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

Volume 19, No. 10 **May 15, 2017**

Subject Index

Aboriginal Law – Residential Schools Settlement Agreement – Interpretation

Administrative Law – Duty of Fairness – Breach

Business Corporations Act – Derivative Action

Civil Procedure – Appeal – Taxation of Accounts

Civil Procedure – Discontinuance – Costs

Civil Procedure – Jurisdiction – Territorial Competence

Civil Procedure – Summary Judgment

Contracts – Breach – Damages

Contracts – Breach of Contract – Non-payment

Criminal Law – Appeal – Conviction

Criminal Law – Assault – Sexual Assault – Sentencing

Criminal Law – Motor

R v Dunford, 2017 SKCA 1

Richards Ottenbreit Whitmore, January 9, 2017 (CA17001)

Criminal Law – Motor Vehicle Offences – Dangerous Driving Causing Death – Conviction – Appeal
Criminal Law – Motor Vehicle Offences – Dangerous Driving Causing Death – Sentencing – Appeal

The appellant appealed his conviction for dangerous driving causing death, contrary to s. 249(4) of the Criminal Code (see: 2015 SKQB 322), and his sentence of two years less a day (see: 2015 SKQB 386). The grounds of appeal included whether the trial judge erred in the following ways: 1) in ruling the appellant's s. 10(b) Charter rights had not been infringed. The appellant argued at trial and on appeal that the RCMP officer who read him his rights to counsel at the scene of the accident should have recognized that he did not understand because he was distraught. After speaking freely with the officer right after the accident, the appellant later consulted a Legal Aid lawyer and then made no further statements. This conduct indicated that the appellant had not understood his right to counsel at the outset; 2) in determining that the actus reus of the offence had been proven on the basis of the appellant's driving. He argued that the judge erred in her application of the test and held him to a higher standard of proving his driving was "normal". The appellant argued that he was driving normally and the judge erred in finding that he had not been because he failed to follow the requirements of the construction zone signs; 3) in finding

Vehicle Offences – Dangerous Driving Causing Death – Conviction – Appeal

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

Criminal Law – Motor Vehicle Offences – Impaired Driving

Criminal Law – Sentencing – Aboriginal Offender

Criminal Law – Sentencing – Controlled Drugs and Substances Act – Trafficking – Fentanyl

Family Law – Child Support – Determination of Income

Small Claims – Breach of Contract – Tort

Statutes – Interpretation – Automobile Accident Insurance Act, Section 100(e), Section 136(1), Section 144

Statutes – Interpretation – Local Government Election Regulations

Cases by Name

Ackerman v Ackerman

Fontaine v Canada (Attorney General)

Helberg v Proznick

Hill v Famhill Investments Ltd.

Jahnke v Johnson

Larochelle v Saskatchewan Government Insurance

Montgrand v Saskatchewan Government Insurance

New South Wales, Australia (Chief Commissioner of State

that the mens rea of the offence had been proven based upon the appellant's driving because he failed to follow the existing rules of the road. The appellant argued that it had not been a marked departure from the standard of care expected of a reasonable person; and 4) whether the sentence imposed was demonstrably unfit.
HELD: The appeal of the conviction and sentence was dismissed. The court found that the trial judge had not erred: 1) in finding no breach of s. 10(b) of the Charter based on her conclusion that the appellant had understood the right to counsel as given by the officer at the scene. The appellant had not communicated that he did not understand them to the officer and had not communicated any confusion or lack of comprehension regarding them; 2) in finding that the actus reus had been proven. The appellant's manner of driving was dangerous to the public because he failed to follow the rules of the road in the construction zone; 3) by finding the appellant's driving was dangerous. The trial judge had dealt with this argument with respect to the actus reus. The appellant's driving in a construction zone required more than normal driving. She found that he had departed from the standard of care because he knew that he was in a construction zone and was inattentive and failed to slow his speed; and 4) in imposing the sentence. The judge found that the gravity of the offence and the appellant's moral culpability was high. She noted that the appellant had been driving inattentively for a long distance and distinguished the case from those of youthful offenders who engaged in a momentary act of poor driving.

© The Law Society of Saskatchewan Libraries Back to top

Montgrand v Saskatchewan Government Insurance, 2017 SKCA 2

Richards Lane Caldwell, January 10, 2017 (CA17002)

Statutes – Interpretation – Automobile Accident Insurance Act, Section 100(e), Section 136(1), Section 144

The appellant appealed the decision of The Automobile Injury Appeal Commission pursuant to s. 194(1) of The Automobile Accident Insurance Act (see: 2016 SKAIA 001). The commission had affirmed the decision of Saskatchewan Government Insurance (SGI) regarding the calculation of death benefits payable to the appellant under Part VIII, Division 5 of the Act. The appellant was the common law spouse of an insured driver who was fatally injured in a motor vehicle accident. SGI limited the yearly insurable earnings of the appellant's deceased spouse

Revenue) v Babatunde

O'Byrne v RBC Life Insurance Co.

Quilichini v Wilson's Greenhouse & Garden Centre Ltd.

R v Delorme

R v Dunford

R v Fyfe

R v Knoblauch

R v Meyers

R v Smith

R v Starblanket

Reimer v Anderson

Risseeuw v Saskatchewan College of Psychologists

Virtual Building Systems Inc. v Integrated Designs Inc.

Disclaimer
All submissions to Saskatchewan courts must conform to the *Citation Guide for the Courts of Saskatchewan*. Please note that the citations contained in our databases may differ in style from those endorsed by the *Citation Guide for the Courts of Saskatchewan*.

to his "maximum yearly insurable earnings" as defined by s. 136 of the Act and paid a lump sum benefit to the appellant. The appellant appealed to the commission, arguing that there was no "maximum yearly insurable earnings" cap on death benefits payable under the Act. The commission rejected the argument on the basis that it had been made and rejected in Korpess v SGI. On appeal, the appellant argued that Korpess was no longer the controlling authority because s. 144(1) of the Act had been amended in 2002 to provide that the spousal death benefit was to be calculated subject to the regulations. The Personal Injury Benefits Regulations had no maximum yearly insurable earnings provision and therefore, no insurable earnings cap should apply in the calculation of death benefits.
HELD: The appeal was dismissed. The court held that correctness was the appropriate standard of review applicable to decisions of the commission. It found that the amount of the weekly death benefit under s. 144(1) was calculated by taking 50 percent of the weekly "income replacement benefit" as provided for under s. 100(e). The benefit was defined in accordance with Division 4, in which s. 136(1) provided the total of all benefits an insured can received pursuant to Division 4 may not exceed maximum yearly insurable earnings and defined that phrase. Therefore maximum yearly insurable earnings must be accounted for in the calculation of death benefits. The reference to the regulations in s. 144 could not deny the combined effect of s. 100(e) and s. 136.

