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 23, No. 19 **October 1, 2021**

Subject Index

Birnie v Birnie, 2021 SKCA 107

Ottenbreit Schwann Leurer, August 4, 2021 (CA21107)

Family Law - Child Support - Imputing Income - Appeal

Z.M.B., the spouse of W.P.B., and mother of a child of the marriage for whom she sought child support, appealed the child support order made after trial (2019 SKQB 303) on grounds which challenged the trial judge's findings with respect to the income to be imputed to W.P.B. under the Federal Child Support Guidelines (Guidelines), by which the quantum of child support was to be calculated. At the time of trial, W.P.B. operated his farm through a corporation called Mustang Land and Cattle Corp. (Mustang) from which he derived most of his personal income. At trial, Z.M.B. sought to impute income from Mustang to the amount of W.P.B.'s income available for determining child support. In particular, she sought 1) to have the trial judge determine W.P.B.'s net income from Mustang for 2015; 2) to include 100% of the depreciation claimed by Mustang for machinery and equipment added to Mustang's gross income; 3) to add back to the gross income of

Bankruptcy and Insolvency - Conditional Discharge

Civil Procedure - Class Actions - Certification
Statutes - Interpretation - Class Actions Act, Section 6(3)(b)(iii)

Contract Law - Breach - Damages

Contract Law - Interpretation

Contracts - Breach of Contract - Repudiation and Damages

Criminal Law - Drinking and Driving - Dangerous Driving

Criminal Law - Evidence - Admissibility - Hearsay - Principled Exception - Appeal
Criminal Law - Sentencing - Appeal

Criminal Law - Reasonable Doubt - Credibility

Criminal Law - Sentencing - Appeal - Aggravated Assault

Employment Law - Fiduciary Duty
Civil Procedure - Interlocutory Injunction - Requirements

Enforcement of Money Judgments - Preservation Orders

Family Law - Child Support - Determination of Income
Family Law - Divorce - Spousal Support
Family Law - Division of Family Property - Evidence
Civil Procedure - Queen's Bench Rules, Rule 9-25
Civil Procedure - Self-Represented Litigants - Duty of Court

Mustang W.P.B.'s personal use of a truck owned by it; 4) to impute 100% of Mustang's pre-tax corporate profit to W.P.B. for 2016 and 2017; 5) to adjust W.P.B.'s income by including an amount representing a reduction of Mustang's cash for excessive purchases of inventory; and 6) to reverse the reduction in the child support payable for overpayment under a previous interim order. The trial judge also made a ruling denying Z.M.B.'s application that the court draw an adverse inference from W.P.B. not calling certain witnesses. As to 1), the income of Mustang for 2015, which appeared to be an anomaly because it was much higher than the other years being considered, was claimed by W.P.B. as an error made in the preparation of the financial statements erroneously showing a large gross profit which, when corrected, showed a "substantial loss" in gross income. The trial judge declined to delve into the specifics of the financial statements for 2015, given the lack of clarity in the evidence as to how the error arose for that year, but nonetheless agreed that for 2015, he would extend the child support payable by W.P.B. pursuant to a separation agreement beyond the agreed termination date of June 2014. With respect to 2), the trial judge recognized that some of the depreciation claimed in the financial statements was an accounting entry only, but was not prepared to "bring back all of the amortization" for the common-sense reason that machinery and equipment wear out and must be replaced at some point in the future, and added back 50% of the depreciation to the income of Mustang. Further, as to 3), the trial judge found that the truck was used in large measure for farming purposes, and the expenses related to it were legitimate, though he did add back other expenses of Mustang as being personal to W.P.B. In relation to 4), and Z.M.B.'s argument that all of the pre-tax income of Mustang for 2016 and 2017 should be included in the calculation of child support, the trial judge included 50% of the income for these years for that purpose. Lastly, as to ground 5), the trial judge could not find on the evidence that W.P.B. had converted cash to inventory to artificially reduce his income, finding rather that the purchase of inventory was for legitimate farming purposes; and 6) he found that that W.P.B. had overpaid child support, and adjusted the amount payable in the final order to reflect the overpayment.

HELD: The appeal court dismissed all grounds of appeal except that related to the child support adjustment for overpayment pursuant to a previous interim order. By exercising his discretion to make the adjustment, the trial judge failed to consider whether such would cause Z.M.B. hardship, and so this decision was sent back to the trial judge for reconsideration. As to the other grounds, the appeal court found that, in making the numerous rulings he was required to make in arriving at a fair and just determination of the child support to be paid in accordance with the principles applicable to the exercise of this discretion as mandated by the Guidelines in the imputation of income from a corporation controlled by the payor spouse, he made no palpable or overriding errors, and thus his decisions should be sustained. Also, in many cases, the appeal court held, the trial judge was correct in finding that Z.M.B. had failed to adduce evidence required to support the arguments she advanced. As to the trial judge's decision not to draw an adverse inference against W.P.B. for not calling certain witnesses, the appeal court found the trial judge was correct in not drawing such an

Cases by Name

inference since Z.M.B. had failed to establish the evidentiary basis to raise a presumption that it was incumbent on W.P.B. to disprove Z.M.B's allegation of improper entries in Mustang's financial statements.

 Back to top

R v Anaquod, 2021 SKCA 111

Jackson Ottenbreit Caldwell, August 16, 2021 (CA21111)

Criminal Law - Evidence - Admissibility - Hearsay - Principled Exception - Appeal
Criminal Law - Sentencing - Appeal

The accused, L.M.A., appealed an evidentiary ruling made by the trial judge after a voir dire (Sask PC, Regina, 9 October 2018) admitting into evidence at the trial proper a prior inconsistent statement of an essential Crown witness (M.) who recanted that statement while testifying. He also appealed his sentence of eight years in the penitentiary for the offence of "intentionally discharging a firearm while being reckless as to the life or safety of other persons." The grounds of appeal were narrow: 1) whether the trial judge erred in principle by finding that the hearsay danger of absence of contemporaneous cross-examination at trial was alleviated sufficiently by M.'s availability to be cross-examined during the trial on the making of her statement, and thereby allowing the trial judge to determine if the prior inconsistent out-of-court statement was likely true; and 2) whether the trial judge erred in principle in relying on sentencing cases for the offence of intentionally discharging a firearm at a person "with intent toâ€¦ prevent the arrest or detention of any person" in arriving at the eight-year sentence. The trial judge found at trial (Sask PC, Regina, 30 July 2019) that L.M.A. and M. were the only persons in a house that was the location of a lengthy armed standoff and from which shots from a firearm were discharged in the vicinity of numerous police officers. In a warned, video-taped statement taken soon after the incident, M. recounted that L.M.A. had fired the shots, and said she was telling the truth and was not lying. M. was a reluctant witness and did not come to court voluntarily. At trial, she testified that she did not see L.M.A. fire the gun but she did not deny that he was in the house alone with her. She did not deny giving the statement and testified to details about what had occurred during the armed standoff.
HELD: Both the conviction appeal and the sentence appeal were dismissed. As concerns the conviction appeal, the appeal court, speaking through Jackson J.A., reviewed the state of the law with respect to the principled exception to the hearsay rule, in particular R v Bradshaw, 2017 SCC 35, and more specifically the law with respect to recanting witnesses being available for "meaningful cross-examination" and the place of

King v King

Kontek v Golay

Krug v Dakine Home Builders

Martin, Re (Bankrupt)

Montieth v Highway Traffic Board

Piett v Global Learning Group Inc.

R v Anaquod

R v Bird

R v Brassington

R v Noltcho

R v Shaw

Saskcon Repair Services Ltd. v Weyburn (City)

Stettner v Burak

Thorpe v Kindersley (Town)

Tran, Re (Bankrupt)

W.L.G. v A.C.G.

this factor in the "constellation of factors" to be considered in determining the threshold reliability of that prior inconsistent statement and its admissibility at trial pursuant to the principled exception. In doing so, the appeal court reviewed and distinguished its own cases, R v Johnson, 2018 SKCA 28, and R v Gardipy, 2012 SKCA 58. First, the court summarized the governing principles and found the trial judge had these in mind and had applied them correctly. It found that the trial judge recognized that hearsay evidence is presumptively inadmissible but that it may be admissible if it can be said to be procedurally reliable or substantively reliable, or a combination of both. The appeal court found the lower court had been correct in determining that the Crown had proven on a balance of probabilities that the prior inconsistent statement was procedurally reliable, and did not need to consider whether it was also substantively reliable. It was procedurally reliable because it was taken with a degree of formality by a police officer, was video-taped in its entirety, being viewed by the trial judge at trial, who was then able to assess M.'s veracity as he would that of a witness in court. As well, M. was available to be examined and cross-examined in court, and in this way the trial judge could assess whether she was truly disavowing her prior statement. L.M.A. advanced the argument that M. was not meaningfully available for cross-examination, though in the courtroom, because she claimed to not remember giving the statement or what she said in it, and as such it was not possible to extract the reasons why she "changed her story." The appeal court pointed out that in the courtroom, she did not claim to have forgotten her statement or its contents but that she lied in her statement, so by implication, she remembered it. In her testimony, she provided details of what happened in the house during the standoff. As such, the trial judge was able to assess that she was trying to protect L.M.A. in her testimony, and thereby correctly satisfied himself that threshold reliability had been met and the prior inconsistent statement should be admitted into the trial to be weighed with the balance of the evidence. As to the sentence appeal, the appeal court viewed this ground as one raising an issue about the gravity of the offence. Both the offence of discharging with intent and the offence of discharging a firearm recklessly provide for the same maximum penalty, so it was of no consequence that the cases relied on by the trial judge dealt with the offence of discharging a firearm with intent. The appeal court agreed with the trial judge that the armed standoff, which was lengthy, involved many police officers, including a SWAT team, one of whom a bullet missed by inches; an intoxicated, keyed-up shooter who would not stand down; and the use of tear gas, justified the sentence, which was fit and imposed without any error of principle.

 Back to top

W.L.G. v A.C.G., 2021 SKCA 112

Jackson Ottenbreit Caldwell, August 18, 2021 (CA21112)

for the Courts of Saskatchewan.

