Criminal Code. The accused was involved in an accident while driving a large transport truck with two trailers, one 32 feet long and

one 28 feet long. The truck was fully loaded hauling drywall. The truck left the highway and rolled onto its side in the median separating the two double lanes of Highway No. 1. The accused's breath samples were .110 and .100.

HELD: The court found the following aggravating factors: the size of the vehicle; the accused was a professional driver and the offence took place during the course of his employment; the vehicle was driven on Highway No. 1; there was an accident; the risk of harm to the accused and others by consuming alcohol prior to driving should have been contemplated or known by the accused; and there was property damage resulting from the accident. The mitigating factors were: the accused pled guilty at his first opportunity; he had no record; he would lose his employment as a professional truck driver; he was employed for many years and supported a wife and young child; and he would likely have a substantial civil debt due to the damage to the truck. A fine higher than the usual $1,000 was found to be necessary to reflect the aggravating factors. The accused was sentenced to: a $3,000 fine; a one-year driving prohibition; a nine-month probation, which included terms of residence, no alcohol or drug consumption, assessment and programming for addictions, and presenting self.

 Back to top

Zatylny v. Kramer Ltd., 2016 SKPC 60

Demong, April 27, 2016 (PC16048)

Employment Law – Commission – Non-payment
Small Claims Court

The plaintiff brought the application against the two defendants, jointly and severally, alleging they owed him $9,996.58 for sales commission. The defendants denied the claim and also argued that the individual defendant should not have been named as a defendant. The plaintiff agreed to withdraw the claim against the personal defendant. The plaintiff was a salesperson for the corporate defendant. He had a wage guarantee and would earn five percent commission based on a stated percentage of the defendant's gross profit on implements sold by him. The sale in question involved the sale of new equipment and taking back some of the purchaser's equipment in trade. The new equipment was purchased for $2,436,000 and the trade-in equipment was valued at $1,796,000. Therefore the amount owing was $643,882.50. The plaintiff argued that the defendant signed off on a "New Equip Sales – With Trade" sheet indicating the full commission; however, the defendant indicated they would never sign off on such an early date in the sale. The plaintiff was unable to produce the sheet. A minimum of eight months passed before the sale proceeded. The plaintiff was notified that

the sale resulted in a net loss to the defendant of $90,427.77. The defendant, however, indicated that because of the plaintiff's hard work on the deal, they were prepared to pay him a $2,500 finder's fee.
HELD: There was no basis in fact or law to lift the corporate veil to hold the personal defendant, who was an officer, director and shareholder of the corporate defendant, personally liable for any of the actions taken by the corporate defendant. The court indicated that it could come to no other conclusion than that the plaintiff was well aware of the arrangement regarding commission. He acknowledged that of the 500 to 600 sales he made for the defendant he only received the full commission ten percent of the time, and in the remaining 90 percent of the cases he received less. The court indicated that the lack of evidence regarding the sale of the used equipment lent support to the defendant's conclusion that the true value appraisal was too high. The plaintiff failed to show that the actions taken by the defendant to reduce the value was undertaken in bad faith. All of the defendant's witnesses were found to be credible. The plaintiff's case was dismissed.

 Back to top

Bell v. Century 21 Dome Realty Inc., 2016 SKPC 61

Demong, April 27, 2016 (PC16050)

Contracts – Exclusionary Clause – Enforceability
Small Claims

The plaintiff claimed money from the defendant for the repayment of fees allegedly charged to him while he was working for the defendant and also for money relating to a prize he won in an office pool. The defendant argued that the fees related to the plaintiff failing to remove his personal belongings from an office he was renting from the defendant and that he was ineligible to win the office pool because he was not a working agent at the time. The plaintiff worked as a real estate agent for the defendant from 2011 to December 31, 2014. In late 2013 the defendant developed a promotion that in part dealt with the defendant's agents. The winner's name would be drawn on January 5, 2015, and the prize was 21,000 Air Miles. The plaintiff's name was drawn as the winner, but he did not receive the Air Miles because the terms and conditions of the promotion clearly indicated that the winner had to be a working agent. The plaintiff indicated that he had not read the terms and conditions, and if he had he would not have resigned until after the draw date. He requested the court to hold that the exclusionary clause be unenforceable.
HELD: The court preferred the defendant's evidence over the plaintiff's where it differed. The court did not find the exclusionary clause to be unenforceable. The court found it hard to believe that the plaintiff was

not aware of the rules, and if he was not aware of the rules he should have known of their existence.

 Back to top

O. (A.) v. E. (T.), 2016 SKQB 92

Brown, March 15, 2016 (QB16079)

Family Law – Custody and Access – Adoptive Parents

The parties applied to the court to resolve the issue of custody and access regarding a five-year-old girl. The child had been placed with the petitioner wife and husband when she was less than a year old and they later applied to adopt her. The respondent and his common law spouse were the parents of two boys during their relationship. When his spouse left the relationship, she was pregnant. The respondent believed that the child was not his. The respondent knew that the child was born in 2011 after they separated but did not know that she had been placed for adoption until 2012 during a pre-trial conference regarding custody of his sons. The respondent's former spouse and another man had placed the child for adoption, representing themselves as her biological parents. The respondent contacted Social Services to advise them of his interest in the child and eventually through DNA tests, established that he was her biological father. During the following four-year period, the child continued to reside with the petitioners. Just before their adoption of her was formalized, the petitioners were informed early in 2012 that the respondent had come forward as the biological parent of the child. The parties met a number of times attempting to come to an agreement. The petitioners rejected the proposal that custody of the child should be transferred to the respondent by August 2012 and in June 2012 the petitioners issued their petition. The respondent also made an application for custody at the same time. Various interim orders were made regarding the respondent's parenting time. Eventually a pre-trial was held and the parties agreed that an expert would prepare a custody and access assessment. The expert, who had observed the child interact with each of the respective parties, recommended in his report that the respondent have custody. The petitioners sought the opinion of another expert, who recommended that the respondent's access be terminated in the best interests of the child. During the four years before this trial, the respondent visited the child regularly in Prince Albert or drove her to his home where her brothers and extended family lived. The arrangements were complicated because the respondent had to drive for six hours from his reserve to visit the child as the petitioners lived in Prince Albert. At various times, the respondent's access was denied or obstructed by the petitioner wife. She and others testified that the