© The Law Society of Saskatchewan Libraries Back to top

R v Delorme, 2017 SKCA 3

Jackson Ryan-Froslie Wilkinson, January 12, 2017 (CA17003)

Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Sentence
Criminal Law – Assault with a Weapon
Criminal Law – Evidence – Credibility
Criminal Law – Evidence – Identity
Criminal Law – Evidence – Video Surveillance
Criminal Law – Sentencing – Aboriginal Offenders
Criminal Law – Sentencing – Pre-Sentence Report
Criminal Law – Sentencing – Sentencing Principles

The appellant appealed his conviction of assault with a weapon, a rifle, contrary to s. 267(a) of the Criminal Code. He also appealed his sentence of three-and-a-half years, less one-and-a-half years' credit for time spent on remand. The appellant also received a one-year consecutive sentence for violating a firearms

prohibition order, contrary to s. 117.01(3) of the Criminal Code, and concurrent six-month sentences for other related offences. A birthday party group stopped at a bar just after 1:30 am. The appellant was drinking at the bar with five other people. The appellant was aggressive towards the birthday group and took a swing at them. The group left, but later returned. After they parked, the appellant and others came out to the birthday group. When the victim attempted to intervene, the appellant motioned to someone and called out for his gun. The appellant told the victim to get down on his knees and pointed the barrel of the rifle at the victim's head. Two others began punching and kicking the victim when he held onto the barrel of the rifle. The sober driver of the birthday group testified, and his testimony was accepted by the trial judge. Some of the evening's events were captured on the interior and exterior surveillance video. The altercation was just outside the area of the camera. At trial, the appellant argued that he could not have done everything the sober driver said because there was only about 40 seconds that he was outside the surveillance camera's range. The trial judge undertook, with the appellant's consent, an independent review of the surveillance video. The trial judge concluded that the appellant had over a minute and a half to commit the offences. The trial judge also rejected the appellant's argument that the sober driver's identification was unreliable. The appellant argued that the sentencing judge focused excessively on punishment and separation of him from society and failed to give adequate consideration to his circumstances as an Aboriginal offender. The appellant was a First Nations member, but never lived on a reserve. His parents abused alcohol and substances. When the appellant was five, his grandmother got custody of him and he had stability in her home. He had one child. The appellant had a grade 12 education and some training in roofing and ironwork. His employment history was inconsistent due to his interaction with the criminal justice system. He had a lengthy criminal record, including convictions for assaults. His grandfather attended residential schools, but details were not known. The appellant took partial responsibility for the offences. He was considered a high risk to reoffend. HELD: The appeal was dismissed. The appeal court reviewed the surveillance video and concluded that there was one minute and thirty-one seconds that the appellant was not on the video. The trial judge did not err in the use or assessment of the video evidence. The appeal court found that there was confirmatory evidence to support the sober driver's identification evidence. The trial judge's assessment of the sober driver's credibility was entitled to deference by the appeal court. The evidence was found to support the trial judge's findings. The appeal court found that the trial judge did not err in his determination that

the appellant's guilt had been established beyond a reasonable doubt. The appeal conviction was dismissed. The sentencing judge reviewed the Gladue factors that were present, but concluded that there were serious concerns outweighing them. The appeal court noted the appellant's lack of taking responsibility for the offences. The appeal court found little evidence to suggest that rehabilitation was the sentencing objective to be emphasized. The appeal court found that the sentencing judge may not have conformed the recent requirements regarding Gladue factors, but the sentencing outcome was not affected. Further, the sentence for assault with a weapon was not demonstrably unfit in all the circumstances, nor were any of the other sentences.

© The Law Society of Saskatchewan Libraries Back to top

Larochelle v Saskatchewan Government Insurance, 2017 SKPC 1

Demong, January 4, 2017 (PC17001)

Small Claims – Breach of Contract – Tort
Statutes – Interpretation – Consumer Protection and Business Practices Act
Statutes – Interpretation – Sale of Goods Act
Torts – Damages
Torts – Misrepresentation – Fraudulent – Innocent – Negligent
Torts – Rescission

The plaintiff was the successful bidder of a vehicle in an online auction held by the defendant. The plaintiff said that his bid was partly based on his reliance of the accuracy of certain documentation that the defendant provided to him. He argued that the information was incomplete, and as a result, he bid more than he otherwise would have. The defendant acknowledged that it failed to provide prospective bidders with updated information, but said that it was an innocent omission. The defendant argued that the plaintiff was contractually bound by terms and conditions of the online auction. The plaintiff acknowledged that he was aware of and bound by the terms and conditions of the auction. The terms and conditions included a statement that vehicles are sold as is and any copies of repair estimates don't necessarily reflect a complete or accurate estimate of damages. The repair estimate prepared by the defendant indicated that the cost to fix the accident-related loss was $9,809,17 plus GST. The plaintiff's successful bid was $16,500. After the purchase, the plaintiff learned that the vehicle had been taken to an independent repair shop where a second repair estimate of $33,906.95 resulted. The plaintiff repaired the

vehicle for $6,866.38 of parts and $6,000 of his own labour at the rate of $20 per hour. The vehicle was resold for $29,000. The plaintiff claimed $10,600 based on the lower reserve price that the defendant had for a truck that was similar to the one the plaintiff purchased. The defendant argued that the two vehicles were not comparable. The plaintiff did not stipulate whether he was claiming innocent, fraudulent, or negligent misrepresentation. The issues were as follows: 1) whether or not the defendant's failure to provide the supplemental repair estimate online constituted a misrepresentation, and, by mistaking to do this, gave rise to a legal claim for compensation; 2) if compensation was to be awarded, upon what legal basis was that compensation to be allowed; and 3) if compensation was to be awarded, what amount should be awarded, and how should it be calculated.
HELD: The issues were determined as follows: 1) the contract between the parties included an express agreement that the vehicle was to be sold as is, no warranty as it related to the vehicle's condition, and that the repair estimates did not necessarily reflect a complete or accurate estimate of damage. The court was satisfied that the plaintiff was aware of these express reservations of warranty and that they applied to him. The court concluded that neither The Sale of Goods Act nor The Consumer Protection and Business Practices Act assisted the plaintiff. The court was satisfied that the defendant did not fraudulently misrepresent the repair estimate as accurate, nor did they negligently misrepresent the information. The misrepresentation was innocent; 2) the remedy to be awarded for innocent misrepresentation is rescission of the contract and return of any monies paid as a part of the contract. The court was authorized to order rescission of an agreement, pursuant to s. 3(1)(c) of The Small Claims Act, 1997. In this case, the plaintiff was not entitled to rescission because the parties set the terms of their bargain, and the bargain transferred the risk that a misrepresentation might occur to the plaintiff. The principle of caveat emptor was imported into the agreement; and 3) for rescission to be ordered, the parties must be able to make a restitution in integrum. The plaintiff chose to retain the vehicle, repair it, and re-sell it to a third party. Courts have, however, chosen to award money damages when restitution in integrum is unavailable. The court determined the difference between the total of the plaintiff's purchase price, repairs, and labour and the plaintiff's selling price to a third party. The difference was $1,239.68, but the court concluded that the plaintiff's claim be dismissed.

© The Law Society of Saskatchewan Libraries Back to top

Reimer v Anderson, 2017 SKPC 2

Schiefner, January 6, 2017 (PC17002)

Contracts – Breach – Damages

The plaintiff sued the defendant for damages, alleging breach of contract. The plaintiff entered into an agreement with the defendant, an auto mechanic, to repair a truck that had been damaged in an accident. The defendant agreed to make it roadworthy and able to pass any government safety inspections. The defendant estimated that the repairs would cost between $10,000 and $11,500. The plaintiff paid a $6,000 deposit to the defendant. The written agreement was entered into in September 2013 with the repairs to be completed by December 2013. With the acquiescence of the plaintiff, the defendant did not start working on the vehicle until January 2015 when he began disassembling the vehicle but did not complete the repairs because he feared that he would not be paid. The plaintiff notified him in September 2015 that the defendant had defaulted on their agreement. The plaintiff estimated the value of the truck to be between $6,000 and $9,000 if it had been sold for parts, and if repaired, its estimated value was $20,000. The defendant's estimate of the truck's salvage value was $2,500 to $5,000 and if the repairs had been completed, the truck would worth $15,000 to $16,000 in 2015.
HELD: The plaintiff was awarded damages in the amount of $8,000, comprised of the deposit of $6,000 and the plaintiff's expectation of interest in the amount of $2,000. The latter amount was based on the court assessing the truck value at $17,500 if repaired and deducting the cost of repair of $11,500 and the original value of it being set at $4,000.

