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Subject Index

Ricker v. Straka, 2014 KQB 351

Wilson, October 30, 2014 (QB14340)

Family Law – Custody and Access – Variation
Family Law – Custody and Access – Mobility Rights

The parties had a brief common law relationship in 2000, during which time the respondent gave birth to their son. They separated five months after the birth. The parties met and continued to live in Yorkton. In 2001, the petitioner issued a petition that sought joint custody. The court set out a joint and shared parenting arrangement under which the parties operated until July 2006, when the respondent terminated the petitioner's access because during one of the child's visits to his father, he was injured in a quad accident. The petitioner brought a motion in 2006 that sought reasonable parenting time. The court ordered that the child's visits to the petitioner should resume in a manner where the amount of time would increase gradually and include overnight visits. The respondent never permitted the child to have overnight visits though, and eventually in 2012 the petitioner filed this application for variation that sought overnight access. The respondent then brought her own application for variation of the 2006 order, allowing her to move with her son, because she wished to relocate to Beaumont, Alberta, to live with her fiancé. The respondent also sought an increase in child support payments and for a retroactive order to 2009 based on the petitioner's actual income. After a pre-trial conference, the court ordered a Children's Voice Report. The matter proceeded to trial in the fall of 2012 but it was adjourned to February 2013. The court made an interim order granting the

petitioner parenting time with his son for two evenings every week and every second weekend from Friday afternoon to Sunday evening. When the matter was returned to court in February 2013, the parties disagreed regarding the effect of the parenting order and the court requested another report to evaluate what the child's opinion was of his time with his father and to determine whether the respondent had supported the child's visits with the petitioner. The report indicated that as a 14-year-old, the child was quite emotionally dependent upon his mother and that she had given him the idea that she did not think he should spend time with the petitioner or that she expected him to go on the visits, so he frequently refused to. His mother focused on his interest in computers and his father was more interested in him participating in outdoor activities and sports. The boy indicated that he was very happy in school and participating in the band program in Yorkton, but he was also in favour of moving to a place near Edmonton. The petitioner took the position that his son's best interests would be served by the parties having joint custody and that his primary residence be with the respondent as long as she resided in Yorkton. If the respondent moved, the petitioner argued that his son's primary residence be with him in Yorkton. The petitioner stated his income was $60,000 and that the respondent's was $48,400. As a result, he was prepared to pay $500 per month in child support and 55 percent of s. 7 expenses. Since the separation, the petitioner had voluntarily paid support from the outset, from $450 per month until 2012 when he increased it to $500 per month and paid many other expenses when the respondent requested. The respondent argued that it would be in the best interests of the child to move with her and that the petitioner could have access during school holidays and some long weekends during the year. The petitioner did not have any employment lined up in Beaumont and had no relatives there. Her mother lived in Yorkton and looked after her grandson every day after school and they enjoyed a close relationship.

HELD: The court granted the petitioner's application and ordered that the child should live in Yorkton, refusing the respondent's request to move him to Alberta. As long as she remained in Yorkton, his primary residence would be with her; otherwise, he should be in the primary care of the petitioner. It was in the child's best interest to have contact with his father. The court was not convinced that if the respondent moved that she would permit the petitioner to have access as she had violated court orders in the past. The child was happy and well-adjusted in Yorkton; he had school, his band program, his friends and the support of his grandmother. With respect to child support, the court found that the respondent's income was $48,300 and imputed a higher income of $70,000 to the petitioner based on his 2010-2011 income tax returns but found that prior to that time he had earned $60,000 per year. It ordered him to pay $581 per month and 59 percent of s. 7 expenses. It denied the respondent's request for retroactive support because between 2002 and 2005, the petitioner had overpaid

considering his earnings at the time.

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Thompson v. Bear, 2014 SKCA 111

Klebuc Ottenbreit Whitmore, October 29, 2014 (CA14111)

Family Law – Child Support – Determination of Income – Section 17 – Appeal
Family Law – Child Support – Interim – Variation – Appeal
Statutes – Interpretation – Federal Child Support Guidelines, Section 17, Section 18

The appellant appealed the decision by the Queen's Bench chambers judge that varied an earlier interim child support order by increasing the amount of child support to be paid by the appellant to the respondent who had custody of their daughter (see: 2013 SKQB 174). The appellant was the sole shareholder of a corporation, Thompson's Plumbing and Heating Ltd. (TP&H). The court ordered an increase in the amount of child support based on the average of the appellant's employment income and the attribution to him of $308,900 per year, a sum substantially greater than TP&H's pre-tax income of $188,300 for the 2013 tax year. This figure represented the average of the corporation's annual pre-tax income for the fiscal years 2010, 2011 and 2012. At the hearing, the appellant had filed an affidavit indicating that in order to operate and compete for contracts, the corporation required its retained earnings. The appellant's grounds of appeal were that: 1) the chamber judge erred in his interpretation of ss. 17 and 18 of the Federal Child Support Guidelines, and attributing to the appellant a sum greater than TP&H's pre-tax income for its most recent tax year; 2) if the chamber judge had erred, should the whole or any portion of TP&H's pre-tax income for the year ending January 31, 2013, be attributed to the appellant; and 3) the chambers judge erred in attempting to definitively decide complex issues that required a trial or viva voce hearing, during which expert evidence could be presented and challenged.
HELD: The court granted the appeal. It set aside the decision of the chambers judge and ordered that the appellant pay child support of $1,130 per month. It found with respect to the issues that: 1) the chambers judge erred in his interpretation of ss. 17 and 18(1)(a) of the Guidelines, specifically in applying s. 18 by attributing to the appellant a sum greater than TP&H's pre-tax income for the 2013 tax year. Section 17 does not entitle a court to include the pre-tax income of a corporation or as a source of funds when calculating a payor's adjusted average income during the preceding three years, on a stand-alone basis. Section 18 was implemented for the purpose of making

some of the current pre-tax income of a corporation available for child support, without putting it at risk or interfering with third parties' legal and commercial rights in dealing with the corporation. It was not intended to allow for an average of a corporation's pre-tax income during the preceding three years to be attributed to the payor; 2) the application by the respondent for increased child support based on the attribution to the appellant of a sum equal to the average of TP&H's pre-tax income during the preceding three years (an amount that was greater than its pre-tax income for the most recent tax year) involved complex evidentiary issues. Without proper evidence concerning the corporation's financial needs and market conditions, the character of plumbing contracting business and the corporation's financial statements, the chambers judge could not have reasonably assessed the evidence of the appellant that his corporation's pre-tax income was not available for child support purposes. In the circumstances, the evidence satisfied the court that TP&H required some of its pre-tax income from the most recent year for legitimate business purposed but attributed $25,000 of the corporation's pre-tax income for the 2013 tax year on an interim basis; and 3) the established practice of the Court of Queen's Bench is to not conclusively vary interim child support orders based on a definitive attribution of pre-tax income of a corporation to the payor without the benefit of a trial or viva voce hearing, except when it is clearly necessary.

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R. v. Bunn, 2014 SKCA 112

Herauf Whitmore Ryan-Froslie, October 31, 2014 (CA14112)

Criminal Law – Assault –Sexual Assault – Conviction – Appeal
Criminal Law – Sentencing – Dangerous Offender – Appeal

The appellant, appearing on his own behalf, sought to overturn his conviction by a jury for sexual assault and the sentencing judge's decision to designate him a dangerous offender and order an indeterminate sentence (see: 2012 SKQB 397). The appellant had been convicted of sexually assaulting a disabled woman based on the testimony of three witnesses and DNA evidence found on the victim. The sentencing judge had found that the appellant had a 40-year criminal record and had been convicted of over 90 offences, involving violence, weapons or threatening offences. He had been convicted of two sexual assaults on his step-daughter before the predicate offence. The assessment prepared for the court relating to the dangerous offender application concluded that the appellant was a high risk to reoffend violently and sexually. The judge had sentenced the appellant to an indeterminate sentence, relying upon the provisions of the 2008

amendments to the Criminal Code, although the offence occurred in 2006. The Crown acknowledged that the sentencing judge erred in law in this regard. The appellant's grounds of appeal were: 1) with respect to the conviction, that one of the witnesses to the assault had not been called to testify at trial; 2) with respect to the dangerous offender designation, that it was unreasonable; and 3) with respect to the indeterminate sentence, that it was too harsh and the sentencing judge had failed to take into account the six years that he had spent on remand, his age, his health and the Gladue considerations.
HELD: The court dismissed the appeal. It held with respect to the various grounds that: 1) the witness's testimony would not have helped the appellant's case as his version of the events confirmed the testimony of the other witnesses. The guilty verdict was reasonable and supported by the evidence. As the appellant was self-represented, the court had reviewed the charge to the jury and found that it met the requirements for a fair trial; 2) the sentencing judge accepted the expert's assessment that there was no reasonable possibility that the appellant's risk could be managed in the community and therefore he met the dangerous offender criteria, which was a reasonable conclusion; and 3) the sentencing judge was not required to consider remand time when imposing an indeterminate sentence. He had also considered the appellant's age and health. The appellant was 56 years old at the time of the sexual assault and the sentencing judge accepted the court appointed assessor's evidence that aging would not decrease the potential for committing acts of sexual violence. The sentencing judge considered the Gladue factors when he reviewed the appellant's background but found that there was no possibility of eventual control of his behaviour in the community. With respect to the sentencing judge's application of the 2008 amendments, the court held that his error in considering them as more favourable to the appellant that the 2006 version of s. 753 was inconsequential as he still applied the correct standard of "reasonable possibility" and not "reasonable expectation" in declaring the appellant a dangerous offender. The error had not lead to a substantial wrong or miscarriage of justice.

