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 21, No. 10 **May 15, 2019**

Subject Index

B.J.M. v R, 2018 SKQB 73

Chow, March 15, 2019 (QB19087)

Criminal Law – Appeal – Conviction – Assault with a Weapon
Criminal Law – Criminal Code, Section 606
Criminal Law – Guilty Plea
Criminal Law – Sentencing – Joint Submission
Criminal Law – Youth Criminal Justice Act, Section 36, Section 140

The appellant pled guilty to a charge of assault with a weapon, contrary to s. 267(a) of the Criminal Code. A joint submission was accepted by the sentencing judge. The appellant was sentenced to 80 days' secure custody, followed by 40 days to be supervised in the community. The appellant appealed his conviction and sentence the next day. He abandoned the appeal of his sentence. The appellant was represented by counsel when he entered the guilty plea and the joint submission. The Crown argued that the appellant had been represented by experienced counsel at the time of plea and sentencing and further that he did not demonstrate for the appeal court that his plea was uninformed, equivocal, or involuntary. The appellant was a young person within the meaning of the Youth Criminal Justice Act (YCJA).
HELD: Section 140 of the YCJA confirms that s. 606 of the Criminal Code applies to young persons. Section 606 outlines the procedure for accepting pleas by the court. Additional procedural protections are also applied when the accused is a young person. Section 36 of the YCJA requires the court to be satisfied that the facts of the matter support the charge before a guilty plea is accepted. In T.L., the appeal court found the sentencing judge had made an error of law by not first considering and applying s. 36 of the YCJA in

circumstances similar to those of the present case. The appellant argued that he may have been operating under the influence of an officially-induced error or acting in self-defence and that the judge was obliged to consider those potential defences. He argued that because those defences were not considered, the judge committed an error of law. The appeal court disagreed. In T.L., the appeal court found that the facts on record were not sufficient to prove the intent required for the conviction. T.L. was not interpreted to mean that a judge has a positive obligation to explicitly reference s. 36 when accepting a guilty plea. Neither did T.L. require a judge to identify and eliminate potential, hypothetical defences that were not raised or reasonably apparent. The appeal court found that the sentencing judge considered the facts of the case indirectly and satisfied herself that they supported the essential elements of the offence. The judge complied with s. 36 and committed no error of law.

 Back to top

Hrycyna v Hood, 2019 SKCA 30

Ottenbreit Whitmore Leurer, March 28, 2019 (CA19029)

Power of Attorney – Capacity
Statutes – Interpretation – Adult Guardianship and Co-decision-making Act, Section 13, Section 14
Statutes – Interpretation – Court of Appeal Act, 2000, Section 12
Civil Procedure – Costs – Solicitor-Client Costs

The appellant appealed the decision of a Queen's Bench judge in chambers that granted the application of his sister, the respondent A.H., to be appointed personal guardian for their mother, V.H., under The Adult Guardianship and Co-decision-making Act (AGCA). The court found that the Power of Attorney (POA) granted by V.H. to A.H. in 2010 remained in effect and that V.H. lacked the capacity to revoke such a POA or to grant the POA given by V.H. to the appellant in 2017. The appellant also appealed the order of costs made against him in the amount of $10,000 (see: 2018 SKQB 63). As a result of an earlier decision of the Court of Appeal, V.H. was represented by her own counsel in this appeal. She appealed the judge's appointment of A.H. as her personal guardian (see: 2018 SKCA 49). The issues raised by the appellant were whether the chambers judge erred: 1) by excluding the medical evidence of the 2017 assessment of V.H. by a physician indicating that she had the capacity to grant him POA; 2) in determining the time at which capacity must be assessed as well as the extent of the capacity necessary to execute a POA. The physician's evidence submitted by the appellant was that V.H. had capacity when she executed the 2017 POA; 3) in awarding solicitor-client costs. The appellant argued that the judge wrongly used the appellant's pre-litigation conduct rather than his conduct in this litigation.

First Aberdeen Properties Ltd. v Loblaws Inc.

Hrycyna v Hood

Ituna Investment LP v Industrial Alliance Insurance and Financial Services Inc.

Kals v Dhillon

Mabee v Siemens Canada Ltd.

New Discovery Lines Canada Ltd. v Hopkins Transportation Inc.

Paradon v Ratzlaff

R v Carrier Forest Products Ltd.

R v Hansen

Royal Bank of Canada v Gaudet

Saskatchewan Government Insurance v Gardipy

Siemens v Baker

Sir v SPCA Prince Albert

T.M.W. v A.B.

Yara Belle Plaine Inc. v Ingersoll-Rand Co.

HELD: The appellant's appeal was dismissed. The appeal by V.H. was allowed. The court found with respect to the issues that: 1) the chambers judge had not erred in excluding the letter opinion of the physician. The appellant's evidence was submitted in response to the respondent's application to have the 2010 POA declared valid pursuant to an application under Queen's Bench rule 13-30(1). That rule stipulates the evidence in an affidavit on such an application must be confined to facts within the personal knowledge of the affiant. Thus, the letter providing the medical opinion, attached to the appellant's affidavit, was inadmissible hearsay. The appellant should have submitted an affidavit from the physician in a form admissible under the Rules; 2) the finding with respect to the first issue was determinative of this issue. However, even if the physician's evidence was admissible, the chambers judge could have given it very little weight as it was unsupported by testing or investigation. Therefore, the admissible evidence submitted by the respondent, the expert witnesses who tested V.H. in 2017 and deposed that she was suffering from advanced dementia, informed the judge's analysis of her legal capacity. The judge correctly stated that the capacity to execute a document must be assessed proximate to the time of its execution but found that V.H. did not have capacity to either grant or revoke a POA in 2017 and that the capacity required under The Powers of Attorney Act is more expansive than an understanding of the nature and effect of the document. The judge was not satisfied either with the sufficiency of the evidence submitted by the appellant from a lawyer who had attended V.H. when she executed the 2017 POA and attested that she had capacity; 3) the chambers judge had not erred in making the award of costs. The court expressed concern as to whether the judge had in fact awarded solicitor-client costs, but on the premise that he had, the court found that pre-litigation conduct can ground an award under the fourth branch of the factors set out in Siemens v Bawolin. The judge properly exercised his discretion when he made the award on the basis of the appellant's pre-litigation conduct. With respect to the appeal on behalf of V.H., the court found that, because the chambers judge had not performed the necessary analysis required by s. 13 and s. 14 of the AGCA, it had the jurisdiction to make any decision that could have been made by him under s. 12(1)(d) of The Court of Appeal Act, 2000. In this case, it would cause prejudice to V.H. to remit the matter back to the Court of Queen's Bench. V.H.'s need for a personal guardian was established by the evidence before the chambers judge. The court ordered that the respondent be appointed as V.H.'s personal guardian and that there would be no limitations on her authority.

 Back to top

101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority), 2019 SKCA 31

Jackson Whitmore Ryan-Froslie, March 29, 2019 (CA19030)

Administrative Law – Disclosure Requirements
Administrative Law – Judicial Review – Bias – Apprehension of Bias
Administrative Law – Judicial Review – Procedural Fairness
Civil Procedure – Appeal – Fresh Evidence
Statutes – Interpretation – Freedom of Information and Protection of Privacy Act
Statutes – Interpretation – Securities Act