child's behaviour changed for the worse after she had been with the respondent. Both the petitioners and the respondent had excellent relationships with child. The respondent had raised six children. His background was Nakoda and his family was immersed in its culture. The petitioner husband was Cree and maintained his language and was close with the Cree community. The petitioner wife was not of Aboriginal descent was but was familiar with the Cree culture. All of the parties had secure employment and good homes. Their respective communities offered support and advantages in the raising of the child. HELD: The respondent was given custody of the child and the petitioners were given specific access. The court established a mandatory requirement for the child to receive counselling during the transition period between the date of judgment and the start of school in September when the child would begin living with the respondent. The court accepted the original recommendation made for custody and access because the expert had actually observed the child with each of the parties and the other expert had not. The court found that the child's behavioural changes were not the effect of visits with the respondent but the outcome of the tension and hostility between the parties. The court considered the child's blood relationship with the respondent and her brothers and her cultural background as important factors in reaching its decision.

 Back to top

Starling v. Starling, 2016 SKQB 112

Labach, April 1, 2016 (QB16110)

Family Law – Spousal Support – Determination of Income
Family Law – Spousal Support – Disability Benefits

The parties separated in February 2015 after eight and one-half years of marriage. The petitioner claimed interim spousal support and the respondent argued that she was intentionally under-employed and that he did not have the means to pay spousal support. The respondent was discharged from the Canadian military prior to the parties' marriage. He was diagnosed with depression and post-traumatic stress disorder. The respondent had children from a prior marriage and was required to pay child support of $587 per month. He obtained employment as an operations supervisor until just prior to the proceedings. The petitioner had chronic back pain, stress-related tremors, and bipolar disorder. She was employable but was limited to working part-time. She worked 16 hours at a store and cleaned two buildings. Interim orders required the respondent to pay $525 and then $500 per month in spousal support. The matter was adjourned to September 2015. The family home was sold and the net proceeds of approximately $100,000 were held in trust.

The respondent's doctor recommended that he take a medical leave from his employment in June 2015 due to his difficulty managing the stress related to the divorce. The doctor recommended the respondent attend inpatient treatment and advised that he would not be able to return to work for six months to a year. The respondent moved to Ontario to live with his parents. He was receiving employment insurance, a military pension, and a Veterans Affairs Canada disability pension. The petitioner moved in with her sister after the house sold. She was also experiencing some anxiety and depression. During their marriage, the petitioner had been claiming split pension income and the respondent had been deducting the same.
HELD: The court was satisfied that the petitioner established a need for interim spousal support. For the most part she was financially dependent on the respondent during the marriage. The petitioner was not able to cover her basic living expenses since separation nor was she able to enjoy a lifestyle similar to what the parties had while they were together. The petitioner also satisfied the court that she was not under-employed. The court determined that the funds received by the respondent for veteran's disability pension should be included in calculating his income because of the expansive definition of income in the Guidelines or "means" in the case law. The respondent was receiving the disability pension prior to the parties' meeting and continued to receive it throughout and beyond their marriage. The amount received was also income-split by the parties. The court found that the respondent's income was $32,208, based on his not working. The petitioner's income was $23,393. After considering the respondent's annual expenses, the court found that he had the means to pay spousal support in the case. The Spousal Support Advisory Guidelines provided a spousal support range of $94 to $125 per month. The court found that the petitioner was entitled to spousal support of $175 per month commencing October 1, 2015.

 Back to top

M. (D.) v. W. (R.), 2016 SKQB 113

Megaw, April 4, 2016 (QB16111)

Family Law – Custody and Access – Variation
Custody and Access – Voices of the Children Report

The application concerned the parties' two youngest children. The parties had three children, ages 16, 14, and 11, and separated in 2008. There was a Voices of the Child report regarding the oldest child that indicated he wished to live with the respondent. The report also indicated, however, that the child was strongly influenced by the respondent in the choices he made. The respondent sought a Voices of

the Children report for the two youngest children. The respondent also applied to have the two youngest children reside with him and to consolidate the application with the one regarding the oldest child. HELD: It was apparent from the report that the respondent had been discussing the proposed living arrangements and matters known only through litigation with the oldest child. The court concluded that the oldest child's decision on who he wanted to live with may not have been made all on his own. The court said that there was reason to suspect that the respondent had also influenced the younger two children. The court declined to order a Voices of the Children report with respect to the two younger children. A material change in the circumstances had not been established. The wishes expressed by the children were not found to be sufficient to create a material change. The respondent's application was dismissed.

