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 17, No. 6 **March 15, 2015**

Subject Index

Gehlen v. Bryden, 2014 SKCA 117

Whitmore, November 17, 2014 (CA14117)

Civil Procedure – Appeal – Leave to Appeal

The prospective appellants sought leave to appeal the chambers decision that dismissed their application for summary judgment with respect to the prospective respondents' counterclaim. Each of the parties claimed defamation by the other. The chambers application for summary judgment was dismissed because the chambers judge was unable to reach a "fair and just determination" based on affidavit evidence. Also, the judge found that a summary judgment would not save time or expense because the evidence for the prospective appellants' claim would be the same as the evidence for the counterclaim.

HELD: The application for leave to appeal was dismissed. The prospective applicants met the first branch of the test for leave to appeal; the appeal had merit. The appeal court concluded that the appeal was not of sufficient importance and therefore did not meet the second test. If the appeal was allowed, the original claim would still have much the same evidence so an appeal would not decide the matters between the parties. Also, the question raised was not new, controversial or an unusual issue of practice. There were not new, uncertain or unsettled points of law raised.

 Back to top

Impaired Driving – Driving/Care or Control with Excessive Alcohol – Appeal

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

Criminal Law – Sentencing – Aboriginal Offender

Criminal Law – Sentencing – Breach of Probation

Criminal Law – Strict Liability – Defences – Due Diligence

Evidence – Admissibility – Statements – Prior/Inconsistent

Family Law – Child in Need of Protection – Child and Family Services Act

Family Law – Custody and Access

Family Law – Custody and Access – Joint Custody – Principle Residence

Family Law – Division of Family Property – Jurisdiction

Family Law – Interspousal Agreement

Regulatory Offence – Occupational Health and Safety Act – Employee

Small Claims – Appeal

Statutes – Interpretation – Animal Protection Act, 1999

Torts – Motor Vehicle Accident – Liability

Cases by Name

1140832 Alberta Ltd. v. Regional Tire Distributors (Saskatchewan) Inc.

6517633 Canada Ltd. v. Knudsen & Sons Muddy View Ranch Ltd.

Andersen v. Andersen

Rutherford v. Husky Oil Operations Ltd., 2014 SKCA 118

Whitmore, November 18, 2014 (CA14118)

Civil Procedure – Appeal – Leave to Appeal
Statutes – Interpretation – Surface Rights Acquisition and Compensation Act

The prospective appellants applied for leave to appeal from a decision of the Saskatchewan Surface Rights Board. The Surface Rights Acquisition and Compensation Act gave a right to appeal decisions in ss. 71 and 72. The appeal court determined leave to appeal with respect to: 1) jurisdiction of the board; 2) reasonable apprehension of bias; and 3) breach of duty of fairness and evidentiary errors.
HELD: The appeal court concluded that leave to appeal under the Act should be determined by applying the Rothman's test used in civil litigation right to appeal. The appeal court concluded that: 1) the prospective appellants argued that the court did not have jurisdiction to make the order that it did with respect to entry in a decision dating back to 2011. The court found that there was no right to appeal from this order established in the legislation; 2) the court indicated that there would always be a potential for bias because the board was made up of people from the industry. The appeal court held that this question of bias was not frivolous or without merit, and it also raised issues of general importance. Leave to appeal was granted with respect to the apprehension of bias ground; and 3) the prospective appellants stated that the board ignored evidence but they did not provide specifics. The ground did not satisfy the first branch of the Rothman's test because specifics were not provided. The prospective appellants also argued that proper court procedures were not followed. The Court of Appeal noted that the board could conduct its hearing as it wanted as long as the rules of natural justice were followed. There was no evidence of failing to allow cross-examination or interfering with the prospective appellants' right to make full answer. The appeal court held that the ground did not have sufficient merit and therefore failed on the first branch of the Rothman's test.

 Back to top

R. v. Swiderski, 2014 SKCA 120

Whitmore, November 18, 2014 (CA14120)

Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Interim Release
Criminal Law – Appeal – Sentence
Criminal Law – Blood Alcohol Level Exceeding .08

The appellant appealed the decision of the summary conviction appeal judge, which confirmed the trial decision and sentence. The appellant was sentenced to 120 days incarceration and his driver's licence was revoked when he was convicted of operating a motor vehicle while his blood alcohol was over .08. The appellant also applied for interim release and an order staying his licence revocation. The charge resulted when the appellant was travelling at a speed of 153 km per hour just outside the City of Yorkton. The appellant was quite uncooperative. He argued that he was arbitrarily detained and thus his s. 9 Charter rights were breached. The appellant argued that he was arbitrarily detained because he was placed in the back of the police vehicle for excessive speed even before an odour of alcohol was detected. The Crown argued that it was necessary for the appellant to exit his vehicle because it was going to be seized for excessive speed. HELD: Section 679(3) of the Criminal Code sets out the requirements for the appellant to be released. The Court of Appeal agreed with the Crown that the appellant was not arbitrarily detained when he was asked to leave his vehicle so that it could be seized. The appeal was found to be without merit. The first requirement of s. 679(3) is that the appeal is not frivolous and the Court of Appeal was not satisfied that it was not. The Crown conceded on the second requirement that there was no concern whether the appellant would surrender himself into custody if required. The Court of Appeal also found that it would have a negative impact on the public's confidence in the administration of justice to release the appellant pending determination of his appeal. The appellant had 31 previous convictions, including: four driving with a blood alcohol over .08; five driving while disqualified; and one dangerous driving.

 Back to top

R. v. Charles, 2014 SKCA 121

Whitmore, November 19, 2014 (CA14121)

Criminal Law – Appeal – Conviction
Criminal Law – Appeal – Interim Release
Criminal Law – Appeal – Sentence
Criminal Law – Controlled Drugs and Substances – Possession – Cocaine
Criminal Law – Firearm Offences

The appellant appealed his convictions and sentence and sought interim release from custody pursuant to s. 679(3) of the Criminal Code, pending determination of his appeal. He was convicted of: 1) being an occupant of a motor vehicle, knowing there was a firearm in the vehicle, contrary to s. 94 of the Criminal Code; 2) possession of a

prohibited firearm contrary to s. 95 of the Criminal Code; and 3) possession of cocaine contrary to s. 4(1) of the Controlled Drugs and Substances Act. The appellant was sentenced to three years' incarceration. The accused had warrants for his arrest and was therefore pulled over when driving a vehicle. His vehicle was searched incident to arrest and a handgun and cocaine were located. The appellant argued that the firearm was not his, but the trial judge did not find him credible and instead believed the conflicting evidence of the Crown witness. The appellant appealed on two grounds: that the trial judge erred in law by finding that the appellant fabricated his testimony regarding a confession from the owner of the firearm; and that the trial judge erred by shifting the burden of proof to the appellant to rebut the presumption of knowledge and control for the purposes of determining possession, based on the fact that the accused was the owner and operator of the vehicle in which the contraband was found.
HELD: The appellant was released from custody pending determination of his appeal. The Court of Appeal decided on the requirements of s. 679(3) of the Criminal Code as follows: 1) the appeal court had to give deference to the trial judge's findings on credibility. The appellant's first ground of appeal was found to have little chance of success. The Court of Appeal could not find anything in the trial decision bearing out the second ground of appeal and as such it also was without much merit. The court did note, however, the threshold is very low and the appeal court could not find with certainty that the appeal was frivolous; 2) the Crown conceded that the appellant would surrender himself into custody if required; and 3) the appellant was 28 with no criminal record. His former employer was willing to hire him if he was released and he would live with his mother, who would monitor him. His girlfriend was also willing to monitor him and act as his surety. The Crown opposed his release based on the severity of the crimes. The Court of Appeal found that the appellant's release was not against the public's interest, noting that his chances of success were modest.

