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

Volume 19, No. 14 **July 15, 2017**

Subject Index

B. (W.A.), Re, 2016 SKPC 86

Green, June 16, 2016 (PC16170)

Family Law – Child in Need of Protection – Temporary Order

The Ministry of Social Services apprehended an infant, aged 15 months, from the care of his parents. The mother, C.B., was 19 years of age and the father, J.A., was 16 years old. The child was technically apprehended by the Ministry when he was born, as it had learned that C.B. had various cognitive challenges and mental health problems. The Ministry had not proceeded with the application and allowed C.B. to take the child home with her because J.A.'s parents agreed that one of them would always be present in C.B. and J.A.'s home to supervise the care of the child. C.B. and J.A. later moved into J.A.'s father's house. J.A.'s mother looked after the child in her own home and had reduced her work schedule in order to help. She testified that both parents were too immature to be able to handle the pressure of caring for their child. In November 2015, a family support worker testified that when she visited J.A.'s father's farm, she found J.A. to be very angry and he eventually locked her and C.B. out of the house while he remained in it with the child. C.B. advised the support worker that she and J.A. had had a fight earlier and he had tried to strangle her. The support worker called the Ministry and the RCMP and the child was then apprehended and placed with J.A.'s mother. After this, a child protection worker went to the mother's house to complete documentation. During her visit, J.A. arrived and threatened her. The RCMP were called. The

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine – Conviction – Sentencing

Criminal Law – Sentencing – Aboriginal Offender

Family Law – Appeal

Family Law – Child in Need of Protection – Temporary Order

Family Law – Custody and Access – Best Interests of Child

Landlord and Tenant – Residential Tenancies Act – Appeal

Municipal Law – Property Maintenance Appeals Board – Appeal

Real Property – Certificate of Pending Litigation – Discharge

Regulatory Offence – Occupational Health and Safety – Sentencing

Residential Tenancies Act – Appeal

Statutes – Interpretation – Saskatchewan Farm Security Act

Torts – Negligence

Wills and Estates – Accounting

Wills and Estates – Will – Revocation – Appeal

Cases by Name

B. (W.A.), Re

Babatunde v Bank of Canada

Bacic v Ivakic

Bryson v Bryson

Buhl v Saskatoon (City)

Bulmer v Nissan Motor Co., Ltd.

court learned that the RCMP had ten to twelve files regarding J.A. C.B. proposed that the child be returned to her and J.A. and that they resume their previous arrangement of living with J.A.'s father.
HELD: The court found that the child was in need of protection under s. 11(b) of The Child and Family Services Act, that his parents were unable to care for him, and that physical or emotional harm was likely to occur to him. J.A.'s mother was found to be a person of sufficient interest under s. 23 of the Act. The court ordered that the child should be placed in the custody of J.A.'s mother as a person of sufficient interest for a period of four months pursuant to s. 37(1)(b) of the Act. The child's parents should have adequate access to build their relationship with him and to allow them, with the assistance of others, to come up with a plan that would allow them to eventually care for their child.

 Back to top

R. v. J & D Sewer Services (1984) Ltd., 2016 SKPC 125

Klause, September 27, 2016 (PC16171)

Regulatory Offence – Occupational Health and Safety – Sentencing

The accused corporation pled guilty of violating ss. 19(1)(a) and 302(2)(a) of The Occupational Health and Safety Regulations, 1996. The corporation's business was performing routine maintenance of village sewer lines. The operation was comprised of the owner and, at the time of the incident, two young men hired as employees to flush out sewer lines. One young man fell through a manhole and while his co-worker was trying to help him out, he collapsed and died. Both men died as a result of hydrogen sulfide toxicity. The owner of the corporation had no training in how to protect himself from problems associated with working with this lethal gas, and he had offered none to his two new employees. He did not have any breathing apparatus or any safety equipment. The Crown noted that the maximum fine had increased to $1.5 million under s. 3-79 of The Saskatchewan Employment Act to promote general deterrence. The accused corporation had no prior convictions, no prior notices of contravention, was a very small corporation with a limited ability to pay, and was no longer performing the same type of work.
HELD: The accused was fined $15,000 on each charge. The court found that this was a completely foreseeable and preventable

Daniels Investments Saskatoon Ltd. v Houk

Ehman v Albony Place Condominium Corp.

Fecyk v Bracken

Fitzpatrick v Ollenberger

Holmes v Jastek Master Builder 2004 Inc.

Menke Holdings Ltd. v Aguirre

O. (A.) v E. (T.)

Picketts v Picketts Estate

R v Carter

R. v. J & D Sewer Services (1984) Ltd.

R v Mamchur

R v Morrisseau

R v Noname

Ready v Saskatoon Regional Health Authority

Saskatchewan Crop Insurance Corp. v McVeigh

Saskatchewan (Minister of Finance) v Crescent Point Resources Partnership

Stoney; Burns v Sound Stage Performance Inc.