In 2014, the personal appellant as well as the corporate appellants, which the personal appellant was the sole director and officer of, were found to have breached ss. 27(2), 58(1), 44.1(2), 55.1(b), and 135.7(1) and (2) of the Securities Act (Merits Decision). The hearing panel imposed the following sanctions: an administrative penalty of $100,000; $100,000 to each person or company that suffered financial loss as a result of their conduct; costs of $46,638; and the personal appellant was prohibited from becoming or acting as a registrant, an investment fund manager or a promotor pursuant to s. 134(1)(h.1). The appellants appealed the merits decision as well as the sanctions decision pursuant to s. 11 of the Act. The Financial and Consumer Affairs Authority for Saskatchewan (FCAA) first began investigating one of the companies in 2008. The merits hearing was scheduled to commence on December 5, 2012. The appellants requested an adjournment or stay of proceedings, both of which were denied. The appellants did not participate in the merits hearing until after FCAA had closed its case. The appellants made many unsuccessful applications throughout. The issues on appeal were: 1) whether the appellants were denied procedural fairness; 2) whether the hearing panel applied the proper standard of proof in arriving at its decision; 3) whether the appellants demonstrated bias or a reasonable apprehension of bias on the part of the chair and panel; 4) whether there was witness tampering; and 5) the sanctions appeal. The appellants also applied for leave to adduce fresh evidence.
HELD: The appeals were dismissed. Section 11 provides for the introduction of fresh evidence in some circumstances. The court reviewed each type of document that the appellants wanted to adduce as fresh evidence. The application was denied. The issues on appeal were determined as follows: 1) the court determined that the Baker factors weighed in favour of a high degree of procedural fairness in the case. The appellants argued that the hearings were not procedurally fair for 14 reasons. One of the reasons given for unfairness was that the FCAA had not provided full disclosure. The merits hearing closely resembled a trial and the consequences for the appellants were severe, so the court found that a high degree of procedural fairness was warranted. Full disclosure was required. The panel concluded that the witnesses had made full disclosure. There was no identifiable error with the panel's finding. The panel did deny the appellants procedural fairness by setting the initial hearing date without ensuring disclosure had been made. The hearing did not occur on that date; rather, it was adjourned for

disclosure, so the court concluded that the appellants did not suffer any prejudice as a result of the panel's error. The appeal court also did not find that there was procedural unfairness for any of the other reasons asserted by the appellants; 2) the panel applied a balance of probabilities standard in the merits decision, which was the right standard. The panel did require the appellants to establish that full disclosure had not been made on their application rather than requiring FCAA to show that full disclosure had been made. The panel erred; however, FCAA did provide evidence that full disclosure had been made; 3) the appellants argued that the chair of the panel had an ongoing relationship with the law firm that had represented one of the appellants' investors and that investor testified on behalf of FCAA. The appellants argued the result was bias or reasonable apprehension of bias. There was no evidence of actual bias. The court concluded, for a number of reasons, that the factual context of the case would not raise a reasonable apprehension of bias in the mind of an informed person viewing the matter realistically and practically and having thought the matter through. There was also no reasonable apprehension of bias with respect to other members of the panel; and 4) the appellants did not cross-examine any witnesses, which was their decision. The panel did not err; and 5) the court did not find any error of law with respect to the sanctions imposed. There were no mitigating circumstances noted by the panel, and the appellants did not argue otherwise. The costs ordered by the panel were significantly lower than those sought by the FCAA. The panel had discretion; such discretion was entitled to deference by the court. The panel decided not to order the full costs so as not to negatively affect potential reimbursement to investors. The court did not find an error of law.

 Back to top

Saskatchewan Government Insurance v Gardipy, 2019 SKCA 32

Jackson Ottenbreit Schwann, April 5, 2019 (CA19031)

Administrative Law – Judicial Review – Automobile Injury Appeal Commission
Automobile Accident Insurance Act – Appeal – Loss of Studies – Post-Secondary
Automobile Accident Insurance Act – Appeal – Costs – Solicitor-Client Costs
Statutes – Interpretation – Automobile Accident Insurance Act
Statutes – Interpretation – Education Act, 1995

The Automobile Injury Appeal Commission (commission) agreed with the respondent that she was entitled to a loss of studies benefit under s. 121 of The Automobile Accident Insurance Act (AAIA) as a post-secondary student. The appellant insurance company appealed

the decision arguing the loss of studies benefit should have been calculated according to secondary level studies. The respondent cross-appealed the decision of the commission fixing her costs at $2,500. At the time of the accident, the respondent was 48 and a full-time student in Level 2 Adult Basic Education at Northwest Regional College (college). The college was administered pursuant to The Regional Colleges Act, not The Education Act, 1995. The commission referenced the Ballantyne case and found that if an ambiguity existed in the AAIA, it should be resolved in the claimant's favour. The appellant's issue was whether the commission erred by failing to properly interpret and apply s. 121 of the AAIA in finding that the respondent was a student studying at a post-secondary level. The issue on the respondent's cross-appeal was whether the commission erred in its interpretation of s. 193(11) and (12) of the AAIA and in making the award of costs it did. HELD: The appeals were dismissed. Section 121 entitles students to a loss of studies benefit determined based on whether the student studies at an elementary, secondary, or post-secondary level. The secondary level definition in the AAIA refers to the ranking and scaling of grades as set forth in The Education Act, 1995. Post-secondary is not defined in the AAIA. The court found that the lack of definition suggested that the definition of level as it related to post-secondary was not necessarily as restrictive as the definition of level in elementary and secondary. Section 100(i) of the AAIA defines a post-secondary institution as an educational institution not administered pursuant to The Education Act, 1995. The court assumed that post-secondary level programs would be offered at post-secondary institutions. There are a number of Acts that govern delivery of education at post-secondary institutions. The Post-Secondary Education and Skills Training Act deals with regional colleges. The education and programming under that Act is not congruent with that provided by The Education Act, 1995. To be eligible to take adult basic education, the student must be at least 18 years old and have taken some education at the primary or secondary level; adult basic education is post attendance at such a school. The court concluded that adult basic education is clearly a subset of post-secondary education offered by a post-secondary institution. The court then continued to determine the meaning of "post-secondary level" in s. 121. Post-secondary studies are not tied to programs and studies under The Education Act, 1995 and they are not taught at educational institutions administered by The Education Act, 1995. The appellant argued that the purpose of adult basic education in s. 35.1 of The Training Programs Regulations took it out of the realm of post-secondary education. The Regulations say the purpose is to assist adults in "furthering their education at the primary or secondary education level". The commission had numerous concerns with the appellant's approach: the Regulations were not made pursuant to the AAIA; the section of the Regulations was aspirational only; "primary education level" as used in the Regulations is not in the AAIA or the Education Act, 1995; implicit in the submission is that the content of the course is determinative,

but content at the post-secondary level is not defined like it is for elementary and secondary levels. The content of the respondent's course was not restricted to studies at the secondary level. The court concluded that the adult basic education program that the respondent was enrolled in was at the post-secondary level. The commission did not err. The court then dealt with the respondent's cross-appeal. The respondent argued that ss. 193(11) and s 193(12), read in the context of s. 171, required the commission to award actual costs or solicitor-client costs. The court found that s. 171 only placed an obligation on the appellant to ensure that the benefits of the AAIA flow to the claimant: it does not deal with costs. Section 193(11) was found to allow for reimbursement in the manner of normal court costs. The court looked to Speir and found that the commission had the power to award solicitor-client costs or party-party costs. The wording in the AAIA only reinforced that successful claimants should receive costs. There is no duty to award solicitor-client costs. The respondents' cross-appeal was dismissed.

 Back to top

Canadian National Railway Co. v SSAB Alabama Inc., 2019 SKCA 33

Schwann, April 4, 2019 (CA19032)

Civil Procedure – Application – Removal of Lawyer – Conflict
Civil Procedure – Court of Appeal – Application in Chambers
Statutes – Interpretation – Court of Appeal Act, 2000, Section 20(1)