 Back to top

H. (S.) v. G. (W.), 2016 SKQB 114

Megaw, April 4, 2016 (QB16102)

Family Law – Custody and Access – Interim – Variation

The petitioner applied for orders granting her interim custody of the children, child support and permission to apply for passports for the children. During the parties' three-year relationship, they had two children, now three and two years of age. The petitioner had a seven-year-old son from a previous relationship to whom the respondent stood in loco parentis. Following separation, the children's primary residence was with the petitioner and the two younger children stayed with the respondent from Thursday through Sunday afternoon while his access to the oldest child was from Friday afternoon through Sunday afternoon. The respondent argued that he should have equal parenting time and alleged that the petitioner had unilaterally imposed the current parenting arrangement upon him. He raised concerns about the involvement of the petitioner and her fiancé with the occult, which apparently was frightening the children. Based on her lifestyle, the respondent had refused to allow her to obtain passports for the children. He sought a custody and access report. The petitioner took the position that the status quo parenting arrangement should not be disturbed. She also raised concerns about the cleanliness of the respondent's residence and its suitability for the children. The petitioner opposed obtaining a custody and access report, suggesting that the matter should be dealt with at a pre-trial conference. The respondent was approaching retirement age and was in poor health. He had just started working again for his former employer on a trial basis and had the potential to earn $51,500 per year.

HELD: The application was granted in part. The court held that on an interim application it was in a position to adjust parenting time in the children's best interests. While the parties were together the respondent was an involved father. The parenting time imposed upon him was not the status quo. The court increased the amount of parenting time allotted to the respondent and found that the all the children should have the same scheduled time with him. The court ordered that a custody and access report should be prepared immediately given the allegations made by both parties. Regarding the application for child support, the court ordered monthly payments based upon the respondent's presumed income. In light of his health problems and age, the court gave leave to either party to return the matter to court if the respondent's employment situation changed.

 Back to top

Egware v. Egware, 2016 SKQB 116

Brown, April 16, 2016 (QB16113)

Civil Procedure – Queen's Bench Rules, Rule 7-9(a), Rule 7-9(b), Rule 7-9(e)
Family Law – Divorce

The parties were married in May 2011 and separated in October 2012. They were granted a divorce in September 2014. In January 2016 the petitioner filed and served a new petition claiming division of property; spousal support for himself; and constructive trust, unjust enrichment. The new petition also claimed that the divorce was invalid because it was based on facts that were not true, namely that the parties had been living separate and apart for one year prior to the judgment. The petitioner claimed that the parties had reconciled immediately after separation, briefly breaking up in September 2013, and then in a relationship from October 2013 to June 2014. The respondent brought an application to strike the petition pursuant to rule 7-9 of The Queen's Bench Rules. She argued that the petitioner had no status to issue the petition because he was no longer a "spouse". The petitioner responded by applying to consolidate the two actions. The issues were whether the new petition should be struck and, if not, whether it should be stayed. If the petition was not stayed, the remaining issue was whether it should be joined with the 2012 petition so that all issues remaining from both petitions could be determined at the trial in May 2016.
HELD: The court concluded that the petition should be struck. The petitioner could not argue that the divorce should be found void when he participated in the process leading to the final judgment. Because he was no longer the respondent's spouse, he could not bring a claim for family property division by way of a new petition. Rule 7-9 is

applicable to family law proceedings. The court also noted rules 1-3, 1-5, and 1-7 in supporting its conclusion. The rules outline the objective of timely adjudication of matters in a cost-effective way. Rule 7-9(2)(a) does not permit the analysis of affidavit evidence whereas rules 7-9(2)(b) and (e) do, as well as assessing the merits of the claim and the motives of the applicant. The court found that there was a high standard required to set aside a final order for divorce. The petitioner must have clean hands to engage the court's inherent power to set aside a final order of divorce. The petition was struck pursuant to rule 7-9(2)(a). The court went on to consider rules 7-9(2)(b) and (e). In his affidavit the petitioner attested to various circumstances that he says confirmed the parties were still together until June 2014. The court concluded that some of the indicia of a spousal relationship were demonstrated by the petitioner. The court concluded that it would be an abuse of process to allow the petitioner to actively participate in the first petition and then 15 months later bring a claim that the judgment was based on fraudulent information he was aware of all along. The court found the new petition could also be struck on the basis of rule 7-9(2)(e). The court found it unnecessary to assess the matter pursuant to rule 7-9(2)(b). The plaintiff's assertions of unjust enrichment and constructive trust were bare pleadings without any factual underpinning.

 Back to top

Bias v. Scarrow, 2016 SKQB 117

Goebel, April 8, 2016 (QB16114)

Family Law – Division of Family Property – Family Home
Family Law – Division of Family Property – Certificate of Pending Litigation
Land – Certificate of Pending Litigation

The parties commenced a relationship in 1998 and had a child in 1999. When the child was born, the respondent moved into the house the petitioner lived in with her two children from a previous relationship. The petitioner claimed that the parties were roommates to raise their child, but were not living together as spouses. They ceased cohabiting in February 2010 when the respondent and child moved out. The petitioner sought orders for shared parenting and child support. The respondent filed an answer and counter-petition and sought primary care of the child and a division of family property. He claimed the home as a family home and registered a certificate of pending litigation (CPL) on the title. The petitioner accepted an offer from her neighbour to purchase the home for $145,000. The respondent claimed that the house was worth $225,000. The petitioner sought an order authorizing the sale of the house. There were two appraisals of the house; one in

2010 finding the house in fair condition with a value of $175,000 and one in 2015 indicating again the home was in fair condition with an estimated value of $200,000. The petitioner indicated that the home was in need of a lot of repairs and that the neighbour would be tearing it down due to that disrepair.
HELD: The power of a judge to vacate a CPL is discretionary pursuant to s. 47(1) of The Queen's Bench Act, 1998. The court did not find the situation to be one where the respondent failed to proceed with the action in good faith. No formal steps had been taken since 2010, but the petitioner had not filed an answer to the respondent's property claim until March 2016. Also, the court found that it was not clear that the respondent's claim could not, in any circumstances, succeed. The court did not find that the offer represented the fair market value of the property. It was not possible for the court to determine the potential prejudice to the respondent if the CPL was vacated and the sale was confirmed. The CPL was validly placed and properly supports the respondent's claim to an interest in land. The application was dismissed.