© The Law Society of Saskatchewan Libraries Back to top

Virtual Building Systems Inc. v Integrated Designs Inc., 2017 SKPC 3

Monar Enweani, January 6, 2017 (PC17006)

Contracts – Breach of Contract – Non-payment
Contracts – Interpretation
Contracts – Rescission
Small Claims – Debt for Service Supplied

The plaintiff contracted to provide architectural drawings to the defendant for a home to be built for the defendant's clients. The

plaintiff claimed for the amount of the last three invoices that were not paid by the defendant. The defendant counterclaimed for overpayment on the first two invoices that were paid. The defendant also denied any monies were owing in relation to the final three invoices. By mid-April 2015 the plaintiff had prepared a complete set of architectural construction drawings as described in the contract. In mid-April, the client wrote to the plaintiff to apologize for the number of changes being requested and for late changes that had been made to the design. On April 15, a decision was made to eliminate the basement, increase the garage and main floor footprint. On April 30, the plaintiff provided hard copies of a second complete set of architectural construction drawings to the defendant. The plaintiff received payment for the first two invoices, which were $3,560.02 and $14,174.42. The defendant contacted the plaintiff in May and re-engaged them to do work for the defendant. The plaintiff indicated that they were reassured that he would be paid for his work on an hourly basis. In June and July, the plaintiff delivered the third version of the residence and invoiced the defendant. The client rejected the drawings and the plaintiff prepared a fourth version. Another invoice was attached to the fourth version. The fifth invoice resulted from changes to the drawings. The last three invoices totaled $5,944.30, excluding GST. The issues were as follows: 1) what was the contract between the plaintiff and the defendant; 2) did the plaintiff overcharge for work performed under the contract between March 2 and May 1, 2015; 3) was the plaintiff entitled to payment of three outstanding invoices for work performed between May 19 and August 4, 2015; and 4) was the defendant entitled to recover the sum of $1,560 from the plaintiff, for the cost of engaging another firm to complete and coordinate the drawings with a structural engineer.
HELD: The issues were determined as follows: 1) evidence of subjective intentions regarding contract construction is inadmissible. The plain language of the contract indicated that the total cost payable to the plaintiff was $6,640 plus GST. Any changes after print review would be charged at an additional rate of $65/hour. The court found that print review occurred on April 17, 2015. Thereafter, the plaintiff was entitled to charge $100/hour for mechanical work and $65/hour for work in relation to architectural construction drawings; 2) the plaintiff overcharged the defendant for the work between March 2 and May 1, 2015. The plaintiff charged the defendant at an hourly rate prior to the print review. The plaintiff charged fees of $10,436.45, so overcharged the defendant $3,796.45. Further, the plaintiff charged the defendant at the rate of $100/hour after the print review for consultation and design. The court determined that the plaintiff did not satisfy the court, on a balance of

probabilities, that the amount of time billed for his services was fair and reasonable. At least some additional time was incurred by the plaintiff and billed to the defendant, as a direct result of the plaintiff's use of 3D software, which took more time and was not required by the contract. The number of hours was reduced by 10 percent. The plaintiff overcharged in the second invoice by $998.37. The plaintiff overcharged the defendant $4,794.82 in the first two invoices. The court decided to deal with the overpayment in the context of the entire action, and by way of set-off, rather than restitution, which would require the defendant to commence an action in the Court of Queen's Bench; 3) the plaintiff was re-engaged by the defendant to perform additional work for the defendant on the residence, at the same hourly rate as set out in the original contract. The plaintiff charged $65/hour for the additional work, which was appropriate. The total amount billed was reduced by ten percent to account for the more time-consuming software used by the plaintiff. The balance owing to the plaintiff for the three remaining invoices totaled $5,348.07; and 4) the court did not find any merit in the defendant's argument. The plaintiff was given judgment in the amount $553.25 plus GST.

© The Law Society of Saskatchewan Libraries Back to top

R v Starblanket, 2017 SKPC 5

Metivier, January 12, 2017 (PC17007)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Dangerous Offender – Indeterminate Sentence
Criminal Law – Sentencing – Robbery

The accused was found guilty of committing robbery, contrary to s. 344(1) of the Criminal Code. The Crown applied to have the accused designated a dangerous offender. The issues were as follows: 1) did the accused commit a "serious personal injury offence" as defined in s. 752 of the Criminal Code; 2) did the evidence establish a pattern of repetitive or persistent aggressive behaviour pursuant to ss. 753(1)(a)(i) of the Criminal Code; and 3) if the accused was designated a dangerous offender, was there a reasonable expectation that a lesser measure would adequately protect the public against the commission of murder or a serious personal injury offence. The accused was a 34-year-old Aboriginal male. He was the middle of five siblings and was raised primarily in urban off-reserve centres. There was chronic substance abuse and domestic violence in the family home. The

accused's father committed suicide while in police custody when the accused was five years old. He was also sexually molested by a male relative around the same time. The accused was placed in foster care and lived in 10 to 15 different foster families. The accused's mother was convicted of manslaughter when he was nine or ten. The conviction was later set aside and the accused moved in with his mother. He was transferred to a male group home when he was 12, due to behavioural concerns and substance abuse. He continued to struggle with a serious addictions problem. The accused obtained his grade 12 equivalency but was unable to maintain long-term employment. The predicate offence occurred when the accused and a female accomplice robbed a confectionery. The accused had 63 criminal convictions, 23 involved the use or threatened use of violence against another person. The expert that prepared the required report for the court diagnosed the accused with antisocial personality disorder and alcohol and substance abuse problems. The Crown and accused's experts both agreed that antisocial personality disorder could not be cured and the goal of treatment is to help the person manage their personality. The accused was assessed as a high risk for future violence. The Crown's expert saw little prospect for a positive treatment outcome even though he found the accused would likely engage in treatment and complete it. The accused had participated and completed programming while serving previous sentences. The accused had expressed remorse and a desire to change on many previous occasions. He indicated that on the previous occasions he was always sincere about his desire to change, but he had a hard time conquering addictions and, at times, has had difficulty finding appropriate resources.
HELD: The court analyzed the issues as follows: 1) a robbery committed by using violence, or threats of violence, towards a person is a serious personal injury offence as defined in s. 752(a) of the Criminal Code; 2) the court was satisfied beyond a reasonable doubt that the accused's offending history demonstrated a pattern of repetitive violent behaviour, of which the predicate offence formed a part, showing an inability to restrain his behaviour and a likelihood of causing injury or inflicting severe psychological damage on other persons. The accused's behaviour was also found to demonstrate a pattern of persistent aggressive behaviour, of which the predicate offence formed a part, showing a substantial degree of indifference respecting the reasonably foreseeable consequences to other persons of his behaviour. The Crown proved the requirement of ss. 753(1)(a)(i) and (ii) of the Criminal Code beyond a reasonable doubt; and 3) the accused continued to commit violent offences despite completing both mainstream and culturally appropriate programming targeted to his individual needs. The court was

not satisfied that there was a realistic expectation that any sentence other than an indeterminate sentence would adequately protect the public against the risk that the accused would commit a serious personal injury offence in the future. The accused was designated a dangerous offender and an indeterminate term of imprisonment was imposed on him. The court also made ancillary orders.