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United Food and Commercial Workers, Local 1400 v. Affinity Credit Union, 2014 SKCA 114

Ottenbreit, November 7, 2014 (CA14114)

Statutes – Interpretation – Court of Appeal Act, 2000, Section 20
Civil Procedure – Publication Ban

The appellant union appealed a Queen's Bench decision that quashed certain Saskatchewan Labour Relations Board (SLRB) decisions

respecting a certification application by it in which it sought to represent certain employees at the respondent Credit Union. The appellant applied for an order restricting public access to two affidavits contained in its appeal book and its unredacted factum, and restricting any reference to certain information contained in the affidavits and requesting that the respondent file a redacted factum. It made the application on the basis that the disclosure of the information to the public may result in the administration of justice being brought into disrepute as it pertains to labour relations and that such disclosure would undermine public confidence in the SLRB. The information in question referred to acts and omissions of the SLRB's administrative staff in their handling of certain information involved in the certification application prior to the SLRB's decision.
HELD: The court granted the application. Section 20(1) of The Court of Appeal Act, 2000 authorizes a chambers judge to make orders that play a minor or subordinate role in relation to the outcome of the appeal. It ordered that the affidavits in the appellant's Appeal Book, its factum, the respondent's brief argument in this application and portions of its factum not be disclosed to the public. Redacted factums of both parties would be available to the public. The information in question may not play a substantial role in the appeal, but the nature of the acts or omissions of the SLRB staff is significant in the context of the statutory regulatory and administrative procedures regarding the administration of labour relations in the province. The applicant had met the Dagenais/Mentuck criteria and an order restricting public access to the information was necessary to prevent serious risk to the proper administration of justice in respect of the SLRB and the salutary effect of the order would outweigh any deleterious effects of restricting public access.

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Long v. Van Burgsteden, 2014 SKCA 115

Ottenbreit Caldwell Whitmore, November 14, 2014 (CA14115)

Judgments and Orders – Disregard of Pleadings – Appeal

The appellant appealed a Queen's Bench decision in which he was found liable for the destruction of some trees and ordered to pay the respondent damages in the amount of $56,179, pre-judgment interest and $9,900 in punitive damages (see: 2012 SKQB 89). The respondent had entered into an oral agreement to plant 200 trees on land owned then by the appellant's uncle and aunt. The respondent intended to sell the trees as part of her landscaping business. She placed the tree in wire baskets so that they could be moved upon their sale. The appellant was aware of the agreement at the time it was made and

when he purchased the property. After the sale, he asked the appellant and her partner a number of times to remove the trees, finally advising them that he would destroy the trees, which he proceeded to do when they had not complied. The grounds of appeal were that the trial judge erred in: 1) determining liability on the basis of legal theories were not pled or argued at trial; 2) finding that the arrangement between the parties was an irrevocable contractual licence and holding that the equitable principle of proprietary estoppel applied; 3) finding that the trees had not been abandoned; and 4) awarding punitive damages. The respondent cross-appealed on the ground that the trial judge erred by arbitrarily discounting her damages by 25 percent.

HELD: The court dismissed the appeal but allowed it with respect to the award of punitive damages. The cross-appeal was dismissed. Regarding the grounds of appeal, the court held that: 1) the trial judge erred in law in making her finding of liability based upon theories that had not been pleaded or argued. However, the trial decision was sustained. The appellant had not taken issue with the evidentiary record nor sought to adduce fresh evidence on appeal or argued that he had lost a right of cross-examination regarding evidence or suffered any prejudice. The court found that after receiving submissions from appellate counsel it was clear that no other evidence would have been adduced at trial, that the trial judge's finding of liability based on the fresh theories advanced in the judge's reasons was sound; 2) the appellant's argument that as there was no relationship between him and the respondent that the doctrine of proprietary estoppel did not apply was rejected. The facts showed that the appellant encouraged the respondent to put the trees on the land and knew of the agreement between her and the previous owners that the trees were chattels owned by her and then encouraged her to believe that she would enjoy a right over the land until such time as the trees were sold to third parties. The respondent relied upon that belief and purchased wire baskets for the trees to be planted in and located on the land. The appellant then tried to take unconscionable advantage of the respondent by denying her the right she expected to receive when he destroyed the trees and it was from the appellant's denial of her right that his liability arose, regardless of the character of the licence. The court agreed that it would be unconscionable to allow the appellant to insist on his strict legal rights to destroy the trees planted on his lands when he knew that they were owned by the respondent subject to the terms of the agreement; 3) the appellant's argument that the respondent had abandoned the trees was not supported by the facts; and 4) the trial judge failed to question whether the appellant's conduct in destroying the trees was an independent actionable wrong. The appellant had given the respondent clear and repeated notices over two years that he wanted her to remove the trees. Although liable for damages, the appellant's conduct did not meet the requirement of being itself an actionable wrong. Regarding the cross-appeal, the court

found that there was sufficient evidence adduced at trial that some of the trees were not saleable because of their shape and size to support the trial judge's reduction of damages.

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R. v. Nordstrom, 2014 SKCA 124

Richards Caldwell Whitmore, November 27, 2014 (CA14124)

Regulatory Offence – Wildlife Act – Export Licence
Regulatory Offence – Wildlife Act – Strict Liability – Defence of Due Diligence
Regulatory Offence – Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act

The applicant applied for leave to appeal his convictions and the sentence imposed upon him after trial in Provincial Court and affirmed upon appeal to Queen's Bench (see: 2013 SKPC 166; 2014 SKQB 26). The applicant, a Treaty Indian and member of the Poundmaker First Nation, operated a game farm on the reserve. The applicant was self-represented at the hearing but had filed a factum prepared by a lawyer. The grounds of appeal and the applicant's arguments were as follows: 1) Were the elk and white-tailed deer parts exported by the applicant "wildlife" within the meaning of the Wildlife Act (WA)? The applicant argued that animal parts are not "wildlife" within the meaning of the WA. The word "part" within s. 2(a) of the WA should be taken to mean only as referring to substances in the nature of "developmental life" rather than to things like meat or antlers. As a result, his convictions, which were contingent on him being in possession of elk and deer parts, should be set aside; 2) Was the applicant exempt from the export licence requirements of the WA by virtue of s. 13(2) of The Captive Wildlife Regulations (CWR), regardless of whether the definition of "wildlife" included animal parts? Section 13(2) of the CWR states that "…a person who holds a valid licence pursuant to The Domestic Game Farm Animal Regulations (GFR) may export domestic game farm animals without an export licence". As the applicant was operating a game farm pursuant to a band bylaw, and as a result of an agreement made between him and Saskatchewan Environment, he was neither required to licence that operation pursuant to the CWR nor obliged to obtain a licence before exporting parts of wildlife killed on his farm. Such agreements were permitted by s. 9 of the WA; 3) Did Poundmaker First Nation Bylaw No. 5 and Band Council Resolutions Nos. 38 and 39 allow the applicant to export wildlife without a licence?; 4) Did the applicant have to comply with the labelling requirements of s. 18(2) of GFR? The applicant submitted that the trial erred in when he found

this obligation applied even when an operator was exempted by s. 13(2) of the CWR; 5) Did the applicant "export or cause to be exported" wildlife in those situations where he did not personally transport animal parts? The applicant argued that, as he had not personally moved the animal parts across the border, the trial judge had erred in finding that he had "caused" the exportation; 6) Did s. 8(a) of The Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (WAPPRIITTA) apply to white-tailed deer? The applicant acknowledged that he had imported a deer from Alberta without a licence or permit but that he should not have been convicted because it was not included in the definition of animal in s. 2 of WAPPRIITA as white-tailed deer are not listed in the Convention to which s. 2 refers; 7) Did the applicant have a defence of due diligence to the charges?; and 8) Were errors made in sentencing the applicant?