 Back to top

R. v. Higginbotham, 2016 SKQB 118

Acton, April 12, 2016 (QB16118)

Criminal Law – Sentencing – Dangerous Driving Causing Death
Criminal Law – Sentencing – Sentencing Principles – Denunciation – Parity

The accused was found guilty of one count of dangerous driving causing death pursuant to s. 249(4) of the Criminal Code. The accused was driving an F-150 truck pulling a small trailer. He was following a semi-truck with two grain trailers, which was stirring up clouds of dust blowing across the oncoming lane of the highway. The accused pulled out to pass and collided with a Dodge truck killing the driver of that vehicle. The accused did not have a criminal record, was a low risk to re-offend, and had not had provincial traffic violations in the previous 19 years. He was 56 years old, had four children, and was an electrician.
HELD: The court accepted that the accused had expressed some degree of remorse to his friends and colleagues, but he had not made any attempt to communicate his remorse to the victim's family until the sentencing arguments. At that point the accused said he was sorry for "any part I played in the accident". The aggravating factors were: the impact caused by the death of the victim; the accused knew the extreme low visibility and chose to ignore the conditions; and the accused was accelerating to pass the semi in zero visibility. The mitigating factors were: there was minimal risk the accused would re-offend; the accused

cooperated with the police; the accused was not speeding; and the accused had no criminal record and no traffic violations in the last 19 years. The primary factors that the court focused on were denunciation and parity. The court considered the similar recent case of Reynolds, where two individuals were killed when the offender pulled out to pass a gravel truck when there was fog causing zero visibility. The accused was sentenced to 18 months incarceration less 83 days for time served. The accused was sentenced to a period of 18 months' probation following the incarceration. The probation subjected the accused to a curfew, more restrictive for the first nine months. He was also required to perform 200 hours of community service work by the end of the fifteenth month of probation. Further, the accused was prohibited from driving for a period of three years following the incarceration.

 Back to top

R. v. Taylor, 2016 SKQB 119

Schwann, April 12, 2016 (QB16115)

Criminal Law – Sentencing – Impaired Driving Causing Bodily Harm
Criminal Law – Sentencing – Impaired Driving Causing Death
Criminal Law – Sentencing – Joint Submission
Criminal Law – Sentencing – Sentencing Principles

The accused pled guilty to two Criminal Code charges: 1) operating a motor vehicle having over .08 and causing an accident and the death of three people contrary to s. 255(3.1); and 2) operating a motor vehicle over .08 and causing an accident resulting in bodily harm to a person contrary to s. 255(2.1). The accused was the driver of a vehicle with all four victims and another being his passengers. They picked up beer and went fishing. They fished and drank all afternoon, with nothing to eat. They went to a house party that evening where they continued to drink beer and whiskey and they consumed marijuana and cocaine. When they left the party, the accused and the uninjured passenger wore seatbelts. The four victims sat in three vehicle seats and did not wear seat belts. The vehicle rolled down a steep embankment and all four victims were ejected from it. Two victims died at the scene and the remaining two were airlifted to hospital. One victim died the following day and the victim that survived was in a coma for a number of weeks. He has mostly recovered but still suffers from residual neurological problems. A blood sample taken from the accused three hours after the accident resulted in a blood alcohol level of .143 and it tested positive for cocaine and marihuana. A toxicologist extrapolated the accused's blood alcohol level at the time of the accident to be .174 to .225. A collision reconstruction expert concluded that the accused was driving 129 km/h to 145 km/h in a 100 km/h zone. The black box from the

vehicle revealed a speed of 157 km/h five seconds prior to the accident. The accused was 24 years old, had a spouse, a child, and another child on the way. He did not have prior criminal record. Numerous letters of support were filed in support of the accused. The accused's employer indicated that he would employ the accused once he completed his sentence or was eligible for parole. The accused and Crown made a joint submission on sentencing that suggested the appropriate sentence was: four years in jail followed by a five-year driving prohibition upon his release for count one; 18 months concurrent jail time and five-year driving prohibition for count two; and a DNA and firearm order. HELD: The paramount sentencing objectives were denunciation and general deterrence. The court accepted Kasakan as the binding authority on the standard to be applied by a court in deciding whether or not to accept a joint sentencing submission. The aggravating factors were: the excessive speed; the accused failed to take measures to control the vehicle after it went into the ditch, which led to overreaction; the accused's blood alcohol level was twice the legal limit at driving and there were traces of marihuana and cocaine in his system; three people died and one was seriously injured; and the enormous grief caused for the families involved. The mitigating factors included: a guilty plea, although after a preliminary inquiry; the accused was deeply remorseful; no criminal record; the accused was a hardworking family man; the accused had strong family and community support; and there was some suggestion that the passengers all debated who would drive that night. The court concluded that the joint submission was not unfit and the accused was thus sentenced as outlined in the joint submission.

