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Subject Index

R. v. Parada, 2016 SKCA 102

Jackson Ottenbreit Herauf, August 12, 2016 (CA16102)

Criminal Law – Appeal – Conviction
Criminal Law – Blood Alcohol Level Exceeding .08 – Field Sobriety Tests
Criminal Law – Evidence – Witness – Expert
Criminal Law – Voir Dire

The issue was whether the evidence of a peace officer regarding standard sobriety tests were an expert opinion requiring a Mohan voir dire. The officer pulled over a vehicle that the appellant was driving, and who had a difficult time retrieving her driver's licence. The officer could smell an odour of alcohol. The appellant indicated that she had consumed three beers. The officer did not have an ASD, so he had the appellant perform the three prescribed sobriety tests. She failed all of the tests and was arrested for impaired driving. The trial judge held that the officer's evidence was not expert testimony and, therefore, did not require the Crown to serve proper notice under s. 657.3 of the Criminal Code. The trial judge found a distinction between "peace officer" and an "evaluation officer" in the Criminal Code and its regulations. A peace officer is authorized to use either an ASD or roadside sobriety tests. The Crown is not required to call an expert to explain the ASD, and according to the trial judge, the sobriety tests were no different. On appeal, the Court of Queen's Bench dismissed the conviction appeal after concluding that the trial judge was correct in determining that the officer's

testimony was not expert testimony.
HELD: The appeal was dismissed after leave to appeal was granted. The peace officer's evidence was not expert evidence that required a Mohan voir dire. Amendments to the Criminal Code in 2008 allow a peace officer that has a reasonable suspicion that a driver has alcohol in his or her body to require the driver to perform physical coordination tests under s. 254(2)(a). Section 254(2) is clear that a peace officer may demand that a suspected impaired driver perform the sobriety tests. An officer does not require a special qualification to perform the sobriety tests, and therefore, the appeal court held that the officer did not need to be qualified as an expert.

 Back to top

R. v. Sunshine, 2016 SKCA 104

Jackson Caldwell Whitmore, August 18, 2016 (CA16104)

Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Sentence
Criminal Law – Assault
Criminal Law – Expunging a Guilty Plea

The appellant pled guilty to the following Criminal Code charges: breach of undertaking, contrary to s. 145(3); mischief under $5,000, contrary to s. 430(4); and assault, contrary to s. 267(b). The appellant sought to set aside his guilty plea to the assault charge, and he argued that his global sentence of 18 months incarceration and 12 months of probation was excessive. The appellant argued that he pled guilty to the assault charge because his lawyer suggested he would receive a sentence of time served if he pled guilty. He said that his guilty plea was not voluntary, because procedural errors led to his will being overborne. The conviction appeal was made pursuant to s. 686(1)(a)(ii). The appellant pled guilty to the mischief and breach charges before the first judge and at a later date pled guilty to the assault charge before a second judge. The appellant argued that the first judge erred in two ways: she denied him the right to personally conduct his case, and she granted an adjournment on two erroneous considerations because she took submissions from counsel that the appellant had fired and she acted inappropriately by encouraging the appellant to reconsider his decision to fire his counsel. On the date set for the assault trial, the appellant's counsel asked for an adjournment notwithstanding that the appellant had apparently fired the counsel and he wanted the trial to proceed. The assault charge

Bank Inc. v. Archieposcopal Corp. of Regina

Davis v. Davis

Duck Mountain Elk Ranch Inc. v. Zoocan Inc.

Gajewski v. Gajewski

Imperial Oil Ltd. v. Regina (City)

Kosolofski v. Kosolofski

Lemisko v. Saskatchewan Watershed Authority/Water Security Agency

Markel v. Strauch

Morsky Construction Ltd. v. Nickle Lake (Regional Park Authority)

R. v. Bray

R. v. Farnham

R. v. Jensen

R. v. McGill

R. v. Mitchell

R. v. Parada

R. v. Pfrimmer

R. v. Renz

R. v. Rogers

R. v. S. (V.J.)

R. v. Sunshine

R. v. Viterra Inc.

Redhead Equipment v. Canada (Attorney General)

Regina Qu'Appelle Health Region (Mental Health Inpatient Services Division) v. W. (K.)

Santiago v. Trottier

Scotia Mortgage Corp. v. Conroy

Semchyshen v. Semchyshen

Short v. Pfliger

occurred within a domestic relationship and therefore the Crown indicated that a lawyer should cross-examine the complainant rather than the appellant doing it. The first judge agreed and ordered the complainant's cross-examination would be done by the appellant's former counsel. The lawyer indicated he required an adjournment to prepare. The trial was preemptively adjourned for one month. On the return trial date the appellant appeared before the second judge.

HELD: The conviction and sentence appeals were dismissed. The appellant still had to convince the court that there were valid grounds for changing his plea. The appeal court found that the guilty plea on the assault charge was voluntary, unequivocal, and was an informed plea of guilt made by the appellant who was aware of the nature of the allegations against him, the effect of the plea, and its consequences. The appeal court found that the invocation of the court's power under s. 686(a)(ii) was a red herring because the appeal ended up with an assessment by the court under s. 686(1)(a)(iii) as to whether the evidence established that the plea was involuntary and that there was a miscarriage of justice. Even if the first judge made the alleged errors, the court found, on a balance of probabilities, that the appellant's will was not overborne such that his plea on the assault charge was not voluntary. The appellant did not assert that he received ineffective representation from his counsel. The appeal court indicated that something more, going to the appellant's state of mind, was required to substantiate his allegation that his free will had been overborne such that his plea was not voluntary. There was no error in failure to consider a relevant factor nor was there an erroneous consideration of an aggravating factor on the part of the sentencing judge, justifying appellate court intervention. The global sentence was proportionate to the overall gravity of the offences and the overall moral culpability of the appellant in their commission.

 Back to top

R. v. Rogers, 2016 SKCA 105

Jackson Whitmore Ryan-Froslie, August 19, 2016 (CA16105)

Criminal Law – Appeal
Criminal Law – Defences – Charter of Rights, Section 8, Section 24(2)
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08

The police knocked on the door of the appellant's apartment

Swaenpoel v. Swaenpoel

Willow Bunch (Town) v. Fister

after receiving a tip of an impaired driver driving a vehicle registered to the appellant. The police made a Breathalyzer demand after forming the opinion that he was intoxicated. The appellant was charged with impaired driving and driving over .08, contrary to s. 253(1)(a) and 253(1)(b) of the Criminal Code, respectively. The appellant was acquitted at trial because the trial judge found that the officer had knocked on the door for the purpose of obtaining evidence against the occupant, which was an unreasonable breach of s. 8 of the Charter. The trial judge held that the hallways and secure underground garages to apartments in multiple unit complexes fell under the definition of "dwelling-house" within s. 2 of the Criminal Code. The trial judge concluded that the officer's entry into the apartment building was an entry into the appellant's dwelling house. Alternatively, the trial judge said that the officer exceeded the implied licence to knock pursuant to the common law. The trial judge excluded all evidence and entered not guilty verdicts. On summary conviction appeal, the court set aside both acquittals and ordered a new trial. The appellant appealed the decision of the summary conviction appeal court. The summary conviction appeal court held that no one, including the appellant in the specific case, had a reasonable expectation of privacy in the common hallways of an apartment building. The court further held that the officer's actions were compatible with the implied licence to knock. The issues on appeal were: 1) whether the appeal court judge properly concluded that the appellant's s. 8 Charter rights were not violated, which required a consideration of: a) whether the appeal court judge erred when he concluded that the trial judge erred by finding that the officer's conduct constituted a search; and b) if no, was the search unreasonable; 2) whether the trial judge properly applied s. 24(2) of the Charter; and 3) whether the summary appeal court judge erred by finding the trial judge erred by acquitting the appellant of the impaired driving charge as well as the .08 charge.
HELD: Leave to appeal was granted and the appeal was allowed. The issues were resolved as follows: 1a) if a trial judge finds on all the evidence that a police officer knocked on the door to a residence for the purpose of securing evidence against the occupant, the officer was conducting a search within the meaning of s. 8 of the Charter. The trial judge found that the officer knocked on the appellant's door for the purpose of obtaining evidence against the occupant. The summary court appeal judge erred by finding that the trial judge had misinterpreted the law pertaining to the implied licence to knock; 1b) the Crown did not contest the trial judge's conclusion that the search was unreasonable; 2) the appeal court held that because the Crown did not make arguments or take a position on the s. 24(2) analysis at trial the trial judge did not err in failing

to conduct an adequate s. 24(2) analysis; and 3) the trial judge excluded all the evidence, including that of the witness that had called the police. The trial judge's exclusion of the witness evidence appeared to be an error; however, no one advised the trial judge that there was evidence of impairment outside of evidence within the voir dire. The appeal court indicated that in an adversarial system of criminal trials, trial judges must be able to rely on counsel to raise issues of concern.