 Back to top

R. v. Fred Thue Construction Ltd., 2014 SKPC 168

Toth, December 1, 2014 (PC14190)

Regulatory Offence – Occupational Health and Safety Act – Employee Statutes – Interpretation – Occupational Health and Safety Act

The accused was charged with committing five violations of The Occupational Health and Safety Act. The accused construction company was hired to frame walls and trusses for a building. One of

the people, Jacob Ulmer, who was working on a truss that was 25 feet off the ground, fell and broke his wrist and two vertebra. He was taken to the hospital (there was no first aid station on site) and released after five days of treatment. He had to wear a halo, which was bolted to his head. For the next year he had to wear various kinds of braces. Ulmer testified that he went to the building site to work for the accused and expected to be paid by it. He received no training regarding the work nor did he demonstrate to the accused that he could perform the work safely. He was not given fall protection equipment or a hard hat by the accused. The accused did not notify Occupational Health and Safety of the accident, and the office learned of it from Workers' Compensation. The owner of the building testified that when he paid the bill, the owner of the accused company advised him that the amount charged was based upon "what his guys' wages were" and other costs. The witnesses who testified on behalf of the accused maintained that Ulmer was a subcontractor. The counts against the accused were: 1) breaching s. 19(1) of The Occupational Health and Safety Act by failing as an employer to train its employee; 2) failing to provide notice of an accident in violation of s. 8(1)(b) of the Regulations; 3) failing to provide a fall protection system where employees were working at heights greater than three metres, contrary to s. 116(2) of the Regulations; 4) failing to ensure that all work at the site was competently and sufficiently supervised, contrary to s. 17 of the Regulations; and 5) failing to provide a worker with protective headwear and ensuring that it was worn on the construction site, contrary to s. 91 of the Regulations.
HELD: The court found the accused guilty on all five counts. With respect to the first count, the court held that the Crown had established as required that the accused was an employer under the Act and rejected the accused's defence that the accident victim was a subcontractor because he had no control over his work and his wages were set by the accused.

 Back to top

R. v. Andres, 2014 SKPC 193

Green, December 5, 2014 (PC14192)

Statutes – Interpretation – Animal Protection Act, 1999
Regulatory Offence – Animal Proctection Act, 1999 – Strict Liability

The accused was charged under s. 4(2) of The Animal Protection Act, 1999 (APA) with, being a person responsible for an animal, causing the animal to be in distress, and under s. 446(1)(b) of the Criminal Code with, being the person having custody or control of animals (cattle, horses and dogs), wilfully neglecting or failing to provide adequate

food, water, shelter and care for the animals. The charges were laid after animal protection officers employed by the Saskatchewan Society for the Prevention of Cruelty to Animals (SSPCA) had obtained a search warrant under s. 7 of the Act and searched the accused's home and yard and his farm property in February 2012. The officer was responding to a number of complaints received about the condition of the accused's cattle and dogs. In addition, two police officers accompanied the SSPCA officers. After entering the properties, the SSPCA officers contacted a veterinarian and asked her to attend at the properties. She examined the animals at both locations – dogs, horses and cattle. A cow was euthanized and a number of dogs were seized. The accused initially brought a Charter application that the search warrant was unlawful and that he was arbitrarily detained by the police (see: 2014 SKPC 75). The judge dismissed the application and proceeded with the trial on the charges noted above. As part of his Charter application, the accused also challenged the constitutional validity of ss. 2, 4, 5(1), 6 and 12 of the APA pursuant to s. 52 of the Constitution Act and to s. 24(1) of the Charter. He argued that the definition of distress in s. 2 of the APA was vague and overbroad and that, as a result, the offence created under s. 4 of the APA was similarly cast thereby violating s. 7 of the Charter. During the trial on the charges, the Crown called as witnesses the SSPCA officers and the veterinarian who examined the animals at the properties owned by the accused. The accused did not testify but called as witnesses two veterinarians who had examined the animals, the dogs in particular, after they were seized from the accused. A friend of the accused, who attended at his residence around the relevant times, also testified. The Crown's witnesses testified that the dogs were not housed to be protected from the cold and had not been given adequate water and their food was unsanitary. The horses and cows were not given water or food and had untreated injuries. The veterinarians who testified on behalf of the accused found that some of the dogs' conditions suggested some manner of neglect but rated the Body Condition Score higher than had the Crown's veterinarian witness. The friend of the accused testified that he had seen the accused feed the animals and that they had water nearby. His photographs of the animals taken on the day that the properties were searched showed weather conditions that were inconsistent with the evidence given by the Crown's witnesses.

HELD: The court found the accused guilty of the charge under s. 4 of the APA but not guilty of the charge under s. 446(1)(b) of the Code. The court held with respect to the issues of constitutional validity related to the APA raised by the accused that it was not necessary for the court to review ss. 5, 6 or 12 of the APA as they were not relevant. Regarding s. 2 of the APA, the court held that the definition of "distress" as it was incorporated into the offence created in s. 4 of the APA, provided the required "sufficient guidance for legal debate" established by the Court of Appeal in its decision in R. v. Spindloe,

regarding whether or not an animal is in distress. The court held that the Crown's evidence had satisfied it that the animals for which the accused was responsible were in distress as defined by the APA and that the accused had not shown that he took reasonable care of them to prevent them from being in distress. The Crown had not proven that the accused had willfully neglected his animals or failed to provide them suitable care as required by s. 446(1)(b) of the Code and that the accused's evidence had shown that he was making some attempt at caring for the animals.

 Back to top

R. v. Weatherbee, 2014 SKPC 196

Labach, November 10, 2014 (PC14182)

Criminal Law – Sentencing – Breach of Probation
Criminal Law – Sentencing – Breach of Recognizance
Criminal Law – Sentencing – Fraud – Restitution
Criminal Law – Sentencing – Pre-Sentence Report
Criminal Law – Sentencing – Remand Time
Criminal Law – Sentencing – Sentencing Principles
Criminal Law – Theft

The accused pled guilty to 22 charges from Alberta and 18 charges from Saskatchewan. The charges included: defrauding people of money contrary to s. 380(1)(b) of the Criminal Code; failing to comply with a probation order contrary to s. 733.1(1) of the Criminal Code; theft contrary to s. 334(b) of the Criminal Code; and breaching a recognizance contrary to ss. 145(2)(a) and (3) of the Criminal Code. The Crown argued that the accused should be sentenced to 21 months less six months credit for remand time and that there should be a restitution order for all of the victims. The Crown was giving 1:1 credit for the remand time. The defence did not take issue with the restitution order but argued that a Conditional Sentence Order was more appropriate. The accused was 31 and had a normal upbringing. The accused had six children, all in care. The accused had previous offences for fraud (s. 380(1)(b)) and stealing a cheque (s. 334(b)). The accused began committing the new offences while on probation for stealing a cheque. The fraud charges resulted when the accused asked numerous people to deposit cheques for her through the ATM and then withdraw the money. The cheques were either not in the deposit envelope or were not good for another reason. A common story used by the accused was that she locked her keys in her vehicle and needed the person to deposit the cheque and give her money so that she could hire a tow truck or locksmith. Another story used was that a family member was dying and that she needed a cheque deposited to get money to visit the person or attend their funeral. The accused also

befriended a 93-year-old man; she would get him to withdraw money for her and even set up an internet account for him so that she could transfer money directly to her account. The accused took $12,218 from him. The accused and her common law even lived in the man's home for nine months after he was placed in long-term care, despite being asked to leave by his family. The accused did not abide by her release conditions and failed to attend court. The accused defrauded 13 people out of $21,173 in Alberta and 15 people out of $9,522 in Saskatchewan. She also forged a letter from Social Services to a landlord advising that Social Services would pay her rent. The pre-sentence report indicated that the accused was using the money to support her crack cocaine addiction in Alberta and for living expenses in Saskatchewan. The accused's general risk to re-offend was high. The report indicated that the accused did not have a true understanding of the impact her crimes had on her victims. Also, the accused convinced someone she recently met to lie for her pre-sentence report and indicate that she was a family friend willing to provide the accused with accommodation. The accused had in fact just met this person. The accused also told the court that she had $33,000 in inheritance from her father but indicated that she did not want to pay restitution out of this money because she would rather get a job and pay restitution.

HELD: The court was skeptical that the accused actually received an inheritance from her father, and if she did, her reluctance to pay back her victims with it was found to be shocking. The accused took advantage of the generosity of others for selfish reasons. The court listed nine aggravating factors, including: 1) the accused defrauded numerous people in one year over two provinces; 2) rather than dealing with her Alberta charges, the accused fled to Saskatchewan and continued to defraud people; 3) the accused breached court orders; and 4) the accused did not repay any of the money. The court only noted three mitigating factors, which were: 1) she pled guilty; 2) she expressed some remorse for her actions; and 3) one of the reasons the accused committed the offences in Alberta was to support a drug habit. The only appropriate sentence for the accused was found to be incarceration and serving the same in the community was not found to be appropriate because: 1) it would not be consistent with the principles and purpose of sentencing, namely, denunciation and deterrence; and 2) the s. 374 offence was a straight indictable offence with a maximum sentence thereby precluding a conditional sentence. The accused was only given credit for her remand time of 1:1 because she was detained in custody pursuant to s. 524(8) of the Criminal Code and therefore fell within one of the statutory exceptions to the general rule set forth in s. 719(3.1). The accused was sentenced to concurrent periods of incarceration ranging from one month to six months followed by periods of consecutive incarceration of a total of 15 months. The accused was also ordered to pay restitution and was not given a victim surcharge fine for the Alberta charges but the court

had to impose the victim surcharge fines for the Saskatchewan offences because they were committed after October 24, 2013.