Family Law - Spousal Support - Determination of Income
Civil Procedure - Appeal - Application to Adduce Fresh Evidence

The appellant appealed the decision of a Queen's Bench judge, after trial, to grant retroactive and ongoing child and spousal support. He also applied to admit fresh evidence that went to the issue of how the judge had imputed income to him. The trial judge also ordered an unequal division of family property, resulting in the appellant paying the respondent approximately $2.3 million (see: 2020 SKQB 43). The parties separated in 2014 after 18 years of marriage and one child, now aged 14, who resided primarily with the respondent. The parties had agreed after his birth that their son's care and that of the home would be the responsibility of the respondent and the appellant would focus on his business career. Although the respondent had been employed before the child was born and had started some home-based businesses after that, she had been financially dependent on the appellant. At the time of separation she was 36 and the respondent, 40. In dealing first with the issue of support, the trial judge first reviewed the appellant's income. After separation, the parties had negotiated a series of interim consent orders regarding child and spousal support. In force at the time of trial was a 2018 order that set the appellant's income at $396,500 per annum and provided $3,070 and $6,000 per month in child and spousal support respectively. The parties had used a three-year average of the appellant's line 150 income in his tax returns to arrive at the support set out in the consent orders, but the judge found that that was not the fairest determination of the income available to him for support purposes. At the time of trial, the appellant owned a 30 percent share of Allied Lumberland Ltd. (Allied). He held that interest through a holding corporation known as WLG Holdings Ltd. (WLG) of which he was sole shareholder. Evidence showed that Allied did not declare or pay out dividends to WLG every year, and between the date of petition and the trial, funds of more than $2 million had been held in reserve. It was admitted that money was stockpiled in Allied in anticipation of a property settlement between the parties. The judge found that the appellant's minority shareholder interest in Allied rendered s. 18 of the Guidelines inapplicable and although it would be inappropriate to pierce Allied's corporate veil, the judge was satisfied, pursuant to s. 19, that the income from Allied should be imputed to him for support purposes. She concluded that the setting of the appellant's income at $500,000 per annum provided a reasonable support level for the child, having regard to the parties' pre-separation lifestyle and the respondent's needs as outlined in her financial statement. Based on that imputed income, the appellant's child support obligation was $4,000 per month. Respecting spousal support, the judge found that the respondent was entitled on both a compensatory and non-compensatory basis. She noted that the respondent's education and work experience were limited and considered the parties' agreement regarding her child and domestic responsibilities. In establishing the quantum of support, the judge found that the respondent's income was negligible and she was not prepared to impute employment or self-employment income to her, nor could she impute investment income derived from the family property equalization payment in the absence of evidence of a potential rate of return. After reviewing the Spousal Support Advisory Guidelines (SSAG), the judge concluded that based on the appellant's imputed income, the

respondent should receive $12,400 per month, at the low end of the SSAG. This amount would provide her with more than enough for her and the child to maintain a decent standard of living, took into account the amount of child support and whatever the respondent might earn from self-employment or investment. Because the parties had been separated for six years, she deducted that period from SSAG's suggested maximum duration for support of 18.5 years, resulting in the respondent being eligible for a further 12.5 years. The judge also awarded retroactive spousal support to the date of the first order for support with credit given for the payments made. The issues on appeal were whether: 1) the fresh evidence should be admitted. The appellant's proposed fresh evidence was a dividend paid by Allied to WLG in 2017 in anticipation of the appellant paying the respondent in a mediated family property settlement. Settlement had not happened, and the dividend was paid back to Allied. He argued that the declaration of the dividend on Allied's books was relevant to the trial judge's imputation of his income; 2) the trial judge erred in imputing income of $500,000 to the appellant. The appellant advanced multiple arguments relating to her analysis of ss. 18 and 19 of the Guidelines, such as utilizing s. 19 because the appellant was a minority shareholder in Allied, making s. 18 inapplicable, but failing to identify the specific provision of s. 19 on which she relied, and thereby impermissibly piercing Allied's corporate veil; 3) the trial judge erred in determining ongoing spousal support. The judge ordered an amount that exceeded the standard that existed during the marriage and the respondent's actual need. The judge failed to consider the respondent's ability to earn a greater income and that she had made no effort to attain self-sufficiency. Income should have been imputed to her; 4) the trial judge erred in failing to apply the legal test with respect to retroactive spousal support. Although it was open to the judge to order a different amount of support for the period 2014 to 2018, she failed to analyze whether retroactive spousal support was warranted in the circumstances and simply backdated the appellant's imputed income to the date of petition. The respondent's needs had been adequately met by the spousal support she received under the consent interim orders for five years; and 5) the trial judge erred in double-counting the cash flow of WLG in her award of spousal support.

HELD: The appeal was allowed in part. In its majority decision, the court dismissed the application to admit fresh evidence and set aside the award of retroactive spousal support. In dissent, Caldwell J.A. ordered a new trial. He found that that the appeal succeeded on the grounds relating to the imputation of income to the appellant, including the double-counting of the cash flow to WLG, and the calculation of the quantum of child and spousal support. The majority found with respect to each issue that: 1) the application failed because the proposed fresh evidence did not meet the first and third Palmer criteria ([1980] 1 SCR 759). It was in existence at the time of trial, could have been adduced and, considered with the trial evidence, it would not have affected the result as the judge had accounted for the dividend. She found that a reserve of money built up in Allied over five years could have been channeled to WLG and the appellant and used as a source of support; 2) the trial judge had not erred by using s. 19 of the Guidelines to impute income in the circumstances of this case, although she did not specify which provisions of the section she was using. The section provides judges with

additional discretion to determine income through imputation when sources of income, after adjustment according to the provisions of Schedule III of the Guidelines, do not provide a reliable picture of a payor's annual income for support purposes. The court agreed with the decision in Bak (2007 ONCA 304) that the list of situations wherein a judge may exercise her discretion to impute income under s. 19 is open-ended and not confined to the enumerated provisions. Further, the non-enumerated ones that a judge may use need not be analogous, as long as they comport with the objectives of the Guidelines. In this case, the judge exercised her discretion under s. 19 appropriately to impute income by considering that the appellant was the sole shareholder of a corporation that depended on dividend income from another corporation of which he was a minority shareholder and its affairs were structured to make accumulated funds unavailable for support. She had not pierced the corporate veil of Allied; 3) the trial judge had not erred in the exercise of her discretion in determining that the respondent was entitled to receive ongoing spousal support based on non-compensatory and compensatory factors, the amount of support and its duration, in accordance with the factors set out in s. 15.2(4) of the Divorce Act and under SSAG, because the appellant's income was above $350,000; 4) had erred by awarding retroactive spousal support in the circumstances. She failed to analyse whether retroactive support was warranted. She disregarded the significant evidence that showed that after separation and before trial, the respondent lived a lifestyle similar to that enjoyed during the marriage based on the interim spousal support she received; and 5) there was no need to address this issue because as the appellant's arguments targeted the issue of retroactive support, they had been dealt with by the setting aside of that decision. There was no order as to costs. In his dissenting judgment, Caldwell J.A. found that the trial judge had committed multiple errors in principle in establishing the appellant's income and by failing to consider the respondent's, and thus the awards for ongoing and retroactive child and spousal support should be set aside. Because the judge did not make the findings of fact necessary for the determination of support, it would have been necessary to order a new trial. The appellant would have had his costs.

 Back to top

R v Noltcho, 2021 SKCA 113

Schwann Leurer Tholl, August 25, 2021 (CA21113)

Criminal Law - Sentencing - Appeal - Aggravated Assault

The self-represented appellant appealed the sentence imposed upon him by a Queen's Bench judge after his conviction for aggravated assault contrary to s. 268(2) of the Criminal Code, uttering a death threat contrary to

s. 264.1(1)(a) of the Code and breaching an undertaking contrary to s. 145(5.1) (now repealed). The sentencing judge determined that a custodial sentence of 58 months less 36 months' credit for time served in pre-trial custody was appropriate. Following his release, the appellant would be subject to conditions during a period of probation of two years. The appellant argued that the sentence was excessively long and he did not agree with the probation because he had not arranged a place to live following his release, so he would immediately be in breach of that condition. The appellant committed the offence of aggravated assault after he had been drinking with another individual. He believed that the man had robbed him, so he attacked the man, kicking him repeatedly in the head and body. The wounds required stitching and left scars on the victim's face. After the appellant was arrested, he threatened to shoot one of the police officers in the head. The appellant was convicted for a breach of an undertaking because he was on release subject to abstaining from consumption of alcohol. During the sentencing hearing, evidence was provided of the appellant's Indigenous background and difficult childhood that involved abuse, violence and alcohol. His schooling ended at grade seven. He did not know his mother, and his father was stabbed to death when he was a young child. His grandfather cared for him but he had a drinking problem and died unexpectedly when the appellant was 17. The appellant suffered from an addiction to alcohol. The judge noted the appellant's circumstances as an Indigenous offender and that the presence of the Gladue factors in his background were responsible for his problems with alcohol that in turn had a connection with his criminal activity. The appellant's criminal record began when he was 22 and included 83 convictions, 14 of which involved violence. The date of his last conviction was seven years prior to these offences and during that time the appellant had attempted to rehabilitate himself. The judge concluded that a lengthy custodial sentence was warranted to satisfy the principles of sentencing, in particular those of deterrence and denunciation and the overarching need to ensure the protection of the public. After considering the principle of rehabilitation and applying the Gladue principles, she found that the protection of the public must be paramount in this case. It was analogous to the decision in Ratt (2021 SKCA 7), in which the accused had received a five-and-a-half year sentence for the same offence. Because of the severity of the attack, the lasting physical impact on the victim and the appellant's long criminal record, the judge concluded that a sentence of 50 months was appropriate. After determining that the uttering threats offence was serious and was separate and distinct from the assault charge, the judge imposed an eight-month consecutive sentence for it. A three-month concurrent sentence was imposed for breach of undertaking. The appellant's grounds of appeal were that the trial judge erred in principle: 1) by inadequately accounting for the appellant's circumstance as an Indigenous offender; 2) by misapprehending the relevance of the gap in the appellant's criminal record; 3) by making a probation order.

HELD: The appeal was dismissed. The court found with respect to each issue that the trial judge: 1) had not erred. She considered the applicable sentencing principles, including those relating to Gladue. In light of the appellant's background, the judge reduced the period of incarceration she would have imposed by providing for a period of probation; 2) had not erred. She had not ignored the gap in the appellant's record and his

rehabilitation. After noting how similar this case was to Ratt, where the accused did not have a gap in his criminal record, the judge imposed a shorter sentence than the 66-month sentence given in the Ratt case; 3) had not erred by making a probation order. The overall sentence was not demonstrably unfit.