Thompson Estate v Thomspon

situation, which was worsened by the corporation's owner's lack of training, his failure to train, or even inform, his employees regarding the potentially lethal hazard or to carry safety equipment to ensure their safety. The fine reflected the small size of the corporation, its limited ability to pay, the absence of any previous record and the remorse expressed by the owner.

 Back to top

O. (A.) v E. (T.), 2016 SKQB 92

Brown, March 15, 2016 (QB16407)

Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Children Born Outside Marriage
Family Law – Custody and Access – Custody and Access Report
Family Law – Custody and Access – Person of Sufficient Interest
Family Law – Custody and Access – Primary Residence

The O.K.s and T.E. sought sole custody of C., born 2011. The child lived with the O.K.s since she was just over seven months old, and T.E. was her biological father. T.E. lived on a First Nations reserve with his two sons, aged 12 and 8 in a four-bedroom home with a developed basement. He had sole custody of his sons, who were C.'s full brothers. T.E. also had three children from his first marriage; all were successful, independent adults and he had a good relationship with them all. T.E.'s mother and sister lived close by him. T.E. was a band councilor and was an approved foster parent. T.E. had been convicted of an assault on C.'s biological mother, but he had no other criminal charges or convictions. The child's biological mother and T.E. ended their relationship while she was pregnant with C., and T.E. did not initially know that she was his child. T.E. requested a paternity test when he learned of C.'s pending adoption. The child was placed with the O.K.s for adoption when she was a baby. Mr. O.K. was Cree, and he maintained his language and connection with his Cree community. He worked primarily for the government. Mrs. O.K. was of European ancestry and she worked as the coordinator of the Family Connections program for the school division. The O.K.s lived close to a park and a school, and C. was involved in numerous activities. The O.K.s did not have any other children. A custody and access assessment was completed in September 2014, wherein the assessor concluded that it was in C.'s best interests to transition into T.E.'s care. The O.K.s thereafter obtained another professional, Dr. D., to provide a critique of the assessment. Dr. D. recommended ceasing T.E.'s access

immediately, although she did not observe C. during a visit or stay with T.E. There were some issues with T.E.'s access being cancelled for various reasons, and the parties experienced conflict. Mrs. O.K. indicated that C. became anxious once overnight access with T.E. started. T.E.'s mother testified as to his ability to parent the child and also to the family's Nakoda roots, which are quite different from Cree.
HELD: The best interests of C. required something other than shared parenting. The primary reason for cancelations of T.E.'s access with C. was based on Mrs. O.K.s decision to do so. The court accepted the assessor's description of C. being happy, playful, loving, and content when she was with T.E. The court concluded that Mrs. O.K. was more concerned about the effect of overnight visits than was warranted. The court found the O.K.s met the criteria within the meaning of s. 6 of The Children's Law Act, 1997 to be designated as persons having sufficient interest. The court also found that T.E. continued to be a legal custodian of C. pursuant to ss. 3(1) of the Act. The court found that it was in C.'s best interests to continue her relationship with her full brothers in more than a periodic and casual way and weighed in favour of C. residing with T.E. The O.K.s relationship with one another was appropriate and supportive. The child would not have the benefit of a two-parent family if she was with T.E. However, there was a significant extended family living close to T.E. The connection with extended biological family weighed in favour of C. residing primarily with T.E. The court found that C. would be more likely to have contact with her biological mother if she primarily resided with the O.K.s. The court found that T.E. had much more parenting experience than the O.K.s. The court did not put much weight on Dr. D.'s conclusions due to shortcomings in experience, processes employed, and the report tendered. The assessor's opinion was given considerably greater weight. C. would have the opportunity for powwow dancing if she primarily resided with T.E., which was something T.E.'s family had done well over time and was clearly an important family tradition. The court found that there was little difference in the level of amenities that were available to C. as between the two small community settings. The risks associated with C.'s custody being transferred to T.E. were minimized because of the relationship already developed. The court found C. was bonded and attached with both the O.K.s and T.E. and saw them all as her parents. The court concluded that it was in C.'s best interests to be resident with and in the custody of T.E. and he was, therefore, granted custody of C. The O.K.s were given specified access. The distance between the parties and the inability to communicate effectively prevented the court from making a shared parenting order. The court provided for a summer transition into T.E.'s home. The court also ordered that a

counsellor be retained to provide advice and counseling to T.E. and C. during the transition. The counsellor was to be paid by T.E., and if the parties could not agree on the counsellor, the court would appoint the counsellor. Further, the court specified that the transition would not proceed as ordered if a counsellor was not engaged prior to the extended-time access in June.