 Back to top

R. v. Daniels, 2014 SKPC 197

Daunt, November 12, 2014 (PC14179)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Break and Enter
Criminal Law – Sentencing – Conditional Sentence
Criminal Law – Sentencing – Driving over .08
Criminal Law – Sentencing – Mischief
Criminal Law – Sentencing – Pre-Sentence Report
Criminal Law – Sentencing – Sentencing Principles
Criminal Law – Sentencing – Victim Surcharge

The accused pled guilty to six Criminal Code charges on two informations: 1) break and enter, committing mischief contrary to s. 348(1)(b); 2) driving over .08 contrary to s. 253(1)(b); 3) operating a motor vehicle while disqualified contrary to s. 259(4); 4) break and enter and theft contrary to s. 348(1)(b); 5) mischief under $5,000 contrary to s. 430(4); and 6) possession of a firearm without a licence contrary to s. 91(1). The first break and enter happened when the drunk accused was lost and broke a window to get into a cabin and sleep. The owner claimed restitution in the amount of $505. The rest of the charges resulted when the accused got stuck backing out of the driveway to the cabin he had just broken into. He had cut the phone line so that the alarm did not sound. He was intoxicated, did not have a licence to drive, and had a rifle in the vehicle without a case or trigger guard. The accused was a 48-year-old Cree man who grew up in five different foster homes. He briefly attended a residential school. He had a grade 10 education, was single and had no children. His work was repairing vehicles. The accused had an alcohol addiction but completed treatment after his arrest and remained sober. The accused abided by a strict recognizance since March 20, 2014. He had a lengthy criminal record with 31 prior convictions for break and enter. Most of the offences were prior to 2006. All of the accused's sentences were jail or fines. He was a medium risk to reoffend generally and the risk could be reduced by targeting alcohol use and family relationships. The accused had support from a neighbour. He took responsibility for the offences and was remorseful.
HELD: The court found that the accused's degree of responsibility were reduced due to his background and the Gladue factors present. A penitentiary term was found to be disproportionate to the gravity of the offences and the degree of responsibility of the accused. Two years less a day was the outer limit. A conditional sentence was an option

for the break and enters because they were not “dwellings”. The accused was sentenced for the charges as follows: 1) 30 days intermittent; 2) 30 days intermittent, consecutive; 3) 5 days’ time deemed served; 4) 18-month conditional sentence order, concurrent; 5) 6-month conditional sentence order, concurrent; and 6) 30 days intermittent, consecutive. The conditional sentence orders included a curfew term, abstention from alcohol clause, and prohibition from entering a place where the main purposed was selling alcohol. A firearms prohibition was not ordered.

 Back to top

6517633 Canada Ltd. v. Knudsen & Sons Muddy View Ranch Ltd., 2014 SKPC 202

Demong, November 25, 2014 (PC14186)

Contracts – Breach – Anticipatory Breach
Contracts – Breach – Damages – Mitigation
Contracts – Breach – Repudiation
Small Claims – Breach of Contract

The plaintiff and defendant entered into a written agreement whereby the plaintiff would custom seed 1,050 acres of the defendant’s land for the price of $19,293.75. The contract was made on May 29 and the seeding was to start on June 2 or 3. On May 30 the defendant asked the plaintiff to seed alongside them rather than seed the whole 1,050. The plaintiff indicated he would think about it. The defendant then left a message for the plaintiff on May 31 that he should not move his equipment to their land because they had found someone else to start right away. The defendants then called the plaintiff on June 2 and said he could come and seed the rest, which was still about 950 acres. The plaintiff did not go and seed for the defendants. The plaintiff asserted that he mitigated his damages because he kept his ads for custom seeding in The Western Producer and on Kijiji, but he received no other offers for seeding. The parties agreed that the plaintiff’s costs to seed would have been about 10 percent of the total contract price. The issues were: 1) if there was an anticipatory breach of the contract. Did the defendant repudiate the written agreement that it entered into? Was there any lawful justification for the repudiation? Was the repudiation of the contract accepted by the plaintiff?; 2) did the defendant revive the contract by repudiating the repudiation; and 3) if the plaintiff was entitled to damages, did he take reasonable steps to mitigate his loss.
HELD: The court analyzed the issues as follows: 1) there was an anticipatory breach by the defendants and there was no lawful justification for the repudiation. They had agreed two days earlier to

let the plaintiff start seeding on June 2 or 3; 2) the court did not find the defendants' phone call offering the plaintiff the opportunity to seed the rest as a repudiation of the repudiation so as to revive the contract. Some of the acres had already been seeded and any revival would have thus been on different terms than agreed upon; and 3) the plaintiff was entitled to accept the repudiation and sue for the loss that flowed naturally from the breach subject to a reduction for mitigation. The defendants argued that the plaintiff failed to mitigate his losses because he did not seed the remainder of their land when offered on June 2. The defendants indicated that they had told the plaintiff that only 900 to 950 acres remained to be seeded. The court found that the plaintiff's failure to go and seed the rest of the defendants' acres was unreasonable. The work was precisely the same as what was contracted for, just fewer acres. Given how late it was in the season, the court noted that the plaintiff should have seriously considered any work it was offered. Because the defendants still had 950 acres left to seed, the plaintiff would have only lost 100 acres of work minus 10 percent cost. The plaintiff was therefore awarded damages in the amount of $1,575.

 Back to top

Lavjinder v. Stenko, 2014 SKPC 208

Demong, December 9, 2014 (PC14197)

Torts – Motor Vehicle Accident – Liability
Torts – Negligence

The plaintiff's vehicle was in an accident with a vehicle driven by the defendant; the plaintiff's vehicle was being driven by someone other than the plaintiff but with his consent. The plaintiff seeks damages of $700, which was the insurance deductible paid to have his vehicle repaired. Credibility was in issue because the only witnesses were the drivers of the two vehicles involved in the collision. The driver of the plaintiff's vehicle indicated that he was driving in the curbside lane and without notice the vehicle operated by the defendant hit the plaintiff's vehicle. The driver of the plaintiff's vehicle wanted the court to believe that the defendant was trying to pass the plaintiff's vehicle and lost control. The damage to the plaintiff's vehicle was along the driver's side front corner panel up to and including the front bumper. The damage to the vehicle driven by the defendant was also on the front corner panel but on the passenger side. There was no evidence of scratching along the length of either vehicle. The defendant indicated that he was driving in the centre lane and the plaintiff's vehicle was in the curbside lane, both vehicles heading in the same direction. According to the defendant, the plaintiff's vehicle attempted to change

lanes, apparently to make a U-turn. The defendant tendered pictures of the debris in the centre of the road slightly closer to the curbside. He also tendered pictures of tire tracks that he argued were the plaintiff's vehicle starting its U-turn.
HELD: The court could not ascertain how the damage to the vehicles could have been done by one vehicle trying to pass the other. The pictures showed damage more consistent with a direct blow rather than a glancing blow as would happen if one vehicle was attempting to pass another. Also, the tire tracks were consistent with a vehicle turning towards the collision site. The photographic evidence was entirely consistent with the defendant's version of events and inconsistent with the driver of the plaintiff's vehicle. The court found that the plaintiff's vehicle attempted to make a U-turn and collided with the vehicle driven by the defendant. The defendant was not negligent. The accident arose due to the negligent actions of the driver of the plaintiff's vehicle.