 Back to top

Fraser v Mountstephen, 2021 SKQB 192

Clackson, July 5, 2021 (QB21189)

Wills and Estates - Proof of Will in Solemn Form

The applicants, the siblings of the deceased testator, brought an application pursuant to s. 8 of The Administration of Estates Act and Queen's Bench rule 16-46 seeking an order to have the will proven in solemn form. The testator lived with his parents and helped with the family farm. In his original will, made in 1993, he left his estate to his parents. After the deaths of his father in 2012 and his mother in 2014, the testator received help in operating the farm from the respondent, a cousin. He made a new will in March 2018 in which he left his entire estate to the children of the respondent, the executrix of his will. He executed it before his lawyer and the respondent's brother-in-law. The testator died in 2020, without having married or having had children. His lawyer deposed that when the testator signed the will, appeared to understand it. This evidence was not contested. The applicants argued that the testator lacked capacity and/or was unduly influenced by the executrix. The issues were: 1) whether there was a genuine issue to be tried with respect to the deceased's capacity. The applicants submitted that the deceased had displayed cognitive difficulties while he was in school and during his operation of the farm. They submitted the coroner's report that described that alcohol had affected the testator's health and an affidavit deposed by his long-term friend attesting that the testator had abused alcohol; and 2) whether there was a genuine issue to be tried respecting whether the testator was unduly influenced in execution of his will. The evidence submitted by the applicants to demonstrate undue influence upon the mind of the testator was that: his lawyer had not disclosed his notes taken during meetings with the testator about his will, and his friend deposed that several months before the testator's death, he had phoned him saying that he was upset because the executrix was pressuring him to transfer his home quarter to her son.
HELD: The application was dismissed. The court found that the applicants failed to meet their initial burden. The evidence offered did not raise a genuine question as to the testator's testamentary capacity at the time he signed the will, nor did it raise a genuine issue as to whether he was unduly influenced to do so. It found with

respect to each issue that: 1) the applicants had not rebutted the presumption that the deceased possessed the requisite testamentary capacity at the time he signed his will. The evidence regarding the testator's problems with school or managing the farm did not, singly or collectively, support an inference that the deceased in fact suffered cognitive difficulties or an inference that they impacted upon his testamentary capacity at the time he signed the will. The evidence of alcoholism was not sufficient to raise a genuine issue to be tried in the absence of medical evidence that alcoholism eroded the testator's capacity or that the deceased was intoxicated when he executed the will. The applicants' evidence did not demonstrate undue influence. Regardless of whether the lawyer's file was disclosed or what was in it, it did not assist or detract from the applicants' position. The information in the friend's affidavits related to an event that occurred after the will was signed and could not be accepted at trial to demonstrate undue influence. Finally, the applicants did not provide any evidence that the signature of the executrix's brother-in-law was a suspicious circumstance. It was the testator's lawyer's uncontroverted evidence that the testator specifically requested that individual witness the will.

 Back to top

R v Shaw, 2021 SKQB 210

McMurtry, July 9, 2021 (QB21205)

Criminal Law - Drinking and Driving - Dangerous Driving

A trial was conducted with respect to a number of driving offences, including the offence of operating a conveyance while over the legal limit, the only charge requiring an in-depth consideration by the trial judge, who found on the evidence that the accused, R.J.G.S., was observed by a civilian driver to be alone and operating a motor vehicle on a highway in a concerning manner which included swerving and bobbing his head as though he was falling asleep. The court further found that when stopped by peace officers, two partially full vodka bottles were found on the floor in the back passenger area, one with a lid off, and a yellow plastic cup with liquid smelling of alcohol upright on the floor of the backseat area. R.J.G.S. failed an ASD test and, in the police vehicle, smelled strongly of alcohol. At the police station while waiting to give breath samples, he burped numerous times between the first and second test, the last burp being eight minutes before the second test. The qualified technician was not told by the officer observing R.J.G.S. about the burping before the second test. He testified he would have waited an additional 15 minutes before taking the second sample to allow for dissipation of any mouth alcohol had he known about the burping, as he was taught to do. Both tests resulted in readings of 170 mg/dL. The approved instrument had built-in safeguards warning of the

presence of mouth alcohol when a breath sample is taken. The qualified technician did not receive such a warning from the instrument. An expert called to the stand by the defence testified that the circumstances surrounding the administration of the second test were "sub-standard" because the qualified technician did not allow a 15-minute observation period after the burping and before the second test. The expert witness was not qualified to provide evidence concerning burping and the presence of mouth alcohol, and his evidence did not speak specifically to the question of whether the burping in this particular case "tended to cast doubt on the reliability" of the readings. R.J.G.S. also testified on his own behalf, saying he had not been drinking alcohol, and that the glass and bottles were placed there by friends who had been drinking the night before. He had no explanation as to how the plastic glass could have remained upright in a moving vehicle.
HELD: The trial judge convicted the accused of operating a conveyance while over the legal limit. She first determined that R v Cyr-Langlois, 2018 SCC 54, continued to be applicable law, and reviewed it and other case authorities applying it. She concluded that to refute the legislated presumption that the breath samples obtained were accurate, the accused needed to present evidence which tended to cast doubt on the reliability of the readings due to a malfunction of the instrument or its improper operation. In this case, R.J.G.S. had failed to present concrete evidence that the burping might have caused falsely high readings in this instance. The opinion of the expert witness did not go beyond a criticism of the failure of the qualified technician to follow his training manual but did not raise a doubt that in this case the burping had given false readings which erroneously showed a concentration of alcohol above the legal limit. The trial judge then asked herself if the balance of the evidence raised a reasonable doubt in her mind about the accuracy of the readings, concluding it did not because both readings were the same, there was no mouth alcohol warning from the instrument, and she did not believe the evidence of the accused, R.J.G.S.

 Back to top

Jans v Jans, 2021 SKQB 199

Mitchell, July 13, 2021 (QB21195)

Injunction - Interlocutory Injunction - Requirements

The plaintiff and the defendants each brought applications for interim injunctive relief against the other, pursuant to s. 65 of The Queen's Bench Act and Queen's Bench rules 6-41 and 6-48. The plaintiff sought, among other things, an order enjoining the defendant (his brother, J. Jans) from interfering with his right to access and use Crown lease lands for the purposes of grazing his cattle. J. Jans sought an order requiring the

plaintiff to remove his cattle from the Crown lease lands and enjoining him from any further access to them. The brothers had been involved in the operation of their father's ranch, which he had promised to divide equally between them when he retired or died. He had instead transferred all of his property to J. Jans in 2011. The plaintiff brought an action against his father, J. and his family, and others in which he sought the enforcement of his father's promise and specific performance. In the trial decision, the judge did not award specific performance but gave damages to the plaintiff for breach of contract (see 2016 SKQB 275). The judge's review of the property and value at issue included the Crown lease now in dispute between the parties. He described it as 16,247 acres of grazing land, an essential element of the ranch, and then found that the father and the brothers each had a one-third interest in it. The judge stated that the lease could not be sold and determined its market value as $1,813,028.78. In the assessment of the damages resulting from the father's failure to transfer the land, the judge assessed the plaintiff's share of the value to be one-half of the father's one-third interest, and awarded damages in the amount of $302,159. The judge later issued an addendum to the judgment clarifying some aspects of it, including a recalculation of damages, and ultimately ordered the defendants to pay $3,234,985 (see: 2017 SKQB 232). Appeals and cross-appeals were made without much success (see: 2020 SKCA 61). The defendants then satisfied the judgment by using the ranch as collateral for a loan. In the spring of 2021, the defendants blocked the plaintiff on two occasions from releasing his cattle on the Crown lease land. J. Jans took the position that the plaintiff had vacated the lands by 2020, after the Queen's Bench decisions, and that although his name was still on the lease, the plaintiff's right to use it had been extinguished by the decision. The plaintiff denied that he had not been using the lands and submitted that by the defendants' unlawful actions in preventing him from accessing them, they were jeopardizing his cattle operation and putting him out of business. He had nowhere else to graze his cattle and if he could not move them to the lease lands, he could not grow the crop necessary to feed them. Further, he argued that his leasehold interest in the Crown lease remained undisturbed by the Queen's Bench judgment because it stated the parties had agreed that it could not grant a proprietary remedy in the lands.

HELD: The plaintiff's application for interim injunctive relief was granted and the defendants' application dismissed. The court made an order restraining the defendants from interfering in any way with the plaintiff's use of the lease lands. It found that plaintiff had met the three tests set out in RJR-MacDonald and it was satisfied that: 1) the plaintiff had shown that there was a serious issue to be tried. After reading the trial judge's decisions, it was not persuaded that the plaintiff's leasehold interest had been bought out as a result of the damages award or that his ability to have access to the lands and to graze his cattle there had been truncated, let alone extinguished; 2) the plaintiff would suffer irreparable harm if the relief were not granted, following the decision in MacPherson Estate (2008 SKQB 147), and he could not be adequately compensated by an award of monetary damages; and 3) the balance of convenience favoured granting the plaintiff the relief requested because J. Jans' leasehold interests in the Crown lease would remain undisturbed as he was free to bring his cattle onto the lands. The defendants' application for injunctive relief was dismissed. They had failed

to demonstrate that injunctive relief should be issued against the plaintiff because he had satisfied the second and third elements of the RJR-MacDonald test.