 Back to top

C. (D.R.) v. F. (A.D.), 2016 SKQB 121

Megaw, April 13, 2016 (QB16117)

Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Evidence – Sexual Abuse
Family Law – Custody and Access – Variation

The parties had four children, but the issues only concerned the two youngest children. The petitioner father sought sole custody of the younger children and sought to restrict the respondent mother's access to those children. The respondent indicated that there was improper physical and sexual conduct with the children. The petitioner had issues with alcohol and the respondent had some mental health difficulties. The parties were divorced in 2011 and the children primarily resided with the respondent. The Ministry of Social Services became involved in January 2014. The children were apprehended by the Ministry and placed in the care of the petitioner. There was a pre-

trial conference in April 2014 where all parenting issues were resolved and set out in an order. The respondent withheld access a few months after the pre-trial conference and also filed a complaint with the RCMP alleging the petitioner had sexually molested the children. The RCMP concluded that the allegations were baseless. The petitioner's access was reinstated in November 2014. The respondent continued to allege abuse, which was found to be false, and the Ministry placed the children with the petitioner. In September 2015 a variation order was made changing the custody of the youngest children to the petitioner and giving the respondent supervised access. The issues were: 1) was an order for joint custody with no primary residence for the two oldest children an appropriate order; and 2) was an order for sole custody to the petitioner, with supervised access to the respondent, for the two youngest children an appropriate order.
HELD: The issues were analyzed as follows: 1) the two oldest children appeared to move between houses on their own choosing. The court held that the only practical thing to do was to order that the parties have joint custody with no order as to their fixed residence; and 2) a material change in circumstances was made out. The respondent asserted abuse at the hands of the petitioner and his family numerous times. There has never been any evidence found for the allegations. The court concluded that it was in the children's best interests to remain in the primary care of the petitioner. The parties were awarded joint custody, but the petitioner was entitled to make all decisions with respect to the children. The respondent was given access to the children twice weekly for four and then five hours each. The access was to be supervised for the first six months and both parties were given leave to return to the court after the six months to determine ongoing access. If the respondent sought the assistance of a health care professional for her mental difficulties prior to the six-month period she was given leave to have the matter returned to the court.

 Back to top

R. v. Mooswa, 2016 SKQB 122

Allbright, April 15, 2016 (QB16119)

Criminal Law – Sentencing – Aboriginal Offenders
Criminal Law – Sentencing – Assault Causing Bodily Harm
Criminal Law – Sentencing – Dangerous Offender – Determinate Sentence – Long-term Supervision Order
Criminal Law – Sentencing – Remand Time
Criminal Law – Sentencing – Robbery with Firearm
Criminal Law – Sentencing – Unlawful Confinement

The accused and his brother were charged with 11 Criminal Code offences all allegedly occurring on January 14, 2012: 1) attempted

murder (s. 239); 2) aggravated assault (s. 268(1)); 3) using a firearm while robbing (s. 344(1)); 4) confining a person without lawful authority (s. 279(2)); 5) committing theft of a motor vehicle (s. 333.1(1)); 6) possessing a prohibited weapon while prohibited from doing so (s. 117.01(1)); 7) possessing a prohibited firearm together with ammunition (s. 95(1)(a)); 8) being an occupant of a motor vehicle in which he knew there was a firearm with no occupant of the motor vehicle holding a licence or authorization to transport it (s. 94(1)(b)); 9) pointing a firearm (s. 87)); 10) having in his possession a weapon for a purpose dangerous to the public peace (s. 88)); and 11) possessing a firearm knowing that he was not the holder of a licence under which he may possess it (s. 92(1)). He pled guilty to counts 6, 7, 8, and 11. The accused was found not guilty of counts 1 and 2, but guilty to the lesser included offence of assault causing bodily harm contrary to s. 267(b), guilty of counts 3, 4, 5, 9, and 10. An assessment of the accused was prepared pursuant to s. 752.1. After the report was received the Crown amended their application to request an order that the accused be sentenced as a dangerous offender to a determinate sentence of detention, rather than indeterminate, followed by a long-term supervision order. The accused also had a report prepared. The accused and his brother attended a nightclub and consumed alcohol and then went to an apartment. One of the other people at the apartment indicated that it appeared the brothers were attempting to rob the victim and he described how one would punch and kick him while the other would hold him down. The accused had a firearm up his sleeve that was pointed at the victim. The victim indicated he would take the brothers to his apartment and the two brothers and victim left the apartment. The three drove in the victim's vehicle. During the drive, a sawed-off shotgun was discharged close to the victim's head. The victim was able to escape the vehicle and went to the police detachment. The victim did not previously know the brothers. Neither brother was found guilty of attempted murder because they did not have the requisite intent. The accused was a 28-year-old Aboriginal man who had 68 prior convictions. Fifty-five of the offences were committed as a young offender. Seven of the total offences were violent offences. The accused began drinking alcohol at the age of 12. He grew up with his mom and stepdad and had little contact with his biological father. He acquired his GED while incarcerated and had no real employment history. He had gang affiliations. The accused's mother indicated that his biological father physically abused him for the first two years of his life and that his stepdad verbally abused him. The accused was on remand in custody since 2012. The psychiatrist preparing the report for the court concluded that "ideally there should be short incarceration, then long supervision". The issues were: 1) did the Crown prove that the accused was a dangerous offender, and specifically: a) were any of the offences serious personal injury offences as defined in s. 752(2); and b) did the Crown establish a pattern of repetitive behavior showing a failure to restrain his behavior and the likelihood of causing death or injury to