 Back to top

R. v. Synkiw, 2014 SKQB 362

Currie, November 5, 2014 (QB14382)

Criminal Law – Appeal – Conviction
Criminal Law – Defences – Charter of Rights Section 8, Section 9, Section 24(2)
Criminal Law – Driving with Blood Alcohol Level Exceeding .08 – Breath Demand – Reasonable Grounds

The appellant was stopped after he did a U-turn in his vehicle a mile before a police check stop. The officer indicated that he pursued the vehicle because the U-turn was illegal and for suspicion of evading the check stop to hide the commission of an offence. A roadside breath sample was demanded and taken, resulting in a "fail" reading. A breath demand was made and the appellant was charged with driving over .08 and impaired driving after the Breathalyzer test. At trial the appellant argued, unsuccessfully, that his ss. 8 and 9 Charter rights were infringed and therefore the Certificates of Analysis should be excluded. The trial judge found that there was no breach and indicated that, even if there had been a breach, the evidence would not have been excluded. The appellant was acquitted on the impaired charge. The issues on appeal were: 1) did the trial judge err in finding that the stop was lawful; 2) did the trial judge err in finding that the RCMP had sufficient grounds to demand a roadside breath sample; and 3) did the trial judge err in his s 24(2) analysis.
HELD: The appeal was dismissed. The court determined the issues as follows: 1) the trial judge found that the appellant's vehicle was

pursued and stopped because of suspicion of an offence, not because of an illegal U-turn. The question of whether the officer had the reasonable grounds for the stop was one of law subject to the correctness standard of review. The appellant argued that the trial judge failed to consider investigative detention. The appeal court found it clear that the trial judge did address reasonable grounds for investigative detention when he was addressing whether the officer had reasonable grounds to stop the appellant. The appellant argued further that the officer only had a hunch that the appellant had been drinking and driving and that was inadequate to constitute an objective basis for a suspicion of the offence. The appellant argued that there could be a number of reasons that a person would make a U-turn as he did. The court held that the appellant was correct that there could be a number of reasons for the U-turn but that the threshold was low to establish reasonable grounds for the stop. There must be a nexus between the drinking and driving offence and the driver observed to do the U-turn. The appellant argued that the nexus was so tenuous so as not to amount to a nexus. A roadside check stop is lawful pursuant to s. 209.1 of The Traffic Safety Act. Once a vehicle is signaled to stop, the driver must stop; the appellant's vehicle was not signaled to stop in this case. The court found that a reasonable person would conclude that the officer's suspicion was reasonable. Maneuvering a vehicle to avoid a check stop was found to be an act that can provide the police with reasonable grounds for stopping a vehicle. The stop was not an arbitrary detention; 2) the question of whether the officer had reasonable grounds to suspect that the appellant had alcohol in his body was a question of law to be reviewed on the correctness standard. The officers noted signs of alcohol consumption were: stumbling with words; bloodshot, glassy eyes; odor of alcohol from the appellant's vehicle; the appellant gave two different answers to where he was going; he had to catch his balance getting out of his vehicle; he walked unsteadily; and the smell of alcohol from the back of the police cruiser when the appellant was in the back. The appeal court reviewed the evidence and determined that the breath demand was made after the appellant was in the police vehicle and after both officers had smelled alcohol about the appellant. It was held that a reasonable person, knowing the circumstances of each officer, would suspect alcohol in the appellant's body; and 3) it was unnecessary for the court to consider s. 24(2) because no Charter breach was found.

 Back to top

Harvey v. Armbruster, 2014 SKQB 363

Layh, November 6, 2014 (QB14344)

Family Law – Custody and Access

The parties had two children during their eight-year marriage. Their son was born in 2006 and their daughter in 2009. The family and their extended families all lived in Yorkton, and the petitioner mother was the primary caregiver. In 2011, the petitioner left the marriage and moved with the children to another house in Yorkton, and the parties were able to work out a satisfactory parenting schedule. In 2012, the petitioner moved to North Portal because she had obtained employment there. She returned to Yorkton frequently to visit the children and assumed that when she completed the three-month probation attached to her new position, that the respondent would allow the children to move to the petitioner's new home. When the respondent resisted that plan, the parties went to court and the judge made an interim order in 2012: it awarded them joint custody of the children and established a parenting schedule where the petitioner was given time with the children, whether it was in Yorkton or Estevan of 40 percent and 60 percent of holidays. Based on the respective incomes of the parties, the petitioner was ordered to pay the set-off amount of $72 per month. The court recommended that they proceed to a speedy pre-trial, which did not occur until late in 2012 after the parties had been divorced. The trial date was set for October 2014. During that period, the petitioner remarried and continued to live in North Portal and the children lived with the respondent. The petitioner argued that the respondent wasn't taking proper care of the children and it would be in their best interests if they relocated to North Portal. They had visited there regularly and had made many friends.

HELD: The court granted the parties joint custody of the children and ordered that their primary residence remain with the respondent. The petitioner would have access every Friday until Tuesday for three consecutive weeks, such access to be exercised in Yorkton or North Portal. The court found that this was not a mobility case but applied some of the principles. Neither of the parties were the preferred psychological parent, they were both equally good parents. The court was persuaded by the fact that the children had remained in the family home and this continuity was important. It would be easier for the petitioner to spend time with the children in Yorkton because of the presence of her extended family there than it would be if the respondent had to travel to North Portal. With respect to child support, the court found that under s. 9 of the Guidelines, which applied to shared custody, the respondent's income at $58,000 and the petitioner's at $24,100 per annum respectively, resulted in a set-off of support payable by the respondent of $469 per month. The respondent was to pay 71 percent of s. 7 expenses.

 Back to top

P. (J.L.) v. R. (J.), 2014 SKQB 366

Dufour, November 6, 2014 (QB14355)

Family Law – Interspousal Agreement

The petitioner wife applied for joint custody of the parties' two children and to have their primary residence with her, providing reasonable access to the respondent, continued exclusive possession of the family home, and child and spousal support. The respondent brought an application in response, asserting that the parties entered into a binding agreement in 2013 that covered all the items sought in the petitioner's application and requesting an order enabling him to take out judgment based on the agreement and enforcing the clause that stipulated shared parenting of the children. The parties had negotiated the agreement but the execution of it was done in an unusual way. The petitioner and respondent each signed their own copy. In the case of the latter, his copy was sent to the petitioner's lawyer. The petitioner forbade her lawyer from sending her executed copy to the respondent's lawyer. However, the petitioner did advise the respondent by a text message sent in March 2013 that she had signed the agreement. At the hearing, the petitioner deposed that she instructed her lawyer not to proceed with the agreement because of ongoing conflict with the respondent but neither she nor her lawyer told the respondent or his lawyer that she did not consider the contract to be binding. The respondent proceeded to honour the terms of the contract for the next 11 months.
HELD: The court dismissed the petitioner's application. It rejected her submission that the agreement was unenforceable: an objective, reasonable person would conclude that the petitioner had entered into a legally binding contract. She could not refile in any case, 11 months after the respondent had lived up to his end of the bargain. The court allowed the respondent's application and ordered that he could take out judgment on the agreement with respect to spousal support and property division. It denied the respondent's request for judgment for shared parenting. A clause in an agreement cannot oust the jurisdiction of the court to determine what was in the best interests of the children. The issues of custody and access must be determined at trial and an expedited pre-trial was ordered.

 Back to top

R. v. Lozinski, 2014 SKQB 370

Layh, November 10, 2014 (QB14370)

Criminal Law – Motor Vehicle Offences – Impaired Driving –

Driving/Care or Control with Excessive Alcohol – Appeal

The appellant was convicted of the charge of being in care or control of a motor vehicle having consumed alcohol in such quantity that his blood alcohol content exceeded 80 mg in 100 ml of blood, contrary to s. 253(1)(b) of the Criminal Code. The appellant appealed the summary conviction to the Court of Queen's Bench. The appellant was found by RCMP officers sleeping in his truck, which was parked a half-mile from the main road on a snowmobile trail. The truck was running and the lights were on. The appellant was lying across the bench seat of the truck with this feet and legs wedged on the driver's side. The officers had difficulty waking him and breath samples subsequently taken from him showed 280 mg and 300 mg of alcohol in 100 ml of blood. Because of the appellant's position in the truck, the trial judge accepted that he could not rely on the presumptive provision of s. 258(1) and determined that the appellant was in actual care or control of the vehicle. The appellant's grounds of appeal were that the trial judge: 1) erred when he convicted the appellant in the absence of proof that he involved the use of the truck, its fitting or equipment. The appellant argued that the actus reus required the performance of some act associated with the truck whereby it might have been unintentionally set in motion; 2) failed to follow Shuparski. The appellant argued that that decision established that an accused cannot be convicted for something he has not done. In this case, even though the appellant was in a position to do something wrong, he could not be found guilty of the offence of care and control based on what he may have done; and 3) failed to find only a negligible non-culpable risk associated with the appellant's conduct based on the facts of the case. The appellant argued that the truck was parked in a remote location and there was no traffic on the trail.
HELD: The court dismissed the appeal. It held with respect to the grounds of appeal that: 1) the appellant's argument could not succeed based on the facts. The keys were in the ignition, the truck was running and the lights were on. The appellant had fully involved the fittings of the truck. The actus reus of the offence is not confined to the test relied upon by the appellant, as demonstrated in the Supreme Court's decision in Boudreault; 2) the case law confirms that an inebriated person who is found in proximity to a vehicle and a determination of what he could have done is part of the test whether the actus reus has been found; and 3) the trial judge could not have not come to any other reasonable conclusion as he found and applied the facts based on the evidence that the truck was running with its lights on, which could have attracted attention from passersby. Their investigation might have caused the appellant to put the truck in motion. The appellant had not offered any plan that he had formed that would have allowed the trial judge to find a minimal or negligible risk.