The proposed respondent applied to have counsel for the proposed appellants removed. The proposed appellants were three corporations. One of the corporations, which was based in Alabama, had an order of steel products to be delivered to Alberta. The proposed respondent was to deliver the steel. The proposed respondent indicated that the steel plates slid off the flatbed and caused the train to derail, resulting in over $12 million in losses to the proposed respondent. The proposed respondent commenced an action arguing that the steel product had been improperly loaded by the proposed appellants and the improper loading caused the derailment. The proposed appellants were unsuccessful on an application arguing that the Saskatchewan court did not have territorial competence pursuant to The Court Jurisdiction and Proceedings Transfer Act. They applied for leave to appeal that chambers decision. The lawyer whom the proposed respondent wanted removed was first shown as counsel of record on the leave application. The lawyer had a long connection with the proposed respondents, having been their in-house general counsel from 1983 to 1997. He continued to represent them frequently in his private practice from 1998 to 2007. The relationship was terminated by the proposed respondent in late 2007. In 2008, the lawyer established a

solo practice, focusing on transportation and railway law. He represented clients adverse in interest to the proposed respondent. The proposed respondent had not objected to the lawyer's representation on other matters. The lawyer did, however, represent shortline railways that were contractually obligated to assume the defence of any action on behalf of the proposed respondent and to indemnify and save it harmless. The shortline railways leased tracks from the proposed respondent. There were five ongoing actions wherein the lawyer represented shortline railways. Those actions were in no way related to the present action. The proposed respondent argued that the lawyer was in a solicitor-client relationship with it because of the shortline railway actions in Ontario. The issues were as follows: 1) was the lawyer in a solicitor-client relationship with the proposed respondent because of his involvement in the Ontario actions; 2) did the bright line rule apply to the lawyer's circumstance, and, if so, did he breach it; and 3) was the lawyer's removal as counsel of record in the action for the proposed appellants the appropriate remedy?
HELD: The application was denied. The court did not find it necessary to decide the first two issues. The court proceeded on the assumption that they were resolved in favour of the proposed respondent. The only question left was that of remedy. The appeal court had to consider whether a single judge of the Court of Appeal could grant the relief sought; the relief, if granted, would bind proceedings in the Court of Queen's Bench. This application was a first instance application to the Court of Appeal, not an appeal from a lower court's decision. The application was found to be premature. It was aimed at concerns with the lawyer's duty of loyalty in the Ontario actions, so it had been brought in the wrong court. The appeal court had not yet ruled on the proposed appellants' leave application. If leave were granted, the proposed respondent would have to bring its action in Alabama and presumably discontinue the Saskatchewan action. The relief sought was not incidental to an appeal because until leave is granted, there is no appeal. The scope of the relief sought by the proposed respondent, however, was beyond the jurisdiction of s. 20(1), since it was far more than incidental to a matter before this court. The order would remove the lawyer from the Queen's Bench action altogether. There were no exceptional circumstances requiring the appeal court judge to exercise the powers of a Queen's Bench judge. The appeal court also determined that its inherent jurisdiction to control its own processes did not provide jurisdictional support because of the broad reach of the relief sought. The court did not order that the lawyer be removed from the leave to appeal application. The proposed respondent's application was dismissed. If leave to appeal were granted, the proposed respondent had leave to renew its application for the lawyer to be disqualified in relation to his participation in the appeal proper. The proposed appellants were awarded costs in the usual manner.

 Back to top

New Discovery Lines Canada Ltd. v Hopkins Transportation Inc., 2019 SKPC 20

Demong, March 29, 2019 (PC19016)

Contract Law – Breach – Waiver

The plaintiff, a trucking services company, brought an action against the defendant, a transportation goods brokerage firm, for $6,800 owing to it pursuant to a contract between them. The defendant advertised to find a freight hauling company to attend at Airdrie, Alberta to load equipment onto a flatbed trailer for transport to Ontario. The plaintiff contacted the defendant to quote on the job and was informed that because of the weight and size of the shipment, special loading arrangements were required to be made and that the costs included the hiring of a crane and loading crew. The parties agreed that the plaintiff would have a tractor and flatbed trailer onsite to have the equipment loaded at 8:00 am. The plaintiff advised the defendant on the day in question that its driver would not arrive until 12:00 pm. The loading crew waited but the driver did not arrive. The defendant was then told by the plaintiff that the driver would be there at 3:00, but when he did not appear, the crane and loading crew left for the day. After the driver arrived after 6:00 pm, the parties agreed that the driver would overnight at the loading site and the defendant testified that he agreed to pay $300 to compensate the driver for his time, but only because he had no recourse. The plaintiff delivered its invoice. The defendant's client passed on the costs it had incurred for waiting time for the crane and loading crew to the defendant. As a result, it then advised the plaintiff that it would not pay the invoice because it was not being paid its fee by its client. In its reply to the plaintiff's claim, the defendant stated the plaintiff had breached two essential terms of the contract: failing to attend at the agreed-upon time and failure to properly tarp the equipment. Because it had to pay its client the sum of $7,900, it sought to set off this amount against the plaintiff's claim. The plaintiff argued that the defendant had waived the requirement that performance be completed at the stipulated time by successively agreeing to loading at later times.
HELD: The plaintiff's claim was dismissed. Judgment was given for the defendant in its claim for set-off. The court found that the evidence was insufficient to prove the defendant had made an unequivocal and conscious decision to abandon its rights.

 Back to top

Kals v Dhillon, 2019 SKPC 25

Scott, April 10, 2019 (PC19017)

Contract Law – Breach

The plaintiff claimed the balance owing on a loan that he had allegedly made to the defendants. They acknowledged that the plaintiff transferred $12,000 to their bank account in September 2016, but denied that the funds were a loan, claiming that the money was a gift. They relied upon a TD Canada Trust "gift letter" signed by the plaintiff purporting to give them the sum in relation to their purchase of a house. The plaintiff said that the defendants had asked him to help them to purchase the house and that after he had made the loan, they called him to come to the bank because it was concerned about how they had acquired the money. In order to satisfy the bank, the defendants asked him to sign a document that would establish that he had given them funds before approving their mortgage. The plaintiff was in a rush, signed the document without reading it, and did not speak to any bank official. The defendants counterclaimed in the action and alleged that two months after the defendants had acquired their house, the plaintiff contacted them and asked them to loan him $6,000 which they did. As it remained unpaid, the defendants brought a counterclaim for that amount against the plaintiff. The plaintiff agreed that the $6,000 was transferred to him by the defendants but asserted that it was a partial repayment of his loan to them.
HELD: Judgment was given for the plaintiff in the amount of $6,000. The court did not find the defendant who testified to be credible. Although not pled by the self-represented plaintiff, the court found that the defence of non est factum was available to him and that the defendants could not rely upon the gift letter because they had misled him about its true nature. The court dismissed the defendants' counterclaim, concluding on the basis of probabilities that they had repaid $6,000 to the plaintiff. Costs of $600 were awarded against the defendants pursuant to s. 36(3)(e) of The Small Claims Act, 2016 and s. 6(3) of The Small Claims Regulations, 2017 because of their untruthful testimony.

 Back to top

Ituna Investment LP v Industrial Alliance Insurance and Financial Services Inc., 2019 SKQB 75

Scherman, March 15, 2019 (QB19088)

Contract Law – Interpretation
Insurance – Contract – Interpretation
Statutes – Interpretation – Saskatchewan Insurance (Licence Condition) Amendment Regulations, 2019

The applicant requested the court to make declarations regarding a contract between it and the respondent that would interpret the contract as having distinct life insurance and investment

entitlements and that it was entitled to have premiums deposited into a specific account in such amounts as it chose with selected investment options as provided in the contract. Among the investment options were a 10-year GIC-type investment that would pay interest at rates higher than those available in other investments. The applicant, a Saskatchewan limited partnership, was created for the purpose of acquiring and holding securities and other financial assets. In 2009, it acquired this contract, a universal life insurance policy, so that it could make use of the investment features. The original policy had been issued in 1999 by a subsidiary of the respondent, Industrial Alliance Insurance (IA), to an individual insured. IA received the assets of its subsidiary and began administering the policy in 2005. The applicant substituted another individual as the life insured in 2011 and provided notice of the assignment to IA, which it accepted. The applicant requested IA to modify the investment allocations within the various accounts to be 100 percent to the 10-year term guaranteed interest account. From 2009 to 2015, IA complied with the applicant's allocation instructions and the applicant made premium contributions in varying large amounts. Due to the allocation to what the policy described as "the express account" and invested at 4.5 percent, the total value of the account was over $2,500,000 by 2015. IA notified the applicant that year that it was no longer entitled to allocate premiums to the 10-year guaranteed interest account but would be confined to the one-year guaranteed interest in the express account, based upon its interpretation of a term in the contract. IA continued to accept premiums from the applicant until March 2016, when it advised that the contract was subject to an audit and no further premiums would be accepted. IA's law firm notified the applicant in September 2016 that the current balance of the express account exceeded the permitted premium amount under the policy and that IA would refund the excess amount and would not accept any further premiums from the applicant. It then made this application and sought, amongst other declarations, that there be no clause in the contract that would prevent it from contributing premiums for the purpose of obtaining the rates of return set out in it. IA opposed the declarations and took the position that the universal life insurance policy was never intended to permit the insured to access distinct and stand-alone investment options unconnected to the core life insurance purpose of the contract, and investment options were limited to those within the exempt policy criteria under the Income Tax Act. Preliminary to the hearing on the merits, both parties applied to strike major portions of each other's original, reply and rebuttal affidavit evidence as inadmissible because it was not relevant to a material issue in the case, because it was opinion evidence or evidence as to the subjective intention or understanding of a contract, and on other bases. In addition, IA and other insurance companies involved in similar proceedings with insureds argued that the recent coming into force of The Saskatchewan Insurance (Licence Condition) Amendment Regulations, 2019 under s. 467 of The Saskatchewan Insurance Act made the various applications by