 Back to top

King v King, 2021 SKQB 201

Megaw, July 16, 2021 (QB21197)

Family Law - Child Support - Determination of Income
Family Law - Divorce - Spousal Support
Family Law - Division of Family Property - Evidence
Civil Procedure - Queen's Bench Rules, Rule 9-25
Civil Procedure - Self-Represented Litigants - Duty of Court

The parties married in 2001 and separated in 2015. During the marriage, they raised six children and a child of the petitioner's from a previous marriage. By agreement of the parties, the petitioner, who had a degree in social work, stayed at home to look after the children and the respondent was responsible for the financial support of the family. Before and after his marriage, the respondent derived his income from a family business, a department store that he operated in a nearby town. The business was held in two corporations of which the respondent was the sole shareholder. After the separation, the petitioner purchased her own residence with financial assistance from the respondent. The children lived with the petitioner but were often at the respondent's home. In 2016, the court made orders for the respondent to pay: interim child and spousal support of $3,946 and $3,500 per month respectively; $1,000 per month in s. 7 support; and the petitioner's monthly mortgage payment of $1,200, based upon his income being $155,700. At the time of trial, four of the children continued to be children of the marriage for whom the petitioner sought child support. Sometime after separating and before trial, the petitioner had begun working outside the home as a social worker, but she did not expect to be able to engage in full-time employment for a number of years while she was still needed by the youngest two children. Her current income was $35,280. In her claim for spousal support, she sought an order which included a provision for review because of the uncertainty as to whether she would attain full-time employment status. She submitted that the respondent's income for support purposes should be his 2020 actual income of $289,145 or, alternatively, the whole of his pre-tax corporate income plus depreciation and certain personal benefits. The respondent, appearing on his own behalf, did not prepare for the presentation of evidence concerning the issues at the trial, notably whether an exemption was available to him regarding the

business and the potential income tax consequences of having to make an equalization payment to the petitioner, although he did seek to have the court consider income tax consequences and the amount of the exemption he was entitled to receive. He argued that his income for support purposes should be set at a lower amount and submitted evidence that the company had paid him consistent employment income of $78,950 per annum and he had arranged for it to pay him dividends according to his financial needs, including his child and spousal support. He did not present evidence to establish the amount needed by the corporation from the pre-tax net income but did claim depreciation related to the building owned by the corporation. He agreed that the petitioner was entitled to spousal support but proposed $1,500 per month, an amount that was not based upon the Spousal Support Advisory Guidelines (SSAG), nor on the needs and entitlement of the petitioner. With respect to the division of family property, the petitioner provided uncontroverted figures for its value and debt owed and submitted an uncontested valuation report of the business operations. She acknowledged that the amount of $223,000 should be deducted from her equalization payment, as it represented the respondent's advance to her to permit her to purchase her current residence. Her counsel requested the court defer judgment on the granting of divorce until he could consider income tax issues on her behalf regarding the transfer of shares in the business.

HELD: The court ordered that the trial be re-opened pursuant to Queen's Bench rule 9-25 to allow evidence to be introduced by the respondent within 30 days of the judgment respecting potential issues under ss. 23 and 21(3)(j) of The Family Property Act (FPA). It gave leave to either party to renew the request for a judgment for divorce. The court ordered that the parties have joint decision-making respecting the children but declined to make any schedule regarding parenting time as the parties had shown that they had had no difficulties in that regard in the past, and the children were older and would determine with which parent they intended to spend their time. It found that the respondent's income for the purposes of calculating support was $256,518, including his employment income, net income, and amortization and cell phone expenses charged to the company. In the circumstances, it was appropriate to determine the respondent's income under s. 18(a) of the Guidelines as he had not met the onus of establishing that a lesser amount than the total pre-tax income should be used for support purposes. As well, it added back the full amount claimed as depreciation on the real property. Based on that income, the respondent was ordered to pay child support of $5,111 per month until further order and s. 7 expenses of $150 per month per child. Regarding entitlement to spousal support, the court found that the petitioner was entitled on both compensatory and non-compensatory grounds as the parties had agreed that she would have responsibility for managing the children and was financially dependent upon the respondent. She had resumed employment in her field and was working toward a full-time position. It determined that the petitioner should receive $2,559 per month, in the mid-range of SSAG, based upon her financial expenses and the lifestyle enjoyed by the parties during the marriage. The support would be paid for a period of five years following judgment because by that time, the youngest child would be self-sufficient. It declined to order a review of spousal support as it was satisfied that since the petitioner expected to work

toward full-time employment, the duration of spousal support should fit with that expectation. With respect to the division of family property, based upon the evidence, the net equalization payment due to the petitioner was set at $824,200. The court considered the pertinence of The Canadian Judicial Council's new handbook, Family Law Handbook for Self-Represented Litigants, to this case. In light of the failure of the self-represented respondent to provide evidence regarding his potential claim to an exemption under s. 23 of the FPA and the absence of information regarding the tax liability he might incur as a result of the transfer or sale of family property under s. 21(3)(j) of the FPA, the court re-opened the trial to enable him to adduce evidence on these issues and the petitioner would be given the opportunity to respond. As the petitioner had come prepared to the trial and there was a need for partial payment, the respondent was ordered to make partial payment of her equalization amount of $500,000. If the respondent did not file any further evidence within the time prescribed, the petitioner could apply for final judgment.

 Back to top

Martin, Re (Bankrupt), 2021 SKQB 209

Thompson, July 30, 2021 (QB21204)

Bankruptcy and Insolvency - Conditional Discharge

The assets of the bankrupt (N.R.M.) were all exempt from distribution to her unsecured creditors such that she was eligible for an automatic discharge, subject to the overriding scrutiny of the Official Receiver (OR), who was empowered by the Bankruptcy and Insolvency Act (BIA) to oppose an automatic discharge in circumstances where the OR believed evidence existed showing that the bankrupt had engaged in misconduct pursuant to s. 173 of the BIA. In this case, the OR submitted to the bankruptcy court that N.R.M. had "brought on or contributed to her bankruptcy by rash or hazardous spending in the year prior to filing, at the expense of the creditors." At the hearing of the matter, the OR provided evidence that most of the debt of the bankrupt was credit card debt. Credit card statements were filed that showed that between July 2018 and August 2018, large amounts of credit were incurred for plane tickets, hotels, restaurants, and gas at multiple cities on the same day or on dates which made it highly unlikely that N.R.M. had incurred them. N.R.M., in questioning by the O.R. under oath, denied that any other persons but she had used the cards. N.R.M. had also transferred funds for a TFSA to an RRSP, thus making that amount unavailable to her creditors.
HELD: The registrar in bankruptcy ruled that N.R.M. had engaged in flagrant and reckless spending as defined by the BIA within a year of her assignment in bankruptcy, and agreed with the OR that in order to deter others

from profligate spending at the expense of her creditors on the assumption that they would not be brought to account, N.R.M. was discharged on the condition that she pay $30,000.00 to the trustee on behalf of the creditors.

 Back to top

Thorpe v Kindersley (Town), 2021 SKQB 211

Robertson, August 10, 2021 (QB21206)

Administrative Law - Judicial Review
Statutes - Interpretation - Municipalities Act, Section 7, Section 275, Section 369, Section 405
Statutes - Interpretation - Planning and Development Act, Section 172, Section 175, Section 235

The applicant filed an originating application seeking an order of certiorari to quash the decision of the respondent, the Town of Kindersley, to add work charges to the property tax roll and to prohibit the respondent from taking steps to register or enforce a tax lien on the land. In 2016, the land in question, consisting of 11 parcels, was owned by Quest Developments. It and its principals entered into a mortgage agreement with the applicant to borrow $1,150,000, to be secured by the land. The mortgage was registered on the title and the mortgagors were Quest and three individuals. In March 2019, the respondent entered into a servicing agreement (SA) with Quest for a development on the land under which the former agreed to construct public works to service it and the latter agreed to pay 50 percent of the costs. The applicant learned of the SA in March 2019, and in June, he began foreclosure proceedings under the mortgage. All of the mortgagors except one were noted for default of defence to the action on August 2, 2019. On August 14, 2019, the respondent billed Quest for work charges of $516,238 but the bill was never paid. In October 2019, the respondent issued a tax certificate to the respondent showing taxes of $36,422 owing on the land. In December, a Queen's Bench judge granted an order nisi for sale of the land by real estate listing. In December 2020, the respondent added the amount of unpaid work charges to the property tax roll for the land. In January 2021, it issued a tax certificate showing a total amount owing of $534,369 consisting of the taxes and the invoice. The applicant then filed this application. The issues at the hearing were: 1) whether judicial review was available; 2) whether the respondent had the authority to add the charges to the tax roll; 3) if so, did they take priority over the mortgage debt as a prior secured interest; 4) whether the respondent had agreed in the SA to subordinate its priority. The applicant relied upon a clause in the SA stating that the respondent's interest was subordinated to that of prior registered interests; and 5) whether the 2019 tax certificate barred the respondent's recovery, as it

had not shown the charges.
HELD: The application was dismissed. The court found with respect to each issue that: 1) judicial review was available to challenge the authority of the respondent to add charges to the tax roll, and as the decision affected the respondent, he had sufficient interest to have standing to bring the application; 2) the respondent was authorized to enter into SAs that include cost sharing under s. 172 of The Planning and Development Act, 2007 (PDA) and to add the costs incurred under the SA as charges to the tax roll. It is not limited in enforcing payment of the charges incurred under the SA to ss. 172(3)(e) and (c) and 175 of the PDA. Further, under s. 235 of the PDA, the respondent may rely on the authority conferred on it by s. 405 of The Municipalities Act (MA). This provision is broad enough to encompass the adding of charges to the tax roll and the respondent's authority to add amounts to the tax roll is confirmed in s. 369 of the MA; 3) the charges added to the tax roll become inseparable from the property taxes and are accorded the same priority and enforcement remedies. The SA charges added to the property taxes on the land were entitled to priority above that of the mortgage debt. The Legislature accorded priority to property taxes under s. 275(c) of the MA and s. 33 of The Tax Enforcement Act as public policy; 4) there was no subordination agreement. The clause was an agreement to agree. The applicant was not a party to the SA or any other subordination agreement. As well, the clause was invalid as offending the rule against contracting out of legislation and fettering municipal council's discretion, codified in s. 7 of the MA; and 5) the 2019 tax certificate did not show the charges because, as at that time, the respondent had not added the still contingent charges to the tax roll: it was complying with s. 405(3) of the MA. It might have indicated the contingent charges on the 2019 certificate under "potential impacts," since before issuance, the respondent had both previously invoiced Quest and then completed the works. However, there was no evidence that the applicant relied upon the certificate to his detriment.