 Back to top

Kosolofski v. Kosolofski, 2016 SKCA 106

Richards Whitmore Ryan-Froslie, August 23, 2016 (CA16106)

Family Law – Division of Family Property – Pension
Family Law – Spousal Support – Appeal
Family Law – Spousal Support – Compensatory
Family Law – Spousal Support – Determination of Income
Family Law – Spousal Support – Duration of Spousal Support
Family Law – Spousal Support – Non-compensatory
Family Law – Spousal Support – Spousal Support Guidelines

The parties married in 1994 and separated in 2011. Their youngest child was 17, in grade 12, and planned to pursue post-secondary education. She lived with the appellant father after the separation. The respondent mother paid child support pursuant to the guidelines. The appellant paid spousal support pursuant to interim orders. The respondent was diagnosed with depression when she was 15 and indicated that she was diagnosed with bipolar disorder, anxiety and acute insomnia post-separation. The appellant became a city police officer after the parties married. He acknowledged performing security work each year for cash not declared. The respondent held various jobs throughout the marriage. In February 2013, she began work as a receptionist and administrative assistant earning $36,000 per year. The respondent indicated that she had stopped working due to physical ailments but no medical evidence was tendered. The only assets the parties had at separation were a bank account and the appellant's defined benefit pension. The trial judge valued the appellant's pension at the date of adjudication. The trial judge fixed the appellant's income at $128,000 and the respondent's at $16,000 based on her ten-year average income. The trial judge found the respondent's mental health affected her ability to work. The appellant was ordered to pay $1,800 per month in spousal support with a possible review after December 31, 2018. The review would not include a right to terminate the spousal support, but would be limited. The appellant argued

that the trial judge erred by: 1) valuing his pension at the date of adjudication; 2) failing to impute income to the respondent for the spousal support award; 3) calculating his income by failing to deduct a one-time payment from the appellant's income, including overtime and security income, and failing to take into consideration child support he paid for a child from another relationship; and 4) framing the review order so termination of the spousal support order could not be considered.
HELD: The appeal was allowed. The issues were analyzed as follows: 1) the trial judge's reasons for choosing the adjudication date were not supported by the evidence or the law. The proper valuation date was the date of application; 2) the respondent indicated physical health concerns for not working at the time of trial, not ongoing mental health concerns. The trial judge's findings with respect to the respondent's employability were grounded in palpable and overriding errors of fact. The trial judge also erred in principle by averaging the respondent's income over ten years rather than three as indicated in the Guidelines. The trial judge also erred by not including some employment income in 2012, but including social assistance payments; 3) the trial judge did not err by including the appellant's one-time retroactive pay in his income. The appellant had also earned the overtime and security income over a number of years and therefore it formed part of the family's means prior to separation and was properly included in his income. The trial judge did err by failing to take into account the $863 per month the appellant paid to support his son from another relationship; and 4) the appeal court found the trial judge erred in his assessment of the respondent's employability and income and therefore the primary reason for the review no longer existed. The trial judge should have made a final order, subject only to a successful variation application in the future. The appellant was ordered to pay $1,600 per month spousal support for 12 years.

 Back to top

Imperial Oil Ltd. v. Regina (City), 2016 SKCA 107

Ottenbreit Caldwell Ryan-Froslie, August 23, 2016 (CA16107)

Municipal Law – Appeal – Property Taxes – Assessments – Non-regulated Property

The appellant argued, pursuant to s. 33.1 of The Municipal Board Act, that the Saskatchewan Municipal Board Assessment Appeals Committee committed a material error in law by dismissing an appeal from a decision of the Board of Revision of

the city that sat on an appeal of the 2013 assessment of industrial land owned by the appellant. The property was 106.1 acres that was zoned as heavy industrial land. The base land rate was $5.10 per square foot and was adjusted for lot size to recognize that the sale price per square foot decreased with increased lot sizes. A curve of 105 percent was established for the lot size adjustment based on the 31 sales that had been used to establish the base land rate. The 31 properties ranged in size from half an acre to 10.9 acres, with 28 of the sales being less than 2.2 acres. The appellant's land was given an assessed value of $25,864,800 for 2013. Prior to 2009, if there was insufficient market data to establish a reliable land size multiplier (LSM) curve, an assessor had to use a default of 130 percent for the land. The default had been applied in the court's previous decision. The issue before the court was whether that reasoning still applied. The appellant had unsuccessfully appealed the assessor's assessment to the board and then to the committee.

HELD: The appeal was dismissed. The LSM curve the assessor applied was not reliable, but the committee did correctly confirm the decision of the board. Pursuant s. 165(5) of The Cities Act, the committee could not set aside the board's decision where equity had been achieved with similar properties. The committee was correct in upholding the finding of the board that found the former default of 130 percent LSM curve was no longer applicable by reason of assessment practice changes in 2009. The reasoning of the previous case still applied but the outcome was now different. The previous case found that the curve on any graph would be unreliable because of the disparity in size between the sale parcels used and the land in question. The sales in the previous case ranged from half an acre to five acres in size, and the land was 100 acres. There was a similar size disparity in this case. The court concluded that the manifestly disparate size of the 31 properties relative to the size of the land rendered the 105 percent LSM curve used to be unreliable. The appeal court nonetheless found that equity had been achieved by applying the market valuation standard so that the 2013 assessment bears a fair and just proportion to the market value of similar properties as of the applicable base date. The assessor was found to have achieved equity with similar properties and therefore there was no room for the board to set aside the assessment even though the reasoning in the previous decision was not followed.

 Back to top

Semchyshen v. Semchyshen, 2016 SKCA 108

Richards Lane Ryan-Froslie, August 23, 2016 (CA16108)

Civil Procedure – Costs – Queen's Bench Rules, Rule 564(2)(b)
Civil Procedure – Evidence – Credibility
Contracts – Interpretation – Unjust Enrichment
Real Property – Sale – Farmland
Real Property – Statute of Frauds
Statutes – Interpretation – Statute of Frauds
Trusts – Constructive Trust
Trusts – Express Trust
Trusts – Resulting Trust

The appellants appealed the Court of Queen's Bench decision, finding that they had transferred their interest in the family farm to the respondents, their son and his wife. The respondents cross-appealed, arguing that they should have been awarded costs because they were primarily successful at trial. A rollover agreement for the transfer of the appellants' land was signed by the father and son pursuant to s. 73(3) of the Income Tax Act. The land, including buildings thereon, were transferred to the son at their tax cost on January 1, 2005. The son thereafter claimed all of the income from the farm land on his income tax return. The trial judge held that the land in the respondents' names was not held in trust for the appellants. The only written document signed by the parties was the rollover and it did not mention a trust. Section 7 of The Statute of Frauds would have rendered any trust void because it was not in writing according to the trial judge. The trial judge also held that there was no resulting trust. The trial judge found that the Statute of Frauds did not apply to the land sale agreement because it only renders oral agreements unenforceable, not void, and the respondents were not trying to enforce an agreement but were raising the agreement as a defence. Unjust enrichment was also found not to apply to the land transfer. The agreement for sale proved a juristic reason for any enrichment of the respondents. The trial judge did find enrichment to the respondents due to the transfer of depreciable property for which there was not juristic reason. The respondents were ordered to pay the tax cost of the depreciable property minus the amount the trial judge found the respondents overpaid for the land. The appellants were awarded taxable costs even though they were only partially successful. There was evidence that the respondents received legal advice urging them to seek the advice of an accountant, which may have prevented the action in its entirety. The issues were if the trial judge: 1) made palpable and overriding errors in his findings of fact; 2) erred in concluding there was a contract between father and son for the purchase of the land as opposed to a resulting trust; 3) erred in concluding The Statute of Frauds did not apply to the agreement for sale; 4) erred in concluding the doctrine of unjust enrichment did not apply to the land

transfers; and 5) erred in awarding costs against the respondents.
HELD: The appeal and cross-appeal were dismissed. The issues were dealt with as follows: 1) the trial judge accepted the son's evidence over that of his mother. His findings of credibility were reasonable and each of the findings of fact were supported by oral testimony; 2) the trial judge found that the respondents had established, on a balance of probabilities, that there was an agreement and that the terms could be determined with sufficient particularity. The trial judge did not incorrectly shift the burden as alleged by the appellants. The trial judge also correctly determined that the appellants bore the onus of establishing an express trust. He determined that there was not an express trust and was correct in noting that if one had been found it could not be enforced by the appellants because s. 7 of The Statute of Frauds. The trial judge correctly recognized that a presumption of resulting trust did arise because of the transfer of land from parents to child for less than fair market value. The trial judge found that the respondents met their burden by establishing an oral agreement for the purchase of the land; 3) The Statute of Frauds did not apply because the respondents were not trying to enforce the agreement, they already owned the land; 4) the trial judge did not err in concluding that the agreement was a juristic reason for the respondents' enrichment; and 5) the appeal court found that the trial judge's conclusions constituted errors in principle. The appellants could have also sought accounting advice and perhaps prevented the action. The appellants were awarded a judgment in the amount $12,887.78 and the trial judge awarded them costs in the tariff for that judgment amount. Therefore, even though the trial judge erred, the ultimate cost award was in accordance with rule 564(2)(b) of The Queen's Bench Rules of Court.