the insured for declaratory relief moot and they should be dismissed.
HELD: The application was dismissed. The court found that the purpose of the contract was to provide life insurance and investment opportunities within the accrual tax exempt opportunities permitted by the Income Tax Act, not investment opportunities unrelated to the fundamental life insurance purpose of the contract. The subject contract did not obligate IA to accept payments from the applicant to access express account investment opportunities where those payments did not have the essential character of being premiums as understood in the context of the life insurance industry. As the court classified the contract as being both of a standard form variety and of life insurance, it interpreted it in accordance with the principles set out by the Supreme Court in Ledcor and Sabean. The court ascertained the purpose of the contract by finding as relevant: its language; the legislation applicable to life insurance companies; the nature of the relationship created between the original insurer who purchased the life insurance policy; and that the life insurance industry was the market in question. In this context, the court interpreted the word "premiums" to be understood by the ordinary insured as monies to be paid to the insurer that would not include unlimited investment opportunities and that the purpose of the express account was to hold excess premiums to maintain the tax-exempt status of the policy. Respecting the preliminary applications to strike affidavit evidence, the court left the matter until it had determined how it would interpret the contract. It then reviewed each affidavit in light of the permissible context to be considered when interpreting standard form contracts and on the basis of relevance and other factors and struck the entire contents or portions of each of them accordingly. The court disposed of the issue of the effect of the recent regulation by finding that it was not applicable to the type of insurance contract in this case, it was not declaratory in nature and had only prospective effect.

 Back to top

T.M.W. v A.B., 2019 SKQB 81

Wilson, March 20, 2019 (QB19070)

Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Children's Law Act
Family Law – Custody and Access – Person of Sufficient Interest – Non-relative
Family Law – Custody and Access – Shared Parenting
Family Law – Custody and Access – Sole Custody

The petitioner had a daughter in 2014. The respondents, A. and M., were the caregivers of the child from 2014 to the end of June 2017. In

June 2017, the court made an interim order that the petitioner and respondents parent the child in a shared parenting arrangement, one week on, one week off. Both parties sought sole custody of the child. The petitioner signed a handwritten document on October 5, 2014 giving F.P. full custody of the child. The respondents began assisting F.P. with the child's care and eventually had her in their full-time care. They were told by F.P. that they could adopt the child. The petitioner never signed a consent to an adoption, and she indicated that she never consented to it verbally. In March 2016, the chambers judge directed the parties to an expedited pre-trial. The interim order indicated that the petitioner was the legal custodian of the child and the matter of person of sufficient interest (PSI) was directed to pre-trial or trial, if necessary. The child was to remain in the primary de facto care of the respondents. The petitioner was to care for the child two overnights per week after a few weeks. The parties attended a pre-trial conference on May 30, 2016 but the matters of custody were not resolved. A trial date was set for June 2017 but was adjourned at the request of the respondents. At that time, the petitioner's time with the child was increased to the shared parenting, one week on, one week off schedule. The biological father, J., began seeing the child in late 2017 and he cared for her two overnights while she was in the petitioner's care. The issues were: 1) whether the caregivers were persons of sufficient interest with respect to the child; 2) if yes, what custodial arrangement would be in the best interests of the child; and 3) in the event sole custody should be granted to one of the parties, what, if any, access should be provided to the non-custodial party?

HELD: The issues were determined as follows: 1) the respondents were PSIs with the ability to apply for custody of the child pursuant to s. 6 of The Children's Law Act, 1997. F.P. acknowledged that she agreed to the respondents having the child in their care without the consent of the petitioner. F.P. also verbally offered that the respondents adopt the child, which was found to distinguish the case from previous decisions regarding non-related persons being PSIs. The petitioner also appeared to acquiesce to the respondents' care of the child from November 2014 to June 2015; and 2) the court considered the factors in s. 8 of the Act: a) the personality, character, and emotional needs of the child. She did not have any special needs. There was indication from various witnesses that the child was experiencing some recent anxiety. The court concluded that the child needed to have stability in her life with a clear understanding of the word "family"; b) the physical, psychological, social, and economic needs of the child. All parties were found to be capable of providing for these needs; c) home environment. The homes provided by both parties were found to be satisfactory. The court did express concern with the number of moves the petitioner had made, while the respondents continued to remain in the same rental accommodation throughout; d) bonds and capacity to parent the child. Both parties were found to have a bond with the child and were both her psychological parents. The court did not agree with the respondents that the petitioner did not have the capacity to

parent the child. The respondents had made exchanges and telephone access difficult for the child. The court concluded that it would be in the child's best interests for her to be in the full-time care of the petitioner and also have a relationship with her father. The court further determined that it would be in the best interests of the child to have no contact with the respondents. The child was getting caught between the parties. The petitioner was ordered to have sole custody of the child. The court did not order costs.

 Back to top

Mabee v Siemens Canada Ltd., 2019 SKQB 82

Kalmakoff, March 21, 2019 (QB19071)

Civil Procedure – Appearance Day Notice
Civil Procedure – Queen's Bench Rule 1-6(4), Rule 5-12, Rule 5-18(1)(a), Rule 5-36
Civil Procedure – Undertakings – Litigation Privilege
Civil Procedure – Undertakings – Relevance

The plaintiff applied to compel the defendants to comply with undertakings either taken under advisement or refused at questioning. The application was pursuant to Queen's Bench Rule 5-36. The plaintiff was an employee of the defendant company. The personal defendant, A.M., was the Vice President of the company. The plaintiff commenced a claim for wrongful dismissal when his employment with the company was terminated. When the plaintiff questioned A.M., several undertakings were requested and were either refused or taken under advisement. There were six undertakings still in issue. The defendants refused the undertakings because the information requested was subject to litigation privilege or was irrelevant. The four undertakings that the defendants argued were subject to litigation privilege related to an investigation the company had undertaken to investigate allegations against the plaintiff. The defendants said that the plaintiff should have made an application for the production of a document, the investigation report, pursuant to Rule 5-12 rather than trying to obtain it through the questioning and undertaking process. The undertakings that the defendants argued were irrelevant had to do with the profit of the company in Regina compared to that of other locations, as well as information other employees were aware of. The issues were: 1) whether the plaintiff provided an evidentiary basis for the application; 2) whether the application was properly brought under Rule 5-36; 3) whether litigation privilege applied to the four undertakings, as argued by the defendants; and 4) whether the information in two of the undertakings was relevant.
HELD: The issues were determined as follows: 1) the plaintiff did not file affidavit evidence in support of his application. He instead attached portions of the questioning to his application, including