 Back to top

Big River First Nation v A.C. Forestry Ltd., 2021 SKQB 216

Bardai, August 12, 2021 (QB21218)

Enforcement of Money Judgments - Preservation Orders

In this matter, NorSask Forest Products Limited Partnership (NorSask) sought a preservation order before paying $1,122,964.00 due to A.C. Forestry Ltd. (AC) pursuant to a softwood lumber contract (contract). It did so because of a competing interest in the money from Big River First Nation (Big River), which had a 59.29 percent share in AC, and wanted its share of the money paid to it directly pursuant to an alleged royalty

agreement with AC. AC asserted that as the contracting party to the contract, the full amount due should be paid to it. Two other shareholders had the balance of the shares in AC and were not given notice of the two applications.
HELD: The chambers judge determined that the governing legislation by which he was to decide whether a preservation order in favour of NorSask should be made, and if so, any conditions to that order, was s. 5 of The Enforcement of Money Judgments Act (Act). He was satisfied, on reading Arslan v Sekerbank T.A.S., 2016 SKCA 77, that the Act replaced all other prior law, whether common law, equity, or statutory, by which money judgments were to be enforced. He stated that he could not consider making a preservation order unless Big River established by way of evidence that it had commenced a recognized action which, if successful, might result in a judgment as defined by the Act. He was cognizant that satisfaction of these conditions did not require him to make a preservation order, and that the decision to do so, and on what conditions, were discretionary ones. In this case, he found that Big River had commenced an action against AC for breach of contract, though it had proceeded by originating notice and not by statement of claim largely because the proceeding had previously been set down for trial on the issues. He was also of the view that "there is some possibility that a judgment in favour of Big River could result." Next, he considered the need for Big River to provide security in favour of NorSask, concluding that providing security was mandatory under s. 5 of the Act before a preservation order could be made. He then ordered that 59.29 percent of the contract amount due by NorSask to AC be paid into court subject to the filing in court of appropriate security, which he calculated based on AC's credit facility carrying costs of 6.25% for one year, or $46,013.23, to be paid into court. The order was to be in force on an interim basis for 21 days and returned to court when all parties would be present, further submissions could be heard, and further orders made under the Act.

 Back to top

Montieth v Highway Traffic Board, 2021 SKQB 219

Crooks, August 16, 2021 (QB21214)

Administrative Law - Driver's Licence Suspension - Judicial Review

The applicant applied for a review of the decision of the Highway Traffic Board (HTB) upholding his driver's licence suspension following a roadside vehicle stop pursuant to The Traffic Safety Act (Act). The reviewing judge found as facts that: the applicant was stopped by a peace officer while driving a motor vehicle on a highway at 4:00 am; he was asked if he had been drinking alcohol and he said he had had nothing to drink; an

ASD was administered and he blew a fail, indicating the presence of alcohol in his blood; breath samples from an approved instrument were obtained at 5:30 am, within 2 hours of his being stopped at the roadside, and both readings were 0.0; the officer in charge nonetheless impounded his vehicle and suspended his licence for the reason that he had not been truthful to the peace officers at roadside as to his alcohol consumption; he appealed this decision to the HTB, which, in written reasons, dismissed his appeal because "based on the information provided," his reading at the time he was stopped indicated "a blood alcohol reading of not less than 40 milligrams of alcohol in 100 millilitres of blood." The reviewing judge also determined that the relevant statutory provisions she was to apply in his review of the decision were ss 146(2), 146(8), and 155(2) of Act; and the standard of review by which she was to be governed was that pronounced in Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 (Vavilov), one of reasonableness, with two "hallmarks" of an unreasonable decision being a failure of internal consistency of reasoning and an untenable departure from "the relevant factual and legal constraints that bear" on the decision.
HELD: The application was allowed and the decision of the HTB quashed so that the applicant's driving suspension was lifted. The reviewing judge found that the decision was unreasonable for both internal inconsistency of reasoning and a failure to stay within the bounds of the relevant facts and the applicable law. Though the HTB was correct that a blood alcohol level of 40 milligrams at the time of driving justified a suspension of the applicant's driver's licence, the decision did not provide reasons that would justify such a finding. The reviewing judge asked what information led the HTB to conclude that the applicant's blood alcohol level was at least 40 milligrams of alcohol per 100 milliliters of blood at the time of driving; and further pondered that if that conclusion was based on the failure of the applicant to pass the ASD, then why was no evidence referred to in the decision which tied one to the other? As to the application of the provisions of the Act to the facts, the reviewing judge could not find any justification in the decision for upholding the suspension in light of ss 146(8)(a)(ii) and 155 of the Act, which together provide that a certificate taken as prescribed is proof of its contents, and in this case, it indicated a blood alcohol level of 0.0, and was also evidence that the samples were taken within two hours of the driving as required by s 155. The certificate was part of the "information" before the HTB, and if properly considered by it should have led it to allow the appeal and lift the suspension. That it did not was unreasonable according to Vavilov.

 Back to top

Kontek v Golay, 2021 SKQB 220

Layh, August 17, 2021 (QB21215)

Wills and Estates - Will - Interpretation
Wills and Estates - Missing Codicil - Presumption of Revocation
Wills and Estates - Designation of Beneficiary of Insurance
Statutes - Insurance Act, Section 8-23

The executor of the estate of the deceased testator, Barry Golay (testator), brought an originating application seeking an order to determine whether some notes written by the testator subsequent to his will constituted a "testamentary document." The testator had died in November 2017 without spouse or children. The family that survived him included his only brother and his brother's son and three female first cousins, each of whom had three, two and two children respectively. The testator had purchased a $250,000 life insurance policy in 2011 and named as beneficiaries only four of his first cousins' seven children. No one knew his reasons for naming these four children and excluding the others or his nephew. He executed a will in 2016 wherein he left specific gifts of land to his brother and gave the rest and residue of his estate to be divided equally between his nephew, his three cousins' seven children and two other children of friends. While he was hospitalized before his death, the testator was visited by one of his first cousins, who also held his power of attorney. She found the testator sleeping and after discovering a handwritten note in his room, took a picture of it with her cell phone. She did not discuss it with him at the time and after the testator's death, the document was not found in his room or elsewhere. The parties agreed that that note was in his handwriting and although not signed, the testator had clearly written his name numerous times in the document. The notes indicated that all his solely-owned property was to be sold and the proceeds to be divided between his beneficiaries as stated in his will. He made specific bequests of personal property and then mentioned the life insurance policy described above and wrote a list of names of children under the heading "recipients ; beneficiaries" that included his nephew, the seven children of his cousins and the two children of his friends. All of the beneficiaries under the testator's will consented to an order in June 2020 that letters probate were to be granted in the testator's will without prejudice to any party's right to argue that the handwritten notes were testamentary. Letters probate were granted shortly thereafter. In May 2021, the lawyer for the testator's brother filed an application to be heard with the executor's, seeking a declaration that the notes contained testamentary intentions pursuant to ss. 8 or 37 of The Wills Act, 1996 and constituted a codicil or, alternatively, a designation in the will within the meaning of s. 8-23 of The Insurance Act (IA) to change the beneficiaries under the policy. The testator's first cousins objected to the expansion of the application to include whether the notes were a designation. They took the position that the presumption of revocation applied and that the notes had been destroyed.
HELD: The court concluded that the consent order was sufficiently broad to permit it to determine whether the notes were testamentary or a valid beneficiary designation under the IA and found that the notes were an adequate designation within the meaning of the IA to effect a change in beneficiaries under the testator's insurance policy from the original four named under the policy to include the children listed in the notes. It held with respect to each issue that: 1) the proving of a lost instrument under an insurance policy engages a

less stringent standard than that required for a lost will, following Buckmeyer Estate (2008 SKQB 141). It accepted the validity of the notes as at the date the photograph was taken. The proponent for the notes bears the burden of establishing whether the notes were destroyed. After considering all the evidence, it concluded that the presumption of revocation had been overcome and did not apply to the notes. It found that the requirements for a declaration under the IA had been met. Under both ss. 8-98 and 8-123 of the IA, the testator's notes were either sufficiently signed or, alternatively, they constituted an instrument or an instrument purporting to be a will or codicil. Further, the notes identified the policy. The notes also effectively altered the designated beneficiaries.

 Back to top

Saskcon Repair Services Ltd. v Weyburn (City), 2021 SKQB 226

Bardai, August 24, 2021 (QB21219)

Contract Law - Interpretation

The applicant, a contractor, applied for a declaration of its rights pursuant to a contract of agreement and settlement it executed with the respondent, the City of Weyburn, in August 2011 and a distribution of proceeds of $235,597 held in trust by its counsel. The applicant had entered into a contract to perform work on a project for the respondent in August 2008. The engineer employed by the engineering company responsible for inspecting the work, Stantec, indicated that there were issues with the project. The parties then entered in to the contract referred to in the application. It was a memorandum of agreement and settlement (memorandum) in regards to the issues between them, and the respondent paid $235,597 to the applicant's solicitors in trust to be released only under the terms specified in the memorandum. One of the terms was that Stantec would certify completion of the work outlined as of December 31, 2011, but it did not do so. The parties offered differing reasons in explanation. However, the applicant asserted that the differences were immaterial because there had been a communication in December 2012 between the parties that resulted in an amendment to the memorandum, entitling them to payment. It was on this basis that the applicants sought a declaration that the monies were being held for their benefit. The respondent denied that an amendment to the memorandum had been made.
HELD: The application was dismissed and the court directed a trial be held. It found that there was a dispute as to whether or not the memorandum was amended by the December 2012 communication. The affidavit evidence was in conflict on this point, and that conflict could not be resolved without further evidence, cross-

examination and further particulars as to the factual matrix giving rise to the memorandum and subsequent communications.

 Back to top

Impact Security Group Inc. v Brown, 2021 SKQB 212

Mitchell, August 24, 2021 (QB21224)

Employment Law - Fiduciary Duty
Civil Procedure - Interlocutory Injunction - Requirements

The applicant, Impact Security Inc. (Impact), applied for interim and permanent injunctive relief against the respondents, Brown and Zanger, who were former employees, and Executive Protective Services (Executive), restraining them from directly or indirectly soliciting current clients of the applicant. It offered private security protection services to corporate, institutional, retail and other client across western Canada. The applicant alleged that Brown and Zanger breached their fiduciary obligations to it following their departure from employment with it in April 2021 by utilising confidential information obtained while they worked for it to solicit future customers for Executive, a competing security protection company started by Brown within a week of leaving the applicant. In May 2021, the applicant issued a statement of claim, applied for and was granted a temporary emergency injunction against the respondents. The respondent Brown had had many years' experience in the security industry in Saskatchewan before being hired by the applicant in 2011 in the position of Saskatchewan Regional Manager. He executed an employment agreement with it in 2013 that did not contain any non-solicitation, non-competition or restrictive covenant clause. Brown then hired the respondent Zanger in 2013. He too had considerable experience in the same field. Zanger's title changed over time but he essentially performed the same tasks and reported to Brown. In early May 2021, Impact was notified by five clients that they were terminating their contracts with it and moving to Executive. Impact's chief accountant deposed that the anticipated loss of revenue would be $50,000. The loss of market share would cause erosion of its goodwill within the industry. Brown deposed that he had had a long-standing relationship with the companies that had transferred their business to Executive prior to working for the applicant, and he did not solicit them when he advised them he was leaving to start his own security company. He had not used confidential information and the companies transferred their business because of their loyalty to him. The industry was highly competitive. The applicant led evidence regarding the respondents' job descriptions and responsibilities, with the applicant contending that both Brown and Zanger were key

employees and alleging that they both had breached their fiduciary obligations to it after they resigned. It argued that the facts of this case were similar to those in Evans (2013 ABCA 14) and distinguished the decision in Garda (2011 SKQB 294) because Brown and Zanger held positions with it possessing far greater authority, responsibilities and importance than did the respondent in Garda. Brown was the face of the company in Saskatchewan and managed 240 employees, liaising with customers and negotiating contracts. He acted independently for the most part and rarely consulted with head office. The applicant acknowledged that Zanger did not hold a senior management position. Counsel for Brown and Zanger submitted that neither of them was a key employee of the applicant and thus did not owe a fiduciary obligation to the company following their departure.