 Back to top

R. v. Jensen, 2016 SKCA 109

Ottenbreit Herauf Ryan-Froslie, August 25, 2016 (CA16109)

Criminal Code – Sentencing – Long-term Offender – Appeal

The Crown sought leave to appeal and appealed from the decision of a Queen's Bench judge declaring the respondent a long-term offender and imposing upon him a determinate sentence (see: 2015 SKQB 179). The respondent had committed four robberies while armed with a knife during a one-month period. At the time of these offences, the Aboriginal offender

was 52 years old. He possessed a lengthy criminal record of increasingly serious offences. Although he used weapons in his crimes, he had not physically harmed anyone during their commission. The psychologist who prepared the assessment of the respondent pursuant to Part XXIV of the Criminal Code described how his childhood spent in foster homes contributed to his failure to develop emotionally and morally. In the opinion of the psychologist, the respondent did not have any psychiatric disorders but was not treatable or likely to change his behaviour until his age prevented him from committing crimes. The sentencing judge concluded that the respondent met the criteria for designation as a dangerous offender pursuant to s. 753(1)(a)(ii) of the Code and then decided that there was a reasonable expectation that his risk to the public could be managed by a long-term offender designation and community supervision due to the lessening of the risk of violence as he aged. The judge imposed a global sentence of 13 years for the four robberies less remand credit of 4.5 years. The Crown argued that the sentencing judge erred by misinterpreting s. 753(1) of the Code in that after finding the appellant met the criteria for designation as a dangerous offender, it was mandatory to designate him as one.

HELD: Leave to appeal was granted and the appeal allowed. The court found that the trial judge erred in not determining the appellant was a dangerous offender. The trial judge's error in interpreting ss. 753(1) and 753.1 affected his analysis of the appellant's sentence under s. 753(4.1). The court referred the matter back to the sentencing judge to set an appropriate sentence.

 Back to top

Morsky Construction Ltd. v. Nickle Lake (Regional Park Authority), 2016 SKCA 110

Lane Jackson Whitmore, August 26, 2016 (CA16110)

Civil Procedure – Queen's Bench Rules, Rule 4-44
Civil Procedure – Application to Dismiss Action – Want of Prosecution
Civil Procedure – Queen's Bench Rules, Rule 1-3

The appellants, Morsky Construction and ASL Paving, appealed the decision of the Queen's Bench chambers judge dismissing their claim against the respondent Nickle Lake Regional Park Authority. The respondent appealed the same decision in which the chambers judge dismissed its claim against ASL (see: 2015

SKQB 257). Morsky had contracted with Nickle Lake in 2005 to repave a road in the park. Morsky subcontracted with ASL to provide the asphalt overlay for the road. After completion of work, Nickle Lake refused to pay Morsky, claiming that the quality of work was defective. Morsky paid ASL and then commenced an action against Nickle Lake. It defended and counterclaimed against both Morsky and ASL. The appellants commenced cross-claims against each other. The pleadings and mandatory mediation were completed in 2008. No further steps were taken, and in 2015, Nickle Lake brought its application pursuant to Queen's Bench rule 4-44. The chambers judge decided that a delay of seven years without further steps was inordinate and that the delay was inexcusable. The appellants appealed on the grounds that the chambers judge erred with respect to his consideration of whether it might be in the interests of justice that the case proceed notwithstanding the delay as established in the three-pronged test in International Capital Corporation v. Robinson Twigg & Ketilson. The factors that the appellants raised as issues were: 1) whether there was prejudice to the defendant. The chambers judge found that the memories of Nickle Lake's witnesses would have faded. However, there had been no evidence provided by Nickle Lake as to the actual prejudice it would have suffered. Further, the chambers judge had not considered that evidence from examinations from another action involving ASL had been preserved that could have been applied to this case; 2) that the chambers judge failed to address the impact of the delay on the defendant; 3) the context in which the delay occurred. Nickle had not undertaken to move the action forward. Queen's Bench rule 1-3 places an obligation on both parties to aid the resolution of a claim; and 4) the public interest. The chambers judge had not employed the correct factor.

HELD: The appeal was dismissed. The court found with respect to the chambers judge's consideration of the factors that: 1) he correctly decided that Nickle Lake would suffer prejudice. There was no requirement that a defendant file affidavits to that effect under rule 4-44. Although the evidence produced in examination of the proper officer of ASL in another action might have been applicable, there was no evidence before the chambers judge that would indicate that evidence would be useful to the defendants in this case; 2) the chambers judge failed to consider the impact of the delay on the defendant. However, the factor had no real application in this case and was not fatal to the judge's analysis; and 3) the chambers judge considered the context in which the delay occurred and decided that it did not offset all of the other considerations. The court would not interfere with the discretionary decision of the judge. Rule 1-3 did not change the fact that the party who commences an action is ultimately

responsible for its progress; and 4) although the chambers judge had not treated the public interest consistently with the analysis in International Capital Corporation, the chambers judge did not err because there was no evidence before him in this case of the claim having broader public importance.

 Back to top

R. v. Farnham, 2016 SKCA 111

Jackson Whitmore Ryan-Froslie, August 30, 2016 (CA16111)

Regulatory Offence – Occupational Health and Safety – Appeal

The Crown sought leave to appeal and appealed the judgment of the summary conviction appeal court judge that allowed an appeal from the trial judge's decision that had found the respondent guilty of the charge of failing to sufficiently and competently supervise work at a jobsite, as required by s. 17(1) of The Occupational Health and Safety Regulations, 1996. The trial judge found that there had been an electrical hazard at the jobsite and one of the respondent's employees had died from electrocution as a result of that hazard. The respondent appealed the conviction and sentence to the Court of Queen's Bench. The appeal court judge allowed the appeal and ordered a new trial. He found that the trial judge had erred in law because the decision was unreasonable. There was evidence that the employee might have died from carbon monoxide poisoning. Where there were two hazards present at the jobsite, the trial judge should have determined that the respondent had failed to supervise the work with respect to both hazards (see: 2014 SKQB 195). The Crown brought the appeal of that decision pursuant to s. 839(1) of the Criminal Code. It argued that the appeal court judge erred by employing the wrong standard of review, thereby improperly interfering with the trial judge's factual finding that the employee could not have died from carbon monoxide poisoning. The respondent appealed on the ground that the appeal court judge erred by ordering a new trial as opposed to entering an acquittal.
HELD: The appeal was allowed and the court restored the decision of the trial judge to convict the respondent. As the appeal court judge had not dealt with the appeal by the respondent of its sentence, the court returned the matter to him for determination. The court held that the appeal court judge erred by failing to apply the correct standard and substituted his view of the evidence for that of the trial judge. The court found that the appeal court judge's determination that the trial judge's

verdict was unreasonable could not be sustained. The trial judge's findings of fact and factual inference with respect to carbon monoxide poisoning were both reasonable and supported by the evidence and therefore she did not err in finding that carbon monoxide poisoning was not a second workplace hazard. The court found that the appeal court judge's decision could not be upheld on other grounds. It rejected the respondent's arguments that the trial judge had erred in law by qualifying an individual as an expert and allowing some testimony and by finding the respondent failed to sufficiently and competently supervise the work.

 Back to top

Santiago v. Trottier, 2016 SKCA 113

Jackson Caldwell Herauf, August 31, 2016 (CA16113)

Wills and Estates – Wills - Interpretation
Statutes – Interpretation – Wills Act, 1996, Section 17
Civil Procedure – Costs – Solicitor-Client

The appellant appealed from a Queen's Bench judgment regarding the validity of a will made by the appellant's deceased father. The testator made a will in 1997 leaving his estate to the appellant and her brother (one of the respondents). The testator began cohabiting with the respondent Paulette Trottier in 1998 and at that time also executed a second will in which he left the bulk of his estate to his two children and a cabin and its contents to Trottier. In November 2001, The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 amended s. 17(1) and s. 17(3) of The Wills Act, 1996. In August 2012, Trottier and the testator were married and the testator died shortly thereafter. The appellant argued in Queen's Bench that the 1998 will was not revoked by the testator's marriage under s. 17(1)(a) because of the plain meaning of s. 17(3). However, the judge agreed with Trottier that the will was revoked by her marriage. The chambers judge held that s. 17(3) applies only where a will is made after two years of cohabitation. She also found that the failure by Trottier to bring the second will to the attention of the respondent administrator and the appellant did not warrant an award of solicitor-client costs against Trottier as her lawyer had taken responsibility for the mistake. The lawyer had advised the court that he thought that the will had been revoked by the marriage and did not bring it to the attention of the parties. The chambers judge awarded solicitor-client costs against the estate. The appellant appealed on the grounds that the chambers judge

erred: 1) in her interpretation of s. 17 of the Act; and 2) in deciding that Trottier did not have to pay solicitor-client costs personally.
HELD: The appeal was dismissed. The court found with respect to each issue that: 1) the chambers judge had not erred in her interpretation of s. 17 of the Act that the change to it was to achieve equality between the status of married and common law couples. The legislative intent behind the amendment to s. 17(3) was to make it possible for both married partners and common law partners to choose to leave assets to someone other than their partner, either after marriage or two years of continuous habitation and their will made thereafter would be effective. In this case, the 1998 will was revoked by the testator's subsequent marriage to Trottier pursuant to s. 17(1)(a) of the Act; and 2) the trial judge had not erred in her award of costs. As the judge accepted the admission by Trottier's lawyer that he was at fault in the matter, there was no basis upon which the court could set aside her determination that the estate should pay costs awarded. The court found that the appropriate award of costs on appeal was that each of the parties should receive their reasonable solicitor-client costs. The costs of the respondent administrator's factum was fixed at $500.