© The Law Society of Saskatchewan Libraries Back to top

Fontaine v Canada (Attorney General), 2017 SKQB 1

Gabrielson, January 3, 2017 (QB17004)

Aboriginal Law – Residential Schools Settlement Agreement – Interpretation
Civil Procedure – Queen's Bench Rules, Rule 11-23

In 2016 a Request for Direction (RFD) was brought on behalf of a law firm (ML) pursuant to the Indian Residential Schools Settlement Agreement (IRSSA), which is the pan-Canadian class action settlement addressing the legacy of Indian Residential Schools. ML sought an order that accounts it submitted to the Attorney General of Canada (Canada) be assessed pursuant to rule 11-23 of the Queen's Bench Rules and that Canada pay the amount within 30 days of the assessment. ML claimed legal fees of $321,644.04 plus interest. ML's claim for payment had five parts: 1) claim for fees pursuant to s. 13.02 of the IRSSA. ML originally claimed $10,992.40 pursuant to s. 13.02, but later amended its invoice to $22,476.56 arguing that the original invoice only dealt with one lawyer's work and did not include other lawyers' work; 2) claim for fees pursuant to s. 13.03 of the IRSSA. ML argued that their invoices totaling $158,766.49 for completion of the Settlement Agreement were payable, arguing that if fees claimed do not qualify under s. 13.03, then nothing does. ML did concede that the amount invoiced reflected fees for work performed by a lawyer after the Settlement Agreement was executed; 3) ML claimed $66,161.55 in respect of costs incurred as a result of executing the June 1, 2006 order. ML argued that the order required them to send notifications to potential IRSSA claimants informing them of the Order, and that it also required them to send the same IRSSA claimants a letter advising them of the settlement application. Further, ML said that pursuant to the order, Canada was obliged to bear those costs; 4) claim for fees pursuant to the December 15, 2006 Order. The order involved sending Opt-Out Notices to potential IRSSA claimants. ML invoiced Canada $74,239,44 pursuant to the order. ML argued

that charging a flat fee of $100 to each of its 660 clients was reasonable; and 5) a claim for interest. Initially ML claimed Canada should pay the same amount it charges its other clients, 18 percent per annum. ML later claimed that interest at the rate of 5 percent would be appropriate.
HELD: ML's five parts of the claim for payment were dealt with by the court as follows: 1) Canada admitted that the amount claimed by ML minus provincial sales tax was reasonable. The court held that ML did establish that the amount claimed was reasonable and was owed under the provision of the IRSSA. The amount of $21,534.56 was payable under s. 13.02 of the IRSSA; 2) the entries refer mainly to receiving and reviewing various items, not attending meetings where the IRSSA was negotiated. The court interpreted s. 13.03 to keep costs incurred "in respect of finalizing (the IRSSA)" at a modest level. The court found, on the evidence, that ML was not actively engaged in the negotiations, but submitted accounts for work that consisted almost entirely of receiving and reviewing documents. The court held that no amount was payable to ML under s. 13.03; 3) the court found that the June 1, 2006 order did create an obligation on ML to provide a letter of advice to each of its clients, but it did not create a concomitant obligation on Canada to pay ML for doing so. The court also found that $100 for each of the clients was excessive and unreasonable. The court determined that ML should only recover postage in the amount of $636.90; 4) the order did not require ML to send out the "Phase II Notices" to its 660 clients, it did so on a voluntary basis and without letting Canada know it was doing so. The court ordered Canada to pay ML postage in the amount of $726, because the court presumed that Canada saved that disbursement because it didn't have to send out the notifications; and 5) by the end of the submissions the parties agreed that 5 percent was a reasonable interest rate if the court determined interest to be payable. The court agreed that 5 percent interest was a reasonable amount, and that it should be payable from April 10, 2007, which was the date of ML's amended invoice seeking payment under s. 13.02. Interest on the postage amounts was ordered to only run from the date of the court's decision.

© The Law Society of Saskatchewan Libraries Back to top

Helberg v Proznick, 2017 SKQB 2

Mills, January 3, 2017 (QB17010)

Statutes – Interpretation – Local Government Election Regulations

The applicant brought an action pursuant to The Controverted Municipal Elections Act to set aside the election of the respondent as a member of the School Division. The basis of the application was that the respondent's nomination papers were not signed by qualified nominators. The applicant was also a candidate for the same subdivision in the election. Pursuant to s. 67(3)(f) of the Local Government Election Regulations (LGEA), the nomination must be signed by at least 10 voters in the ward. Six of the 10 nominators on the respondent's form did not reside in the ward she was running for. The respondent acknowledged the problem, but relied on s. 8 of the LGEA to allow the election to stand. The issue was whether the failure to have the proper nominators was a mistake in the use of a form or an inadvertent error or irregularity.
HELD: The court determined that s. 67(5) was very clear as to the requirements of the nominee. Section 67(6) requires that the returning officer not accept a nomination unless the provisions of ss. 67(3), requiring nominators to reside in the ward of the election, are met. The court concluded that the nomination of the respondent should never have been accepted as it was not in accordance with the LGEA, and therefore, her name should not have appeared on the ballot. The court determined that it was not a mere irregularity or mistake in the use of the form but an issue going to a pre-condition of a proper nomination for a candidate. The court declared the election of the respondent to be invalid. The court did not declare the applicant to be the elected member, even though she was the only properly nominated candidate, for two reasons: it would not be appropriate to declare her as elected when she clearly did not have the support of the majority of electors in the subdivision; and the respondent would have had the opportunity to submit new nomination forms if she had been advised of the original forms being rejected by the returning officer. The court did not award costs because the applicant did not add the School Board as a party to the proceedings to defend that election and the Board could have been required to pay costs.

© The Law Society of Saskatchewan Libraries Back to top

New South Wales, Australia (Chief Commissioner of State Revenue) v Babatunde, 2017 SKQB 3

Layh, January 4, 2017 (QB17011)

Civil Procedure – Jurisdiction – Territorial Competence
Statutes – Interpretation – Court Jurisdiction and Proceedings Transfer Act

The applicant, a Chief Commissioner of State Revenue for a foreign state, applied for orders that the respondent' claim be dismissed for lack of territorial competence or jurisdiction or, in the alternative, that if the court found it had territorial competence to hear the matter, it exercise its discretion and decline territorial competence. The respondent claimed for funds that he said the applicant promised to pay him pursuant to items of correspondence he said were executed by the applicant. The applicant argued that the letters presented by the respondent in reliance of his claim were forgeries. The total amount claimed by the respondent was $840 million. The respondent argued that since the applicant ran a website that permitted access to persons in other jurisdictions, it operated in multiple jurisdictions around the world. The applicant said that its website offered information and did not advertise or solicit any type of business.
HELD: The court found that the only real connection the respondent had to Saskatchewan was his residence in Saskatchewan, which is not one of the five qualifying conditions listed in s. 4(a) to (e) of The Court Jurisdiction and Proceedings Transfer Act. The court concluded that the mere accessibility of a website did not mean that the owner of the website was conducting business in a particular jurisdiction. The court contrasted the website in this case to the Google site in the Jack case. The court also concluded that, even if the applicant was found to be carrying on business in Saskatchewan, it would have exercised its discretion under s. 10 of the Act to decline jurisdiction. The applicant did not have any assets in Saskatchewan, so the respondent would not be able to enforce an order in Saskatchewan even if he were successful. The respondent's claim was dismissed for lack of territorial competence or jurisdiction.