questioning of himself. The application was originally by appearance day application and such application permits a judge to rely on representations from counsel rather than affidavit evidence (Rule 6-26). The judge determined that the matter could not be heard as an appearance day application but had to be heard in regular chambers. The judge indicated that the determination regarding whether it could be heard as an appearance day notice should have been heard first, and then after determining that the matter must be heard in regular chambers, the plaintiff could have provided affidavit evidence. The court determined that the plaintiff would have included an affidavit if the judge had followed the correct procedure. Rule 1-6(4) was used to cure the "irregularity" and admit the portions of the plaintiff's questioning; 2) the plaintiff's application appeared to be seeking relief more properly dealt with under Rule 5-12, however, failure to make the application under that rule was not fatal. The judge determined that legal issues raised in an application could be dealt with, notwithstanding imperfections in the way the relief sought was framed, as long as the parties would not be prejudiced; 3) litigation privilege provides immunity from disclosure of documents and communications whose dominant purpose is preparation for litigation. There are narrow and clearly defined exceptions to litigation privilege. The court was satisfied that the dominant purpose behind the investigation and the preparation of the report was to prepare for anticipated litigation. The contents of the report were thus subject to litigation privilege. The plaintiff did not establish that an exception applied. The application with respect to the report itself was dismissed. The defendants were ordered to comply with the remaining undertakings to which they claimed privilege applied, namely: the investigators' names; whether meetings took place on certain dates, who attended the meetings, and the subject of the meetings; and whether two compliance officers repeatedly told the plaintiff that he was a liar; and 4) the plaintiff argued that the question of whether other employees knew where the funds came from was relevant because it may demonstrate that the defendants knew of and condoned such conduct. He argued that profitability was relevant because it could help determine whether his actions were beneficial even if they were contrary to company policy. Rule 5-18(1)(a) allows questioning on information relevant to any matter in issue. The court applied the framework set out in Canadian National Railway v Clarke Transport and concluded that the defendants should not be required to reply to either of the undertakings.

 Back to top

Farmer's Business Network Canada, Inc. v Univar Canada Ltd., 2019 SKQB 83

Meschishnick, March 21, 2019 (QB19072)

Contracts – Interpretation – Arbitration Clause
Contracts – Interpretation – Jurisdiction Clause
Statutes – Interpretation – Arbitration Act, Section 7 , Section 8
Statutes – Interpretation – Court Jurisdiction and Proceedings Transfer Act

The defendant applied for a stay of the plaintiff's action on the basis that the parties had agreed to determine the claim by arbitration. Alternatively, it argued that a clause in the contract between the parties required determination in British Columbia. The defendant was a wholesaler of products used in the production of crops and plaintiff, YD, was a retailer of the products. The co-plaintiff FBNC acquired the shares in YD in March 2018. The defendant initially decided not to sell product to YD after the sale of shares, but indicated that it then decided to supply product, but only until July 31, 2018. A requirement to supply product was a new credit agreement. The credit agreement indicated that disputes should be settled by binding arbitration and that the contract should be governed by and construed in accordance with the laws of British Columbia. FBNC alleged that in April 2018 the defendant published an email to industry participants that contained false and misleading information about it. The plaintiffs' causes of action were all founded on the alleged distribution of false and misleading information. The defendant argued that the claims all arose out of or in connection with the credit agreement and, accordingly, s. 8 of The Arbitration Act, 1992 required the action to be stayed because the parties agreed that the dispute must be decided by arbitration in British Columbia. The issues were: 1) whether there should be a stay in favour of arbitration; 2) the enforceability issues; 3) the scope of the arbitration clause; and 4) the enforcement of attornment/jurisdiction clause (jurisdictional clause).
HELD: The issues were determined as follows: 1) the court reviewed ss. 7 and 8 of the Act as well as its application in case law, such as the Dell Test; 2) the court applied the Dell Test. There were facts in dispute and the evidence was somewhat incomplete. A superficial examination of the evidence suggested that the issues would be referred to arbitration under the Dell Test. However, the court determined on another ground that the claim would not be referred to arbitration. The enforceability of the credit agreement would be a triable issue if raised by the defendant when it defended the action; 3) pursuant to s. 8(1) of the Act, if an arbitration clause applies and no legislated exceptions apply, then court proceedings must be stayed and the matter is referred to arbitration. If the matter does not fall within the arbitration clause, then the court has the discretion to refuse the stay pursuant to s. 8(1), without considering whether an exception under s. 8(2) applies. The court applied the Hopkins test. First, it had to be determined whether the claim was one that was to be submitted to arbitration under the arbitration clause. The cause of the claim was the publication of the false and misleading information. The claim did not seek relief relating to the credit agreement. The credit agreement limited matters that would

be referred to arbitration to "…any dispute arising from it…". The standard terms portion limited the matters that would be referred to arbitration to "[a]ll disputes arising out of or in connection with this contract or in respect of any defined legal relationship associated therewith or derived therefrom…". The clauses were found to acknowledge that not all claims were caught by the arbitration provisions. It was found to be clear that the plaintiffs' claims did not arise out of, or in connection with, the terms of the credit agreement. The application to stay the claim to have it referred to arbitration was dismissed; 4) the defendant had to establish that the jurisdiction clause was valid, clear, and enforceable and that it applied to the cause of action before the court. It was not clear to the court that FBNC was bound by the credit agreement. The wording of the clause was found to support an interpretation that claims must be related to the buyer/seller relationship to be caught by the clause. Regardless, the court conducted an analysis under s. 10 of The Court Jurisdiction and Proceedings Transfer Act. All of the parties carried on some business in Saskatchewan. Many of the plaintiffs' witnesses would be from Saskatchewan. The evidence relating to the loss of profits, sales, and customers would be from Saskatchewan. The claims had little connection to British Columbia. The plaintiffs were found to have shown strong cause as to why the court should not give effect to the jurisdiction clause, if it applied at all. Further, the defendant failed to show that there was a jurisdiction alternate to Saskatchewan that was clearly the more appropriate forum. There would also be a multiplicity of proceedings if YD were forced to make its claim in British Columbia and FBNC maintained its claim in Saskatchewan. The defendant's application for the court to decline jurisdiction was dismissed. Costs were awarded to the plaintiffs.

 Back to top

R v Carrier Forest Products Ltd., 2019 SKQB 84

Meschishnick, March 21, 2019 (QB19073)

Regulatory Offence – Appeal – Sentence
Regulatory Offence – Judicial Notice
Regulatory Offence – Saskatchewan Employment Act – Occupational Health and Safety Regulations
Regulatory Offences – Saskatchewan Employment Act – Sentencing, Section 3-79(9)
Regulatory Offences – Sentencing Considerations

The respondent was fined $62,000 plus a 40 percent surcharge after pleading guilty to a charge under The Saskatchewan Employment Act for failing to provide an effective safeguard where a worker may contact a dangerous moving part. The Crown appealed the sentence. The worker had been killed due to the failure. The offence

was contrary to The Occupational Health and Safety Regulations, 1996. The sentencing judge considered the sentencing direction provided in the Act as well as judicial authorities. The sentencing judge's key findings were: the respondent had no history of safety violation or previous convictions; the respondent's degree of responsibility and culpability was low; the respondent responded to the tragedy with integrity; the respondent employed 136 people in high quality jobs; and at the time of the incident, the respondent was operating at significant losses with a large capital deficit. The sentencing judge applied "common sense" to conclude that the area was largely dependent on the respondent for employment and economic activity. He took judicial notice that the respondent was operating in a "company town", employing 136 people. The issues considered by the court were: 1) the consideration of financial evidence by the sentencing judge; 2) the emphasis on the community; 3) the increase to maximum fines in the legislation; 4) parity and fitness; and 5) the ability to pay versus time to pay. HELD: The appeal court found that there was ample evidence to allow the sentencing judge to make the findings he did. The issues were dealt with as follows: 1) the respondent's accountants provided audited financial statements from which the sentencing judge concluded that the respondent was insolvent. The appeal court found that the inference regarding insolvency was reasonable and no error existed. The appeal court then considered the sentencing judge's judicial notice and common-sense conclusions. The court was unable to find an error made by the sentencing judge when he found that a large fine would threaten the respondent's financial livelihood and the stability of the area; 2) the Crown was concerned that the sentencing judge overemphasized a mitigating factor: that the size of the fine could threaten the livelihood of the community. The appeal court found that consideration was only one consideration taken into account by the sentencing judge; 3) the Crown argued that the increase in maximum fines by the legislature was a signal that sentences in general should increase. The appeal court did not agree, instead preferring the view that the legislature did not intend that fines be increased generally because there was no change to the minimum fines; 4) the sentencing judge focused on two cases. The fines in those cases were $420,000 and $98,000 inclusive of the victim surcharge. The sentencing judge found factors distinguishing those cases from the instant case. The appeal court agreed with authorities that cautioned against standardizing fines and found that parity would instead be reached by imposing similar fines where the circumstances are similar for a similarly operated enterprise. The impact of a higher fine on the community could distinguish the present case because the employers in the two cases used by the sentencing judge were not located in "company towns". The appeal court concluded that the sentencing judge did not overemphasize the consequences that a higher fine could have on the community. The fine was not demonstrably unfit; and 5) the Crown argued that the respondent could have been given a larger fine with longer time to pay the fine. The Crown further argued that

the respondent's evidence did not show that it needed time to pay and therefore, there was insufficient evidence that their financial position could not withstand a significant fine. The respondent argued that time to pay was not a relevant factor to be considered in sentencing. The court agreed with the respondent that s. 26 of the Summary Offences Procedures Act outlines that time to pay should only be considered once the fine has been assessed. If sentencing criteria included the financial health of the offender, then the ability to pay can be considered in the sentencing analysis. The offender bears the burden to present evidence to support its position. The appeal court found that whether time to pay could have also been considered did not need to be decided. The sentencing judge had sufficient evidence to draw the inferences that he did.