HELD: The court granted leave to appeal the convictions and dismissed the appeal. The court denied leave to appeal the convictions. It held with respect to the grounds of appeal that: 1) the applicant's reading of the definition of "wildlife" would frustrate the overall object and purpose of the WA. An inability to control the export and trade of animal parts would make it impossible for the province to protect wildlife. The court confirmed that the elk and white-tailed deer parts exported by the applicant were "wildlife" within the meaning of the WA; 2) neither the trial judge nor the appeal judge had erred in their conclusions. The applicant could not rely upon the "agreement". The agreement was a letter from a director of Saskatchewan Environment. The court reviewed the requirements of the letter. It stated that in order to escape the licencing requirements of the GFR, a comprehensive band bylaw must be in place and establish specific requirements regarding the operation of the farm. The court reviewed Bylaw No. 5 and the Band Resolutions and found that none of the documents contained the requirements set out by the director in his letter; 3) without deciding the question, it was not persuaded by the applicant's argument that the bylaw and resolutions he relied upon authorized the export of wildlife in a way that displaced the provisions of the WA and its regulation. In fact, Bylaw No. 5 was silent on the question of game farming and export of wildlife and Resolution No. 39 only permitted export within Saskatchewan; 4) the applicant had not brought himself within the terms of the letter from Saskatchewan Environment, but in any case, the applicant had not been charged or convicted of breaching s. 18(2) of the GFR and an exemption under s. 13(2) of the CWR does not create an exemption from labelling under s. 18(2) of the GFR; 5) the trial judge had correctly decided that s. 21(1) of the Criminal Code was made applicable to provincial offences by virtue of s. 4(4) of The Summary Offences Procedure Act, 1990, and that in finding in fact that the applicant knowingly aided in the illegal export, he was a party to the offence and the appeal judge had not erred in upholding

his conviction for violating s. 31(1) of the WA in the circumstances where he had not personally taken wildlife across the border; 6) the court rejected the applicant's interpretation of WAPPRIITA. The definition of animal provided in The Wild Animal and Plant Trade Regulations made pursuant to WAPPRIITA clearly included white-tailed deer. They cannot be imported to or exported from Saskatchewan without a WAPPRITTA licence; 7) there was no evidence to support a defence of due diligence; and 8) this appeal was brought pursuant to s. 839 of the Criminal Code which restricted it to questions of law, and the appropriateness of the applicant's sentence is not a question of law. Regardless, the court found that the trial judge had not erred in imposing the fines.

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R. v. Jastrebske, 2014 SKCA 127

Richards Lane Ottenbreit, November 27, 2014 (CA14127)

Bankruptcy – Fraudulent Concealing
Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Sentence
Criminal Law – Fraud

The appellant was sentenced to five months for defrauding the Government of Canada in an amount exceeding $5,000 contrary to s. 380(1) of the Criminal Code and with fraudulently concealing or removing property over $50 within one year preceding bankruptcy, contrary to s. 198(1)(f) of the Bankruptcy and Insolvency Act. The appellant denied the jurisdiction of the Court of Queen's Bench throughout the proceedings, and she appealed both her convictions and sentence.
HELD: The conviction and sentence appeals were dismissed. The Court of Appeal could not find a basis on which to interfere with the convictions. The proceedings were fair with a properly instructed jury. Further, the sentences were found to be appropriate. The "jurisdiction" argument was without substance.

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Mosaic Potash Colonsay ULC v. United Steelworkers, Local 7656, 2014 SKCA 134

Jackson Klebuc Ryan-Froslie, November 26, 2014 (CA14134)

Administrative Law – Judicial Review – Arbitration – Collective

Agreement
Administrative Law – Judicial Review – Standard of Review – Reasonableness
Employment Law – Just Cause
Employment Law – Termination – Arbitration
Labour Law – Arbitration – Judicial Review – Standard of Review

The chambers judge dismissed an application for judicial review of a decision of a single arbitrator acting pursuant to a collective agreement between the United Steelworkers and the appellant employer. The arbitrator found that the appellant dismissed the employee without just cause. The employee was dismissed because: 1) he refused to work overtime, which the appellant deemed to be participation in an illegal strike contrary to the collective agreement; and 2) he spoke to a supervisor in a manner that the employer characterized as insubordinate. The arbitrator found that the dismissal was without cause because: 1) there was no illegal strike; 2) if there was an illegal strike, the employee did not participate in it; 3) the employee was wrongly singled out; and 4) termination was too harsh. An application to chambers resulted in the chambers judge finding that the arbitrator's decision was well within the realm of reasonableness. The appellant argued that the reasonableness standard used by the chambers judge was the incorrect standard. The issues on appeal were: 1) did the chambers judge correctly identify the standard of review to apply; and 2) did the chambers judge correctly apply that standard to his review of the arbitrator's decision.
HELD: The appeal was dismissed. The Court of Appeal determined the issues as follows: 1) the appellant argued that the appropriate standard of review was correctness. The usual standard of review for arbitral decisions is reasonableness and the Court of Appeal concluded that none of the appellant's arguments overcame that norm. Also, the Court of Appeal indicated that some leeway should be given to the arbitrator given the arbitrator's knowledge of the subject matter; 2) the appellant argued that even if the standard was reasonableness, the chambers judge erred in finding that the arbitrator's decisions were reasonable. The arbitrator gave four independent reasons for his conclusion. To succeed the appellant would have to show that each of the arbitrator's reasons were unreasonable. To find that the employee was participating in an illegal strike, there had to be a finding that he was acting in concert with others. The employee testified that he was not acting in concert with others when he refused to work overtime. The arbitrator believed the employee. The chambers judge found the arbitrator's reasons for the conclusion to be comprehensive. The credibility determination was accorded deference by the Court of Appeal. Having found that the decision regarding whether there was an illegal strike was reasonable the Court of Appeal did not consider the other reasons given by the appellant.

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R. v. Lawson, 2014 SKPC 191

Wiegers, November 3, 2014 (PC14177)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Refusal to Provide Breath Sample

The accused was charged with refusing to provide a breath sample for an ASD test contrary to s. 254(5) of the Criminal Code. The accused claimed that he had complied, or alternatively, that he had a reasonable excuse for his non-compliance. The charge arose after the accused's vehicle was stopped by a police officer who noted that the accused smelled of alcohol and that there were beer cans on the floor of the accused's vehicle. Based on his suspicion that the accused was impaired, he called for a more senior officer to come to the scene to operate the ASD. The accused was placed in the back of the police cruiser and the officer sat in the front and made the demand. The accused said that he understood. The other officer arrived and sat in the front of the cruiser and instructed the accused how to blow into the device. He passed the device back to the accused through the plexi-glass screen. The accused blew into the ASD four times without success. The officer reiterated the procedure to follow and formed the opinion that the accused was obstructing the tube with his tongue. After the third attempt, the officer asked the accused if he was going to provide a sample and the accused replied that he would once they got to a technician. The officer informed the accused that if he didn't provide a sample with the ASD, he was going to be charged with refusal and repeated that warning after the fourth attempt. The accused continued to assert that he was trying and that they should go to the police station to find out if the ASD was malfunctioning. When the officer talked to the accused about trying for the fifth time, he did not pass the ASD to the accused and asked him why the airflow stopped when the accused began to blow, the accused shrugged and suggested that the device was broken and that they should go to the station to find out. The officer closed the screen and said "good enough" and told the other officer to arrest the accused for refusal. The officer did so and read the accused his right to counsel and the police warning. The accused testified that the ASD was not working and that was the reason that he offered to provide a sample at the station. If he had known that he would not have that opportunity, he would have blown into the ASD again. He argued that he did not realize that the officer wanted a fifth sample because he had not passed the device back to him and did not clearly convey his conclusion that the accused was refusing when he said "good enough". The officer testified that the ASD was in proper working order. The Crown argued that it was not necessary to prove that, though, because the offence was committed when the accused refused

to provide a fifth sample with the requisite intention.
HELD: The accused was found guilty. The court did not accept the accused's testimony and viewing the evidence as a whole, the court concluded that the accused intentionally refused to provide a breath sample on the fifth occasion based on his knowledge that he had failed to provide an adequate sample four times earlier and had been warned twice about the consequences of refusal. If he had wanted to provide a fifth sample, he would have done so. The court rejected the accused's argument that he had a reasonable excuse because he believed that the officer had accepted his offer to provide a sample at the station. The court found that the accused had not honestly nor reasonably held that belief.