© The Law Society of Saskatchewan Libraries Back to top

R v Meyers, 2017 SKQB 4

McMurtry, January 5, 2017 (QB17001)

Back to top

Criminal Law – Assault – Sexual Assault – Sentencing
Criminal Law – Assault – Uttering Threats to Cause Bodily Harm – Sentencing

The accused was convicted of sexual assault, contrary to s. 271 of the Criminal Code, and for uttering threats under s. 264.1(1)(a) of the Code (see: 2016 SKQB 413). The Crown sought a sentence of ten years for the sexual assault and five years for uttering. In the circumstances of this case, the accused should receive the

maximum sentence, and a proportional sentence would be similar to sentences for sexual assault causing bodily harm or aggravated sexual assault because of the violence involved. The defence argued that an appropriate sentence would be the 38 months of time served on remand, on the basis that it was the accused's first conviction for sexual assault and because the Court of Appeal had established three years as a "starting point" sentence for sexual assault. The accused was 42 years of age and had a criminal record that started when he was 23 consisting of 29 convictions, 12 of which were for violent offences and nine of them were for offences against a female or a romantic partner. He had offended violently against six different romantic partners, which the Crown submitted showed a long history of violently imposing his will on women despite the fact that this was his first conviction for sexual assault. In this case, the accused threatened to kill his partner and threatened her daughters with sexual assault. The victim was punched, choked and had lacerations to her genitals.
HELD: The accused was sentenced to five years less 38 months credit for time served. There were no mitigating factors. The court found that the case most closely resembled the circumstances in R v Gamble. The finding of bodily harm was not required by the charges although the court found that the complainant suffered physical and psychological injuries. The complainant's unwillingness to be truthful at trial was problematic for the sentencing. The accused was sentenced to a concurrent term of one-year for uttering. The threats were an aggravating factor of the sexual assault but did not warrant a consecutive sentence.

© The Law Society of Saskatchewan Libraries Back to top

R v Fyfe, 2017 SKQB 5

Danyliuk, January 9, 2017 (QB17012)

Criminal Law – Sentencing – Controlled Drugs and Substances Act – Trafficking – Fentanyl
Criminal Law – Sentencing – Pre-Sentence Report
Criminal Law – Sentencing – Sentencing Principles
Criminal Law – Sentencing – Sentencing Range

The accused pled guilty to two counts of trafficking in fentanyl and one count of breaching his release conditions. The accused sold fentanyl, which contributed to the death of a young man, and while he was on interim release he sold fentanyl again. The accused was a single 23-year-old without any dependents. He

appeared to have a good childhood. He had a grade 12 education and a number of previous jobs that were relatively menial. The accused began using marijuana at age 13 and began using fentanyl daily after graduation. He had no previous criminal record. The young man died as a result of drug overdose, with fentanyl being at the low end of reported fatalities. An expert provided a report that spoke to the increase in potential lethality when fentanyl is combined with other substances. Fentanyl was described by the expert as being 100 times more powerful than morphine. The issue for the court was the appropriate sentence for the accused, which involved consideration of several sub-issues: 1) what were the applicable general sentencing factors and principles; 2) what mitigating factors applied to the accused; 3) what aggravating factors applied to the accused; 4) what case law was of assistance; 5) should the sentences be consecutive or concurrent; 6) how should the totality principle be applied; 7) what was the appropriate sentencing range or starting point for trafficking in fentanyl; and 8) what was the appropriate sentence for the accused.

HELD: The issues were determined as follows: 1) a sentence must be proportionate to the gravity of the offence and the responsibility of the offender; 2) the accused pled guilty early in the process and he was young with no prior record. The court viewed the accused's classification as being a medium risk to re-offend as neither mitigating nor aggravating. The court accepted the small amount of the drug trafficked as a mitigating factor but it was not accorded much weight. The court found that the accused did express some remorse, but it was not a factor that the court placed a great deal of weight on; 3) the second trafficking offence was committed while the accused was on remand for the first offence, which the court found aggravating in that he committed an identical offence and sold the drug again despite the fact that a young man died in the first offence. The court concluded that the accused's involvement in drug trafficking was not incidental to his addiction or minor in nature, and the court, therefore, gave it some weight as an aggravating factor. Another aggravating factor was that the victim's life was lost leaving lasting effects on many people as a result (s. 718.2(a)(iii.1)). The court did not treat the accused's leaving a rehabilitation facility early as an aggravating factor because the court found that he left due to difficulties with his addiction. Another aggravating factor was that the accused was not a productive member of society; 4) there are very few cases dealing with fentanyl trafficking in Canada. According to Saskatchewan law, trafficking in hard or serious drugs will generally call for a jail sentence; 5) the parties agreed that the sentence for the breach charge should run concurrent to the sentences for trafficking. The court found that the two trafficking

charges had origins in two different events, sufficiently separated, to constitute separate transactions. The fact that the accused trafficked a second time while on bail for trafficking was also found to favour a consecutive sentence; 6) the totality principle would be applied after the appropriate sentence for each offence was determined; 7) the court concluded that a sentencing starting point should be two years. The court did not suggest an upper limit to establish a sentencing range; and 8) the court did not agree with the Crown that the accused did not have any prospects for rehabilitation. The primary sentencing principles applicable to the case were general and specific denunciation and deterrence, as well as protection of the public. The court did not find the starting point of two years to be appropriate in this case. A death was involved in the first offence and the second offence was committed while the accused was on bail for the first offence. The court said that the aggravating factors outweighed the mitigating factors in many respects. The court found that a global sentence of five years was appropriate. The accused was sentenced to two and a half years for each trafficking charge, the second to be served consecutive to the first. He was sentenced to 60 days for the breach charge, to be served concurrent to the trafficking charges. The court concluded that the totality principle did not necessitate a reduction in the sentence. The court found that the accused was detained under s. 524, so he was only entitled to remand credit on a 1:1 ratio. His net prison sentence was therefore four years and three months. The court also made ancillary orders.