 Back to top

Willow Bunch (Town) v. Fister, 2016 SKCA 114

Richards Caldwell Whitmore, September 1, 2016 (CA16114)

Municipal Law – Bylaw – Nuisance – Order – Judicial Review – Appeal

The appellant town appealed from the decision of a Queen's Bench chambers judge setting aside an order to remedy issued by the appellant on the basis that it was so overly broad as to exceed the authority of the appellant. The chambers judge declined to sever portions of the order that were outside the appellant's authority (see: 2015 SKQB 362). The appellant conceded that the order was overly broad but appealed on the ground that the chambers judge erred in not severing certain portions of it. The appellant submitted their revision of the order with certain portions excised. It argued that the remainder would meet with the requirements of ss. 364(1), (3) and (4) of The Municipalities Act.
HELD: The appeal was dismissed. The court found that the chambers judge had not erred in refusing to sever the suggested portion of the order. The court reviewed the proposed revised

order and concluded that it would be impossible to determine what nuisance was to be remedied and how it could be remedied.

 Back to top

Redhead Equipment v. Canada (Attorney General), 2016 SKCA 115

Jackson Ottenbreit Ryan-Froslie, September 2, 2016 (CA16115)

Evidence – Documentary Evidence – Privilege – Solicitor-Client
Barristers and Solicitors – Disclosure of Documents – Privilege – Accountants – Agency
Evidence – Legal Advice Privilege

The appellants appealed a Queen's Bench chambers judge's ruling that a number of documents were not privileged. The appellant had applied to the chambers judge to determine whether certain documents were subject to solicitor-client privilege and if so to exempt them for production in response to requirements for information issued by the Canadian Revenue Agency (CRA). The appellant had restructured its business and had employed lawyers and accountants to plan the creation of a new entity. They had submitted 600 documents to the sheriff at the Court of Queen's Bench. The judge then reviewed each document in the presence of counsel for each side and ruled summarily on whether individual documents were privileged (see: 2014 SKQB 172). Of the documents found to be subject to privilege, 32 remained in dispute. The appellant appealed on the grounds that the chambers judge erred in: 1) his statement of the law. It argued that he took too narrow an approach regarding the determination of solicitor-client privilege, finding that it only extends to third party communication that are in furtherance of a function that is essential to the existence or operation of the relationship between the solicitor and client. The applicable principles should be interpreted so as to make most, if not all, communications connected to the appellant's accountant in the context of a reorganization privileged under a transactional umbrella; and 2) determining whether privilege applied to the specific documents in dispute. The appellant argued that to determine whether the judge erred required that each of the documents be considered in their entire context including the "continuum of communications" and each must be considered in light of other privileged documents.
HELD: The appeal was dismissed. The court found with respect to each issue that: 1) the chambers judge had not erred in his

statement of the law. The court held that there was no transactional solicitor-client privilege for third parties in a multi-disciplinary transaction just because a lawyer provides legal advice on the transaction; and 2) it agreed with the appellant's approach to determine whether the chambers judge had erred. The court also noted that the chambers judge's review of the documents was fact-based and the decisions were subject to review on a palpable and overriding error standard. The court reviewed each document and found that the judge erred with regard to only one document and it was found to be privileged. Otherwise, the court found no palpable and overriding errors by the judge's findings that the other documents were not privileged.

 Back to top

R. v. Mitchell, 2016 SKPC 59

Henning, April 26, 2016 (PC16109)

Criminal Law – Defences – Charter of Rights, Section 9, Section 24
Criminal Law – Impaired Driving
Criminal Law – Impaired Driving – Presumption of Care and Control

The accused was in a running vehicle parked with its lights on in a public parking lot that served numerous businesses, including a bar. One of two officers attending in a patrol vehicle testified that he suspected the vehicle could be stolen. The accused was in a reclined seat sleeping. The officer opened the vehicle door and woke up the accused after knocking on the window unsuccessfully. The officer detected the smell of alcohol when attempting to rouse the accused. The accused had glassy eyes, a smell of alcohol, admission of drinking, and poor reaction and disorientation. Those symptoms would not have been apparent if the door was not opened. The accused was arrested and given the breath demand. The accused argued that the investigation proceeded from an illegal entry and search of the vehicle that gave rise to the observations the police acted on. There was evidence the officers had already searched the registration of the vehicle prior to the search and determined that it was not reported stolen.
HELD: The court noted that the vehicle could still have been stolen and not yet reported so the accused's argument that the officers could do nothing else was not conclusive. The officers were involved in an investigation from the moment they

perceived the parked vehicle running in close proximity to a bar. An investigation and detention did occur and the accused appreciated that he was not free to depart in the course of his interactions with police. The court concluded that the officers were not on an arbitrary or illegal investigation when they approached the vehicle in the public parking lot. When the accused did not respond to the knocking, it raised further issues for the officers, which justified opening the car door to investigate further. Lack of response could be a result of a number of medical conditions as well as impairment. The opening of the door was permissible in the court's opinion. The police did not have to open the car door to find the accused, as he was in plain view but unresponsive. They did have to open the door to make further investigation based upon indicia from outside the car. The accused was detained as soon as he was aware he was interacting with the police. The court found that the odour of alcohol was apparent the moment the vehicle door was opened. The investigation and the following investigative detention of the accused was lawful. The court considered the Grant factors, in any event, and the court concluded that the evidence should not be excluded even if there was a breach.

 Back to top

R. v. McGill, 2016 SKPC 103

Baniak, August 29, 2016 (PC16097)

Criminal Law – Care and Control – Presumption
Criminal Law – Driving over .08 – Breath Demand – As Soon As Practicable
Criminal Law – Evidence – Credibility
Criminal Law – Impaired Driving – Blood Alcohol Level Exceeding .08

The accused was charged with three Criminal Code offences: driving while impaired, contrary to s. 253(1)(a); driving over .08, contrary to s. 153(1)(b); and being at large on his recognizance not to possess or consume alcohol, contrary to s. 145(3). The accused conceded that the third charge had been proven. An officer noticed that a vehicle had been parked on a service road for half an hour. The vehicle was running with its lights on and the accused was in the driver's seat sleeping. While attempting to wake up the accused, the officer noticed what appeared to be marihuana in the back seat. A backup officer arrived and both officers attempted to wake up the accused by shaking the vehicle and yelling at him to wake up. When the vehicle door was opened, there was an odour of alcohol coming from the vehicle

and the accused. The accused had glassy eyes and was slurring his words. The accused was arrested at 2:20 am, rights to counsel were given at 2:29, and the breath demand was made at 3:02. The officer indicated that it took 42 minutes to give the breath demand because he forgot to give it. While being transported to the detachment, the accused indicated that he had been driving the vehicle. He later denied driving. A defence witness testified that he had picked up the accused at a bar and left his running vehicle on the service road when it would not move further. He indicated that he left the accused sleeping in the backseat while he walked to Saskatoon rather than a nearby town.
HELD: The court found the defence witness's testimony to be problematic. For example, he indicated that once the vehicle stopped he had no choice but to walk to Saskatoon without any evidence that he first tried to call anyone. The testimony was not credible and was not accepted. The court did not make a distinction between the accused's admitting and denying driving as to whether one was an utterance and the other a statement. The court indicated that the absence of any questioning by the police officer made it impossible to make a distinction. The characterization of the words did not matter, they could both be considered. The court concluded, however, they were of little probative value because of the lack of detail. The court concluded that there was no compelling evidence establishing driving and impairment and therefore the requirements of the impaired charge were not proven. Section 258(1)(a) provides for a presumption that where an accused occupies the driver's seat he is presumed to have care or control of the vehicle. The officer's explanation for the delay in giving the breath demand was accepted and he was found to act in good faith. There was also no clear evidence that the vehicle was inoperable. There was a realistic risk of danger. The court noted that even an inoperable vehicle on the side of a road could pose a danger. The essential elements of care or control were proven beyond a reasonable doubt. The accused was found guilty of driving over .08.