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J & B Drilling v. Sebastian, 2014 SKPC 194

Bazin, November 4, 2014 (PC14178)

Contracts – Formation – Verbal
Contracts – Interpretation – Implied Term
Small Claims – Breach of Contract

The plaintiff, a water well drilling company, claimed payment from the defendant for drilling water wells. The defendant asserted that the plaintiff did not perform the contracted services with the requisite skill such that they had to hire someone else for their domestic water well. Further, the defendant alleged that the agreement with the plaintiff had been terminated on July 4, 2012. The contract did not stipulate a time period within which the well had to be finished but the defendant argued that it must be within a reasonable time. An expert at trial indicated an average would be one to two weeks, but it was dependent on the circumstances. The plaintiff took 44 days to dig two wells. The first well lost circulation. The defendant also indicated that confidence in the plaintiff was lost when the well casing dropped 57 inches within days. The plaintiff indicated that the second well produced 20 to 30 gallons a minute.
HELD: The court found that there was a verbal agreement. The agreement did not guarantee water would be found or that any quantity per minute would be found. The court concluded that the two wells were completed within a reasonable time. One of the wells lost circulation during drilling but it was held that this happened from time to time and did not mean that the plaintiff was not being diligent. There was no evidence that the second well did not produce 20 to 30 gallons per minute. The plaintiff indicated that the casing dropped because the well had not yet been fully developed and, in his experience, wells in the area often fully developed themselves and the

casing stops dropping. The well was fully producing and developed by July 12, 2012, and the court held that for all purposes it was completed on July 4 when the defendant attempted to cancel the contract. The court agreed with the plaintiff that the dropping casing did not mean that there was something permanently wrong with the well. The defendant fired the plaintiff without trying to have the perceived problem explained or rectified. The plaintiff's invoice was reduced to $20,000 for Small Claims Court with pre-judgment interest from when the court believed the defendant should have known the amount owing.

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R. v. Playter, 2014 SKQB 322

Danyliuk, October 6, 2014 (QB14385)

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

The accused was found guilty of driving while his blood alcohol exceeded the legal limit. At his sentencing hearing, he applied for a curative discharge pursuant to s. 255(5) of the Code. The offence had occurred in 2011. The accused had been observed driving erratically on the highway during the early hours of the morning. He worked and lived on a construction site at the time of the offence and had found his employment to be very stressful, which caused him to resume drinking after being sober for five years. The accused had a long history of alcoholism and a long criminal record involving convictions for driving while disqualified and driving over the legal limit. After this offence, the accused had regularly attended AA meetings as well as meetings with his counsellor, but over the last year his attendance had declined substantially, although he remained sober. He advised that as he could not drive, it was difficult to get to meetings in distant towns and to see his counsellor. The accused testified that he was committed to a life of sobriety and took full responsibility for his problem. He had a new job and the full support of his wife. His motivation was real and not prompted by a desire to avoid incarceration.
HELD: The court declined to grant a curative discharge. It held that the accused had not satisfied the onus of proof upon him required by s. 255(5) in that he had not convinced the court that it would be in the public interest. The accused was sentenced to a custodial sentence of 12 months. The court found that the accused was an alcoholic and that he required curative treatment. In its decision to not give the accused a curative discharge, the court was influenced by the seriousness of the offence, the accused's lengthy criminal record for similar offences

and the fact that his motivation for asking for such a discharge was not clear. The accused had not attended AA or counselling meetings regularly for the last year.

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Nagy v. Wu, 2014 SKQB 325

Scherman, October 6, 2014 (QB14349)

Civil Procedure – Queen's Bench Rule 5-20

The plaintiff commenced an action against the defendant, alleging negligence regarding personal injuries that he suffered as a result of neurosurgical procedures carried out by the defendant upon the plaintiff. The plaintiff later sought an order under rule 30 of the former Queen's Bench Rules granting him leave to add four additional physicians, including Dr. Buwembo, as party defendants and for leave to file an amended statement of claim. The court dismissed the application on the basis that the proposed amendments would introduce allegations of negligence against new parties that would significantly complicate the action. It advised that it was open to the plaintiff to commence a separate action against the proposed defendants. The plaintiff then sued Dr. Buewenbo and three other physicians with whom he had originally consulted regarding his condition. In the second action, the plaintiff alleged that Dr. Buwembo had been negligent in a variety of ways, including writing a false, incomplete and misleading medical report relied upon by the defendant Wu. The plaintiff applied under rule 5-20 for leave to question Dr. Buwembo as a witness in the first action because he had refused to provide any information to the plaintiff. He contended that Dr. Buwembo had information relevant to his claim against Dr. Wu. Dr. Wu never spoke to, nor consulted with, Dr. Buwembo. The contact between them consisted of a letter written by the latter. In discovery, Dr. Wu said that he trusted what Dr. Buwembo had written regarding the plaintiff's medical problem because it was consistent with his own observations, but that he had made his own diagnosis and decisions. HELD: The court dismissed the application. The court reviewed the pleadings and concluded that what was at issue was whether Dr. Wu was negligent, and if so, what injury the plaintiff had suffered as a result. There was no basis to find that Dr. Buwembo had information relevant to the issue of whether Dr. Wu was negligent as he had never spoken to Dr. Buwembo and the only information that had originated from him was the letter.

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Knight (Proust) v. Proust, 2014 SKQB 342

Krogan, October 24, 2014 (QB14327)

Family Law – Division of Family Property – Unequal Division

The petitioner wife petitioned for divorce and an unequal division of family home and property. During the course of the marriage the parties had purchased various sections of farmland and had obtained a mortgage requiring the payment to the mortgagee of semi-annual payments of $7,500. Later they leased their land to a neighbour for an annual amount of $15,000, which was used to pay the bare land mortgage. Another mortgage was obtained regarding the purchase of a home quarter. After the petitioner left the marriage in June 2009, the respondent continued to live in the family home. He did not make any mortgage payments despite receiving the lease payment as well as having the sum of $20,000 available to him to pay the arrears. Foreclosure proceedings were commenced. The parties disagreed as to the value of the property and eventually the petitioner obtained a court order for the sale of the land and it sold for $600,000. After the sale, $217,400 was paid into court. As a result of the respondent's failure to make mortgage payments, $27,500 of avoidable interest costs accrued as well as the costs of $3,200 for the foreclosure application. The petitioner argued that she should be entitled to an unequal division of the family property pursuant to s. 21(2) of The Family Property Act because the respondent chose to cease making mortgage payments when he possessed the necessary funds and thus caused the foreclosure. In addition, the respondent should pay her occupation rent at the rate of $750 per month for the 39 months that he remained in the family home.
HELD: The court granted the application for an unequal distribution of the family property because the petitioner had satisfied the court that it would be unfair and inequitable to make an equal division when the respondent knew that the foreclosure proceedings would commence and had the ability to make the payments. The court denied the petitioner's claim for occupation rent because the unequal division of family property compensated her for the unnecessary expenses.

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Toronto-Dominion Bank v. Schell, 2014 SKQB 344

Rothery, October 23, 2014 (QB14350)

Mortgages – Foreclosure – Application for Judicial Sale – Order Nisi – Requirements

The plaintiff's counsel had submitted a draft order nisi for judicial sale of a property owned by the defendants. The plaintiff held a mortgage on the property. The plaintiff was entitled to do so because The Limitation of Civil Rights Act did not preclude the plaintiff from suing on the covenant because it was not a purchase money mortgage, but judicial sale was required so that the plaintiff could apply to have the amount of the deficiency in the judgment set by the court. The court found the draft order to be deficient and issued this fiat to assist the plaintiff's counsel in preparing a proper draft order. The order was deficient because: 1) it proposed that at the end of the redemption period, the mortgaged land be sold under the direction of the plaintiff's lawyers; 2) the setting of the reserve bid was based on only a "residential desktop report" appraisal that appraised the mortgaged land at a market value of $85,000 to $ 125,000. The plaintiff had not inspected the property and thus had no knowledge of its condition. Counsel suggested setting the reserve bid at $100,000, 80 percent of the appraised value; and 3) the draft set out a proposal for disbursing the purchase monies, which included it paying itself costs to which it was entitled under the mortgage and paying itself costs on a solicitor-client basis to be taxed.

HELD: The court gave leave to counsel for the plaintiff to file an amended draft order nisi. It made the following recommendations regarding the draft order: 1) the sale should be held under the direction of a solicitor other than the plaintiff's solicitor; 2) that relying upon a partial appraisal and in the absence of information on the condition of the property, setting the reserve bid at $100,000 might not reflect the best price. Fairness demanded the reserve bid be set at $125,000 but the court set the bid at $115,000. If the property could not be sold at that price, the plaintiff was given leave to apply to the court for a lower reserve bid; and 3) Queen's Bench rule 10-47(2) required that purchase monies are to be paid into court to the credit of the cause to be applied as directed by the court, including costs. Only after an application and service upon the defendant and after the court had assessed solicitor client costs could monies be disbursed to the plaintiff. Monies owed under the mortgage must be set out by the court on application. All of these matters may be addressed in one final proceeding, in the application to confirm the sale, if the judicial sale proved successful.