© The Law Society of Saskatchewan Libraries Back to top

Hill v Famhill Investments Ltd., 2017 SKQB 6

Tholl, January 5, 2017 (QB17002)

Civil Procedure – Discontinuance – Costs
Civil Procedure – Queen's Bench Rules, Rule 11-1, Rule 13-30, Rule 13-33,

The plaintiff commenced an action against the defendant and others. The plaintiff had commenced similar actions against the defendant in 2005 in Alberta. The last of these actions had been dismissed by the Court of Appeal of Alberta and the plaintiff applied for leave to appeal to the Supreme Court. The defendant promptly applied to have the Saskatchewan action dismissed pursuant to Queen's Bench rule 3-14 or struck pursuant to Queen's Bench rule 7-9 as frivolous, vexatious and an abuse of process. The plaintiff's counsel asked the defendant to consent to

the adjournment of the application pending the results of the plaintiff's application for leave to appeal from the Alberta action. The defendant refused and proposed a special chambers date for the application to strike. The defendant's counsel, believing that the plaintiff would ask for an adjournment, prepared a brief in anticipation. Instead the plaintiff agreed to a special chambers date and a deadline for filing briefs of law. The plaintiff's counsel then offered to discontinue the entire action if the Supreme Court dismissed his application for leave to appeal if the defendant would agree that no costs would be payable by either party. The defendant rejected the offer, saying that it intended to proceed in chambers and was entitled to costs if there was a discontinuance. The plaintiff then filed a notice of discontinuance before the chambers hearing and did not inform or obtain the consent of the defendant in advance. In preparation for the hearing, the defendant's counsel had prepared a detailed brief of law. The defendant applied for an order to have costs fixed and judgment awarded for those costs. The plaintiff failed to reply and then acquired a new lawyer, who then requested an adjournment at the hearing of the application. The adjournment was granted. The plaintiff filed his affidavit and the defendant applied to strike substantial portions of the affidavit and filed a supplementary brief. In the hearing of the two applications, the defendant requested elevated costs of $114,870, representing one-half of its legal fees, plus the entirety of disbursement and tax on disbursements. The defendant also requested costs for the contested adjournment. The defendant requested costs in the amount of $15,000 to $25,000 for the application to strike portions of the affidavit.
HELD: The defendant's application to strike out portions of the plaintiff's affidavit and for an order for costs was granted. With respect to the affidavit, the court found that the plaintiff had repeated serious and harmful allegations that had already been found by the Alberta courts to be untrue. The allegations of failure to disclose, fraud, perjury and dishonesty were struck from the affidavit pursuant to Queen's Bench rule 13-33. Arguments and rhetoric in the affidavit were struck pursuant to rule 13-30. The court awarded elevated costs in the amount of $10,000 because of the allegations made in the affidavit. Regarding the discontinued action, the court reviewed the factors under Queen's Bench rule 11-1(4) and awarded costs in the amount requested. The court noted that there was no acceptable explanation as to why the plaintiff served the statement of claim and then discontinued it without a further event. It had also consented to the special chambers date knowing that it would result in the defendant preparing extensively and then discontinued without warning or explanation. The defendant was also awarded costs for the

adjournment in the amount of $1,500.

© The Law Society of Saskatchewan Libraries Back to top

Ackerman v Ackerman, 2017 SKQB 7

Megaw, January 5, 2017 (QB17003)

Family Law – Child Support – Determination of Income

The respondent applied for an order finding the petitioner in contempt of a Queen's Bench order made three months earlier. The order directed the petitioner to ensure that when the children of the marriage were in her care, that they attend hockey functions. For the party's eight-year-old son, the attendance was set at 90 percent and for their five-year-old daughter, attendance at 50 percent. The respondent was to receive two hours' notice if the petitioner could not take them to an event and if they missed any, she was to provide a detailed explanation. The respondent submitted that the petitioner had breached the order a number of times. She responded that it was difficult to get the children to hockey because they did not enjoy it and because they were involved in so many other activities. The petitioner applied to amend the order because it was not reasonably possible to comply with it. She also applied to the court to have income imputed to the respondent, arguing that he was diverting income to his new spouse through their shared real estate agent arrangement. In the past, the respondent's income was set at $122,380 for child support purposes in 2013 but now his income was only $42,700. The respondent submitted that income should be imputed to the petitioner because she could be working as an architectural technician and earning $72,000 per year and she was also earning income by selling crafts on a community website. The respondent failed to make an application regarding this matter.
HELD: The court dismissed the application to find the petitioner in contempt. Regarding the first order concerning hockey attendance, the court amended it by requiring each party to use their best effort to ensure that the children attend their extra-curricular activities, regardless of which parent selected the activity. The court could not find that the respondent and his wife were engaging in fraud to preclude the petitioner from receiving proper child support. Under s. 19 of the Guidelines though, it found that the respondent was capable of earning income of $100,000 and child support based on that amount would be payable retrospective to the previous January. The court could not impute income to the petitioner until a proper

application was before it.

© The Law Society of Saskatchewan Libraries Back to top

Risseeuw v Saskatchewan College of Psychologists, 2017 SKQB 8

Danyliuk, January 11, 2017 (QB17013)

Administrative Law – Duty of Fairness – Breach
Administrative Law – Judicial Review – Bias – Apprehension of Bias
Administrative Law – Judicial Review – Natural Justice/ Procedural Fairness
Administrative Law – Judicial Review – Standard of Review
Administrative Law – Judicial Review – Undue Delay
Professions and Occupations – Psychologists – Admission
Statute – Interpretation – Psychologists Act, 1997

The applicant applied for judicial review of the decision of the respondent, the council of a college of professionals. The applicant sought to quash the decision as well as for an order in the nature of mandamus compelling the respondent to approve the applicant's application for registration to practice in Saskatchewan, or at least to return the matter to be reconsidered. The applicant was registered to practice in Alberta from December 2001 to the appeal. She applied to be registered in Saskatchewan four times. In her most recent application, the applicant relied on amendments to The Psychologists Act, 1997 to bring it into compliance with the labour mobility provisions of the Agreement on Internal Trade. The college rejected her application for three reasons: she had not demonstrated competence; she lived and worked in Saskatchewan and had worked in Saskatchewan after 2004; and there were concerns about the applicant's ethics. The applicant held a provisional licence allowing her to practice in Saskatchewan for three years. The issues on the judicial review application were as follows: 1) did the delay in bringing the application disqualify the applicant from obtaining relief; 2) was the applicant denied natural justice and/or procedural fairness; 3) did the respondent exceed its jurisdiction by making its decision based on, or in light of, improper considerations, or by exercising an investigative function not authorized by its enabling statute; and 4) was the respondent's decision unreasonable as it lacked an evidentiary foundation.
HELD: The applicant's judicial review was dismissed. The court applied a hybrid standard of review on the issue of natural justice: a standard within the context of correctness, with a measure of deference afforded to the tribunal. The court

determined the appropriate standard to be that of reasonableness with respect to the third and fourth issues. The issues were analyzed as follows: 1) the delay from the decision to application was almost two years. After accepting that there is no pre-established limit for delay in Saskatchewan, the court determined that the delay did amount to undue delay. The court could not find anything in the material to explain the delay so the court went on to consider whether the delay would be likely to cause substantial hardship to or substantially prejudice the rights of any person, or would be detrimental to good administration. The court agreed with an earlier case that it would be extremely difficult for a professional regulator to exercise its proper functions where challenges to decisions could be made years later. The application should have reasonably been brought within six months of the date of the decision. The court dismissed the applicant's application for judicial review because of undue delay on her part in bringing the application before the court. The court nonetheless considered the other issues; 2) the applicant argued that she did not receive notice of the case she had to meet and did not receive an opportunity to be heard. The application was an admission process that was set by the respondent. The applicant was not entitled to all the procedures afforded parties in court cases. The Act and bylaws are public so the court was not convinced that the applicant would not know the test the she had to meet. Also, there was no right of personal appearance on an admission application. The court also noted that there were some inconsistencies between the applicant's affidavit and her argument. The applicant's application form was also incomplete. The court concluded that the record and evidence did not support the applicant's claim. The applicant seemed to argue that the new mobility provisions in the Act allowed her to be granted membership notwithstanding her continuing competency issues. The court did not find that correct or reasonable. The court found that the respondent did what the legislation required. The court also disagreed with the applicant that there was an apprehension of bias. The reasonable person would not conclude that there was any apprehension of bias; 3) the court disagreed with the applicant's submission that the respondent should not have considered other admission requirements because she met the new mobility requirements of the Act. The applicant argued that the respondent exceeded its jurisdiction by considering material from the previous judicial review case between the parties. The court found that knowledge was already within the control of the respondent, it was not an investigation to gain new knowledge. The respondent's decision was reasonable; and 4) the court concluded that the respondent's decision was reasonable.