Back to top

R. v. Cullen, 2014 SKQB 371

Dawson, November 12, 2014 (QB14348)

Criminal Law – Aggravated Assault – Sentencing
Criminal Law – Sentencing – Remand Time
Criminal Law – Sentencing – Sentencing Principles

The accused pled guilty to aggravated assault. The accused drove the victim to the outskirts of a city where he viciously and brutally beat her. The accused left the victim, and she did not obtain assistance until the next morning when someone attended at the commercial business where the assault took place. The victim had severe injuries and spent 12 days in hospital. She continued to have dizzy spells and had difficulty with her speech from being choked. The victim impact statement portrayed the lasting and serious effects on the victim. She was fearful to leave her house with her children unless she had a male adult with her. The accused was 37 years old, was raised in Regina and had a Class 1 A licence. He had a previous short and dated criminal record. Included in his record were an assault charge and two uttering threat charges from 2008. The accused indicated that alcohol was a contributing factor in the assault. He apologized in court. The Crown argued that a sentence of five years with remand credit at a ratio of 1:1.5 was appropriate. The accused argued that appropriate sentence was two years after remand credit of 1:1.5. HELD: The offence was grave and serious, with a maximum sentence of 14 years. The accused's degree of moral culpability was significant. A review of case law led the court to conclude that, generally, sentences for aggravated assault were over two years. There were many aggravating circumstances and the mitigating circumstances of a guilty plea and showing remorse. The paramount sentencing principles were found to be general and specific deterrence with a significant period of incarceration being necessary. A fit and proper sentence was determined to be four years' incarceration minus 1.5 days credit for every day spent on remand.

 Back to top

Bray v. Saskatchewan Government Insurance, 2014 SKQB 372

Danyliuk, November 13, 2014 (QB14383)

Civil Procedure – Appeal
Civil Procedure – Appeal – Fresh Evidence
Evidence – Admissibility

Evidence – Expert Witness – Qualifications

The appellants appealed the judgment from the Small Claims Division of the Provincial Court when they were awarded damages of $1,060, much less than the $16,505 requested. The appellants claimed damages from the respondent insurer for damage caused to their house and personal property by hail. The issues on appeal were: 1) the appropriate standard of review; 2) did the trial judge block evidence on the basis that the file was too thick, or on any other improper basis; 3) did the trial judge have a predisposition toward the matter; and 4) did the trial judge err in failing to qualify a witness as an expert in accordance with the appellants' wishes.
HELD: The appeal was dismissed. The issues were dealt with by the appeal court as follows: 1) questions of law were held to the correctness standard, while findings of fact were held to the reasonableness standard with great deference to the trial judge on matters of credibility; 2) there was nothing on the record to support the appellants' argument that evidence was not admitted at trial because the file was too thick. The trial judge only referred to the number of documents on the court file when explaining what he had and had not looked at. The appellants' assertions were not successful because: a) the trial record did not support the arguments; b) the appellants were represented by senior legal counsel at trial and the court noted that counsel would have done something about it if evidence was being blocked; c) the appellants indicated that they had a lot of other evidence that they could have put into trial but the transcript did not reveal any attempts to enter any further evidence at trial. In any event, there was no application to adduce fresh evidence and the evidence involved was available at trial so it was not fresh evidence; 3) there was no indication on the trial record that the trial judge had made up his mind before the trial commenced; and 4) the appellants' witness was qualified as an expert in home inspection but not an expert in hail damage to roofs. The only qualifications the witness had was two years as a roofer in Calgary and a one-hour course on hail damage to roofs. The appeal court did not find an error with the trial judge's decision on the expert qualification.

 Back to top

Theriault v. Theriault, 2014 SKQB 373

Wilson, November 13, 2014 (QB14357)

Family Law – Division of Family Property – Jurisdiction
Statutes – Interpretation – Court Jurisdiction and Proceedings Transfer Act
Civil Procedure – Jurisdiction – Territorial Competence

The petitioner wife petitioned for divorce, spousal support and a division of family property. The petition was issued in January 2014 in Saskatoon. Later in the month, the respondent filed a case for divorce in Japan. In this application, he argued that the Court of Queen's Bench did not have the territorial competence to hear the family property application and, as a result, the divorce, spousal support and property claims should be transferred to Japan to avoid a multiplicity of actions. The parties had been married in Saskatchewan in 1980 and had resided in the province until 1998 when the family moved to Japan because of the respondent's employment. In 2006 they returned to Canada and stayed until 2009 when the respondent's job took them back to Japan. The marriage ended in 2012 and the petitioner moved back to Saskatoon and the respondent remained in Japan. When they separated, the parties discussed the division of family property and the respondent transferred $1,630,000 to the petitioner from an investment account, which he believed accomplished an equal division. The petitioner submitted that there was other family property in existence and she was entitled to a further distribution and spousal support. The petitioner claimed that most of the family property was constituted by investment accounts held in a Canadian bank and insurance company and that there was a house and investments in Saskatchewan. The respondent stated that the accounts were in the City of Ottawa. The issues were: 1) whether the Court of Queen's Bench had jurisdiction regarding the wife's claim for divorce and spousal support under the Divorce Act; 2) whether The Court Jurisdiction and Proceedings Transfer Act (CJPTA) applied to claims for division of family property brought in Saskatchewan, and if so, did the court have competence as defined by the CJPTA; and 3) if the court had territorial competence, should it decline it in favour of Japan.

HELD: The court dismissed the respondent's application. It held with respect to the issues that: 1) the petitioner was ordinarily resident in Saskatchewan for one year prior to commencing the proceeding as required by s. 3(1) of the Divorce Act, and the court therefore had jurisdiction regarding the divorce and spousal support as corollary relief to it under s. 2(1) of the Act; 2) under s. 4(e) of CJPTA there was a real and substantial connection between Saskatchewan and the facts on which the proceeding against the respondent was based and thus the court had territorial competence. With respect to the petitioner's claim for property located either in Japan or Ottawa, the court was allowed to order the payment of a sum equivalent to the spouse's interest in the property under s. 26 of the Family Property Act; and 3) for a variety of reasons, it would not be appropriate for it to decline jurisdiction in favour of Japanese courts, particularly because that country's law does not have the concept of spousal support and the petitioner might lose the juridical advantage if prevented from proceeding in her home jurisdiction.

 Back to top

R. v. Tesser, 2014 SKQB 374

Wilson, November 13, 2014 (QB14371)

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

The appellant appealed his conviction in Provincial Court for the offence of failing or refusing to comply with a demand to provide a breath sample for analysis in an ASD, contrary to s. 254(5) of the Criminal Code. The appellant was stopped by police officers because the licence plate of the vehicle he was driving had expired. As the officer spoke to the appellant while he was still in his vehicle accompanied by a passenger, the officer could smell alcohol. The officer asked the appellant to leave his vehicle and accompany him to the police cruiser in an effort to determine whether the smell was emanating from the appellant. As soon as the appellant was isolated in the cruiser, the officer testified that he could smell alcohol coming from the appellant's breath, and based on the suspicion that he had alcohol in his body, the officer read an ASD demand to the appellant. When asked if he understood, the appellant asked the officer "does that mean you'd like me to breathe into a Breathalyzer?" The officer repeated the request and the question and the appellant repeated his question. The officer responded by saying that he did want the appellant to provide a breath sample and the appellant stated "I decline". The officer explained that a failure to provide a sample would lead to the arrest of the appellant, and the latter again repeated, "I decline". The officer then arrested the appellant and advised him of his Charter rights and gave the police warning. The appellant was taken to the police station, where he asked to use a telephone to call a lawyer. As he didn't know any lawyer, he picked a name from the yellow pages. There was no answer and a message was left. The appellant made no effort to call another lawyer, although the police had informed him of Legal Aid's availability. At trial, the appellant testified that he had had one glass of wine eight hours earlier and that a tray of drinks had been spilled on him during the evening and that the passenger in his vehicle had been drinking. Regarding the breath demand, the appellant testified that he assumed that the officer was asking him to supply a breath sample at the police station, because he had not known what an ASD was. He admitted that he never asked the officer for clarification regarding his assumption. The appellant's grounds of appeal were that the trial judge erred: 1) by concluding that the officer had a subjective and objective basis to reasonably suspect that the appellant had alcohol in his body. The appellant argued that because he had had only one drink and had explained that drinks had been spilled on him, the Crown had failed to prove