 Back to top

Lemisko v. Saskatchewan Watershed Authority/Water Security Agency, 2016 SKPC 107

Jackson, August 19, 2016 (PC16091)

Civil Procedure – Limitation Period
Civil Procedure – Non-suit Application
Civil Procedure – Small Claims
Limitation of Action – Actions Against Crown

Small Claims – Torts – Negligence
Statutes – Interpretation – Water Security Agency Act, Section 95
Torts – Negligence

The plaintiffs' 35 acre vegetable and fruit farm was damaged when it was submerged with water in June 2011 when the banks of the South Saskatchewan River overflowed. The plaintiffs argued that the legal cause of their economic loss was the direct result of overwhelming and irresponsible water release from the Gardiner Dam, arising from mismanagement and negligent operating policies established and implemented by the defendant. The defendants argued that the claim was statutorily barred under The Limitations of Actions Act and that they were immune from negligence as Crown agents both at common law and pursuant to s. 95 of The Saskatchewan Watershed Authority Act because they acted in good faith. In the end of April 2011 the reservoir level at the dam was approximately two metres higher than normal. There were three significant rainfall events upstream at the end of May through June resulting in high levels that required an increased discharge from the dam that caused flooding to the plaintiffs' farm. The plaintiffs argued that the defendant's actions constituted bad faith because enough water was not released in early spring. The plaintiffs indicated that the water on their property started rising on June 15 and by June 18 virtually all of their land was underwater. The water continued to rise until July 9. The defendants brought an application for non-suit at the conclusion of the plaintiffs' evidence.
HELD: The court concluded that it would be inappropriate to entertain the non-suit application for the following reasons: the limitation argument should only be heard after all of the evidence and could not be a pre-emptive means of disposing of the action; the negligence claim would not only be based on policy considerations, but also based on operational conduct of the dam; and the Provincial Court does not have a pre-trial discovery process like the Court of Queen's Bench, resulting in the plaintiffs not being able to obtain binding admissions, etc., to support their claim. The first day that the loss or injury would have been ascertained would be June 28 when the plaintiffs observed all crops were gone. The claim was not commenced until August 8, 2013, clearly past the two-year deadline. The plaintiffs failed to bring their claim in time pursuant to s. 19 of The Limitations Act. The court also canvassed the other arguments in the event their conclusion regarding the limitation period was incorrect. The defendant operated as a Crown corporation. The court found that the defendants did consider multiple proactive scenarios and chose one that would require a 1-in-15-year flood event. The action was not in bad faith and within the good faith requirement of s. 95 and immune from

Back to top

civil prosecution. The three rain events in Alberta were far in excess of what would normally be anticipated and would have been very difficult to predict. The extreme upsurge was not reasonably foreseeable in the circumstances. The plaintiffs' argument in negligence simpliciter was not successful. Arguments in strict liability, nuisance and trespass also failed due, if nothing else, to the s. 95 immunity the defendant had.

 Back to top

R. v. Pfrimmer, 2016 SKPC 111

Morgan, August 24, 2016 (PC16086)

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

The accused was charged with impaired driving and driving while his blood alcohol content was over .08. The defence brought a Charter application, alleging that the accused was arbitrarily detained, that his breath samples had not been taken as soon as practicable and the accused had not been under proper observation during the period when breath samples were taken. A voir dire was held to determine the admissibility of the evidence, and with agreement, the evidence would be applied to the trial. The accused had been stopped by the police because he had been speeding. The arresting officer testified that the accused parked the vehicle an inappropriate distance from the curb. When she approached the accused's vehicle, she could smell alcohol. Noting that the accused was alone in the vehicle and that there was no visible open liquor in it, she formed the belief that the smell was coming from the accused's breath. She observed that he had some trouble locating his registration and tried to avoid eye contact with her. On the basis of these observations, the officer advised the accused that she was detaining him for an impaired driving investigation. She formed the belief that she had grounds to make a breath sample demand. The defence argued that the arresting officer had not had sufficient reason to believe that the offence of impaired driving had been committed. Therefore the officer had no basis to detain him. The defence relied upon recent decisions such as R. v. Bannerman. The Crown submitted that in light of the Queen's Bench decision in R. v. Vavra regarding s. 254(3), the officer's grounds in this case were rationally capable of supporting her belief that an investigative detention was warranted. The defence further argued that since 35 minutes had elapsed between the time of arrest and the taking of the

accused's breath sample, it was not taken as soon as practicable. The arresting officer explained that the delay was due to waiting for a tow truck to remove the accused's vehicle before leaving the scene for the police station. Finally the defence submitted that when the accused was taken into and out of the testing room for each sample, the officer walked behind the accused and therefore the accused was not under observation at those times. HELD: The Charter application was dismissed and the Certificate of Analysis was admitted. The accused was convicted of the charge of driving while over the legal limit. The court found that the arresting officer had reasonable grounds to detain the accused based upon the smell of alcohol and there had been no Charter breach. The samples were taken as soon as practicable. The officer had provided a satisfactory explanation of what had happened between the arrest and the taking of breath samples. The court found that the observation period was properly conducted. The court dismissed the charge of impaired driving because the Crown had not met the burden of proving that the accused's driving was inappropriate.

 Back to top

R. v. S. (V.J.), 2016 SKPC 112

Daunt, August 24, 2016 (PC16087)

Criminal Law – Sexual Offences – Touching for a Sexual Purpose

The accused was charged with four counts of sexual touching of a person under the age of 16 contrary to s. 151 of the Criminal Code. The Crown re-elected to proceed by summary conviction and the accused entered a guilty plea to a single count under s. 151. The accused entered his plea on the basis of an honest but mistaken belief that the victim was over 16 years old but that he failed to take all reasonable steps to ascertain her age. The victim was in fact 14 years of age. They had engaged in consensual intercourse and in her victim impact statement, the victim indicated that she had suffered mental problems arising primarily from her family's reaction to her behaviour but did not blame the accused for the problems she had had. The accused had been very intoxicated but she had not been drinking when they had intercourse. The accused had worn a condom. He had expressed great remorse and his risk to reoffend was assessed as low. He had support from his family and his community. The Crown argued that the accused should receive a sentence of one year in custody followed by 12 to 15 months' probation. The defence sought the mandatory minimum sentence of 90 days

custody to be served intermittently accompanied by a rehabilitative probation order.
HELD: The accused was sentenced to 90 days in jail to be served intermittently followed by two years' probation. A SOIRA order was made for period of 10 years. The probation conditions included prohibiting the accused from consuming alcohol or drugs. The court found that that there were no aggravating factors in determining an appropriate sentence and that no further denunciation was required in these circumstances.

 Back to top

R. v. Bray, 2016 SKQB 265

McMurtry, August 15, 2016 (QB16256)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Conviction – Appeal
Constitutional Law – Charter of Rights, Section 8, Section 24(2) – Appeal

The appellant appealed her conviction on a charge of impaired driving after trial in Provincial Court. The appellant's grounds of appeal were that the trial judge erred: 1) by failing to find a breach of the appellant's s. 8 Charter right; and 2) by failing to hold that that the administration of justice was brought into disrepute if the evidence was admitted after finding that the appellant's s. 10(b) rights had been violated. The police had attended at the appellant's home after they received a call from her neighbour that a vehicle driven by the accused had hit a house. The officers were admitted to the appellant's home by her husband. He admitted that the appellant had been driving the vehicle when it collided with the house. The officers entered the house and asked the appellant to come outside so that they could speak to her. The appellant was questioned about the accident while standing on the front steps of her house. As soon as they left the house the officer informed the appellant that she was being detained for dangerous driving. She was read her rights to counsel approximately one hour later. The appellant argued that her rights under ss. 8 and 9 were breached by the police entry into her home. The trial judge found that that officers had entered the home with the consent of the appellant's husband and that they had not entered it for the purpose of searching it but did so to communicate with the appellant. There had been no breach of s. 8 and therefore no breach of s. 9. Regarding the appellant's assertion that her s. 10(b) right had been violated, the trial judge found that she had been detained

for an hour prior to being given an opportunity to contact counsel. The police had not obtained any evidence from her during that period except to observe that she displayed signs of intoxication. Although there had been a breach of s. 10(b), the trial judge denied the s. 24(2) remedy because it had been a technical breach.
HELD: The appeal was dismissed. The court found that the trial judge had not erred in: 1) making as a finding of fact based upon the evidence that the appellant's s. 8 Charter rights had not been breached in the circumstances because the officers had not engaged in a search while in her home; and 2) in declining to order a remedy under s. 24(2) of the Charter after finding a violation of s. 10(b). The appellant had not contested the trial judge's finding that it had been a technical breach. The court found that the trial judge properly applied the Grant analysis.

 Back to top

R. v. Renz, 2016 SKQB 266

McMurtry, August 15, 2016 (QB16259)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Conviction – Appeal

The appellant appealed the decision of a Provincial Court judge convicting him of impaired driving. The charge was laid after a police officer had stopped the appellant's vehicle because the rear lights were not working. The appellant testified that he noted the smell of alcohol on the appellant's breath and that he swayed when he walked and had to lean on objects for support. The appellant's speech was slurred and incoherent and his eyes were glossy. The officer found an open beer in the cup-holder of the appellant's vehicle. The officer arrested the appellant for impaired driving and made a breath demand. The appellant complained that he wanted to go to the hospital because he was experiencing acid reflux and the officer complied with the request. The appellant testified at trial that he suffered from diabetes, which caused him to have difficulty walking and with balance because his feet were numb. He admitted that he drank two beers on the date in question but that any signs of impairment were due to his high blood sugar and not by alcohol. At the conclusion of the Crown's case, the appellant brought a non-suit application. He argued that the Crown had failed to establish impairment. It bore the burden of establishing that his impairment was not caused by diabetes. The trial judge dismissed the non-suit application and found that alcohol was at

least a contributing factor and that the accused was guilty of impaired driving. The grounds of appeal were that the trial judge erred in her decision regarding the application and in finding his ability to operate a vehicle was impaired by alcohol. HELD: The appeal was dismissed. The court found that the Crown was not required to anticipate the appellant's defence. If he wished to call evidence with respect to his diabetes in an effort to raise a reasonable doubt that he was impaired by alcohol, he should have done so. The trial judge was aware of the appellant's medical condition and his argument that his impairment was caused by it but she did not accept his evidence. The trial judge correctly applied the legal principle that the Crown may prove impairment by establishing beyond a reasonable doubt that alcohol was a contributing factor and there was sufficient evidence to support her conclusion that it was.