© The Law Society of Saskatchewan Libraries Back to top

R v Knoblauch, 2017 SKQB 9

Elson, January 11, 2017 (QB17005)

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

The appellant appealed his conviction of driving while his blood alcohol content exceeded .08, contrary to ss. 253(1)(b) and 255(1) of the Criminal Code (see: 2016 SKPC 112). The defence made a Charter application at the trial, arguing that the appellant's s. 10(b) Charter rights had been infringed and requesting that the evidence be excluded pursuant to s. 24(2) of the Charter. A voir dire was held. The arresting officer was the only Crown witness. He testified that he had stopped the appellant's vehicle because he was not wearing a seatbelt. The officer formed a belief that the accused was impaired and made an ASD demand. The accused failed the test and the officer arrested him for impaired driving and advised him of his s. 10(b) Charter right to counsel. He read the words from a police issue card. The appellant said that he understood. The officer testified that the appellant had declined to call a lawyer at the roadside and again at the detachment, based on his notes made 10 days after the offence. The videotape taken at the time of roadside stop showed that the officer had not asked the appellant if he wished to call a lawyer. The trial judge concluded that this inaccuracy necessarily led to a second inaccuracy in the officer's testimony and found that the officer had not asked the question twice nor had the accused declined twice. The officer may have intended to ask but had been distracted by a radio transmission and forgot to complete the inquiry. However, on the video the officer was recorded as having said to the appellant that he would be taking him to the detachment where he would have an opportunity to talk to a lawyer. The trial judge found that there had been no Charter breach because this statement fulfilled the informational component of s. 10(b). The appellant understood his right to counsel and did not assert it. The issues were as follows: 1) whether in the circumstances of this case, had the officer's failure to ask whether the appellant wished to contact a lawyer constituted a breach of s. 10(b); and 2) if so, should the breath sample evidence be excluded under s. 24(2).
HELD: The appeal was allowed and the evidence excluded. The court found the following with respect to the issues: 1) the officer was obliged to ascertain whether the appellant wished to

exercise his right once the officer had informed him of his right to counsel. His failure to do so, coupled with the fact that the appellant did not consult counsel before providing the breath sample, constituted a breach of his s. 10(b) Charter right; and 2) after conducting a Grant analysis, the evidence should be excluded because the breach was serious, as the officer's failure to ascertain the appellant's wishes was a negligent disregard of a constitutional responsibility and then he falsely stated that he had asked the appellant twice of his wishes. The impact of the breach on the appellant was moderate. The administration of justice would be best served by excluding the evidence.

© The Law Society of Saskatchewan Libraries Back to top

Quilichini v Wilson's Greenhouse & Garden Centre Ltd., 2017 SKQB 10

Scherman, January 12, 2017 (QB17014)

Civil Procedure – Summary Judgment
Statutes – Interpretation – Electronic Information and Documents Act, Section 18
Torts – Electronic Waiver and Release
Torts – Negligence

The defendants applied, in a summary judgment application, for an order dismissing the action of the plaintiff. The defendants argued that the plaintiff had no claim enforceable at law because he executed an electronic form of waiver and release that was binding on him. The plaintiff claimed damages for bodily injury suffered while go-kart racing at the defendants' go-kart racing track. The plaintiff said that the throttle on the go-kart he was driving got stuck and caused him to crash into a concrete barrier resulting in his injury. He claimed for either a breach of contractual obligation owed to him to maintain the go-kart in proper safe and working condition or a negligent breach of that obligation. The defendants argued that the collision was caused by the plaintiff's fault, including driving at excessive speed. All participants at the go-kart track were obligated to click an "I agree" icon on the electronic waiver and release form before they could participate in a race.
HELD: Section 18 of The Electronic Information and Documents Act makes it clear that agreements to contractual terms can be made by touching or clicking on an appropriately designated icon or place on a computer screen. The court concluded that the plaintiff agreed to the terms in an electronic form after having had the opportunity to read the waiver and release on the screen. The release was in plain English and expressly provided a

discharge "from any and all claims, liabilities, demands and/or actions for damages (including legal costs) arising in any way from my participation in go-kart racing…" The court found that the exclusion clause applied to the circumstances and the plaintiff understood that the assumption of risk and waiver of claims set out in the waiver applied to his participation in go-kart races. The court held that the plaintiff intended to accept and assume responsibility when he clicked agreement to the waiver. The waiver's language was at least as encompassing as previous cases, and even though it did not include the word negligence, the court found it was clear the intent of the document was to release the defendant from all liabilities and claims, including those based on negligence. The applicant was found to have established entitlement to the summary judgment sought. The plaintiff's claim was dismissed.

© The Law Society of Saskatchewan Libraries Back to top

R v Smith, 2017 SKQB 11

Megaw, January 13, 2017 (QB17006)

Criminal Law – Motor Vehicle Offences – Impaired Driving

The appellant appealed his conviction for impaired operation of a motor vehicle contrary to s. 253(1)(a) of the Criminal Code. The grounds of appeal were that the trial judge failed to provide tangible reason for dismissing the evidence of the two defence witnesses and failed to provide reasons for resolving the discrepancies in the evidence of the police officers regarding the indicia of impairment allegedly exhibited by the appellant. The witnesses who testified on behalf of the defence were friends of the appellant who had been drinking with him in a bar on the night in question. They testified that they did not know how much the appellant had had to drink and answered that they thought he was capable of driving. Regarding the evidence of the police, the officers testified that at the time the appellant was at his vehicle, they noted that the appellant had glassy eyes, the smell of alcohol on his breath and slurred speech, and that he was confused, swayed while standing still and then had trouble walking. Another officer testified that when he saw the appellant at the police station he had not noticed that the appellant had any problems with balance or coordination and could not remember if his eyes were bloodshot.
HELD: The appeal was dismissed. The court found that the trial judge had not erred in the sufficiency of his reasons regarding the evidence of the defence witnesses. Neither of the witnesses

were asked whether the appellant had exhibited any signs of impairment, such as how he walked, whether his speech was slurred or if his eyes were bloodshot. Their evidence was of little assistance to the determination of indicia of impairment. The court found that there had been no discrepancy between the various officers' testimonies. Although their observations were not identical, that did not make them contradictory and the observations were made at different times.