HELD: The application was dismissed and the previous interim order granting the applicant a temporary emergency injunction was set aside. To obtain injunctive relief under s. 65 of The Queen's Bench Act, 1998 and Queen's Bench rules 6-41 and rule 6-48, the applicant had failed to meet three requirements of the test set out in RJR-MacDonald. Respecting the first requirement, the court was satisfied that by Brown's alleged breach of fiduciary duties was neither frivolous nor vexatious. It noted that because the applicant alleged a breach by a former employee, the lower standard of "a serious issue to be tried" applied rather than "a strong prima facie case." After reviewing the evidence of the authority and the responsibilities the respondents exercised in their respective positions, it found that Brown was, and Zanger was not, a fiduciary employee. For the purposes of the application, their conduct after leaving their employment could be assessed as to whether it amounted to a breach of fiduciary obligations owed only by Brown. It was satisfied that both men directly attempted and did entice the Impact's customers to leave it and retain Executive almost immediately after their departure. However, the applicant did not meet the second requirement of showing that the harm it would suffer if the relief was not granted, could not be remedied by damages. It had failed to demonstrate that Brown's breach of his continued fiduciary obligations resulted in irreparable harm to it. Its loss was clearly quantifiable and it was unclear whether loss of market share should be assumed to amount to irreparable harm. The applicant had not met the third requirement either. In determining the balance of convenience, the court found that it was not just and equitable to issue an injunction because it would restrain the respondents' commercial freedom.

Back to top

K.F.L. v B.K. , 2021 SKQB 229

Turcotte, August 26, 2021 (QB21226)

Statutes - Interpretation - Children's Law Act, 2020, Section 8, Section 10, Section 14, Section 15
Family Law - Custody and Access - Interim - Primary Residence
Family Law - Custody and Access - Interim - Mobility Rights

The petitioner applied under s. 8 of The Children's Law Act, 2020 (Act) for an order granting her primary residence of the parties' child, aged four, and providing for the respondent to have the child in his care two out of every three weekends. She also sought an order under s. 14 of the Act permitting her to move with the child from Biggar to Delisle. The respondent opposed the application and sought an order giving the parties joint legal decision-making responsibility for, and equal parenting time of, the child on the condition that she remained resident in Biggar. If the petitioner wanted to move to Delisle, he sought an order that the child's primary residence would be with him in Biggar and the petitioner would have parenting time on alternate weekends and such additional time as the parties may agree upon. When the parties began living together in Biggar in 2014, the petitioner had moved there from Saskatoon. She continued to commute to Saskatoon for her employment but was able to find positions in Biggar from January 2015 on. The respondent worked at the grain terminal near Biggar and helped his parents on their farm, situated 14 km from the town. After their child was born in 2017, the petitioner stayed at home to care for her. She alleged that she was responsible for all aspects of the child's care and when she started a new job in October 2018, she continued to be the more involved parent. The respondent disputed this evidence, saying that after working from 6 am to 5 pm on weekdays, he took care of the child every evening and all the time on weekends. She was often cared for by his mother on the farm when both parties were at work although she also attended daycare. After their separation in April 2019, the petitioner continued to reside in the family home with the child and the respondent moved to his parents' farm. He contributed $1,400 per month to the petitioner to cover mortgage and housing expenses. Under an oral agreement between them, the respondent had parenting time with the child each week, alternating between from Thursday to Saturday or Sunday. The child stayed at his parents' home with him, where she had her own room. She enjoyed being with her grandparents and the other members of the extended family residing on the farm. The petitioner was laid off from her job in January 2021 and in April, she advised the respondent that she wanted to move to Delisle to live with her boyfriend. She asserted that she would have better job prospects in Saskatoon and could commute there from Delisle. She had a friend with young children in Delisle with whom the child played and with the relocation, she would be able to see more of her maternal grandparents, aunts and cousins, as contact with them in the past had been infrequent. The respondent argued that positions were available to the petitioner in Delisle and environs but she was not seeking them out. He attached job opportunity listings to his affidavit to corroborate his assertion. Further, the petitioner's tenuous connection to Delisle did not warrant disrupting the child's strong connection to Biggar, where she was attached to his family, her daycare and her friends.
HELD: The petitioner's application for primary residence of the child and allowing her to move the child from Biggar to Delisle was dismissed. The court made an interim order, pursuant to s. 8 of the Act, granting the

parties interim joint legal decision-making responsibility for her. It stipulated that the child's residence be maintained within a 30 km radius of Biggar and set out a parenting schedule. If the petitioner chose to move outside that radius, the child's primary residence would be with the respondent and a different parenting schedule was to be followed. The court concluded that it was in the child's best interests that the parties continue to have joint legal-decision making based on the arrangements that they had agreed to and adhered to, without conflict, since separating. It was also in the child's best interests to maintain an interim parenting schedule where she had frequent contact each week with both parties. They should have shared parenting on a 2-2-3 day bi-weekly parenting rotation. Regarding the application for relocation, the court found that it was not in the child's best interests to change her residence on an interim basis because of the disruption it would cause to her relationships with her family, friends and activities. It considered the issue within the broader context of an appropriate interim parenting arrangement, following J.P. v J.P. In addition, the court reviewed the factors set out in ss. 10 and 15 of the Act to guide its decision, although in the absence of an existing order, the relocation provisions of the Act were not strictly applicable. It found that both parties were actively involved in parenting and noted again their ability to handle shared parenting. The court considered the petitioner's limited connection with Delisle, the absence of information about her new relationship or the strength of her relationship with her extended family, as well as her evidence about her employment prospects.

 Back to top

Piett v Global Learning Group Inc., 2021 SKQB 232

McCreary, August 27, 2021 (QB21228)

Civil Procedure - Class Actions - Certification
Statutes - Interpretation - Class Actions Act, Section 6(3)(b)(iii)

The proposed plaintiff, L. Piett, applied for certification of a multi-jurisdictional class action (the Piett action), commenced in Saskatchewan under The Class Actions Act (CAA) against multiple defendants, including many law firms and the Canada Revenue Agency (CRA), alleging that the former had participated in the sale or marketing of a certain charitable donation program by providing opinions, advice and appraisals while knowing that the program was a sham, and the latter had violated its duty of care to the donors to the program. Piett also applied to substitute R. Shoeman as the proposed representative. The action, commenced in 2016, related to the Global Learning Gifting Initiative Charitable Donation Program (the program), which operated from 2004 to 2014. It was promoted by the defendant, Global Learning Group Inc. (GLGI), as a tax shelter. It

relied on sales agents who marketed and sold the program like a mutual fund. The sales agents received commissions from the cash donations made by their clients to the program. In 2015, the Tax Court of Canada found the program was a sham with deceitful and fraudulent elements. Piett and Shoeman had each donated to the program and had been sales agent for it. The class members in the proposed Piett action were individuals who participated in the program by making cash donations and claiming charitable tax credits. The proposed class definition excluded sales agents. Before this action was commenced, Piett was a plaintiff in another proceeding, the Scheuer action, commenced in 2011, that asserted that Canada and the CRA owed them a private law duty of care and should have warned donors about the program. The Federal Court of Appeal struck the action in 2016 (see: 2016 FCA 7), finding that there was no such duty binding CRA but giving leave to the plaintiffs to amend the claim with particulars of any allegations regarding the exercise of statutory duties in bad faith. No further steps were taken and the action appeared to have been abandoned. In or around 2015, a former executive with GLGI, R. Mitchell, formed a steering committee with Piett and Merchant, the plaintiffs' counsel, to commence and direct the Piett action. The committee agreed that Piett would serve as the representative plaintiff for the class proceeding and would be compensated for doing so. It also apparently agreed that Mitchell would not be named a defendant in the Piett action and contracted with him to create websites, "Merchant Law Helps" and "Donors4Donors," and marketing material, and to obtain the donor list available to him through his position at GLGI in order to solicit individuals to join the Piett class action and to contribute $500 each. The websites suggested that class members who did not pay $500 would receive less information than class members who did contribute. It explained that the donors' contributions would be held in the plaintiffs' counsel's trust account and funds would be paid out for legal fees charged by lawyers working on the file. This promotion resulted in the plaintiffs' counsel receiving $1.7 million from program participants through their donations to the websites, prior to the certification application. Evidence showed that large payments were made from this fund to Mitchell, Piett and Shoeman as finder's fees for recruiting donors. As well, the plaintiffs' counsel had received legal fees of $368,728 from the fund but had not provided statements of account to the contributors from the trust account. The plaintiffs' counsel refused undertaking requests to obtain information from Mitchell and would not consent to an examination of him, nor would they confirm that they operated or approved the website "Merchant Law Helps." Plaintiffs' counsel refused most requests for documents or information relating to the fee arrangement, arguing that they had not been required to obtain the court's approval of the fee arrangement until after the class action was certified. In June 2019, the Ontario Superior Court of Justice certified the Ontario action as a national class proceeding against GLGI, its associated companies, and multiple other defendants. The Piett action overlapped with the Ontario action as both related to the same subject matter. The issues were whether: 1) the proposed plaintiff's claim was an abuse of process requiring it to be dismissed; 2) leave should be granted to substitute Shoeman as the representative plaintiff and whether either he or Piett was a suitable representative plaintiff; and 3) the Piett action was preferable to other means of resolving the claims of the class members, including the Ontario