other persons or inflicting severe psychological damage on other persons through failure in the future to restrain his behavior such that the accused should be declared a dangerous offender; and 2) in the event that the accused is declared a dangerous offender, what was the appropriate sentence under s. 753(4) of the Criminal Code.
HELD: The issues were determined as follows: 1a) the Crown did establish that some of the predicate offences met the definition of a serious personal injury offence; 1b) the court also found that the Crown proved the pattern of behavior pursuant to s. 753(a)(i). Further, the court was satisfied that the Crown proved some of the predicate offences formed part of the demonstrated pattern. The pattern was also found to demonstrate a failure by the accused to restrain his behavior in the past and that the pattern demonstrated a likelihood of death, injury or severe psychological damage to other persons through failure to restrain his behavior in the future. The factors in s. 753(1)(a)(i) were satisfied beyond a reasonable doubt. The accused was found to be a dangerous offender; and 2) the court considered the Gladue factors and found that they were relevant. There was a nexus between the disadvantages experienced by the accused and his involvement in the criminal justice system. The court also recognized the positive approach the accused had to his lengthy time on remand as well as the courteous and respectful behavior the accused showed in his court appearances. The court made note of the written statement the accused wrote and read to the court showing his insight into his criminal past and future need to make changes. The accused was found to have demonstrated some personal redemption. The court found the appropriate global sentence was 11 years. The accused was sentenced to: five years' imprisonment for the robbery charge; six years' imprisonment for the unlawful confinement, to be served consecutively; to various periods of concurrent terms of imprisonment for the remaining counts. The accused was sentenced to a long-term supervision order for a period of ten years to commence upon his date of his release. The accused was on remand for 51 months and the court held that he should be given two months credit for each month on remand. The court fixed the remaining time to be served by the accused at 30 months from the sentencing date. Ancillary orders were also made.

 Back to top

R. v. Gryba, 2016 SKQB 123

Popescul, April 15, 2016 (QB16120)

Criminal Law – Sentencing – Autrefois Convict – Autrefois Acquit
Criminal Law – Sentencing – Making Child Pornography
Criminal Law – Sentencing – Possessing Child Pornography

In 2013, the Saskatchewan Provincial Court accepted a joint submission and sentenced the accused to two years less on day in custody followed by three years' probation for one count of making child pornography available and one count of possessing child pornography. At the sentencing hearing, the Crown made it clear that they had been unable to access two "DataLocker" external hard drives of the accused's. They indicated that the sentencing at the time had nothing to do with what may be found on those hard drives and that the accused may be further charged once those hard drives were accessed. More child pornography charges were laid when the DataLocker hard drives were accessed. The accused was arrested in September 2014 and had been in custody ever since. The court dismissed the accused's arguments that autrefois acquit and autrefois convict applied. The accused then entered a guilty plea to four of the seven charges and the Crown indicated the remaining charges would be stayed at the conclusion of sentencing. The criminal code charges that the accused pled guilty to were: 1) possessing child pornography of images of children under 18 years of age contrary to s. 163.1(4) for 16 additional video and picture images found on one of the computers subject to the original charges; 2) making child pornography contrary to s. 163.1(2) for videos of boys the accused volunteered with through Big Brothers on one of the DataLocker hard drives; 3) making child pornography contrary to s. 163.1(2) for videos of a different victim the accused volunteered with through Big Brothers located on one of the DataLocker hard drives; 4) possessing child pornography contrary to s. 163.1(4) for 12,775 unique child pornographic images and videos located on the DataLocker hard drives. The Crown acknowledged that some of the images may have been the same as the 3,000 images relating to the accused's original charges, but that 9,775 of the videos and/or images were new. The Crown requested a global sentence of five years and conceded that the accused should receive remand credit of 1.5. The accused argued that he should be sentenced to time served. The accused was 23 at the time of arrest. He was not married and did not have children. He graduated from high school with a 95 percent average and had his family's support. He was attending university prior to his initial arrest and was maintaining a 90 percent average. He sought treatment from a clinical psychologist after his arrest. The accused also took sex offender and other treatment.

HELD: The aggravating factors were: the quantity and vile nature of the material; the victims were children; and the accused was in a position of trust with respect to the victims in counts two and three; there was real harm to the thousands of victims. The court disagreed with the Crown that the accused's failure to assist with the investigation was an aggravating factor. The lack of assistance could be, at best, a neutralization of what could have been a mitigating factor. The mitigating factors were: the accused did not have a previous record aside from the original charges; the accused pled guilty; the accused was only 23 at the time of the offence so he had a great opportunity for reform; the accused took significant steps to rehabilitate himself; the

accused was genuinely remorseful; the accused was assessed as a low risk to re-offend; and the accused had made positive strides toward reformation and there was no evidence that he had re-offended. The court agreed with the Crown with respect to counts two and three, the making child pornography charges. At the time of the offences the mandatory minimum sentence was one year with the maximum of 10 years' imprisonment. The circumstances were on the lower end of the scale because it was videoing voyeurism rather than sexual acts, but the children were in the trust of the accused. The accused was sentenced to 18 months for each count, to be served consecutively. At the time of the offences the required sentencing range for child possession was 45 days in jail to five years in jail. The court determined that the focus must be on the offences to be sentenced and the previous sentence for the original charges ought to be considered but not unduly so. The court again agreed with the Crown that the accused should be sentenced to two years, to be served consecutively, for the possession of 9,775 new images. The appropriate sentence for the first charge was one year, to be served concurrently. The court next considered the totality principle. The gravity and degree of guilt was high and the harm to the victims was significant. The offender, however, worked hard towards rehabilitation and he did not have a criminal record other than for the related convictions. The court held that a sentence of five further years would amount to an overly harsh and crushing sentence. The totality principle was applied to reduce the sentence of 60 months to 53 months, less a day. The remand credit was then applied and the accused had to serve 24 months less a day. The sentence was fair and also took into account that the accused could serve the remainder in a provincial jail and the court could also then impose probation. The accused was also sentenced to three years' probation following his release from jail.