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R. v. Heffernan, 2014 SKQB 345

Allbright, October 27, 2014 (QB14351)

Criminal Law – Evidence – Credibility

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

The Crown appealed the acquittal of the respondent on a charge of driving when his blood alcohol level exceeded .08 contrary to s. 253(1)(b) of the Criminal Code. At trial, defence counsel made an application alleging the respondent's s. 8 and s. 9 Charter rights had been violated and applied successfully for an order excluding the Certificate of Analysis under s. 24(2) of the Charter. During the voir dire, the police officer testified about the circumstances of the arrest of the respondent because of the officer's suspicion that he was impaired and requested the opportunity to refer to his notes as the incident had occurred 16 months earlier. The defence had tendered the officer's handwritten notes as an exhibit, and the Crown then applied to have them admitted as an exhibit at the trial proper. The trial judge accepted the defence submission that, as the officer's testimony was based on his notes, it lacked reliability since the notes lacked detail and the officer had not had the reasonable grounds necessary for the breath demand. The Crown appealed the verdict on the ground that the trial judge erred in law in admitting the officer's notes as evidence and drew unreasonable conclusions from the evidence to support the finding of unreliability.
HELD: The court dismissed the appeal. The trial judge had not committed an error of law in marking the notes as an exhibit. It observed that notes prepared by a witness were simply an aide-memoire to the witness. The witness's memory produces the evidence. As a general rule, the practice of making notes an exhibit should be discouraged. Regarding the trial judge's assessment of the officer's evidence in total, the court found that the trial judge had placed some significance on the limited nature of the officer's notes, but this was not the only factor he relied upon in making the assessment. It concluded that the Crown had not demonstrated that the trial judge had committed an error of law in the assessment of the officer's credibility.

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R. v. Reiland, 2014 SKQB 346

Scherman, October 23, 2014 (QB14352)

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

The appellant appealed his conviction of operating a motor vehicle with blood alcohol content over .08. The appellant argued at trial and on appeal that the Certificate of Analysis should not have been

received into evidence because the trial judge expressly found that the police officer had not had a reasonable suspicion that the accused had alcohol in his body when making the initial ASD demand under s. 254(2) of the Criminal Code, the results of which lead to the subsequent approved instrument breath analysis. The issue on appeal was whether the trial judge had erred in holding that once an accused person has blown into a Breathalyzer, the accused person is, absent a motion under the Charter, unable to rely on the lack of reasonable and probable grounds for the demand leading to the test as grounds for acquittal and is similarly unable to argue that lack of reasonable suspicion to make a preceding s. 254(2) screening device demand as grounds for acquittal without a Charter motion.
HELD: The court dismissed the appeal. The trial judge had properly extrapolated the law as stated in R. v. Gundy and R. v. Charette to the circumstances of this case.

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R. v. Lecaine, 2014 SKQB 354

Zarzeczny, October 31, 2014 (QB14342)

Criminal Law – Assault – Assault Causing Bodily Harm – Sentencing

The accused had pled guilty to a charge of committing an assault causing bodily harm contrary to s. 267(b) of the Criminal Code and was to be sentenced after a Pre-Sentence Report was prepared. The accused was living in a tent with his girlfriend, and the victim, his cousin, came to visit. The accused had passed out due to severe intoxication and when he awakened, he believed that his cousin was threatening his partner, so he hit her in the face and mouth, knocking out four teeth. The report indicated that the accused was a 39-year-old Aboriginal man. He was from an extremely poor family of 11 children and had been raised on reserves by his parents, who were both alcoholics and abusive to each other. He had been sexually abused by one of his brothers. He began drinking when he was five and then later started using numerous drugs. The accused's criminal history was long, beginning when he was a youth and included 32 Criminal Code convictions, six of which involved violence. While he had been in prison at various times, he had been offered programming regarding alcohol abuse and anger management. Although the accused seemed to do well while in prison and had completed the programs, as soon as he was released, he resumed drinking, which then caused his criminal behaviour. Although he eventually obtained his GED 12 and completed training as a heavy equipment operator, he had spent most of his life unemployed. His two teenage children were being raised by his mother, who was very supportive of the accused. She

had given up drugs and alcohol for 20 years and expressed her interest in helping her son in the community. The accused expressed a desire to change and understood how his addictions governed his behaviour. He wanted to get a job and intended to live with his mother. The Crown argued that the accused should be given a five-year sentence because of the seriousness of the assault and his criminal record. At the sentencing hearing, the accused had been remanded for 27 months since his arrest and the Crown submitted that he should receive 1:1 credit for time served. The defence counsel took the position that the court should sentence the accused to the time served because if he was given credit of 1.5 for each month served, he would have already served the equivalent of three years and four months' incarceration. In remand the accused had not received any programming during that period.
HELD: The court sentenced the accused to time served on a 1.5:1 basis because that period of time was equivalent to an appropriate and sufficient sentence. The court noted that the accused represented a class example of the type of individual to whom all of the factors identified by the Supreme Court in the cases of Gladue and Ipeelee. The court imposed a one-year term of probation and subject to a number of conditions, which included participating in programs for addictions and anger management and to obtain help from a medical professional for treatment and counselling, to be monitored by his probation officer.

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R. v. Power, 2014 SKQB 356

Elson, October 31, 2014 (QB14335)

Criminal Law – Appeal – Conviction
Criminal Law – Assault – Assault Causing Bodily Harm
Criminal Law – Defences – Self-defence

The appellant was a constable with the Regina Police Service (RPS). He was charged with assault causing bodily harm contrary to s. 267(b) of the Criminal Code, and he was dismissed from his position with RPS. The trial judge rejected the appellant's argument of self-defence finding that he used excessive force. The appellant was sentenced to a conditional discharge. The appellant was 39 and had been an officer since 2006. Mr. Stonechild was 44 and had been homeless for seven years. Mr. Stonechild was a chronic alcoholic. Most of the encounters between RPS and Mr. Stonechild were due to public intoxication. Mr. Stonechild was usually cooperative but had on occasion been aggressive and verbally abusive. Officers had been advised to use caution when dealing with Mr. Stonechild because he was known to

have Hepatitis C and HIV. They had been specifically advised to avoid contact with his bodily fluids. On May 7, 2012, the appellant observed that Mr. Stonechild was intoxicated and he told him to attend the brief detox centre advising him that he would be arrested if he didn't. The appellant followed Mr. Stonechild to the detox centre, and when he told him to go inside, Mr. Stonechild asked if he wanted to fight. While the appellant was putting on latex gloves to arrest him, Mr. Stonechild approached the appellant quickly with hands clenched. The appellant reacted by putting his foot out, contacting Mr. Stonechild's abdomen. Mr. Stonechild hit his head on the concrete and was treated and released from hospital. The appellant admitted that he may have made an error by not paying enough attention to Mr. Stonechild while he exited the vehicle. At trial, Mr. Stonechild had no recollection of the events. A video camera outside of the detox centre captured the incident. The appellant initially advised that he had pushed Mr. Stonechild with one hand and did not change his evidence until he was confronted with the video evidence. The appellant's expert indicated that the kick was given in a thrusting not snapping motion and was pursuant to police training and was used under appropriate circumstances. The self-defence provisions of the Criminal Code were amended after the time of the incident and Parliament did not include a transitional provision. The trial judge concluded that the new self-defence provisions were prospective and had no application. The trial judge concluded that the appellant's use of force was not reasonable in all the circumstances because: he used force before Mr. Stonechild could even strike; he could have done alternate things such as call out; as a police officer he should be expected to use other viable options; and Mr. Stonechild was no match for the appellant. Only a fairly minimal use of force was found to be appropriate at trial.
HELD: The appeal was allowed, and the verdict of guilty was set aside. The Appeal Court found that the trial judge erred in applying the law of self-defence and erred in rejecting the defence. After a review of conflicting case law the Appeal Court decided to first assess the case in the context of the former law and if that resulted in a dismissal of the appeal to then assess in the context of the current law to see if there would be a different result. The trial judge erred by combining the subjective and objective aspects of whether there was harm and whether the force applied was reasonable into a purely objective test. The objective approach used by the trial judge also led him to disregard the expert's testimony. The trial judge had to take into account the actual situation; a trained police officer on duty. The trial judge also should not have assessed all of the other things that the appellant should have done. He held him to a standard of behavior developed after the event, with the benefit of hindsight, and without considering the appellant's training and education. The Appeal Court assessed the evidence and made a conclusion on the facts that were not in substantial dispute. The Appeal Court found that there were factors that raised significant doubt as to the

appellant's guilt.