action. The claim in the Piett action was also against the CRA, which distinguished it from the Ontario action. The CRA argued that the application should be dismissed as disclosing no reasonable cause of action.
HELD: The applications for certification and to substitute the proposed representative plaintiff were each dismissed. The action was struck in its entirety as an abuse of process which thus had no reasonable possibility of succeeding. The court found with respect to each issue that: 1) the Piett action was an abuse of process and it would be struck pursuant to Queen's Bench rule 7-9. Piett, Shoeman and others advanced the litigation for the improper purpose of profiting from the class members they purported to represent. The court enumerated the evidence of such conduct, including: the establishment of the steering committee that decided that Piett would be the representative plaintiff on the condition he was financially compensated for it; the creation of the websites by Mitchell to solicit class members to pay a retainer to plaintiffs' counsel to become class members without court approval; and the solicitation of donors informing them that if they did not contribute $500, the quality of their class membership would be reduced, a violation of s. 6(1)(ii) of the CAA. The court found that the plaintiffs' counsel violated s. 41(2) of the CAA because it had not acquired approval of either its solicitation of putative class members or the fee arrangement. The funding scheme devised by the committee was contrary to the purpose and objectives of the CAA; 2) in the event it was incorrect in making the previous finding, the court would examine whether the application for certification met the requirements of s. 6(1) of the CAA. It determined that neither Piett nor Shoeman as his substitute were suitable representative plaintiffs pursuant to the factors set out in s. 6(1)(e)(i) and (iii) of the CAA. Piett had not provided cogent reasons for his withdrawal. He and Shoeman were unsuitable as representative plaintiffs for many reasons, including their roles in the scheme found to be an abuse of process. They differed from other class members in that they had experienced financial gain as agents of the program and were in conflict because they were named as defendants in other claims relating to the program so that they might benefit if the class action failed; 3) the Piett action should not be certified in light of the certification of the Ontario action which was found to be the preferable procedure for resolution of the class members' claims under s. 6(2) of the CAA after considering the factors listed under s. 6(3). In reviewing the Piett action, it found that under s. 6(1)(a) of the CAA, the claim was untenable because it disclosed no reasonable cause of action. This finding was supported by the jurisprudence, and in particular by the decision in Scheuer, that CRA does not owe the class members a private law duty of care. The court provided a detailed analysis under s. 6(3)(b)(iii) of the CAA respecting whether the plaintiffs' counsel should be selected as counsel in comparison to class counsel in the Ontario action. It found that plaintiffs' counsel were not competent to pursue this class action due to the variety of conflicts they had arising from their representation of Piett and Shoeman versus their duties to class members. It also noted the conduct of plaintiffs' counsel in soliciting fees from putative class members and disbursing them to pay themselves and finder's fees to Piett, Shoeman and Mitchell, without court approval.

Back to top

Tran, Re (Bankrupt), 2021 SKQB 235

Layh, September 7, 2021 (QB21229)

Bankruptcy and Insolvency - Conditional Discharge

Both of the bankrupts applied for discharge, and both the trustee and the Minister of National Revenue (MNR) opposed the applications for unconditional discharge. The bankrupts, Mr. and Mrs. Tran, a married couple, had been involved in the same businesses that were subject to similar or identical audits by the Canada Revenue Agency (CRA). They filed assignments in bankruptcy simultaneously after deciding that that was preferable to continuing with their appeal of the audits, which they had found confusing and were unable to clarify. Their debt arose primarily from non-payment of taxes and failure to remit amounts due under s. 227.1(1) of the Income Tax Act and s. 323 of the Excise Tax Act related to the numerous corporations the Trans owned and operated prior to bankruptcy. Section 172.1 of the Bankruptcy and Insolvency Act (BIA) did not apply to either bankrupt. Mr. Tran was indebted to the MNR for $823,738. He owed $604,275 to the CRA, the largest unsecured creditor, in personal and corporate income tax debt and $219,463 in unremitted GST including penalties and interest. He currently worked for a company owned and operated by Mrs. Tran and the trustee assessed his available monthly income at $2,405. Mrs. Tran's debt to MNR was for $1,098,561 and the trustee allowed it a secured claim of $62,000 that formed a charge against the family home. It was valued at $520,000 and registered in her name alone. A mortgage debt of $395,000 was owed against the home. Aside from the amount of MNR's secured claim, the remainder of Mrs. Tran's debt was unsecured and, of it, she was responsible for $735,920. The remaining amount constituted a joint and several obligation with Mr. Tran arising from unpaid or unremitted corporate obligations. Mrs. Tran's available monthly income was reported by the trustee to be $4,388. After they received the audits, the Trans dismissed their accountant who had not performed his duties properly. They remained opposed to the method, manner and conclusions reached in their audits by the MNR. The couple had two young children, each of whom suffered from psychological and medical problems that required a great deal of their parent's attention. The MNR cited four facts provable under s. 173(1)(a), (b), (c), (e) and (m) of the BIA against each of the Trans. The trustee and the MRN recommended that Mr. Tran pay $3,240 and Mrs. Tran pay $6,900, representing the balance outstanding payable under the Superintendent's Income Standards accrued over the 21 months subsequent to each bankrupt's assignment.
HELD: The court ordered that Mr. Tran and Mrs. Tran would be discharged from bankruptcy upon payment by them of $2,916 and $6,201 respectively, and they would be required to file their income tax returns for 2015, 2016 and 2019. It was satisfied that the MNR had proven the s. 173 facts against the Trans. It would have

accepted the recommendations of the trustee and the MNR regarding the amount each of the Trans should pay but reduced them due to their particular circumstances. They had assigned in bankruptcy because of the confusion they felt regarding the audits and not for dishonest reasons. Their obligation to pay surplus income was based upon their pre-COVID incomes and their business revenue had decreased by 35 percent from pre-COVID sales. The proceeds from the voluntary sale of their home were subject to the bankruptcy caution, the MNR's secured charge and the mortgage debt registered against it. Their children's needs meant that the Trans could not focus solely on their business.

 Back to top

Krug v Dakine Home Builders, 2021 SKQB 241

Keene, September 9, 2021 (QB21230)

Contracts - Breach of Contract - Repudiation and Damages

The plaintiffs sued the defendant, a residential construction company, claiming damages they had suffered when they terminated the building contract between them after the defendant had repudiated it by missing the deadline set out in the contract for possession. The defendant brought a counter-claim for damages and consolidated it with a builders' lien action. The parties had entered into their contract in 2011 for the defendant to build the plaintiffs' new home with a possession date of June 1, 2012. Although the defendant began working on the site in January 2012, the project was delayed in the spring by weather conditions and a road closure, and the possession date passed without remark. For example, the plaintiffs had themselves not attended to getting the electricity hooked up until early June. The plaintiffs did not terminate the contract in June and construction continued until early October 2012. Over the summer, the plaintiffs communicated their desire to have the defendant provide them with a construction schedule and raised various deficiencies they had noted. The defendant said it could not provide them with the schedule but it responded to the plaintiffs' concerns and continued with the project. However, in early October, the plaintiffs' lawyer wrote to the defendant's lawyer to advise that they were contemplating terminating the contract immediately unless the work was completed in the near future. The parties maintained their communications by email about the project regardless, but on October 15, the plaintiffs instructed their lawyer to send a termination letter, but the lawyers engaged in further negotiations. The defendant sent a schedule for phased completion of the work remaining to be done and setting a completion date at the end of December. However, on October 21, the plaintiffs advised that the contract was terminated and that the defendant was no longer welcome on the

property. The defendant's lawyer informed the plaintiff's lawyer that the termination created problems for completion of the new home warranty certificate and demanded, pursuant to the contract, that no further work be completed until the parties agreed on the terms to terminate the contract. The lawyer responded that it was the defendant who had breached the contract and they would look to the defendant for any damages suffered and would mitigate their losses as necessary. The house was left vacant from October 2012 until July 2013, when the new contractor hired by the plaintiffs began working on the project at a cost in excess of the fixed price contract with the defendant and the work was not completed until 2014. The issues were: 1) whether the plaintiffs were entitled to terminate the contract; 2) if so, had the plaintiffs acted properly in mitigating their damages; 3) if the plaintiffs were entitled to terminate the contract, had they proven their damages; and 4) whether the defendant was entitled to damages and if so, in what amount.
HELD: The plaintiff's claim was dismissed and the defendant's counter-claim was allowed. It was awarded $37,796 in damages. The court found with respect to each issue that: 1) the plaintiffs were not entitled to unilaterally terminate the contract because of delay. Their claims regarding alleged deficiencies were minor and did not rise to the level of a fundamental breach of the contract allowing for termination. 2) Had it found the plaintiffs were entitled to terminate the contract, the court assessed the question of whether they had acted reasonably in mitigating their damages, and found that they had not by leaving the house vacant and exposed to the elements from October 2012 until July 2013 after they had ordered the defendant off the site. 3) If the plaintiffs had been successful in proving they had the right to terminate the contract, it would have awarded them $90,817 by way of proven damages; and 4) the defendant succeeded in its counterclaim as to damages arising from the plaintiff's termination of the contract. Its claims for out-of-pocket expenses and anticipated profit was allowed, but its claim for budgeted overhead profit was not allowed on the basis that it was too speculative.