 Back to top

Keast v. Keast, 2016 SKQB 124

Goebel, April 15, 2016 (QB16121)

Family Law – Child Support

The parties settled their family law issues at a pre-trial conference in December 2014. The consent judgment was based upon the respondent's projected income for that year as being $87,000 and the petitioner's at $85,000. The oldest child, 18, lived full-time with the petitioner and the younger child resided half-time with each parent. The order provided that the respondent should pay $473 per month in child support from January 2015 to June 2015. In July, the respondent stopped paying support because she believed that the order reflected her total future obligations given an unequal division of property in

favour of the petitioner. The petitioner brought an application for child support, and at the date of hearing the respondent conceded her obligation to pay support retroactively to July 2015. The issues were: 1) the appropriate method of calculating support given the parenting arrangement. The petitioner submitted that the two-step approach should be used and the respondent argued that the economies of scale approach was preferable; 2) the duration of the support because the oldest child would graduate in June 2016, although whether he would engage in post-secondary training was as yet unknown; and 3) whether the respondent should pay solicitor-client costs. The petitioner alleged that her persistent refusal to pay support and to disclose a significant increase in income were reprehensible and the court should sanction her conduct.
HELD: The court held with respect to each issue that: 1) the two-stage approach was the most appropriate method to determine the child support obligation. In this case, the amount payable by the respondent in the circumstances was $1,200 per month commencing in April 2016; 2) it would be premature to make an order that was presumed to continue. The court ordered that the parties should exchange income information on July 1 and adjust the support payable, taking into account any significant changes to their incomes, the parenting arrangements and whether the oldest child remained a child of the marriage after graduating from high school; and 3) the respondent had explained her conduct and thus it was not an appropriate case to order solicitor-client costs.

 Back to top

McDougall Gauley LLP v. Judicial Centre of Swift Current (Sherriff), 2016 SKQB 125

Brown, April 15, 2016 (QB16122)

Debtor and Creditor – Joint and Several
Debtor and Creditor – Trust – Terms
Statutes – Interpretation – Enforcement of Money Judgments Act

The issue was whether funds held in trust for two opposing parties engaged in litigation was subject to seizure when judgment was obtained jointly against those two litigants by a third party. Three actions were commenced between the two litigants. One of the litigants sold some livestock and the litigants agreed that the net proceeds of the sale should be placed in trust by the applicant and should only be released by agreement between the litigants or by court order. Creditors' of both of the litigants subsequently obtained a judgment of joint and several liability against the litigants. The creditors were not involved in the three actions between the litigants. Notices of seizure

were served on the applicant, which was the law firm holding the net sale proceeds in trust. The applicant sought direction from the court pursuant to s. 114 of the Enforcement of Money Judgments Act (EMJA). Only one of the litigants objected to the release of the funds. She argued that ss. 58 and 59 of the EMJA supported her position not to release the funds. She said the funds could not be released because the litigants did not agree and also because a court order pursuant to the EMJA was not the type of "order" contemplated by the agreement between the litigants. The order, she argued, must be made with respect to the actions between the litigants.
HELD: The funds were subject to seizure and the applicant as trustee was required to provide the funds to the sheriff. The court found that the provisions of the EMJA resolved the issue. Case law also supported the conclusion. The court interpreted ss. 41(3)(a) and (b), and s. 59(1)(b), to determine if they required both litigants to be in agreement for the distribution of trust funds to occur. The opposing litigant's argument would result in a system where two or more people could organize their affairs to make their assets non-exigible because they held the funds jointly. The court concluded that to interpret the provisions in that way would not be a fair, large, and liberal interpretation of the EMJA. Section 49 also supported the court's interpretation because it establishes that jointly held property should not be a way to defeat judgment creditors. The funds were placed in trust to preserve them until each party's entitlement could be established. The statutory presumption that each litigant was entitled to half of the trust applied because there was no evidence put forward to engage ss. 49(8) and (9).

 Back to top

Cutts v. Phillips, 2016 SKQB 126

Mills, April 19, 2016 (QB16123)

Wills and Estates – Capacity/Undue Influence
Wills and Estates – Proof of Will in Solemn Form
Wills and Estates – Testamentary Capacity

The applicant applied for probate of her father's will dated August 14, 2010. The respondent challenged the validity of the will. The applicant and respondent were children of the deceased. The will did not comply with ss. 7(1)(c) and (d) of The Wills Act, 1996 because there was only one witness present for the deceased's signature. The applicant therefore had to rely on s. 37, the substantial compliance section. Shortly before the will was executed the deceased began living with the applicant and her husband because he had been injured in an accident. A lawyer was contacted and attended at the applicant's home. The applicant indicated that the deceased and the lawyer sat in the kitchen

and that she was not in the room and did not see or hear what happened. The will had actually been prepared by a different lawyer some months earlier and the lawyer had not seen it until he arrived at the applicant's home. The document originally had a residual clause giving the estate to all his children equally. That statement was whited-out and over it the statement "whole benefece" was written in with the applicant's name. The deceased signed that change. The applicant indicated that she gave the deceased the white-out and that he covered the residual clause after the lawyer arrived. The applicant's husband testified that the deceased's sight was not very good and also that the deceased wanted the lawyer to come back to do a proper will. The lawyer also testified but his long and short-term memories were impacted by frontal lobe dementia. The lawyer initially confirmed that the deceased did the white-out and overwriting on the will, but later indicated that the white-out and overwriting could have been done before he got there. He also indicated that the deceased could have had no idea of the context of his estate because the majority of the deceased's assets were tied up in his brother's estate. The lawyer said that when he left the applicant's house he told the deceased to see another lawyer to have the will done right. The lawyer did not recall attending upon the deceased in the hospital a month prior to witnessing the will to prepare a power of attorney for him. Medical records from the day of the deceased's accident have a note of his increased confusion and questioned his competency. A social worker at the hospital was also concerned about the deceased's cognitive capacities. A psychological assessment dated July 26, 2010, stated that the deceased was competent to make treatment decisions as well as manage his financial affairs.