that there was alcohol in his body; 2) in concluding beyond a reasonable doubt that the appellant intentionally refused to comply with a lawful demand. The appellant argued that the appellant's misunderstanding with respect to the demand provided him with a reasonable excuse to refuse to provide the breath sample; and 3) by finding that the appellant's right to counsel had not been breached at the police station, and if there was a breach, the evidence should not be excluded because the remedy was disproportionate to any Charter violation. The appellant argued that the officer had not provided sufficient assistance to permit him to make contact with a lawyer. HELD: The appeal was dismissed. The court held with respect to the grounds of appeal that: 1) the trial judge had not erred. She had made findings of fact that the appellant's breath smelled of alcohol as did his vehicle and his clothes. The findings were supported by the evidence. She applied the correct test regarding the officer's suspicion and had found that it was objectively and subjectively reasonable; 2) the trial judge had not erred. She rejected the appellant's argument that he had not willfully refused to provide a sample when he stated twice that he declined, regardless of his mistaken assumption, and there was evidence upon which she could base her conclusion that she did not have a reasonable doubt that the appellant refused to provide a sample and he intended to refuse; 3) the trial judge had not erred in finding that the appellant did not have a right to counsel at the time of the ASD demand and as the appellant had decided not to phone any other lawyers at the police station, that the officer was entitled to rely upon that decision. The trial judge had also correctly found that the alleged breach had happened long after the refusal had taken place and there was no connection between the breach and the charges. The evidence supported the trial judge's findings.

 Back to top

Jorgenson v. ASL Paving Ltd., 2014 SKQB 375

Acton, November 13, 2014 (QB14358)

Civil Procedure – Queen's Bench Rule 7-5

The plaintiff and defendant each applied to the court for summary judgment. The plaintiff contended that, by summary judgment, the court could establish whether the defendant had had obligations to him and whether the defendant breached the obligations. The latter's application was to determine whether it had any of the obligations that the plaintiff alleged it had. It argued that if there were obligations, a trial was required to find whether there had been a breach of them. Both parties agreed that the issue of damages would require a trial. The defendant's alleged obligations arose from an

agreement between the parties.
HELD: The court dismissed the plaintiff's statement of claim as having no possibility of success. With respect to the first issue before it, whether the defendant owed certain obligations to the plaintiff under the agreement, the court made the necessary findings of fact based upon the agreements and affidavits filed on behalf of the defendants. On the basis of the agreement, the plaintiff had no cause of action against the defendant under its new ownership.

 Back to top

Marksview Farms Ltd. v. Corman Park (Rural Municipality No. 344), 2014 SKQB 376

Konkin, November 13, 2014 (QB14359)

Civil Procedure – Judgments and Orders – Res Judicata

The applicant brought an application for an order directing the respondent to offer a certain three acre parcel of land to the applicant. The applicant owned and farmed land adjoining the parcel in question. Since the 1950s the applicant had farmed the parcel and made improvements upon it by way of installing irrigation pivots. It had made repeated attempts over time to find the owner of the land and informed the respondent of these attempts and its desire to purchase the land. In 2008, the respondent took title to the parcel for back taxes and then offered it for sale. The applicants brought the application pursuant to s. 31(7.1) of The Tax Enforcement Act, requesting the court to find that it had an irrevocable licence as its interest under that section. The respondent argued that the issues raised were res judicata. In June 2014, Schwann, J, had entertained an application brought by the same applicant pursuant to s. 107 and 109 of The Land Titles Act, 2000. At that time, it sought an order extending the registration of the miscellaneous interest registered by it against the parcel, but the judge determined that the applicant had been unable to convince her that the rights that the applicant had asserted in the interest gave rise to an interest in land recognized by law.
HELD: The court dismissed the application. It applied the res judicata test established by the Supreme Court in Penner and found that the applicant was attempting to re-litigate the same question: it applied in this application for a judicial sale on its alleged "equitable interest" in land as opposed to a legal interest when the judge held in the previous application that it did not have an interest in the land recognized by law. The court observed that the applicant should have raised its argument that it had an irrevocable licence constituting an equitable interest in land in the previous application rather than

applying to the court again to consider the same facts with a new argument.

 Back to top

At., Re, 2014 SKQB 377

Allbright, November 13, 2014 (QB14360)

Family Law – Child in Need of Protection – Child and Family Services Act
Family Law – Child in Need of Protection – Psychological Report
Family Law – Child in Need of Protection – Termination

A judgment after trial made pursuant to The Child and Family Services Act ordered that the three children continued to be in need of protection pursuant to s. 11 of the Act and directed that each child be assessed to determine from a psychological point of view the best interests of the children. The court also ordered a parenting assessment of the father; one had already been completed on the mother. There were allegations that the father abused the children. The court placed the children with their grandmother for six months to allow for the assessments. The assessment of the father did not conclude whether he hit the children but did make some recommendations for him and his children, such as participating in family therapy and the father attending anger management classes. The children were residing with their grandmother and had significant involvement with their mother. The Ministry of Social Services' position was that the children were no longer in need of protection and could be returned to the care of their mother. The father indicated that the Crown had stayed all charges against him and that an emergency protection order resulted from him trying to access his children by phone. The father urged the court to continue to find the children in need of protection and ordering them to reside with their grandmother and giving access to the father.
HELD: The court concluded that it would not be in the children's best interests to make a similar order as in the past. The children would then continue to be in limbo, which was an expressed concern by one of the children. The court did not find that the children were in need of protection and ordered their return to their mother. The judge also expressed his view that the father did not physically abuse the children and that the mother conducted herself in such a way so as to alienate the children from their father.

 Back to top

R. v. Schwartzenberger, 2014 SKQB 378

Smith, November 13, 2014 (QB14361)

Criminal Law – Strict Liability – Defences – Due Diligence

The appellant was convicted of failing to yield the right-of-way to another vehicle where a yield sign was erected, contrary to s. 219(5) and (8) of The Traffic Safety Act. The appellant appealed his conviction on the following grounds: 1) the trial judge did not engage in the R. v. W. (D.) analysis; 2) the trial judge erred by failing to consider the defence of due diligence; and 3) the trial judge did not conduct the trial in a fair manner because she became involved in questioning Crown witnesses.
HELD: The court did not find support for the appellant's arguments regarding the R. v. W. (D.) analysis or the fair trial. The appellant represented himself at trial and he did not specifically raise the issue of due diligence. The court did, however, find that if the appellant was believed by the trial judge, there was some evidence of due diligence. The trial judge did not give full and appropriate consideration to the due diligence defence and only mentioned the defence. The trial judge's decision was set aside and the matter was remitted back to Provincial Court for a new trial.

 Back to top

Andersen v. Andersen, 2014 SKQB 380

Krogan, November 14, 2014 (QB14362)

Family Law – Custody and Access – Joint Custody – Principle Residence
Family Law – Custody and Access – Shared Parenting
Family Law – Custody and Access – Mobility
Family Law – Child Support

The parties were married in 2009 and had one child in 2010 before their separation in 2011. Since separation, the respondent resided in Alberta and the petitioner in Regina. The primary residence of the child was at issue. In 2012 the parties consented to a joint custody arrangement where the petitioner would parent for eight days and then the respondent for 13 days. The petitioner was 24 years old and a journeyman electrician with work hours Monday to Friday from 7:00 am to 3:30 pm. His parents lived in Regina and he had a brother with a child the same age as the petitioner's. The petitioner had lived with his girlfriend for two years. His girlfriend was a nurse and they planned to get married. The petitioner planned to enroll the child in French immersion school because of his high intellectual ability. The

respondent was opposed to French immersion because she did not know the language; there was no evidence that the petitioner knew the language either. The respondent was 23 years old and had a history of depression. She had been living with a new partner since August 2013; her new partner was a farm labourer. The respondent worked at a bank Monday to Friday from 8:30 am to 5:00 pm. During access time in Regina the child spent time with both extended families. The petitioner's mom operated a daycare, which the child attended when the petitioner and his girlfriend were working. The child's cousins also attended the daycare. The respondent had little contact with her parents, and they both phoned the petitioner when he had the child in order to speak to him. The respondent would not allow the petitioner to FaceTime the child as agreed, nor would she allow telephone contact at times. The respondent had also contacted the police when the child returned to her care with a bruise; the bruise was the result of a door being opened while the child was too close and there was no wrongdoing.