 Back to top

R v Brassington, 2021 SKPC 40

Agnew, August 25, 2021 (PC21034)

Legal Profession - Crown Counsel as Witness

The trial judge was required to determine whether the Crown had proven beyond a reasonable doubt the essential elements of the offence of sexual assault, and reviewed the evidence. The Crown alleged that N.W., a 14-year-old male resident of Eagle's Nest group home, entered the room of S.P., a 14-year-old female, without

invitation by her and had non-consensual sexual intercourse with her. S.C., a staff member at Eagle's Nest, testified that he performed a check of N.W.'s room at 12:00 am, and believed he was in his room at that time. He checked again at 1:00 am and N.W. was missing. Clothing had been stuffed and placed in the bed. S.C. searched every room in the facility, and when he came to S.P.'s room asked her if she had seen N.W. S.P. said she had not seen him. During his search of the entire building, he learned that N.W. might be in S.P.'s room. He then returned to the room, found N.W. hiding under the blankets in S.P.'s bed and told him to leave. In her examination-in-chief, S.P. denied arranging for N.W. to come to her room later that night and testified that when he arrived there, she was surprised. She testified that N.W. forced himself on her and though she repeatedly told him not to, he had sexual intercourse with her for 15 minutes against her will. In cross-examination, she agreed that N.W. was in her room from 1:00 am to 2:30 am, when S.P. found him there and told him to go back to his room. When confronted with her evidence in cross-examination that N.W. was in her room for two and a half hours, and that the sexual assault had lasted only 15 minutes, and asked what they did during the remaining two hours, S.P. for the first time said that the first assault lasted 15 minutes, but that N.W. had sexually assaulted her a second time for 45 minutes. Her evidence was also inconsistent with the evidence of S.C., which the trial judge fully accepted and used as a benchmark to gauge S.P.'s credibility, in particular her denial that N.W. was in her room when he was. N.W.'s testimony was more consistent with that of S.C. He testified to stuffing clothes in his bed, as observed by S.C., and that he hid in S.P.'s room when discovered by him. He said he and S.P. had arranged for him to come to her room. He then described sexually forward behaviour on her part, including fellatio prior to consensual sexual intercourse.
HELD: The trial judge referred to the seminal cases R v Ewanchuk, 1999 SCC 711, and R v Barton, 2019 SCC 33 in ruling that the Crown had failed to prove beyond a reasonable doubt one of the essential elements of the actus reus of the offence, that S.P. had not consented to the sexual intercourse. He ruled the unexplained inconsistencies in her evidence in essential areas of the Crown case when compared to S.C.'s evidence and that of D.W., whose evidence could be believed, compromised her credibility to such an extent that he had a reasonable doubt that she had not consented to the sexual activity.

 Back to top

R v Bird, 2021 SKPC 41

Schiefner, September 2, 2021 (PC21035)

Criminal Law - Reasonable Doubt - Credibility

The trial judge was required to make findings of credibility in a trial for assault with a weapon, to wit, a dog, in which the evidence of the accused, W.P.B., and the arresting officer, R., were diametrically opposed. He recognized that he was to apply the foundational case, D.W. ([1991] 1 SCR 742), in these circumstances to determine whether the Crown had discharged its burden of proving W.P.B.'s guilt beyond a reasonable doubt. He ultimately ruled that he did not believe W.P.B.'s evidence, and accepted without reservation the evidence of R. He did not believe W.P.B.'s evidence because it was internally inconsistent; contradicted by other evidence he did believe; was not balanced, in that it was full of innuendo and character assassination; was contradicted by his own witness; and was not corroborated by other evidence which included a live streamed video clip he claimed proved his version of events, but which he chose not to put into evidence. As an example of internal inconsistency, the trial judge found that W.P.B. testified he had cleaned and put away knives used for hot knifing "roaches," but had nonetheless touched the victim, P.S., on the cheek with one of these when, as he alleged, she approached him in a threatening manner. He stated the knife was cold. R. had observed a burn mark on P.S.'s cheek. She had told him W.P.B. had intentionally burned her with one of the knives which were hot because he was "hot knifing a roach." Contrary to W.P.B.'s account, the trial judge found that, on the evidence of R., he was attempting to make an arrest of W.P.B. and due to exigent circumstances, in particular P.S.'s concern for the safety of children in the house, and hearing children crying within it, broke down the door, and once within was bitten by a dog. He testified W.P.B. said more than once to the dog "Sasha, sic 'em." The trial judge accepted R.'s evidence that the dog, Sasha, was agitated and aggressive before the attack command was made by W.P.B. He found as well that W.P.B. resisted arrest by pulling back from R. and being uncooperative when being escorted to the police vehicle. W.P.B.'s uncorroborated testimony described extreme assaultive behaviour by R. towards him, but no evidence was tendered by W.P.B.
HELD: The trial judge found the accused guilty of resisting arrest, and not of assault with a weapon. He ruled that he had a reasonable doubt that the command "Sic 'em" was the cause of the attack, because Sasha was agitated and aggressive as soon as R. forced the door to the house. He nonetheless found that the attack command and the resistance by W.P.B. by pulling back and being uncooperative on arrest amounted to obstructing a peace officer in the execution of his duty, contrary to s. 129 of the Criminal Code. He also instructed himself, as required by D.W., that rejecting W.P.B's evidence did not end his inquiry as to whether the Crown had proven the offence beyond a reasonable doubt , and that he was to review all the evidence he did accept to decide whether it raised a reasonable doubt as to W.P.B's guilt, and concluded that it did not.

 Back to top

R v Noname , 2021 SKPC 46

Kovatch, September 8, 2021 (PC21037)

Criminal Law - Sentencing - Firearm Offences
Criminal Law - Aboriginal Offender - Sentencing

The accused pled guilty to breaching a release order by possessing or consuming alcohol; being in possession of an unloaded prohibited firearm, a sawed-off shotgun, contrary to s. 95(1)(a) of the Criminal Code; and being in breach of probation regarding the firearm. He had been charged with the s. 95 offence after the police gave chase, trying to stop a stolen vehicle in which the accused was a passenger. The vehicle eventually stopped and its occupants ran. The police tracked down the accused and also found a sawed-off 12-gauge shotgun nearby. The accused admitted it had been in his possession and he had tried to get rid of it during the chase. When the vehicle was searched, shotgun shells were found in it. Prior to these charges, the accused had been convicted for assault and failure to appear in court. A Pre-Sentence Report (PSR) was prepared and it revealed the presence of many Gladue factors in the accused's life. He was 22 years of age and lived on the Piapot First Nation. His father was sent to prison when the accused was two. Because his mother suffered from substance abuse, the accused lived with his grandparents until he was 14, but they too abused substances. He left their home and lived a transient lifestyle, drank heavily and used illicit drugs. Since committing the offence in June 2020, the accused had been living with his girlfriend at her mother's home. The mother, who had been sober for 10 years and did not permit alcohol or drugs in her home, was interviewed for the PSR and commented that the accused had turned his life around. He had been completely sober and drug-free since September 2020. The accused had become involved with Aboriginal healing ceremonies. She offered that the accused would benefit from counselling to address his abandonment issues. The accused and her daughter had recently had a baby. The accused indicated that he wanted to remain sober to keep his child from experiencing what he had during his childhood. He expressed an interest in returning to school to obtain his grade 12 education. The Crown argued that the accused should receive a sentence of three years' imprisonment, consistent with other sentences imposed for the same offence.
HELD: The accused was sentenced to a nine-month incarceral sentence to be served in the Regina Correctional Centre followed by two years' probation. In the conditions, the accused was prohibited from possessing or consuming alcohol or drugs and required to participate in personal counselling. For the other two charges, he received two 30-day sentences to run concurrently with each other and the s. 95 sentence. The court distinguished other cases such as McKenzie (2020 SKPC 31) and Morin (2019 SKPC 69), where a longer sentence had been imposed because the court had not considered Gladue factors or good post-offence conduct in either case. In this case, it noted that Gladue factors present, such as that the accused witnessed substance abuse and lived in poverty during his childhood led directly to him leaving school early, living a transient lifestyle and becoming involved with substance abuse and gangs, decreased his moral blameworthiness and should be considered in arriving at an appropriate sentence. The accused's post-offence

conduct showed his efforts toward rehabilitation and the court should seize upon that conduct and the opportunity to promote and advance the rehabilitative process.

 Back to top

Stettner v Burak, 2021 SKPC 45

Green, September 10, 2021 (PC21036)

Contract Law - Breach - Damages

The plaintiff brought a small claims action for damages for $23,541 against the defendant, the operator of a small agricultural equipment repair business. After purchasing a John Deere tractor online from an American seller for $16,500, the plaintiff took it to the defendant to repair it as the plaintiff discovered soon after purchasing it that there was a problem with its gears. Both parties acknowledged the tractor was in poor condition and the defendant agreed to try to fix it in August 2019. Once notified by the defendant that the tractor was operable, the plaintiff retrieved it in December 2019 and put it into his storage shed where it remained until March 2020. When the plaintiff tried to drive it then, the same problem occurred. He took the trailer back to the defendant to repair and the parties agreed that a certain part would be replaced and installed in the tractor. Despite doing so, neither the defendant and nor his technician could find the problem after making extensive attempts to do so. Later in the spring of 2020, the defendant informed the plaintiff that the tractor was inoperable and he should come and take it. There was some evidence that the defendant said he would charge the plaintiff for 20 hours' labour rather than the 40 hours actually expended. The plaintiff arranged to have the tractor taken to the town where there was a John Deere dealership operated by Pattison Agriculture (Pattison) that used John Deere's computer program for diagnostics. The technician there testified that after he performed diagnostics on the tractor, he discovered that a valve installed by the defendant was upside down. Once corrected, the tractor operated normally. He said that the valve mistake was an easy one to make and that it would be difficult part to assemble without the diagnostic equipment and manuals that the dealership had. Pattison's shop hourly rate was $160 compared to the $85 that the defendant charged. After the evidence was submitted at trial, the plaintiff reduced his claim to; 1) a refund of $4.446 for the defendant's labour consisting of $2,000 of the labour charged in December 2019 plus $2,446 for labour charged in spring 2020; 2) $605 for the cost of transporting his tractor to the defendant in the spring of 2020; 3) $1,096 for the cost of Pattison Agriculture transporting the tractor from the defendant's premises to its own; and 4) $1,496 for the cost of Pattison cleaning his tractor for mice contamination. HELD: The plaintiff's claim was allowed in

part and he was awarded damages in the amount of $3,276. The court found that the plaintiff was not entitled to a partial refund of the defendant's December invoice, regardless of what subsequently happened with the tractor. The defendant provided the labour services as promised and the evidence showed that he was not negligent in the work that he did. It decided that that respecting the next charges incurred in the spring of 2020, it would accept the 20 hours' labour as the appropriate amount owed by the plaintiff and reduced that amount to take into account the $1,134 paid by the plaintiff to Pattison to find and correct the defendant's mistake. This assessment resulted in the defendant refunding $1,879.50 to the plaintiff from his previous payments to him for labour. The plaintiff was also awarded $1,096 for the cost charged by Pattison for transporting the tractor from the defendant's premises to the dealership because it was a direct result of his mistake in rendering the tractor inoperable. The plaintiff's claim for $1,496 for Pattison to clean the tractor was dismissed because of insufficient evidence.

Back to top