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Choquette v. Viczko, 2014 SKQB 358

Acton, November 3, 2014 (QB14353)

Civil Procedure – Queen's Bench Rule 7-2
Statutes – Interpretation – Administration of Estates Act, Section 50
Wills and Estates – Duties of Executor – Sale of Assets – Objection to Sale by Beneficiaries

The plaintiff applied for an order declaring, among other things, that the transfer of lands from the defendant Donna Boots, as personal representative of the estate of Joseph Viczko, to the defendants David and Jennifer Viczko was invalid. The dispute regarding the land in question had arisen after the death of the testator, Joseph. Joseph had three children, Donna, David and Yvonne. Joseph named Donna the executrix of his will. At the time of his death, he owned farmland, and his son and his wife, David and Jennifer, and his other daughter, Yvonne, both expressed an interest in purchasing it. Donna obtained an appraisal valuing the land at $94,000 and had the estate lawyer prepare a sale agreement in January to sell the land to David for that price. The agreement was conditional upon the approval of the beneficiaries, including Yvonne, and with a closing date in May 2012. David advised Donna that he wanted his wife included in the agreement and that she, as a practicing lawyer, had advised him that, as The Devolution of Real Property Act had been repealed in 2008, it was no longer necessary to obtain the consent of the beneficiaries to sell the land. He expressed his fear to Donna that Yvonne would not agree to the sale. Donna told David that she was relying upon the information provided by Jennifer and consequently was not checking with the estate's lawyer. The agreement was then revised, the court presumed by David and his wife, and the requirement for consent was removed. David wanted to sign the agreement as soon as possible because he told Donna that he expected Yvonne to register an interest against the title, so the closing date was moved to March 2012. The agreement was signed in February and the land was transferred to David and Jennifer late in that month. The estate's lawyer sent an email to Yvonne advising her that the land would be sold to David by April and she advised him that she wanted to buy out Donna's share. When Yvonne discovered that the land had been transferred, she had another appraisal performed and brought the application. She had not accepted any of the proceeds of the sale. The issues were: 1) should the action be disposed of by way of summary judgment pursuant to Queen's Bench rule 7-2; 2) whether Yvonne's consent to the sale was

required by The Administration of Estates Act; 3) had David and Jennifer purchased the land in good faith and therefore acquired valid title free of Yvonne's interest; and 4) if they had not acquired the title free from Yvonne's interest, should the lands be vested back into the name of the executrix?
HELD: The court granted the order and gave the plaintiff summary judgment. It held with respect to the issues that: 1) as a result of the affidavits and other submissions filed by the parties, the court did not consider this to be a complex claim or that there was conflict between the evidence provided by the parties. The amount in issue would be dealt with, either by extinguishment of the debt or by distribution of the proceeds of sale; 2) s. 50.5(4) of the Act required Yvonne's consent or an application made to the court for an order approving the sale, neither of which had been obtained; 3) s. 50(9) of the Act required that the purchasers of the land to have acted in good faith. The evidence established that they had not done so. As a consequence, the court had equitable jurisdiction to override their title and rectify the situation; and 4) it would order that the transfer was invalid and that the mortgage on the land be discharged. The title of the land in the names of David and Jennifer were to be cancelled and new title was to issue in the name of Donna Boots as executrix of the estate.

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R. v. Senga, 2014 SKQB 359

Chicoine, November 3, 2014 (QB14336)

Criminal Law – Appeal
Criminal Law – Defences – Charter of Rights, Section10(b)
Criminal Law – Driving with a Blood Alcohol Level Exceeding .08 – Breath Sample – As Soon As Practicable
Criminal Law – Impaired Driving

The appellant was charged with driving while his ability to do so was impaired by alcohol contrary to s. 253(1)(a) and with operating a motor vehicle having consumed alcohol in such quantity that the concentration in his blood exceeded .08 contrary to s. 253(1)(b) of the Criminal Code. After trial, the appellant was convicted of both offences and was sentenced to a fine of $1,000 and a one-year driving prohibition for the .08 charge. A judicial stay was entered with respect to the impaired charge. The appellant appealed his conviction. An officer was stopped adjacent to the No. 1 Highway at 3:00 am. A vehicle in front of him stopped for approximately 10 seconds for no apparent reason. The vehicle was driven into the ditch to stop for the officer, rather than stopped on the shoulder of the highway. The officer noted visual signs of impairment upon approaching the

appellant in the vehicle. The accused was escorted back to the police vehicle and a sample for his breath was demanded. At the police detachment the accused contacted the appellant's lawyer's office and handed the accused the phone. The officer was not sure if the appellant actually talked to the lawyer or if he just reached voicemail. The appellant indicated twice that he was satisfied that he exercised to his right to counsel. The trial judge held that the appellant's Charter right to retain and instruct counsel of his choice had been protected. The trial judge took judicial notice of the fact that the detachment was 25 kilometres from the traffic stop and that it could take 20 minutes to drive there. The trial judge found that the breath tests were taken as soon as practicable. The issues on appeal were: 1) failure to consider evidence. The officer initially testified that the appellant had turned left into the slow lane of the two-lane highway instead of the nearer fast lane, as is normal. The officer only admitted that he was wrong in his recollection after being shown the video showing the appellant accelerating and travelling in the left lane as required. The appellant also argued that the trial judge failed to take into consideration evidence that pointed to an absence of impairment; 2) failure to give adequate reasons for judgment. The appellant argued that the trial judge did not give adequate reasons regarding the contact with counsel. The appellant also argued that the trial judge failed to deal with the fact that some signs of impairment were not recorded on the investigative report; 3) misapprehending both the law and the facts respecting right to counsel; and 4) erring by taking judicial notice when considering the "as soon as practical" issue.

HELD: The issues were determined as follows: 1) the appeal court was satisfied that there were ample indicia of driving actions showing a marked departure from what is usually considered normal. Further, there were numerous indicia that the impairment of the ability to drive was caused by the consumption of alcohol. The court was satisfied that the trial judge carefully considered the evidence of the officer and the fact that his memory of events could be faulty. The video did confirm much of what the officer testified to; 2) the appeal court concluded that the trial judge was aware that the appellant may have only left a message for his lawyer. Because the officer did not note certain signs of impairment did not mean there was evidence to the contrary. Further, there were a number of symptoms referred to in the investigative summary that were evidence of impairment. The trial judge was found to have provided adequate reasons to enable the appellant to know why he was convicted; 3) the appellant suggested that he should have been allowed to call his lawyer while in the police vehicle rather than waiting until they arrived at the police detachment. The appeal court held that the back of a police vehicle would not provide the appellant with adequate privacy to call a lawyer. The appellant also argued that the officer should have advised him that he had the right to call duty counsel or any other lawyer after he was unable to contact his lawyer. The appellant was not reasonably

diligent in pursuing his call to counsel. He was advised at roadside that Legal Aid duty counsel was available and said he wanted to contact his own lawyer; and 4) the trial judge could take judicial notice of the distance to the detachment. The estimated travel time was not necessary to the trial judge's conclusion. The appeal court agreed with the trial judge that the breath tests were taken as soon as practicable. The appeal court also found that there was ample evidence to convict the appellant of driving while impaired, which was judicially stayed at trial.

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United Food and Commercial Workers, Local 1400 v. Sobeys Capital Inc., 2014 SKQB 360

Konkin, November 4, 2014 (QB14354)

Administrative Law – Judicial Review – Standard of Review – Reasonableness or Correctness
Labour Law – Labour Relations Board – Vertical Precedent
Statutes – Interpretation – Trade Union Act Section 43(1)(c)

The applicant union applied for judicial review of a decision of the Saskatchewan Labour Relations Board (SLRB) in which it determined that the closing of a store in Yorkton by the respondent employer was not a technological change. The applicant argued that the SLRB's decision had not followed previous decisions of reviewing courts, which meant that the appropriate standard of review was correctness because stare decisis was a fundamental principle of law. Its application contained the following issues: 1) what was the appropriate standard of review; 2) whether the SLRB had erred in determining that the closure was not a technological change; 3) whether or not the SLRB erred in not applying the legal principle of stare decisis and/or vertical precedent; 4) whether the SLRB erred in finding that the respondent ceased operations in Yorkton; and 5) whether the SLRB's finding that the respondent had not violated the Act nor committed an unfair labour practice was reasonable.
HELD: The court dismissed the application. It found that the SLRB had not failed to apply stare decisis and/or vertical precedent, and thus, the court held that: 1) the standard of review regarding the issues was reasonableness; 2) the SLRB properly applied the principles stated in Culinar to make the determination that the specific act of closure in this case was not a technological change within the meaning of s. 43 of The Trade Union Act. The work was not being moved outside the bargaining unit or being performed in a different location by employees of a third party; 3) it was open to the SLRB to interpret the Court of Appeal's decision in Loraas by finding that the facts of this

case were substantially different and therefore the Loraas case had no direct application. The board's application of vertical precedent was reasonable; 4) the SLRB found that the bargaining unit related only to the respondent's Yorkton store and, as it was closed and its services not contracted out or continued in Yorkton in any way, was a reasonable decision; and 5) as the decisions of the SLRB had not been found to be unreasonable, it was not necessary to decide this point.