 Back to top

Paradon v Ratzlaff, 2019 SKQB 86

Megaw, March 22, 2019 (QB19074)

Family Law – Child Support – Costs of Exercising Parenting Time
Family Law – Child Support – Determination of Income
Family Law – Child Support – Retroactive Support
Family Law – Child Support – Undue Hardship
Family Law – Custody and Access – Parenting Time Exchanges
Family Law – Custody and Access – Communication of Parties
Family Law – Disclosure Obligations

The respondent mother applied for: ongoing and retroactive child support; an order compelling the petitioner to comply with the notice to disclose; an order restraining the petitioner from non-emergent communication with the respondent; and costs. The parties separated in August 2018. The respondent left the family home and moved six hours away, to Alberta. In September 2018, the court ordered that the child remain living in Alberta with the respondent as primary caregiver. The petitioner's access exchanges were to occur at Glentworth, Saskatchewan; Medicine Hat, Alberta; and Linden, Alberta. The parties could not agree on where the exchanges could take place in Linden, where the respondent lived. Police were involved in the matter. In 2017, the petitioner earned $80,816.00. He started a trucking business in the fall of 2018. For the last three months of 2018, the petitioner earned $54,000, but he did not provide expense information. The respondent was starting a new job where she would earn $26,520 per annum. The parties both claimed costs associated with the child exchanges. No child support had been paid since separation. The issues were: 1) the ongoing parenting issues; 2) communication between the parties; 3) the parties' incomes; 4) the appropriate level of child support; 5) disclosure of documents; and 6) costs.
HELD: The issues were determined as follows: 1) the parties were

ordered to exchange the child at the Co-op in Linden. The petitioner had to provide the respondent with three hours' notice of the time he would be there. The petitioner was entitled to video chat with the child three times per week with a schedule being provided a week in advance. The respondent was to provide the petitioner with notice of all medical issues concerning the child; 2) the petitioner was ordered to refrain from communicating with the respondent about matters that did not involve the child and both parties were to refrain from using disparaging language about the other in the presence of the child; 3) the respondent's income was determined to be $26,520. The court concluded that it was not appropriate to use the petitioner's lower 2017 income when he did not provide all of the information necessary to determine his 2018 income. The court determined the petitioner's income to be $100,000 per annum for the purposes of determining child support; 4) the petitioner wanted his child support obligations to be reduced due to the costs of exercising parenting time, such as: fuel costs; wear and tear on his vehicle; meals on the road, etc. The respondent also incurred the same costs. The petitioner did not place any information before the court to allow for an undue hardship claim to be considered. He did not provide full and complete information regarding his financial means. The court also had no information regarding the standards of living of each parent's household. The court did not find that the petitioner established an undue hardship claim justifying a reduction of child support. The matter would remain open for determination through a final order if proper evidence were presented. The Federal Child Support Guideline amount was $858 per month and 79% of s. 3 costs. The petitioner started his trucking company in October 2018. The court ordered child support retroactive to October 1, 2018; 5) the petitioner was ordered to provide all remaining documents not yet disclosed; and 6) the respondent was awarded costs of $500, payable forthwith.

 Back to top

Royal Bank of Canada v Gaudet, 2019 SKQB 87

Danyliuk, March 25, 2019 (QB19075)

Civil Procedure – Evidence – Affidavits – Affiants – Lawyers
Foreclosure – Order Nisi for Sale by Real Estate Listing – Amendment to Order
Foreclosure – Procedure
Foreclosure – Value

The plaintiff, the mortgagee, applied to amend an order nisi for sale by real estate listing (order nisi). The affidavit supporting the leave application attached an email from a realtor that set out three houses that had sold which the realtor concluded were comparable to the subject property. The realtor concluded that the subject property

should sell for $245,000. There were no adjustments made by the realtor for the size or condition of the subject property, even though it was older and had fewer rooms than the comparable properties. The plaintiff relied on this opinion at the leave stage and when seeking its order nisi. The sale order was granted in November 2018 with a 60-day redemption period and an upset sale price of $196,000, which was 80 percent of $245,000. The redemption period expired in January 2019. In late February 2019, the plaintiff applied on an ex parte basis to amend the order. Attached as Exhibit "A" to the plaintiff's lawyer's affidavit in support of the ex parte order was an appraisal of the subject property that concluded it to be valued at $190,000, not $245,000. There was no explanation for the $55,000 value decrease, nor was there any information on whether the original order nisi had been complied with. The comparables used in the appraisal were three sales from 2018 for homes on the same crescent as the subject property. The appraiser adjusted the values based on the size and condition of the subject property. The plaintiff did not seek a new order nisi, they wanted to amend the upset price down to $152,000 without a further redemption period. The issues were: 1) was the filing of an affidavit of this type by plaintiff's counsel appropriate; 2) what were the applicable substantive and procedural principles to apply when an extension or alteration of an order nisi is sought; and 3) what was the proper order to make? HELD: The court declined to grant the plaintiff's request for an amendment until further and better materials were filed. The issues were determined as follows: 1) a lawyer can only provide evidence and continue to act for the party if the evidence is purely a formality or is otherwise not controversial. The plaintiff could have had a bank official swear the affidavit on the ex parte application as it had on previous occasions. There was no good reason for the lawyer to file the affidavit, it was improperly filed; 2) the court dealt with two principles: a) evidence as to compliance with a valid and subsisting order; and b) how to amend or extend a sale order within the foreclosure process. The principles were dealt with as follows: a) there was no evidence regarding the steps taken to comply with the original order nisi. The best practice was to obtain a proper appraisal before seeking a sale order. Regardless of the best practice, there needs to be evidence as to what happened with the original sale order and whether it was complied with; b) there are no issues of delay in this case; the mortgagor did not act obstructively or even taken part in the proceedings. The court adopted 10 factors to be considered by the court on an application to vary an order nisi for sale from the Taylor case; and 3) the court did not grant the plaintiff's amendment request. The evidence was found to be deficient and would have been so found even if a proper affiant had attached the appraisal to his or her affidavit. The plaintiff was granted leave to file further and better affidavit material. The plaintiff was also directed to consider sending the application to the defendant to put him on notice of a potentially higher deficiency judgment.