 Back to top

R. v. Viterra Inc., 2016 SKQB 269

Currie, August 19, 2016 (QB16274)

Criminal Law – Evidence – Credibility
Criminal Law – Canada Labour Code – Occupational Health and Safety – Actus Reus
Criminal Law – Defences – Due Diligence

The respondent was charged with six counts under the Canada Labour Code when an employee entered a grain receiving pit in the respondent's grain terminal and died of suffocation. The respondent was charged with respect to ss. 124, 125(1)(q) and (s), 148(1) and (2) of the Code. One of the witnesses, a driver delivering grain, died before the trial, but his videotaped statement was provided to the court. The assistant manager and manager also testified. The assistant manager said that he told the employee to take the flashlight and look in the grain receiving pit to see if it was plugged with grain. The assistant manager then went to the deceased driver's truck and asked him not to pull in yet because they were checking to see whether the pit was blocked. At some point, within sixty to ninety seconds, the employee climbed down into the pit and stepped onto the grain that had accumulated. When he stepped on the grain he was immediately engulfed and he suffocated. The employee began working for the respondent in May 2011 and the incident occurred in September 2011. He had some computer based training (CBT) and education before he started working in the

grain facility. Four of the modules dealt with dangers of engulfment and some dealt with the dangers of entering a confined space. The employee had to receive over 80 percent on a test following each module. The employee also took five hands-on training courses in June 2011. He had not received his hands-on training in confined space entry by the time of the incident.

HELD: The court did not accept the Crown's position that proof of a worker injury or death necessarily proved the actus reus of failing to ensure the health and safety of an employee. The deceased witness's evidence was not relied upon by the court due to inconsistencies. The assistant manager's evidence also had some inconsistencies but overall his oral testifying was found to be in a frank and honest manner. The court accepted the assistant manager's evidence that he would not have told the employee or anyone to go down into the pit to clear a blockage, because it is not possible to clear such a blockage from inside the pit. The Crown argued that, in any event, the court should infer that because the employee entered the pit, the respondent did not adequately instruct, train, supervise and inform him. The court found that the mass of training material emphasized the dangers and the importance of following the safety procedures. The information was not buried in a mass of other information as suggested by the Crown. The court found that the information, training, instruction and supervision was sufficient, if adhered to, to ensure the health and safety of the employee, generally. The Crown argued that a culture of paying lip service to safety had developed at the respondent's place of business. The court held that, despite some lapses in safety, overall there was a culture of safety. The court also held that the respondent did not instruct the employee to unplug a blockage in the pit and, therefore, did not have an obligation to instruct him on how to perform that task. The respondent was not guilty of counts 1 and 2. The Crown also did not prove the actus reus of counts 3 and 4. The Crown failed to prove that the respondent did not adequately train and supervise the employee with respect to responding to a blockage by looking into the receiving pit to see if it was full of grain. The court also concluded that the respondent had made the employee aware of the hazard of being engulfed in grain in a receiving pit and, therefore, the actus reus of counts 5 and 6 were not proved. The court noted that if the actus reus had been proven with respect to any count, the court would have, nonetheless, concluded that the respondent exercised due diligence.

 Back to top

Gajewski v. Gajewski, 2016 SKQB 270

Goebel, August 19, 2016 (QB16275)

Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Parental Alienation
Family Law – Custody and Access – Variation

The parties married in 2006 and separated in 2009. They had one child together, born in 2007. The divorce judgment provided that the petitioner mother would have sole custody with the respondent father having reasonable access on reasonable notice, with at least eight days per calendar month. In May 2015 the respondent applied to enforce the judgment, alleging that since July 2013 the petitioner had stopped all contact between him and the child. The respondent was granted specified parenting time in May 2015. In July 2016 the respondent applied again to enforce his access time and to vary the parenting judgment to joint custody. He said that he had not seen the child since January 2016, he and his family were not allowed to participate in the child's extracurricular activities, and the petitioner started using her spouse's surname for the child. Both parties agreed that the child suffered from severe anxiety.
HELD: The court concluded that it had jurisdiction even though the child and mother resided in Alberta. The mother filed materials and made submissions to the court; she was found to effectively attorn to the jurisdiction. The court found that there had been a material change in the circumstances since the judgment, as required for a variation order pursuant to s. 17 of the Divorce Act. The child was now eight, not three. His developmental needs changed, as did his activities. Another change was that the petitioner delegated power and authority to the child to resist contact with the father. The court found the primary problem to be miscommunication and misdirection of each parent's focus and energy. The court was unable to determine what custody order or parenting arrangement would be in the child's best interests given the controverted evidence filed. The court made an interim order and directed the matter to pre-trial settlement conference. The petitioner was ordered to share in the access travel. The parties were ordered to exchange income information. The interim order also included the following: both parties attend a Parenting After Separation course and a High Conflict Parenting After Separation course within 90 days; the petitioner keep the respondent apprised of decisions regarding the child; the respondent had reasonable phone and electronic access; and the petitioner was to arrange for counselling for the child.

 Back to top

Armstrong v. Armstrong, 2016 SKQB 271

Smith, August 22, 2016 (QB16276)

Power of Attorney – Accounting
Statutes – Interpretation – Power of Attorney Act, Section 18

The applicants applied pursuant to s. 18.1(5) of The Powers of Attorney Act, 2002 for a final accounting from the enduring power of attorney of their deceased mother. The respondent had given a partial accounting. The applicants and the respondent were siblings, and they were all children of the deceased. The deceased resided with the respondent in a home they jointly purchased. The respondent was her primary caregiver and personal guardian pursuant to an appointment under The Adult Guardianship and Co-decision-making Act. The applicants argued that the partial accounting was not enough and wanted explanations for cash withdrawals amounting to over $40,000, as well as the necessity for the CHIP Reverse Mortgage.
HELD: The applicants were within the contemplated applicants that could request an accounting pursuant to the Act. The partial accounting failed to conform to the prescribed form under the Act and it did not contain a complete accounting of the actions and expenditures therein. The court found that the cash withdrawals, the reverse mortgage when the deceased was in a care home, and unnecessary home improvements all combined to raise flags of concern. A final accounting, in the prescribed form, was ordered from the period 2011 to 2014, which was the period the respondent acted as the deceased's sole power of attorney. The court also listed information that had to be included in the accounting, such as an explanation of the total of $40,000 withdrawn in $500 installments.

 Back to top

Davis v. Davis, 2016 SKQB 273

Goebel, August 24, 2016 (QB16277)

Family Law – Child Support – Arrears
Family Law – Child Support – Enforcement
Family Law – Spousal Support – Agreement – Interpretation
Family Law – Spousal Support – Arrears
Family Law – Spousal Support – Enforcement

The parties married in 2004 and separated in 2012. They had one

child. A settlement agreement was executed in 2013 and a divorce was granted in 2014. The agreement required the respondent to pay $780 per month in child support and $1,220 per month in spousal support until April 2016. In July 2015 the petitioner registered the agreement with the Maintenance Enforcement Office alleging arrears of $22,780. A garnishee summons was served on the respondent's employer. The respondent disputed the amount payable and brought an application to set aside the notice of garnishment on the basis that there was no money owing under the agreement and/or that any amounts owing were paid. The respondent filed bank statements and receipts showing that he significantly overpaid support in 2013 and 2014. There was no dispute regarding the amounts paid in 2015 and 2016. The respondent acknowledged underpaying and stopping spousal support payments in February 2015 when the petitioner failed to provide him with receipts. The amount of spousal support for 2015 and 2016 was $23,920. The respondent argued that the amount was not payable, however, because the petitioner failed to comply with the contractual provisions of their agreement.
HELD: The respondent's evidence was detailed and, on balance, more persuasive than the petitioner's where there were discrepancies. The respondent overpaid $6,550 in 2013 and 2014. Any notice of garnishment for those years was set aside on the basis that there were no monies owing for that time pursuant to s. 28 of The Enforcement of Maintenance Orders Act, 1997. The respondent remained contractually obligated to pay spousal support up to and including April 2016. The total amount payable by the respondent to the petitioner was $17,370.