HELD: The court was satisfied that the applicant arranged for the lawyer to come to her house to have the deceased sign the will. Further, the court was satisfied that the white-out was done by the applicant prior to the lawyer's arrival. The court also noted the deceased's vision problems. The will could be submitted for probate pursuant to s. 37 of the Act, because, on its face it expressed the testamentary intention of the deceased. Section 37 does not require proof of testamentary capacity. The conditions outlined in Vout to create a rebuttable presumption regarding testamentary capacity were not met because the requisite formalities were not complied with as only one witness signed the will, and because the testator did not read the will due to his lack of vision and there was no evidence that it was read over to him in its entirety. The applicant could not rely on the presumption and, therefore, had the legal burden on a civil standard of probabilities with respect to the testator's knowledge and approval of the document's content and his testamentary capacity. The applicant's husband was found to be a credible witness in that he did not appear to fashion his answers to correspond with what was necessary for establishing the validity of the will. The applicant presented as aggressive, if not domineering and tenacious. The psychological report was prepared by

a doctor who had only seen the deceased on that occasion because the regular doctor was unavailable. The report consisted of three short sentences. The applicant failed to establish that the deceased had the necessary testamentary capacity when he executed the will and it was not admitted for probate. Undue influence did not have to be considered, but the court found that it was established. The court also found that it would be inappropriate for the applicant to be appointed administrator.

 Back to top

Armstrong v. Armstrong, 2016 SKQB 127

Smith, April 21, 2016 (QB16126)

Family Law – Family Property – Interspousal Agreement – Family Home – Exclusive Possession

The petitioner sought an order for exclusive possession of the family home. The parties separated in 2010 but continued to reside in the family home with the respondent staying in the basement. As part of an interspousal contract entered into that year, the parties agreed that the petitioner would have exclusive possession of the home and that the respondent would transfer his interest in the house to the petitioner and that she would pay him an amount in equalization. The respondent transferred his interest, but the petitioner did not pay the respondent. She explained that it was her intention to do so but not until the respondent left the home as he had undertaken to do. The agreement contained a provision that it would become null and void if the parties resumed cohabitation for a certain period, which the respondent asserted had happened.
HELD: The court ordered that the petitioner have exclusive possession of the family home.

 Back to top

R. v. Stonechild, 2016 SKQB 130

Elson, April 21, 2016 (QB16124)

Criminal Law – Assault – Assault Causing Bodily Harm

The accused was charged with one count of causing grievous bodily harm to a victim, contrary to s. 276(b) of the Criminal Code, two counts of assault on other victims, contrary to s. 266 of the Code, and one count of uttering a threat to the first victim to cause her death, contrary to s.

264.1(1)(a) of the Code. The charges were laid after the accused attacked three people while he was a visitor in their house. The only issue before the court was whether the assault caused bodily harm to that specific victim. The Crown did not submit any medical records in evidence to document the injuries alleged to have been caused. The victim had been thrown to the floor. The accused kicked her once in the ribs and pinned her down by sitting on her. He banged her head repeatedly on the floor and hit her with closed fists. After the police arrived, the victim declined any medical assessment when it was first offered by the EMS personnel. Later the victim began suffering headaches and had trouble breathing because of pain in her ribcage. A couple of days after the attack, the victim attended at the local hospital's emergency department and received a chest X-ray and a CT scan of her head. The X-ray did not reveal any fractures. She was not informed by the hospital of any clinical findings from the examinations, nor did the Crown submit any records regarding the hospital findings. There was photographic evidence of the victim's more visible injuries taken by the investigating officer about one week after the attack. As the victim's pain did not subside, she went to her physician and he ordered another X-ray, which showed fractures. The doctor testified that although he did not have access to his records because he had moved his practice, he recalled the victim's attendance and the nature of her injuries.
HELD: The accused was found guilty of assault causing bodily harm as well as the three other counts. The court found that the evidence was sufficient to prove that the victim has suffered bodily harm because of her broken ribs and persistent headaches. Although the Crown is not required to produce medical evidence in cases of assault causing bodily harm, the court recommended that the Crown produce it where such evidence existed, such as hospital records and medical charts.

 Back to top

CIBC Mortgages Inc. v. Whitesell, 2016 SKQB 131

Keene, April 22, 2016 (QB16129)

Mortgage – Foreclosure – Leave to Commence Action – Costs

The proposed plaintiff mortgagee received leave to commence its action in foreclosure against the proposed defendant and then requested pre-leave costs. The proposed defendant was served notice of the request but did not appear. The costs were estimated at $3,000 for legal fees and $2,800 for property management fees. The plaintiff had retained a property management company because the defendant had abandoned the property.
HELD: The application for pre-leave costs based on the solicitor-client bill was not allowed. The court gave the plaintiff a period of time in

which to file more particularized evidence of the management fees leading up to the granting of leave. The court found that there was no evidence of misconduct on behalf of the proposed defendant such as being in a state of chronic arrears but for his abandonment of the property.

Back to top