 Back to top

R v Hansen, 2019 SKQB 88

Mitchell, March 22, 2019 (QB19076)

Criminal Law – Mischief over $5,000
Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Sentencing Principles

The accused was charged with mischief over $5,000, contrary to s. 430(3), by damaging a camera at the Regina Provincial Correctional Centre. He pled not guilty and was convicted after trial. The circumstances of the offence were captured on CCCT video. The Crown's witness testified that the accused was on remand and scheduled to appear in court by video-conference. Prior to the scheduled appearance, the accused was escorted to a video room. The court proceedings were delayed, and the accused became agitated. The accused picked up the plastic chair in the room and started beating it against the plexi-glass that housed the video camera. The video showed 21 hits to the unit. The accused did not resist when two corrections officers escorted him out of the room. The video camera, as well as microphone and connecting wires, were destroyed. The damage totaled $10,514.99. The accused had a lengthy and substantial criminal record. His first convictions dated back to 2006, when he was 20 years old, and he had 35 convictions including the present one. This was the accused's second mischief conviction for damaging property within a correctional facility. He was sentenced to 8.5 months minus remand time for the first offence. The Crown argued that an appropriate sentence would be 18 to 24 months' incarceration. The accused argued that three months' incarceration would be appropriate. The accused was Métis. He lost his mother when he was 14 years old. The accused did not complete grade 12. He was not on speaking terms with most of his family, except for a grandmother. The accused indicated that he suffered from a number of addiction issues. The court applied the following sentencing principles in determining the appropriate sentence: 1) proportionality; 2) aggravating and mitigating factors; 3) parity; and 4) restraint.
HELD: Section 718.2(e) of the Criminal Code was especially relevant, given the accused was a Métis person. The sentencing principles were applied as follows: 1) the Crown chose to proceed by indictment, and therefore, the maximum penalty was 10 years. It was a serious offence, but definitely far from the most significant or egregious. The damage value was found to fall at the low end of the seriousness spectrum. The gravity of the offence was found to fall at or near the lowest end of the spectrum of offences that would qualify as mischief over $5,000. The Gladue factors were found to reduce the accused's level of blameworthiness. His moral culpability was at the lower end of the continuum for the indictable offence of

mischief; b) the aggravating factors included: the accused solely and deliberately set out to destroy the equipment; the accused's lengthy criminal record; and the fact that he had previously been convicted for damaging property at a correctional centre. The court found that there were many mitigating Gladue factors present: the accused was 32 years old; he had a deprived upbringing; his mother died when he was an adolescent; his lack of education; his attempt to get his grade 12; and he suffered from addictions and had for years. The accused did not plead guilty, but instead required the Crown to prove the case against him beyond a reasonable doubt, which the court reiterated was his right to do. The court found that the not guilty plea should not be weighed against the accused. The crime was also a victimless crime and did not involve property of the general public; 3) the three cases provided to the court all involved convictions for mischief under $5,000 and the offenders in two of the cases were younger than the accused, but had more significant criminal records; 4) the court found that restraint was not applicable because the accused's record and the circumstances of the offence were such that there was no alternative to incarceration. The court concluded that the Crown's sentencing recommendation would offend the proportionality and parity principles. The accused was sentenced to five months' imprisonment, concurrent to any sentence of imprisonment he was currently serving. The court also directed that correctional authorities give serious consideration to allowing the accused to be transferred to the Prince Albert Correctional Centre to be closer to family and to access programming.

 Back to top

Envirogun Ltd. v R, 2019 SKQB 89

Kalmakoff, March 25, 2019 (QB19092)

Regulatory Offences – Environmental Protection and Management Act – Appeal

The appellant, Envirogun, a company that had operated an industrial effluent works and storage facility, and the appellant, Kimery, the sole shareholder and director of Envirogun, had been found guilty after a trial in Provincial Court on charges of failing to comply with a ministerial order, contrary to ss. 74(1)(c) and 74(2) of The Environmental Management and Protection Act, 2002 (EMPA). They appealed from the trial decision (see: 2015 SKPC 18) as well as a mid-trial ruling that dealt with the proof requirements of the offence and the defences which could be raised (see: 2013 SKPC 191). In the mid-trial ruling, the trial judge decided that the offence with which the appellants were charged was one of strict liability and that they could not defend it by mounting a collateral attack on the validity of the underlying ministerial order. The appellants raised a number of grounds in their summary conviction appeal to

the Court of Queen's Bench, but the appeal judge made her determination on a single ground, finding that the trial judge erred in refusing to allow the appellants to challenge the validity of the ministerial order. She declined to comment on the remaining grounds and ordered a new trial (see: 2016 SKQB 258). The Crown appealed the Queen's Bench judge's decision. The Court of Appeal ruled that mounting a collateral attack on the underlying order was not permitted under the relevant sections of the EMPA. It ordered that the matter be remitted to the summary conviction appeal court for consideration of the remaining grounds (see: 2018 SKCA 8). At the re-hearing, the grounds of appeal included whether the trial judge: 1) erred in law by determining that the offence was one of strict liability rather than one requiring true mens rea; 2) misapprehended the evidence as it related to the defence of due diligence; 3) erred in concluding that the appellants failed to establish the defence of due diligence; and 4) imposed an unfit sentence. The appellants were sentenced to pay a fine of $6,000 plus a surcharge of $2,400. The judge also made an order under s. 74 requiring the appellants to produce an inventory of the hazardous substances on the site, prepare a corrective action plan and remove the hazardous substances.

HELD: The appeal was dismissed. The court found with respect to each issue that the trial judge: 1) had not erred in his determination that it was a strict liability offence. His decision was based upon the jurisprudence, the importance of environmental protection legislation and the clear absence of any statutory language defining a specific mens rea requirement for the offence in ss. 74(1)(c) and 74(2) of EMPA; 2) had considered all of the evidence when he decided that the appellants had not made out the defence. It was not necessary for him to refer to each individual item of evidence in his written reasons. To the extent he made an error in his recollection or assessment of the evidence, any such error had not had any material bearing on the verdict; 3) had not erred. His findings of fact were supported by the evidence and he properly concluded that the appellants had not taken any significant steps to attempt to comply and had no intention of doing so; and 4) had not given a demonstrably unfit sentence in light of the fact that the maximum fine under EMPA was $1,000,000. The surcharge was permitted under s. 3(e) of The Victims of Crime Regulations, 1997. The trial judge considered the nature of the offence and the circumstances of its commission when he made the remediation order under s. 74(4).

 Back to top

Yara Belle Plaine Inc. v Ingersoll-Rand Co., 2019 SKQB 90

Kovach, March 27, 2019 (QB19077)

Civil Procedure – Discovery – Transcripts – Use in Applications
Civil Procedure – Evidence – Admissions

Civil Procedure – Evidence – Non-Parties
Civil Procedure – Queen's Bench Rule 5-34

One of four defendants, IRC, applied for summary judgment dismissing the plaintiff's claim against it. In support of the application, IRC filed an affidavit containing excerpts from the discovery transcripts of co-defendants. The excerpts were from the plaintiff's questioning of officers testifying on behalf of the other defendants. The plaintiff applied to strike those paragraphs in IRC's affidavit on the basis that they contained testimony that was inadmissible as evidence against the plaintiff. The plaintiff argued that Rule 5-34 of The Queen's Bench Rules prohibited the use of the testimony. IRC argued that Rule 5-34(1)(b) supported its use of the discovery transcript in evidence. IRC also argued that the plaintiff was not prejudiced by its use because all of the parties had agreed that the plaintiff's questioning could be used by all parties adverse in interest and there were crossclaims between all of the defendants. The issues were: 1) what was the purpose of Rule 5-34; 2) what, if any, weight should the court put on decisions interpreting similar rules in other provinces; 3) what interpretation of Rule 5-34 comports with foundational principles of evidence; and 4) did Rule 5-34 permit IRC to use co-defendants' discovery transcripts as evidence to support a summary judgment application against the plaintiff?
HELD: The court found that IRC could not use the discovery transcript of any party other than the plaintiff in its application for summary judgment. The issues were resolved as follows: 1) Rule 5-34 allows a party to use relevant parts of a transcript of questioning without putting the entire document into evidence. The rule allows the use of the transcript of the opposite party as well as any other party adverse in interest. Transcripts of non-parties are not allowed. The application in question is the summary judgment application by IRC against the plaintiff. Only IRC and the plaintiff were parties to the application: therefore, transcripts of parties that were adverse in interest in the overall action could not be used in the application for summary judgment; 2) the rules and cases of other provinces were found to be distinguishable. There were no authorities provided to support the plaintiff's position that a discovery transcript arising from questioning by a party may only be adduced by that party. The requirement is that an opposite party be examined: there is no requirement that examination be conducted by the party who seeks to enter it. The plaintiff and IRC were opposite parties. IRC attempted to convince the court to follow Ontario and allow it to use evidence from co-defendants' discovery transcripts. The court found that Ontario's rules differed significantly from Saskatchewan's. There was no Rule identified that would allow the impugned discovery transcripts to be admitted; 3) according to the common law, admissions can only be used against the party that made them. The impugned provisions were admissions by the other defendants. IRC, however, wanted them to be admitted as a principled exception or a just exception under Rule 5-34. The principled exception

requires that the hearsay evidence be reliable and necessary. There was no dispute regarding the reliability of the discovery evidence; however, it was not necessary. The admissions could have been gathered and provided as evidence in a different form and the impugned evidence did not appear central to IRC's case in any event. The just exception also did not assist IRC; and 4) the plaintiff's application was granted. The impugned paragraphs were struck from the affidavit filed by IRC in support of its application for summary judgment.