© The Law Society of Saskatchewan Libraries Back to top

Jahnke v Johnson, 2017 SKQB 13

Schwann, January 13, 2017 (QB17007)

Business Corporations Act – Derivative Action
Business Corporations Act – Revival of Corporation

The applicant was a former shareholder of the numbered company respondent (Saskatchewan Ltd.). The other two respondents, C.J. and J.R., were directors of Saskatchewan Ltd. when the corporation was dissolved in 2015. The applicant applied pursuant to s. 232(1) of The Business Corporations Act for leave to commence a derivative action against proposed defendants. The applicant asserted that the proposed defendants committed a series of wrongdoings, including breach of fiduciary duties, conspiracy, and unjust enrichment, against Saskatchewan Ltd. Saskatchewan Ltd. was initially incorporated to acquire and develop lands from owners that were facing a pending foreclosure action. The applicant and four others were appointed as directors of Saskatchewan Ltd. The applicant and three others were each issued shares. The lands were purchased for $6.5 million. Company L. loaned Saskatchewan Ltd. $6.5 million secured by a mortgage against the lands and a quit claim with a registerable transfer held in escrow. C.J. was L.'s CFO at the time. No payments were made on the loan and the full amount became due and payable on November 6, 2013. The applicant said that constructive efforts were being made to sell part of the lands to third parties. The applicant said that T., a shareholder of Saskatchewan Ltd., approached him while in hospital for surgery and got him to transfer his shares in Saskatchewan Ltd. for $178 to T. and his holding company. The applicant also resigned as director and officer of Saskatchewan Ltd. The other shareholders indicated that T. came up with a plan for them to recoup some of their investment by selling their shares to T. and his holding company for the global figure of $1 million. T. became the sole shareholder of Saskatchewan Ltd. To

facilitate the purchase C.J. loaned T. and his holding company $1 million. In September 2014, T. transferred the shares in Saskatchewan Ltd. to BC Corporation, a corporation partially owned by C.J. Saskatchewan Ltd. was voluntarily dissolved in September 2015. The applicant applied to revive Saskatchewan Ltd. in August 2016. The preconditions and statutory prerequisites that have to be met by a person applying for leave to commence a derivative action under s. 232 are as follows: 1) was the applicant a "complainant" within the meaning of s. 231; 2) did the applicant give reasonable notice to the directors of the corporation of his or her intention to apply for leave to bring an action; 3) was the applicant acting in good faith; and 4) was it in the interests of the corporation that the application be brought. HELD: The preconditions and statutory prerequisites were analyzed as follows: 1) there was no doubt that the applicant had a nominal interest as former shareholder and director of Saskatchewan Ltd. The court also found that the applicant had a sufficient interest in the proposed action insofar as the value of his shares and the viability of Saskatchewan Ltd. could potentially be enhanced by the derivative action; 2) the court found that it was doubtful that notice to a dissolved corporation constituted notice to the directors of the corporation within the meaning of s. 232(2)(a) of the BCA. Further, the court found that even if the notice was valid it was not reasonable; 3) the court found that the proposed claim against T. was neither frivolous nor vexatious. It was possibly also neither frivolous nor vexatious with regard to C.J. The applicant had cause for concern. He received next to nothing for his shares and the other three shareholders shared $1 million. Further, he had reason to question why C.J. would personally loan T. $1 million to buy out the other shareholders of Saskatchewan Ltd. The court also did not find that the proposed action against BC Corporation was frivolous, even though it stood on tenuous legal footing; and 4) the applicant had to also establish a prima facie case that it was in the interests of the corporation for the action to be brought. The applicant did not have regard to the nearly $10 million debt Saskatchewan Ltd. had. Also, the applicant argued that the lands had a considerably higher value but there was no evidence that they did. The court also found that the lost opportunity to sell some of the lands to a third party alleged by the applicant was far from a mature opportunity. The court held that the proposed action was not in the interests of the corporation. The application was dismissed. The applicant was directed to take the steps required to "undo" the dissolution of Saskatchewan Ltd.

© The Law Society of Saskatchewan Libraries

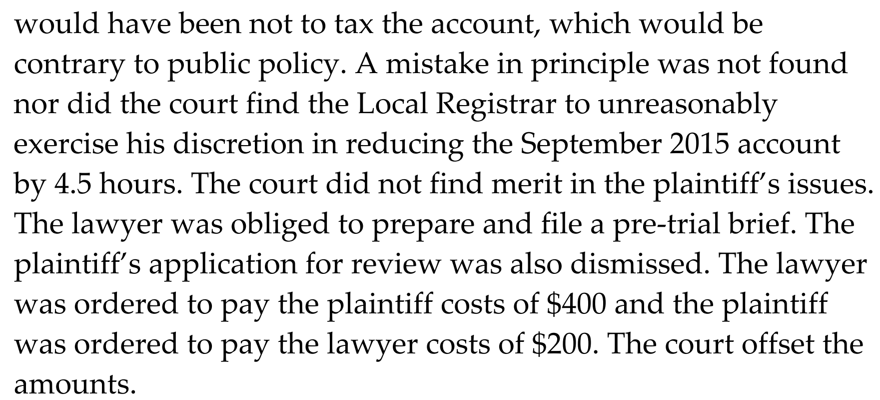
Back to top

O'Byrne v RBC Life Insurance Co., 2017 SKQB 16

Mills, January 16, 2017 (QB17032)

Civil Procedure – Appeal – Taxation of Accounts
Civil Procedure – Queen's Bench Rules, Rule 11-22, Rule 11-23

The court ordered that three of the lawyer's accounts be taxed pursuant to s. 67 of The Legal Profession Act. The plaintiff and his lawyer appealed the Local Registrar's decision. The Registrar concluded that the October 2014 account in the amount of $4,320 plus taxes was fair and reasonable. The $400 per hour charged in the July 13, 2016 account was not challenged, but the 34.9 hours billed were reduced by five do to an addition error. The time spent on research for the pre-trial brief was found to be excessive, so it was reduced by six hours. The lawyer indicated that the Local Registrar exceeded his jurisdiction by speculating how long a brief should take or whether or not research time and preparation time was excessive. It was alleged that the assessor did not properly utilize the factors in rule 2.06(1) of the Code of Professional Conduct in determining what was fair and reasonable. The September 2015 account totaled $28,920 in legal fees for 72.3 hours of work. The lawyer had originally applied a courtesy discount to the account, but removed it when the plaintiff applied to tax the accounts. The Local Registrar did not allow the lawyer to withdraw the first bill. The lawyer said that he could substitute the accounts because he had submitted a conditional bill. The Local Registrar also reduced the account by 4.5 hours, given the nature of the claim, the experience of the lawyer, and communication with the plaintiff that was found to be excessive. The plaintiff's application focused on two issues: 1) the Local Registrar should have considered the lawyer's evidence that he would have done the same amount of work even if he had been instructed not to and even if it resulted in him not being paid; and 2) the Local Registrar should have given effect to an email from the plaintiff to the lawyer advising him not to pursue a claim the plaintiff did not think was achievable. HELD: The court found that the Local Registrar was supposed to decide whether or not research time and preparation was excessive to ultimately decide whether the account was fair and reasonable. Considerable deference must be shown to the Local Registrar as an assessment officer when it appears that he/she is alive to the legal and factual issues associated with the assessment. The court found that to be the case. The Local Registrar did not make a mistake in principle or a fail to exercise discretion in a reasonable manner with respect to the July 2016 account. The court did not accept that the September 2015 account was conditional; there was not any condition in respect of the account. The only condition that there could have been



would have been not to tax the account, which would be contrary to public policy. A mistake in principle was not found nor did the court find the Local Registrar to unreasonably exercise his discretion in reducing the September 2015 account by 4.5 hours. The court did not find merit in the plaintiff's issues. The lawyer was obliged to prepare and file a pre-trial brief. The plaintiff's application for review was also dismissed. The lawyer was ordered to pay the plaintiff costs of $400 and the plaintiff was ordered to pay the lawyer costs of $200. The court offset the amounts.

© The Law Society of Saskatchewan Libraries

Back to top