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Dinsdale v. C.R. Bard, Inc., 2014 SKQB 361

Popescul, November 5, 2014 (QB14368)

Civil Procedure – Commencement of Proceedings – Service – Corporations – Outside the Province

The plaintiffs applied for an order pursuant to s. 4(2) of The Class Actions Act to designate a judge to hear a class action certification application. Before the judge can be designated, the plaintiff must have filed proof that all the named defendants have been properly served. The affidavits of service indicated that service was effected: 1) on a person described as the "Legal Authorized Agent" of the defendant C.R. Bard Inc. in New Jersey; 2) on a person described as the receptionist at the address described as the principal office of the defendant, C.R. Bard Medical Division in Georgia; and 3) on person described as the director of Human Resources of Bard Canada Inc. in Oakville Ontario.
HELD: The application was dismissed. When a party is unilaterally effecting a process that may impact the rights of the other party, such as service of commencement documents, then strict compliance with the Queen's Bench is required. Queen's Bench rule 12-5 states that corporations must be served in accordance with the provisions for service of the enactment by which they are incorporated. Section 269 of The Business Corporations Act sets out how a corporation must be served. As the persons served do not appear to be officers or directors of the corporation, the service would only be valid in accordance with Saskatchewan law if the office at which the service took place was the registered office of the corporation. The plaintiffs did not provide evidence that the locations were the company's registered offices in the jurisdictions in which they were served nor did they provide evidence that service on a registered office was not incompatible with the law of that jurisdiction.

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Ulsen (Keating) v. Keating, 2014 SKQB 364

Sandomirsky, November 6, 2014 (QB14345)

Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Primary Residence

The petitioner and respondent had joint custody, shared parenting time, of their five-year-old daughter. The petitioner resided in Martensville and the respondent in Regina. Because the child was going to start school, they could no longer alternate parenting weeks. The parties met in Ireland while attending high school, and the respondent's entire family continued to reside there. The petitioner's family had since moved back to Saskatchewan. The petitioner was 36 years old and worked as a corporate receptionist Monday to Friday. The petitioner's parents, sister and young nephews lived in La Ronge, which is 378 km from Martensville. The petitioner was in a new common law relationship, which commenced March 2012. The 37-year-old respondent worked in Regina as a purchasing agent for a business supply company. The respondent's common law spouse moved in with him six weeks prior to the trial, although they had been dating since the parties separated. The respondent continued to live in the matrimonial home.
HELD: Both parties were found to be capable of parenting the child. The parties were both emotionally invested in their parental relationship, so much so that their arguments were more subjective than objective. Both parties were, nonetheless, found to be willing to maximize contact with the other parent. The petitioner's household was found to be more tested and stable, given she had lived with her common law partner for two years, whereas the respondent's partner just moved in six weeks previous. Further, the petitioner had family who lived relatively close by that she saw frequently. The court ordered that the child primarily reside with the petitioner. The respondent was given access in Regina on the fourth weekend of every month and optional access in Saskatoon on the second weekend of every month. The respondent was also ordered to pay child support in the amount of $339 per month and 46.24 percent of net child care costs.

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Litzenberger v. Cook, 2014 SKQB 365

Dufour, November 6, 2014 (QB14369)

Barristers and Solicitors – Compensation – Taxation – Limitation Period
Professions and Occupations – Lawyers – Fees – Assessment

The applicant filed an application pursuant to s. 67 of The Legal Profession Act, 1990 for an assessment of her former solicitor's account. As it was beyond the 30-day limit prescribed under s. 67(1)(a), the application was made under s. 67(1)(a)(iii). The applicant had retained the respondent to conduct her family law file and became dissatisfied with her handling of it and switched lawyers. The respondent rendered three bills between April 30, 2014, and June 12, 2014, and the applicant requested that all three bills be referred to the local registrar for assessment. The applicant did not set out any grounds in her application but stated only that she disputed the amount of each bill. Her affidavit explained that she had brought the application beyond the 30-day limit because she had been caring for a sick child. Her response affidavit stated that she found the respondent to have consistently made many errors in materials and that correcting them took additional time. The respondent's affidavit stated that the corrections and revisions had been demanded by the applicant, whom she characterized as a needy client who took up a lot of time. The respondent also opposed the application because she had given the applicant a 25 percent discount on her hourly billing rate of $400 and had not charged her for all of the work performed, and thus if she had known that the bill was going to be assessed, she wouldn't have been so generous.

HELD: The court allowed the application. Because the applicant's application was poorly drafted and her first affidavit was inadequate, the court did not award her costs. However, the court found that, as the three-month period from the date of the last bill to the date of the application was short, the prejudice claimed by the respondent (because she had given the applicant a discount) was not sufficient to offset the finding that it would be in the interests of justice to order an assessment.

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James, Re, 2014 SKQB 367

Megaw, November 6, 2014 (QB14346)

Adult Guardianship and Co-decision-making Act – Personal Guardian
Adult Guardianship and Co-decision-making Act – Property Guardian

Two people, Ms. P and PJ sought to be personal guardian of Mr. J, who suffered a brain injury from a motorcycle accident and required a personal and property guardian. PJ, Mr. J's brother, also sought to be appointed property guardian. Ms. P was involved with Mr. J in a long-term relationship and they had a 12-year-old child. She successfully applied, without notice, to be appointed temporary personal guardian so that she could instruct that feeding tubes be

reinserted for Mr. J. His three adult children had previously decided to have them removed. A doctor estimated that Mr. J had a 15 percent chance of recovery to independence. Essentially, if PJ was appointed, he would follow the advice of healthcare professionals in the rehabilitation centre Mr. J resided in. On the other hand, Ms. P believed Mr. J was not being given adequate opportunity to recover in the rehabilitation centre. There was conflict between healthcare professionals and Ms. P at times.
HELD: It was appropriate that a personal guardian be appointed for Mr. J pursuant to s. 14 of The Adult Guardianship and Co-decision-making Act. Both applicants were found to have sufficient interest in the personal welfare of Mr. J. The best interests of the adult must be considered, and the court concluded that whoever was appointed must be capable "of providing a neutral, unbiased assessment" of the adult's situation. The guardian must be able to act objectively to allow for reasoned decisions regarding Mr. J's care. Constant questioning of the care provided by healthcare professionals was found not to be in accordance with the objective view required of a guardian. PJ was therefore appointed personal and property guardian of Mr. J.

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Boomer Transport Ltd. v. Prevail Energy Canada Ltd., 2014 SKQB 368

Rothery, November 7, 2014 (QB14347)

Bankruptcy – Receiver – Claims Process – Dispute over Ownership of Assets
Builder's Lien – Enforcement
Builder's Lien – Procedure – Registration
Statutes – Interpretation – Builder's Lien Act, Section 22

The defendant was in receivership, and after the sale of its assets, $269,470 was paid into court. Bank M lent $50 million to the defendant, and the defendant granted Bank M a security interest over lands and personal property. Bank M's security interest and mortgage were registered in 2010 and at default there was $7 million owing. Three lien claimants registered their liens pursuant to The Builder's Lien Act ("BLA"), but after Bank M's registrations. Bank M argued that they were entitled to the proceeds because the liens were not valid as defined by s. 22 of the BLA and some were improperly registered against landowner's surface interests rather than the defendant's property. Further, Bank M argued that the lien claimants could not prove that the proceeds in court were proceeds from the sale of oil at the time of the receivership appointment, and s. 22(2) of the BLA providing priority over secured creditors could not be relied on. The three lien claimants provided the following materials and services

for the defendant: 1) pumping out, hauling and disposing of water and oil from the defendants oil wells; 2) providing containment systems at the well site; and 3) service equipment.
HELD: The court easily found that the defendant met the definition of "owner" in the BLA. The court found that the lien claimants also provided services that met the definition of "improvement" and they provided services or materials on or in respect of an improvement, as required by the Act. The court found that hauling and pumping water qualified because it was an integral part of the production of oil for the market. Further, the court determined that even though some of the liens were registered against incorrect interests, the validity of the claim was not undermined. Unregistered lien claims are also entitled to share in proceeds of sale if actions are successful on registered lien claims. Also, once Bank M made the intervening application for court-appointed receiver of all of the defendant's assets, the lien claimants lost all control over the remedies provided by the BLA so they could only assert their claim to the assets, which they did. Section 22(2) of the BLA gives lienholders a priority over secured creditors when lienholders' services and materials are with respect to recovery of minerals. The BLA makes it clear that oil and natural gas are included in "mineral" and that the lienholder has a first claim not only on the mineral but also its proceeds, the oil lease and specified personal property. The receiver, for unknown reason, did not deal with the lien claimants and their priority, but instead operated the business knowing that the lien claimants claimed a priority over assets. The court found that Bank M could not now benefit from the receiver's failure to deal with the lien claimants' priority. The court ordered that the money be paid to the lien claimants in proportion to the amounts in their liens.