HELD: The parties agreed to joint custody. The court considered the parenting arrangement at the time of trial to be a shared parenting arrangement and as such the child had two residences that he could call home. The court also reviewed mobility authorities. The court was unable to conclude that the child had a closer bond with either parent or with either parent's new partner. Neither parent was found to be the psychological parent to the exclusion of the other. The court found nothing in the petitioner's past behaviour to think that he would not support the child's contact with the respondent; however, there was past behaviour questioning whether the respondent would support the petitioner's contact with the child. The child would suffer the loss of time with extended family, including the respondent's family, if time with the petitioner decreased. The court found that a decreased amount of time spent with the respondent would not have as great an impact on the child as would less time spent in Regina. The petitioner was also found to be willing to provide the child with an opportunity to learn a second language. The court concluded that the child's best interest would be met with an order that his primary residence be with the petitioner. The respondent was ordered to pay child support and s. 7 payments in accordance with the Guidelines.

 Back to top

Yanke Multimodal Services Ltd. v. Jastek Master Builder 2004 Inc. (c.o.b. Jastek Master Builder), 2014 SKQB 382

Gabrielson, November 19, 2014 (QB14374)

Contract Law – Interpretation
Contract Law – Breach – Damages

The plaintiff sought judgment against the defendant in the amount of $58,600. The claim related to fees charged by the plaintiff against the defendant's account for transport, logistics and ancillary services which the plaintiff alleged it earned in transporting goods for the defendant in 2011. The plaintiff contracted initially with the defendant in 2010 for transportation services to bring construction materials acquired in China from Vancouver to Saskatoon. After a rate quote was given and accepted by the defendant, the plaintiff sent a Credit Application Agreement and a Value Added Service Fees documents to the defendant, which were signed by the defendant's director. Included in the Service Fees document (dated April 2010) was a demurrage rate that stated: "2 days free at load/unload facility, $75/day". The plaintiff billed the defendant regularly for freight services, which the latter paid. In August 2010, the plaintiff sent an email to all its customers notifying them of changes to the demurrage fees. The email referred to an attached document: "Ancillary Charge Schedule", which included a new demurrage rate: "after 5 days of $150 per day per container". In late 2010, the plaintiff began to issue invoices for demurrage. The defendant paid approximately 20 of these invoices by two cheques dated in December 2010. After that, the defendant refused to pay the invoice on the basis that there had never been any agreement to pay for demurrage. The plaintiff stopped transporting the plaintiff's goods and commenced the action. The major issues were: 1) was there a valid agreement that demurrage would be paid. The plaintiff argued that the defendant had signed the Value Service Fees document and paid 20 invoices. The defendant stated that the understanding between the parties was that there would be no additional fee other than the transportation rate. It had paid the demurrage invoices in error and should not now be taken to have acquiesced to the charges; 2) was the demurrage agreement rate changed, and if so, was the defendant obligated to pay the revised rate. The plaintiff argued that the defendant must be deemed to have accepted the changes in the ancillary charges when it continued to place orders with the plaintiff. The defendant stated that it had never received the August 2010 email and therefore it was unaware of any change in the rates. Further, since it had signed the Service Fees document, it could not be changed unless it had signed the ancillary document agreeing to it.

HELD: The court found with respect to the issues that: 1) there had been agreement between the parties for the defendant to pay demurrage. Such charges would be essential to good container management by the plaintiff and it would be absurd to suggest that the containers could be used for storage by the defendant whenever it chose. The defendant signed the document, which specifically referred to demurrage fees being charged after two days and the payments by it of invoices were an acknowledgment of its liability to pay; 2) it did not accept the position of either party. Because the court was uncertain whether the defendant had been made aware of the changes in the

demurrage rate or that it agreed to pay an increased fee, any demurrage charges over $75 per day was excluded. Therefore, the court calculated that the total chargeable demurrage of $58,600 pursuant to the invoices submitted by the plaintiff was reduced to $28,125 and the court awarded it that amount.

 Back to top

Meier v. Saskatchewan Institute of Agrologists, 2014 SKQB 389

Layh, November 26, 2014 (QB14366)

Administrative Law – Judicial Review – Bias – Apprehension of Bias
Administrative Law – Judicial Review – Standard of Review – Reasonableness
Professions and Occupations – Agrologists
Statutes – Interpretation – Agrologists Act, 1994

The appellant was found guilty of professional misconduct by the Discipline Committee of the Saskatchewan Institute of Agrologists. He appealed the decision. The complaint against the appellant was from another member of the institute who had developed "side-row banding" for seed and fertilizer placement in air seeders. The appellant worked for the company that made "mid-row banding" fertilizer placement and he published an article stating that the difference in crop development on his farm was due to the two different methods of seed and fertilizer placement. The concern of the Institute was whether the appellant undertook the necessary scientific investigation. At the penalty hearing the appellant raised a new issue of bias against the chairperson of the discipline committee, alleging that he had shown bias when providing an opinion to a third party. The chairperson absented himself from the discipline committee's deliberations on whether to allow a new hearing based on the bias allegation. The discipline committee did not allow a new hearing and the appellant was sentenced: 1) to a reprimand; 2) that he complete the professionalism and ethics course; and 3) that he pay costs of $15,000 within three months.
HELD: The appeal was dismissed because the discipline committee's conclusions fell within the parameters of reasonableness afforded under The Agrologists Act, 1994. The appropriate standard of review was correctness for matters of jurisdiction or questions of law outside of the tribunal's area of expertise and reasonableness for questions that related to the interpretation and application of the Act not raising issues of general importance. The standard of review for professional discipline and penalty was reasonableness with significant deference being given to the discipline committee. The discipline committee's approach to the case was reasonable; the facts were reviewed and

applied with necessary reference to the Act. Further, the discipline committee considered and reviewed the evidence of a witness, concluding that the appellant did follow the scientific method. The discipline committee was reasonable in dismissing that witness's evidence. The court found the decision to be transparent, intelligible and justified. The court also concluded that the discipline committee did not err in finding that the appellant failed to establish a reasonable apprehension of bias of the chairperson. The discipline proceedings had nothing to do with which air seeder was better; it had to do with the scientific method, or lack thereof, employed by the appellant in comparing the two in his article. The court also agreed with the discipline committee's approach to determining the costs payable by the appellant; they reviewed previous cases and the length of those hearings compared to the appellant's.

 Back to top

Robinson, Re (Bankrupt), 2014 SKQB 396

Thompson, December 19, 2014 (QB14388)

Bankruptcy and Insolvency – Absolute Discharge

The bankrupt applied for discharge, and the trustee's report indicated that the bankrupt had been cooperative during the bankruptcy period and recommended an absolute discharge. The bankrupt's sister and brother, acting successively in their capacity as Executor of the Estate of Audrey Robinson, the mother of the bankrupt and the executors, made a notice of objection, contesting the trustee's report and submitting that the bankrupt had not been rehabilitated. In 2009 the bankrupt was convicted for fraud and ordered to pay $100,000 in restitution. His mother mortgaged her home and loaned the bankrupt $100,000 to pay out the restitution order. There is evidence that the bankrupt agreed to repay Audrey Robinson for this loan, and the trustee ultimately admitted a secured claim in relation to this loan and released estate assets to deal with it, according to the Claims Register. The bankrupt also admitted to having used his mother's credit card to purchase approximately $84,000 in goods and services between 2009 and 2012. No proof of claim was filed for this debt.
HELD: The court granted the bankrupt an absolute discharge. When a creditor seeks to contest the information in the trustee's report, it bears the onus of establishing the facts supporting its objection. The court found that the executors had not established that the bankrupt conducted himself dishonestly or rashly in the circumstances of this bankruptcy. There was no evidence that the bankrupt deceived or pressured his mother into lending him money or allowing him to use her credit card. Even if the executors had provided evidence

contesting the trustee's report, no dividend could have been paid to the estate because it had not proven its claim as an unsecured creditor.