 Back to top

Sir v SPCA Prince Albert, 2019 SKQB 96

Meschishnick, April 9, 2019 (QB19093)

Statutes – Interpretation – Animal Protection Act, 1999, Section 6, Section 9, Section 10
Statutes – Interpretation – Animal Protection Regulations, 2000, Section 11, Section 13

The appellant appealed the decision of a Provincial Court judge to dismiss her claim for damages against the respondent. She had alleged that the respondent had not returned her dog to her. She found it on a reserve in northern Saskatchewan, took it to the respondent's facility in Prince Albert because it needed the attention of a veterinarian, and left the animal there for treatment. The respondent did not return the dog to the appellant. During the trial, the judge found that the appellant had provided proof of ownership of the dog and that the respondent was aware of that, but had acted lawfully in continuing to keep the dog and was authorized to do so and to transfer it to an animal rescue group.
HELD: The appeal was allowed and the appellant was granted a new trial. The court found that the trial judge erred in law when he limited his analysis to determining if the respondent had reason to retain the dog and failed to consider whether it had satisfied the conditions set out in the Act and had a lawful reason for not returning the dog to the appellant.

 Back to top

Evans v General Motors of Canada Co., 2019 SKQB 98

Barrington-Foote (ex officio), April 8, 2019 (QB19094)

Civil Procedure – Class Actions – Certification

The plaintiff applied pursuant to s. 5 of The Class Actions Act for certification of this action as a class action and to be appointed as the

representative plaintiff. The proposed multi-jurisdictional class action related to the alleged defects in the cooling system of Chevrolet Cruze models manufactured by the defendants from 2011 to the present. The proposed class would include individuals, corporations and estates who purchased or leased the models. The plaintiff claimed that the defendants breached various common law and statutory duties in designing, manufacturing, marketing and selling the Cruze, thereby causing economic loss to the members of the proposed class. The wrongful acts allegedly committed by the defendants included: misrepresentation, negligence, unjust enrichment, breach of s. 52 of the Competition Act, breach of The Consumer Protection and Business Practices Act and similar legislation of other provinces except for Ontario, New Brunswick and Prince Edward Island, breach of contract and waiver of tort. The plaintiff filed affidavits sworn by her and four other individuals who had purchased the vehicle, an employee of the plaintiff's law firm who identified other individuals from six provinces who were interested in joining the contact list for a Cruze class action and an engineer who deposed, as an expert regarding gasoline engines, regarding the alleged defects.
HELD: The application was granted and the class action was certified. The court assessed the plaintiff's proposed claim against the criteria set out in s. 6(1)(a) to (e) of the Act and found that all of the requirements had been met.

 Back to top

Siemens v Baker, 2019 SKQB 99

Mitchell, April 9, 2019 (QB19095)

Civil Procedure – Queen's Bench Rules, Rule 7-9(2)

The self-represented plaintiff filed a statement of claim in 2018 against the defendants, a number of individuals who had been employed by the Government of Canada in the area of tax collections and enforcement. The plaintiff's grievance with the defendants appeared to have had its genesis as early as 1999. In his pleading, the plaintiff alleged that over an unidentified period of time, these defendants had either improperly assessed his tax liability or had maliciously or illegally attempted to enforce that liability. The Department of Justice, representing the defendants, brought an application to have the statement of claim struck in its entirety or, alternatively, seeking an adjournment until the plaintiff filed particulars to support the claims made in his pleading. The plaintiff stated that the defendants had maliciously garnisheed his wage and as a result of such malicious act, the plaintiff was unable to pay his loans and mortgage and he lost his credit rating and eventually his employment. He claimed general damages in the amount of $225,000, special damages and aggravated, exemplary

and punitive damages of $10 million under each head. The issues raised by the defendant's application were: 1) whether the court possessed the jurisdiction to adjudicate those aspects of the claim contesting the validity of the plaintiff's tax assessment; and 2) whether the balance of the pleading should be struck as scandalous, frivolous and vexatious and an abuse of process contrary to Queen's Bench rules 7-9(2)(b) and (e).
HELD: The application was granted. The plaintiff's claim was struck in its entirety. The court found with respect to the issues that: 1) the pleadings disclosed that the plaintiff was contesting the way in which the Minister of National Revenue assessed his tax liability. Only the Tax Court of Canada possesses the jurisdiction to entertain this aspect of the plaintiff's claim; and 2) the remainder of the plaintiff's statement of claim was struck as frivolous and vexatious under Queen's Bench rule 7-9(2)(b) because it failed to state full particulars regarding the identity of the defendants or provide sufficient information to form an adequate factual underpinning for the tort of public misfeasance or to support the plaintiff's claim that the defendants breached their fiduciary duty to him. The court denied the defendants' request for costs because to order costs would present a hardship for the plaintiff.

 Back to top

First Aberdeen Properties Ltd. v Loblaws Inc., 2019 SKQB 101

Layh, April 11, 2019 (QB19096)

Landlord and Tenant – Commercial Lease – Breach

The landlord applied for a writ of possession respecting a property it leased to the respondent for use as a grocery store in Melville. The applicant argued that the respondent was in breach of the lease at times relevant to its right to exercise the option to renew. As a result, the respondent was an overholding tenant and the court should issue the writ. The lease was originally created between predecessors to the parties in 1981. It provided for an initial term of 15 years and gave the original tenant an option to renew the lease for four consecutive terms of five years if the lease was in full force and effect and the tenant was not in default. In 1997, the lease was amended to increase the number of renewal terms available to the tenant. After the respondent succeeded the original tenant in 2006, it initiated a strategic initiative to evaluate all of its grocery store locations in western Canada to determine which of them were sufficiently profitable to warrant additional capital investment to convert them to another banner in their suite of businesses. As part of the review, it undertook site visits that included assessing the roofs and in the case of the Melville property, it arranged to have the condition of the roof assessed and a report prepared in May 2016. The report found that various roof replacements and repairs were

required. The respondent did not provide a copy of the report to the applicant until a year later. Under an original lease term, the respondent was required to deliver written notice of its intention to exercise its option to renew at least six months prior to the last day of the term, which was December 1, 2016. In May 2016, it asked the applicant to split the upcoming renewal terms into two separate renewal terms of one year (December 2016 to November 2017) and a second term of four years. The applicant agreed and the parties signed an agreement. The applicant asserted in this proceeding that when the respondent asked to split the renewal terms, it acted in breach of its duty of good faith by failing to disclose any knowledge it had of previous roof leaks and that it negligently misrepresented why it was requesting the split. It alleged that the respondent breached the lease because it had not obtained express permission from it before it entered upon the roof. It then withheld the information regarding its state of disrepair and previous leaks that had occurred and it sought the split of the renewal term to leverage an advantage over the applicant by withholding the information about the roof. The applicant alleged that because of the respondent's multiple breaches of the lease, the court should retroactively set aside the lease renewal.
HELD: The application was dismissed. The court found that the respondent had not breached a duty of good faith nor negligently misrepresented any material fact. The evidence showed that the respondent had informed the applicant that it was evaluating its premises as part of a larger business plan as the reason for its request for a split lease renewal and in an affidavit submitted by a senior official of the applicant, he had admitted that the applicant was aware of and understood that reason. The applicant had not explained how the respondent's knowledge of the roof's condition was intended as a subterfuge to gain some advantage. The lease provided that the roof's repair was the landlord's responsibility and it did not contain any term that prevented the applicant from entering upon the roof.

 Back to top