 Back to top

Regina Qu'Appelle Health Region (Mental Health Inpatient Services Division) v. W. (K.), 2016 SKQB 274

Acton, August 24, 2016 (QB16278)

Mental Health Services Act – Certification – In-patient Detention
Mental Health Services Act – Harm to Self or Others, Section 24,1(c)

An application was made pursuant to s. 24.1 of The Mental Health Services Act for a long-term detention order for the respondent for a period of up to one year. The respondent was 38 years old and had been diagnosed with schizophrenia, paranoid type, as well as substance abuse disorder. The parties agreed that conditions (a), (b), (d) and (e) of s. 24.1 were met.

They disagreed on whether (c) was met, namely whether the respondent was likely to cause bodily harm to himself or others as a result of his mental disorder. The respondent's doctor indicated that the only way to prevent continued and worsening relapsing was to have him in long-term care at the only available facility in Saskatchewan, the Saskatchewan Hospital. On numerous occasions the respondent went off his medication and drank excessively or overdosed on cocaine. In April 2016 the respondent's ex-wife made complaints regarding disruptive and abusive behavior during one of these periods. He also threatened to commit suicide on three occasions.
HELD: The court found that (c) had been met; the respondent was likely to cause bodily harm to himself or others. The respondent's condition was found to be worsening. The doctor's opinion was clear, consistent and emphatic in that the only way to break this 10-year cycle was long-term care and treatment.

 Back to top

Duck Mountain Elk Ranch Inc. v. Zoocan Inc., 2016 SKQB 276

Pritchard, August 26, 2016 (QB16265)

Corporation Law – Directors and Officers
Corporation Law – Shareholder Remedies – Oppression – Settlement – Interpretation

The plaintiff and the defendants had been involved in setting up and operating an elk hunting business in Saskatchewan under the corporate name Elk Ranch. The plaintiff paid the purchase price for all of the shares and the assets of the business. He received a 49 percent interest in Elk Ranch and the remaining 51 percent of the shares were held by the defendant Durham. Both men were American but, pursuant to their agreement, Durham agreed to move to Saskatchewan to operate the business to meet the with the requirements of The Saskatchewan Farm Land Security Act that a Saskatchewan resident hold a majority interest in any corporation owning significant amount of farmland in the province. In 2009, the plaintiff brought an oppression remedy application against Durham. The application was settled by minutes of settlement in which Durham resigned as director of Elk Ranch with his shares to be held in escrow to be delivered to the plaintiff for corporate redemptions once the terms of the settlement were fulfilled. In 2015 Durham purported to call a shareholders' meeting and then removed the plaintiff as director and appointed himself as the sole director of Elk Ranch. The plaintiff responded by transferring the only asset of any

value held by Elk Ranch, its lands, to an extra-provincially registered corporation. He argued that Durham had no power to call the purported shareholders' meeting and that Durham was no longer a holder of the required percentage of voting shares in Elk Ranch as required by s. 137 of The Business Corporations Act. Durham argued that the plaintiff was not a director when he purported to execute the transfer of land to the corporation. He argued that he remained the beneficial owner of the escrow shares until the settlement terms were satisfied.
HELD: The court found that under the terms of the settlement, Durham had resigned his role as director and was not entitled to resume the post, nor was he entitled, therefore, to exercise any voting rights that may have remained attached to the escrow shares. The termination of the plaintiff as director and the appointment of Durham was improper.

 Back to top

Short v. Pfliger, 2016 SKQB 277

Elson, August 24, 2016 (QB16266)

Family Law – Custody and Access – Variation

The petitioner and the respondent had lived together for two years, during which time their daughter was born in 2010. They lived in Southey and the petitioner worked in the family business in Regina. The respondent left the relationship in 2011 and moved to Yorkton, taking the child with her. The petitioner immediately issued a petition. A number of interim custody orders had been made since, which provided the parties with shared custody and parenting of their six-year-old daughter. They had exercised shared parenting since 2013. In 2012 a family law worker had prepared a custody and access report in which he recommended a review of the shared parenting regime when the child began school. The petitioner brought an application for the review and the family law worker then prepared an updated report. The parties pursued mediation but they both registered the child for school in their respective communities. The respondent decided to withhold the child from the petitioner on the basis that the child could only attend one school. The petitioner then refused to participate in mediation and brought an application for primary residence pending the conclusion of the second report. In the interim, the court ordered that the child would attend schools in both places. This arrangement remained in place until this trial. The petitioner testified that he would prefer to share parenting with the respondent but could not

move to Yorkton because of his employment. He offered to pay for her to live in Regina but she refused. In the updated report, the author recommended that the child's primary residence be with the petitioner as he was the parent most likely to maximize the child's time with the respondent.
HELD: The court ordered that the parties should share custody but that the child's primary residence during the school year would be with the petitioner in Southey. The court found that the current shared parenting regime could not continue while the child attended school if the parties maintained their current residences. The court reviewed the considerations listed in s. 8 of The Children's Law Act, 1997 and the maximum contact principle in s. 6 of the Act in making its decision. The court concluded that the petitioner had a stable life and employment and had demonstrated his willingness to ensure that the respondent's relationship with their child was honoured.

 Back to top

Swaenpoel v. Swaenpoel, 2016 SKQB 280

Goebel, August 30, 2016 (QB16279)

Family Law – Child Support – Section 7 Expenses
Family Law – Custody and Access – Jurisdiction – Habitually Resident
Family Law – Custody and Access – Variation

The parties had one child who resided with the respondent mother. The petitioner father resided in Saskatchewan and the respondent resided in Manitoba. Their homes were 400 km apart. The parties reached a settlement at a pre-trail conference in February 2015. A corresponding judgment and child support orders were issued in March 2015. The issues for the court were: 1) was there a material change in the circumstances since the parenting judgment was granted in March 2015, and if so, was it in the best interests of the child to vary the judgment. The petitioner applied for the variation, claiming a number of material changes, such as he had fewer financial resources because his new spousal relationship ended, he had less time to do all of the travel for his parenting time because he had another child, and the respondent failed to comply with the judgment; 2) was the respondent obligated to contribute towards child-care costs incurred by the petitioner during his summer parenting time; and 3) should the court transfer the proceeding to Manitoba.
HELD: The issues were dealt with as follows: 1) the court was

not satisfied that there had been a material change. The majority of problems described were best addressed through clarification of the terms of the judgment. The court ordered that the petitioner's summer access commence on the first Friday after school ends and continue for the time specified in the judgment with the court specifying the exchange time and place. The petitioner was also granted no less than two periods of telephone and/or electronic access with the child per week, taking place at 8:00 pm Monday and Thursday. The respondent did not have home internet access, but was ordered to accommodate electronic access and provide arrangements to the petitioner within the next 30 days. The petitioner maintained parenting time on alternate weekends unless he agreed to forego it during regular hockey season. The parties would continue with joint custody. The application to vary was dismissed; 2) the child-care expenses incurred by the petitioner during his summer access were found to be within the section 7 expenses contemplated in the consent order of March 2015 and were, therefore, shareable in accordance with the terms of that order; and 3) the petitioner commenced the original proceeding in 2011 when the respondent had already moved to Manitoba. She attorned to the Saskatchewan jurisdiction at that time. The petitioner's variation application was dismissed so there was no practical reason to transfer the matter. The court did not find it more appropriate, expeditious or financially viable for the motion to be transferred. The respondent's application was dismissed.

 Back to top

Scotia Mortgage Corp. v. Conroy, 2016 SKQB 281

Barrington-Foote, August 30, 2016 (QB16270)

Mortgages – Foreclosure – Order Nisi – Amendment
Mortgages – Foreclosure – Reduction of Upset Price
Real Property – Foreclosure – Order Nisi for Sale – Amendment

The plaintiff applied to amend the order nisi for judicial sale to allow the property to be listed by real estate listing for further period of 90 days until such time as an application is made for an order confirming sale. The plaintiff also sought an order reducing the upset price to $235,000. An affidavit from a realtor, without an appraisal or the realtor's relevant experience, was filed to support the reduction in upset price. The realtor indicated a listing price she believed may result in more interest from buyers, but she did not provide her opinion as to the

market value of the property.
HELD: The information was not sufficiently current or complete to enable the court to exercise its discretion to determine an appropriate upset price. The court also did not grant an order that the property may be listed for an additional 90 days in any event. Over 19 months had passed since the order nisi for sale was granted. There was no evidence explaining the significant delays that occurred before the property was first listed, after that listing expired, and between the expiration of the second listing and this application. The court found it likely that the defendant has been prejudiced by the significant delay that occurred in the sale of the property. The plaintiff had to serve the defendants with a copy of this fiat, notice of the new hearing date, and any additional evidence. The court also noted that it would not order automatic renewal of 90-day periods in any event because that would not enable the court to adequately exercise its supervisory jurisdiction.