 Back to top

R. v. Kwok, 2014 SKQB 397

Danyliuk, December 9, 2014 (QB14389)

Evidence – Admissibility – Statements – Prior/Inconsistent

The appellant appealed the decision of the trial judge, which held that one of the appellant's dogs was "dangerous" pursuant to the City of Saskatoon Bylaw 8176. The appellant owned two Akita dogs that appear identical, but one is male and the other female. At the hearing, the identity of the dog became an issue. When the dogs were being walked by a friend of the appellant, one of them attacked another dog being walked by its owner. The owner of the other dog testified at the hearing that she heard the appellant's friend refer to the attacking dog as "he". Before the hearing, the appellant, a lawyer, requested that his friend write a statement concerning the incident. In this written statement, the friend identified the male dog as the attacker. The appellant gave the statement to the Animal Control Officer. The friend also made an oral statement to a solicitor for the city, identifying the male dog. At the hearing, the friend, appearing as a witness for the appellant, testified that she could not remember which dog had been involved in the attack. The city's lawyer sought and obtained leave to cross-examine her as to her two previous statements, where inconsistencies were alleged vis-à-vis her trial testimony. She testified after reflection that she felt she was now unsure about which of the two dogs had committed the attack. The court found that the appellant's male dog qualified as dangerous under the bylaw. The appeal centered on whether there was proper and sufficient evidence to identify the male as the attacking dog. The appellant's ground of appeal was the trial judge erred in admitting the out-of-court statement and in the absence of a voir dire.
HELD: The court dismissed the appeal. It found that the trial judge had not erred in admitting the prior statement, although he did not identify the basis on which he allowed the admission. The court stated that the trial judge could admit the original statement into evidence under the recognized existing exception to hearsay's admission based on the case law, which indicates that where an identification was made out of court and the witness is available to testify but cannot make the identification at trial, the out-of-court statement is admissible.

 Back to top

Anstead v. Saskatchewan Medical Association, 2014 SKQB 406

Zarzeczny, December 12, 2014 (QB14397)

Class Action – Certification
Class Action – Trial of Common Issues

The plaintiff applied for certification of an action as a class action pursuant to s. 6 of The Class Actions Act. The proposed plaintiff was a physician and representative plaintiff suing the Saskatchewan Medical Association ("SMA") on behalf of physicians engaged in providing full-time surgical services in Saskatchewan. Two groups of general physicians perform surgical services; full-time surgical assistants and part-time surgical assistants who had office-based practices. The SMA accepted a differential pay scale for the two groups so that the part-time received more compensation even though the services were the same. The claim alleged that SMA had a fiduciary duty, duty of fairness and duty to represent fairly, which were breached, to the members of the class in negotiating for the fee payments with the government. The SMA indicated that the difference in pay was to encourage part-time surgical assistants to participate in the surgery of their patients even though they continued to have the overhead associated with maintaining an office-based practice during that time.
HELD: The proposed plaintiff argued that the fiduciary duty, duty of fairness, and fair representation causes of action as pled should be recognized at law even though they were novel. It was argued that the SMA is the exclusive body negotiating for the fees of physicians, and because of the exclusivity, the SMA had a fiduciary duty and legal obligation of fairness and fair representation to the physicians and any group of physicians. They argued that the causes of action advanced by the proposed plaintiff do not exist in law, nor does the court have jurisdiction in the matter. Section 40 of The Saskatchewan Medical Care Insurance Act establishes an appeal procedure that could handle the complaint; no appeal procedure was commenced by the proposed plaintiff. The court concluded that for the purposes of s. 6(1)(a) of the Act the proposed plaintiff's claim did disclose a cause of action. There was found to be a plausible basis for supposing the defendants could be liable to the class. Section 6(1)(b) requires the court to be satisfied that there is an identifiable class. The court concluded that the proposed identified class was rationally connected to the causes of action and common issues. The defendant argued that some of the class members may be barred by limitation periods; however, the court noted that the examination of such arguments was premature given the statement of defence had not even been filed. The proposed plaintiff listed three common issues of all class members for the purposes of s. 6(1)(c) of the Act. The court was satisfied that the

common issues raised common issues of fact and law that applied to all members of the proposed class. The requirements of certification were met. The court also found that judicial economy, access to justice and behavior modification all led to favour the class action procedure rather than individual claims. The two different pay codes and their application to the two different groups of surgical assistants logically dictated that the matter be litigated in the context of a class action. Therefore the requirements of s. 6(1)(d) of the Act were met. The proposed plaintiff was the primary advocate with respect to eliminating the differential fee code and as such the court found that he would fairly and adequately represent the interests of the class members as required by s. 6(1)(e). The court was also satisfied that that the proposed plaintiff had met the requirements of s. 6(1)(e)(ii) by setting out a workable method of advancing the action. The defendant's application to dismiss the proposed plaintiff's claim for lack of jurisdiction was not successful.

 Back to top

1140832 Alberta Ltd. v. Regional Tire Distributors (Saskatchewan) Inc., 2014 SKQB 409

Gunn, December 16, 2014 (QB14399)

Corporate Law – Business Corporations Act – Derivative Action
Corporations – Breach of Fiduciary Duty

The applicant was a tire distributor in Edmonton and was a shareholder and creditor of the tire distributor in Saskatchewan, who was the proposed plaintiff. The applicant applied for: 1) an order pursuant to s. 232(1) of The Business Corporations Act ("BCA") granting leave to commence an action on behalf of the proposed plaintiff; 2) an order pursuant to s. 233(a) of the BCA authorizing it to control the conduct of the action; 3) an order pursuant to s. 233(c) of the BCA directing that all amounts payable by the respondents be paid to the applicant as shareholder and creditor of the proposed plaintiff; and 4) an order pursuant to s. 233(d) of the BCA directing that the proposed plaintiff pay all reasonable fees incurred by the applicant in connection with the action. The applicant and the individual respondent were each 50 percent owner of the proposed plaintiff corporation. The individual respondent was also a director of the proposed plaintiff and of the corporate respondent. The respondent argued that a derivative action was not necessary, instead favouring an oppression motion or breach of duty to shareholders action. The issues were: 1) whether the applicant was a complainant as defined in s. 232(1) of the BCA; 2) if the applicant was a complainant, did they satisfy the conditions precedent set out in s. 232(2) of the

BCA; 3) should the applicant be permitted to control the action on behalf of Saskatchewan; 4) who should bear the costs; and 5) if the action was successful, what should happen to the amounts owing. HELD: The issues were determined as follows: 1) the applicant was a complainant and had a bone fide stake in the outcome of the derivative action it sought leave to bring; 2) the applicant gave notice of its intention to apply for leave to commence a derivative action by letter dated June 2, 2014. The contents of the notice were sufficient and the time provided was reasonable. The question of whether the applicant was acting in good faith was not an onerous one, and once it looked like it was in the best interests of the company to sue, the onus shifted to the directors to show why a law suit had not been undertaken. The proposed plaintiff's directors voted and split on whether to bring an action against the respondents. One of the directors of the proposed plaintiff was a director of the respondent company and therefore could not be said to be exercising independent judgment on the issue. The presumption of sound business judgment therefore did not apply. The applicant's affidavit evidence was sufficient to establish a prima facie case warranting leave. Leave was granted pursuant to s. 232(1) of the BCA to bring a derivative action in the name and on behalf of the proposed plaintiff; 3) the applicant argued that the respondents mismanaged the proposed plaintiff and breached the management agreement. The court determined that it was clear, for the purposes of s. 233 of the BCA and in the circumstances, the applicant should control the conduct of the action; 4) and 5) the disposition of awarded amounts and costs were left to the trial judge to determine; to determine prior to that was found to be premature.

 Back to top

McKay v. Erickson, 2014 SKQB 412

Megaw, December 17, 2014 (QB14402)

Small Claims – Appeal

The appellant appealed a judgment from the Small Claims Court, which dismissed his claim. The appellant and the respondent had been involved in a vehicle collision in a parking lot. The appellant's vehicle had suffered damages in the amount of $2,000. At the hearing, the appellant submitted some sketches of the position of the vehicles after the collision indicated that the damage could only have occurred if the respondent was at fault. The appellant maintained that the respondent's vehicle was going south. A third party witness was called. She had seen the collision and drew a diagram of the position of the vehicles and submitted it to SGI a month after the accident. Her

diagram and testimony showed that the respondent's vehicle was heading north. The appellant's grounds of appeal were that the trial judge: 1) disregarded the appellant's diagrams; 2) had permitted the respondent to converse with the witness during a recess; and 3) had interfered in the conduct of the plaintiff's case by excessive questioning of the witness.

HELD: The court dismissed the appeal. The court held with respect to the grounds that: 1) on the basis of the evidence, the trial judge made a finding of fact that the appellant was at fault based on the testimony of the third party witness and had made no palpable error in doing so; 2) there was no evidence regarding what the respondent and the third party witness said to each other during the recess and the ground that the evidence was tainted was dismissed; and 3) the court could not find that inappropriate judicial intervention had occurred.

 Back to top