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R. v. Worme, 2014 SKQB 383

Zuk, November 21, 2014 (QB14375)

Statutes – Interpretation – Criminal Code, Section 507
Criminal Law – Justice of the Peace – Role

The Crown appealed the decision of a Provincial Court judge dismissing an information laid against the respondent accused on the basis that the court had lost jurisdiction over the accused. In April 2013, an informant swore an information before a justice of the peace (JP) in Prince Albert, alleging that the accused had assaulted a peace officer for Corrections Canada in December 2012. On the day that the information was sworn, the accused was incarcerated in the Edmonton Penitentiary. After the JP endorsed the information, seven months

passed before the Crown obtained a production order from the Court of Queen's Bench in November 2013 directing that the accused be produced at the Provincial Court in Prince Albert in December 2013. When the accused appeared, the trial judge decided that, based on s. 485 of the Criminal Code, the court had lost jurisdiction over the accused arising from the failure of the Crown to take any process to have the accused brought before the court within three months. Accordingly, she deemed the proceedings dismissed for want of prosecution under s. 485(3). The Crown argued that the trial judge erred in interpreting s. 507 of the Code as requiring a JP to contemporaneously confirm or issue process compelling the appearance of the accused at the same time that the information is laid before him. Section 507 does not impose a duty on the JP to issue a summons or warrant every time an information is placed before him. HELD: The court granted the appeal and set aside the deemed dismissal of the information and remitted the matter back to Provincial Court. The court distinguished s. 504 from s. 507 of the Code and held that the wording of s. 507(1) does not mandate a JP to issue a summons or warrant each and every time they receive an information under s. 504. The trial judge erred in concluding that jurisdiction over the accused was gained with the laying of the April 2013 information and erred in concluding that a JP must proceed automatically to issue a summons or warrant under s. 507 following the laying of an information under s. 504. The court gained jurisdiction over the accused when he appeared in December 2013.

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Stewart v. Superior Canadian Livestock Auction Ltd., 2014 SKQB 394

Layh, December 4, 2014 (QB14387)

Contracts – Breach of Contract – Non-payment – Appeal
Contracts – Formation – Verbal – Appeal

The appellants appeal the decision rendered in Provincial Court concerning a small claims action commenced by the respondent, awarding damages against them for breach of contract to pay the respondent for the purchase of five Simmental bulls. (See 2014 SKP 72 for the facts and reasons for the trial judge's decision, which was based on an interpretation of s. 11 of The Limitations Act.) The appellants' grounds of appeal were: 1) that the trial judge erred in permitting an alleged verbal contract to alter the limitation period. They stated that the only way to extend a limitation period in a debt relationship would be by satisfying the elements of s. 11 of the Act, which require a debtor to provide a written and signed

acknowledgement of the existence of a claim for payment or to make partial payment of the debt, and either must occur before the expiry of the limitation period, neither of which acts occurred in this case; 2) whether the trial judge erred in concluding that a "verbal collateral contract" can modify the terms of payment of a written invoice; and 3) whether the trial judge erred in finding the creation of a "verbal collateral contract".
HELD: The court granted the appeal. The court found on the third ground that the trial judge had erred in finding that "a verbal collateral contract" had been formed between the parties. The respondent's repeated attempts to collect the debt owing to him by suggesting alternative ways in which the appellants could satisfy the debt, none of which were accepted by the appellants, could not constitute a contract. Neither was there any evidence that the appellants requested forbearance of their obligation to make a timely payment. The court's remarks concerning the first two grounds of the appeal were obiter as a result of its finding on the third ground.

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Cherneski (Rathwell) v. Rathwell, 2014 SKQB 399

Acton, June 18, 2014 (QB14390)

Family Law – Child Support – Variation

The petitioner applied for variation of child support order made in 2012. The petitioner requested that child support for the 11-year-old daughter be varied retroactively to June 1, 2013, so that the respondent be required to pay $18,974 per month based on his income, or alternatively, support should be set at $8,530 per month based on the average of the respondent's income from 2010 to 2012. Should the court choose this approach, the petitioner asked if the respondent's income could be averaged for each year up to June 2016. The petitioner also argued that the respondent should pay 98 percent of s. 7 expenses. The petitioner submitted that there had been a material change in circumstances as the respondent's income increased dramatically in 2012, after the last order was made. The 2012 order had been based upon the respondent's income for the year 2011, which was $311,577. The respondent had paid $2,757 per month from June 2012 to June 2014. The respondent's counsel argued that the court should now consider the payments starting in June of 2014 based on the respondent's anticipated monthly income (without bonuses) for 2014, which counsel calculated would be $185,000. The petitioner argued that that would totally ignore the respondent's 2012 income of $2,113,525.62 and the 2013 income of $3,482.55. The issues were whether the court: 1) should order retroactive child support to June 1,

2013; 2) in assessing the respondent's income, should consider only the previous year's income or the average of his last three years' income or his current projected income for the ensuing year; 3) should order the respondent pay Guideline child support given s. 4 of the Guidelines; and 4) should order s. 7 expenses to be shared.
HELD: The court varied the order for child support. With respect to the issues, it found that: 1) in situations such as this case, where the respondent's income had such extreme fluctuations from year to year that the appropriate procedure to determine the child support payments to be made by the respondent for the period June 1, 2013, to June 1, 2014, would be to apply the three-year rolling average for the years 2010, 2011 and 2012. This resulted in a monthly child support payment of $8,530.12 per month. Current arrears were set at $69,273.84, which the court ordered the respondent to pay immediately; 2) and 3) the respondent had not provided satisfactory evidence that the rolling three-year average of his income and application of the Guidelines to them show clear and compelling evidence that the Guidelines amount is inappropriate. In applying the three-year rolling average of 2011, 2012 and 2013, the average income is $809,528 with child support payments of $7,239 per month commencing June 1, 2014. The court applied similar reasoning to the s. 7 expenses as it did with respect to the 2013 year based upon the acknowledgment by counsel for the petitioner that they would not be pursuing the s. 7 expenses if the child support order was $7,000 or greater in this application; and 4) considering the amount of s. 7 expenses claimed by the petitioner in relation to the child support awarded, the court did not consider it appropriate to require the respondent to pay any portion of the s. 7 expenses for the year June 1, 2013, to June 1, 2014. This should not be taken as a precedent to suggest that as the child increases in age and the s. 7 expenses increase that the respondent would not be required to pay his proportionate share of s. 7 expenses even if his averaged income and child support payments were to increase or decrease.

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Triple A Farms v. State Agriculture Development Inc., 2104 SKQB 369

Elson, November 7, 2014 (QB14356)

Civil Procedure – Costs – Security
Civil Procedure – Queen's Bench Rules 4-24(d)
Statutes – Interpretation – Enforcement of Money Judgments Act, Section 5

The plaintiffs brought an action against the defendant for damages

that they claim they sustained as a result of the alleged abandonment by the defendant of an agreement between them wherein the plaintiffs would perform custom farm work on 3,656.9 acres of land owned by the defendant. The damages claimed totaled $365,600 and were not limited to the amount of lost profit sustained. Later in their relationship, the plaintiffs also performed specific tasks assigned by defendant in connection with land owned by the defendant. There were numerous problems associated with the claim, including the fact that the plaintiffs carried on business under the name Triple A Farms, which led the defendant to mistakenly assume it was a corporation. In the course of the action, the plaintiffs brought this application for an order prohibiting the defendant from disposing of its interest in real property located in Saskatchewan, pursuant to s. 5 and s. 6 of The Enforcement of Money Judgments Act. The defendants brought their own application pursuant to Queen's Bench rule 4-22, requesting an order for security for costs to be paid by the plaintiffs. The defendant counterclaimed, alleging that the plaintiffs failed to perform the required services under the agreement and that they were paid for all the additional services outside the agreement. As a result of the plaintiffs' breaches, the defendant was forced to cancel its seed orders and claimed to have sustained economic loss. With respect to the defendant's application, the plaintiffs provided affidavits that described their impecunious status – they had no income or assets. The plaintiffs also deposed that they had information that the defendant was planning to sell its land in Saskatchewan and that they had had problems in the past contacting the officers of it. The defendant corporation's head office was in BC, and the primary place of residence for the two principal officers was in BC. The plaintiffs argued that these factors might make it difficult for them to enforce any judgment that they might be awarded.

HELD: The court dismissed both applications. With respect to the defendant's application for security for costs, it was dismissed because the court found that the plaintiffs' evidence of impecuniosity to be sufficient for the court to apply the factor in Queen's Bench rule 4-24(d). The court found that although the application by the plaintiffs pursuant to the EMJA met the requirements of s. 5(1)(a), s. 5(2) and s. 5(5)(c), the plaintiffs claim for damages equal to the total consideration under the agreement was not going to succeed on the basis of their pleadings. They had not met the requirements of s. 5(5)(a) of the EMJA in not providing evidence of their anticipated costs and/or margin of profit, which then did not permit the calculation of lost profit they would have sustained if wrongful repudiation was proved. The plaintiffs had also failed to show under the second criteria in s. 5(5) that any judgment that they obtained was likely to be unenforceable, as the evidence that the defendant had listed its land for sale was not itself sufficient to justify a preservation order and the fact that the corporation's headquarter in BC would not prevent enforcement of a judgment.

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