 Back to top

Cosmopolitan Clothing Bank Inc. v. Archieposcopal Corp. of Regina, 2016 SKQB 284

Krogan, August 31, 2016 (QB16271)

Limitations of Actions
Real Property – Agreement for Sale – Part Performance
Real Property – Agreement for Sale – Validity
Real Property – Statute of Frauds
Torts – Negligence – Fiduciary Duty
Torts – Unjust Enrichment
Trusts – Resulting Trust

The plaintiff sought an order for the following: specific performance from the defendant pursuant to an agreement for sale between the parties for a property; an order declaring that the defendant held the property in trust for them; damages; interest; and solicitor-client costs. The basis of the relief was on unjust enrichment, breach of fiduciary duty, and a failure on behalf of the defendant to maintain the property. The plaintiff provided clothing to needy women and children. In May 1985, the plaintiff signed a three-year lease for the property from the owner. The plaintiff had to pay rent and utilities. The corporate records of the owner of the property in 1986 indicated that they were willing to accept $125,000 for the property and the defendant would be the registered owner. A board member of the plaintiff and business man arranged to have his foundation pay part of the purchase price and for the defendant to finance

the rest of the purchase price with it being the registered owner. The foundation provided the money to the defendant to purchase the property. The plaintiff leased the property from the defendant for a period of five years with rent, utility, insurance, building maintenance, etc., being payable by the plaintiff. The plaintiff believed the agreement was not actually a lease. It believed that the $60,000 the defendant invested was a loan to the plaintiff that was being repaid in $400 per month instalments. The minutes of a meeting of the plaintiff noted in 1986, however, that the $60,000 was not a debt. After the defendant installed a $12,000 furnace in the property, the plaintiff paid $450 per month rent. The historical records of the first chair of the plaintiff's board made it clear that he considered the property to be defendant's. The financial statements of the plaintiff did not list the property as a capital asset. In 1994 there was reference to the $12,000 furnace cost as being a debt of the plaintiff's but this is not replicated in any previous or further financial statements. The plaintiff made the last payment to the defendant in December 2001 in the amount of $450. In a history document the first chair of the board of the plaintiff noted the financial difficulties the plaintiff was having and that they could reduce costs if they didn't have to pay rent anymore to the defendant, also indicating that they had already paid more than the defendant invested in the building the defendant owned. In 2004, the plaintiff was in dire financial circumstances and decided to wind up. In that regard the first chair inquired with the defendant as to what they would like done with the property. The executive director of the plaintiff created a plan and the plaintiff did not dissolve. The plaintiff received an interest-free loan of $10,000 from the defendant and the defendant retained title to the property. The plaintiff covered the costs of the property, but did not pay any rent. The plaintiff registered an interest against the title to the property. In 2008, the executive director was approached about selling the property. The defendant and executive director verbally agreed that the property could be sold if an arrangement to buy a second location the plaintiff was leasing could be made for the same price as the selling price of the property. The executive director indicated that she thought this meant that the plaintiff owned the property. The defendant accepted an offer to purchase the property for $650,000 and it purchased the new property with title being transferred to it. The plaintiff spent $130,000 in repairs to the new property between 2009 and 2012. The defendant sent the executive director a proposed lease and she responded that she did not feel they needed a lease because they were so closely related. She met with the defendant to see if the plaintiff could become co-owner of the new property based on her understanding that the plaintiff had an ownership

interest in the property. The defendant agreed to transfer the new property to the plaintiff for $1.00 if it could be ensured that the plaintiff's charitable work would continue there. The executive director had a lawyer prepare an agreement for sale. The defendant received advice not to transfer ownership and the discussions stalled. The plaintiff's operations ceased in December 2012 when a pipe broke in the new property. The plaintiff was not a named insured on the insurance policy even though it had forwarded its portion of the insurance to the defendant. They did received some insurance money though. The plaintiff could not afford the repairs without more insurance money, which the defendant was not willing to provide them with. The plaintiff was still responsible for the costs associated with the new property. In 2014, the plaintiff received a letter that it was being evicted from the new property. From the date of the flood to the eviction, the plaintiff paid $44,792.24 for costs associated with the new property. The issues were: 1) was there an oral agreement for sale between the parties; 2) what was the impact of the Statute of Frauds on the enforceability of an agreement of sale; 3) was the agreement for sale partly performed; 4) was the defendant holding the property and new property in trust for the benefit of the plaintiff; 5) was the defendant unjustly enriched; 6) did the defendant breach a fiduciary duty to the plaintiff; and 7) was the plaintiff's claim statute-barred.

HELD: The issues were determined as follows: 1) there were many details in the corporate records of the defendant that demonstrated that the plaintiff was a tenant of the defendant and nothing more. The plaintiffs may have initially hoped to purchase the property, but the court found that the records indicated that the defendant was the owner and the plaintiff was the tenant. It was clear to the court that the objective of the parties was to ensure that the plaintiff continue to operate. The plaintiff's argument that the $60,000 for the property was a loan that the plaintiff paid back to the defendant with the rent. There was, however, evidence that this was not a loan. The plaintiff actually paid back $72,800, not just $60,000, and the court did not find that this could be interest. The court also found that the defendant did not hold the title to the property as security for a loan because the title was not transferred to the plaintiff when the $60,000 had been repaid and the plaintiff did not demand that it be transferred. The foundation that invested the initial $65,000 also noted that it did not have to be repaid provided that the property was used by a charitable organization and it did not have to be repaid if the property was transferred to any related charitable organization. It did not stipulate that the transfer had to be to the plaintiff. The court also found that the lease contained provisions allowing the defendant to terminate the

lease if the plaintiff changed the nature of its operations. The plaintiff did not have an equitable interest in the property and thus not in the new property either; 2) the court considered the issue in the event that the conclusion in the first issue was incorrect. The plaintiff argued that the various notations in corporate memoranda provide the parties, the property, and the price. The court did not agree with the plaintiff's argument that purchase price was the $60,000. The court concluded that the price, an essential term of the contract, was not identified, and therefore, the Statute of Frauds prohibited enforcement of any existing contract, if one existed. The court also noted that the requirement of the defendant's signature was not met. Also, there was no option to purchase in the only signed document, the lease. The court held that any agreement for sale, if one existed, was not enforceable due to a lack of compliance with the Statute of Frauds; 3) the plaintiff argued that the defendant could not rely on the Statute of Frauds because the agreement for sale was partly performed. The part performance was that the plaintiff remained in possession of the property and new property without a written lease and without protest by the defendant. The court found that the plaintiff was more likely in possession of the property due to a lease than an agreement for sale. The expiration of the lease did not convert the relationship into one of vendor and purchaser. The plaintiff paid for improvements to the property not as a purchaser but as a lessee pursuant to the terms of the lease; 4) in previous cases the court has held that there can be no resulting trust once the transfer of title occurs and the land is registered. The court agreed that the doctrine of resulting trust was inapplicable where the land transfer was registered in Saskatchewan's land titles system. The court nonetheless considered whether the facts of the case led to a resulting trust. A presumption of a resulting trust was found not to arise because the plaintiff did not provide any money for the purchase of the property; 5) the defendant conceded that they may have been enriched by the plaintiff maintaining and repairing the property and the new property and that the plaintiff was correspondingly deprived. The court agreed with the defendant, though, that there was a juristic reason for the enrichment. The lease clearly stipulated that the plaintiff was responsible for payment of utilities, taxes, insurance, and maintenance of the property; 6) the nature of the relationship between the parties was commercial in nature, not fiduciary in nature; and 7) whether the plaintiff's claim was statute-barred did not have to be discussed because the plaintiff was not successful in their claim.

 Back to top

Markel v. Strauch, 2016 SKQB 291

McMurtry, September 7, 2016 (QB16283)

Business Corporations Act – Oppression Remedy

The plaintiff and one of the defendants incorporated a company (the Company) in 2011 wherein they were each 50 percent shareholders. The plaintiff and his other company applied for interim oppression remedies pursuant to s. 234 of The Business Corporations Act (BCA). The plaintiff claimed the following: the defendant joined a competitor company to fraudulently transfer many of the Company's clients and accounts; the defendant took $110,000 from the Company for his own personal use; the defendant cancelled the plaintiff's email; and the defendant changed passwords without the plaintiff's knowledge or agreement. The plaintiff stopped allowing the defendant access to the Company's inventory at some point. The parties also disagreed about the defendant's use of his VISA. The parties had a meeting and decided to dissolve the Company and complete their outstanding obligations. The defendant indicated that he joined another security company as an employee and that he incorporated a different company after the decision was made to dissolve the Company. The Company had outstanding income tax returns, GST returns and PST returns that had to be filed. The accountant would not proceed with the required work to do the filings until they were paid. The plaintiff refused to join with the defendant and pay the fees. A law firm held $21,709.31 in trust, which was the payment from their last project.
HELD: The plaintiff was a complainant, as required by the BCA, to make the application. The first step in the oppression application is to enquire into the complainant's reasonable expectations. The court found that the plaintiff's material frequently overstated and/or contradicted himself. The court concluded that the plaintiff left the Company to go back to his old venture just as the defendant left to start a new company. The plaintiff's reasonable expectations were shown when he sent a letter to the Company entitled "Final Notice", which was him severing his relationship with the Company. The court did not accept, on the contradictory evidence, that the defendant misappropriated funds, withheld accounting materials, or altered the plaintiff's role in the Company when he deleted his email or changed passwords. The court did not find a breach of the plaintiff's reasonable expectations.

 Back to top