 Back to top

Bulmer v Nissan Motor Co., Ltd., 2017 SKCA 19

Richards Herauf Ryan-Froslie, March 8, 2017 (CA17019)

Civil Procedure – Appeal
Civil Procedure – Class Action – Appointment of Judge
Civil Procedure – Class Action – Jurisdiction of the Court
Civil Procedure – Hague Service Convention, Article 10(a)
Civil Procedure – Queen's Bench Rules, Rule 12-11
Civil Procedure – Service of Statement of Claim

The plaintiff commenced a proposed class action and served the claim on the three named defendants. He served the Japanese company by having a commercial courier deliver a copy of the statement of claim in Japan. The plaintiff was denied his application pursuant to s. 4(2) of The Class Actions Act to have a judge appointed on the basis that the defendant had not been properly served. The plaintiff argued that he could serve the defendant via postal channels because Japan was a party to The Hague Convention and that it had not objected to article 10(a). The affidavit of service did not indicate whether the office the statement of claim was delivered to was the head office, nor did it indicate the capacity of the person who accepted delivery of the package. The plaintiff appealed on the following bases: 1) the Act conferred no authority on the Chief Justice to make proof of service a prerequisite for the appointment of a certification judge; 2) the Chief Justice should not have decided the issue of the validity of service on the defendant without giving him and the defendant an opportunity to make submissions; and 3) the service on the defendant was legally effective by virtue of article 10(a) of The Hague Service Convention.
HELD: The appeal was dismissed. The appellant's arguments were considered as follows: 1) there is a connection between the service of a statement of claim and the appointment of a certification judge. The application must be brought within 90 days of the date the statement of defence was delivered so the Chief Justice must know whether the statement of claim was served and when. Second, s. 4(2) does not require the Chief Justice to appoint a judge. Third, the Chief Justice's decision was

entitled to deference. Lastly, the defendants had an interest in seeing that all of the parties alleged to share liability were brought before the certification judge at the same time; 2) it would have been appropriate to ask the parties for submissions on the question of whether the defendant had been properly served. However, full argument was made on appeal so the question of whether further submissions should have been entertained by the court was of no consequence; and 3) the court concluded that the plaintiff could not rely on article 10(a) because it was not incorporated into rule 12-11 of The Queen's Bench Rules.

 Back to top

Ready v Saskatoon Regional Health Authority, 2017 SKCA 20

Jackson Ottenbreit Ryan-Froslie, March 9, 2017 (CA17020)

Administrative Law – Boards and Tribunals – Jurisdiction
Administrative Law – Judicial Review – Standard of Review – Correctness – Appeal
Statutes – Interpretation – Regional Health Services Act, Section 45

The appellant physician appealed the decision of a Queen's Bench chambers judge to allow the appeal by the respondent, the Saskatoon Regional Health Authority, against the decision of the Practitioner Staff Appeals Tribunal (see: 2014 SKQB 273). The appellant had originally appealed under s. 45(1) of The Regional Health Services Act to the tribunal after the respondent had terminated him without cause pursuant to a provision in his employment contract. He argued that by terminating him, the respondent had indirectly revoked his privileges and access to publicly funded laboratory facilities and that he had not been afforded the procedural fairness required by the Practitioner Staff Bylaws that were created pursuant to s. 43(1) of the Act. The bylaws related to such things as how physicians must obtain status as practitioner staff with the respondent in order to obtain the privileges to use its facilities, such as hospitals and laboratories. Neither the granting of status nor privilege created an employment relationship between the respondent and the appellant nor any other physician. The tribunal found that it had jurisdiction to hear the appeal and allowed it. It found that just because there was an employment contract, applicable statutory obligations could not be ignored, and thus, the bylaws of the respondent applied to the matter, irrespective of the terms of the contract. The SHRA could not skirt the bylaws by entering into a

separate contract. The Queen's Bench chambers judge found on appeal that the correctness standard applied to the review of the tribunal's decision regarding the issue of jurisdiction. He determined that it had erred in assuming jurisdiction. The chambers judge found that in the event he was wrong on the question of jurisdiction, he would find that the tribunal's decision was not reasonable. On appeal to the Court of Appeal, the appellant raised multiple grounds, including: 1) whether the chambers judge erred in finding that the tribunal lacked jurisdiction; and 2) whether the chambers judge erred in finding that the tribunal's decision on the merits was unreasonable. HELD: The appeal was dismissed. Ottenbreit, J.A., found the following with respect to the issues: 1) the chambers judge had not erred in determining there was a true question of jurisdiction. He correctly recognized that the contract, the subject matter of employment, and the, at best, indirect effect of the termination on status and privileges gave rise to a threshold true question of jurisdiction subject to review on a correctness standard. The tribunal was required to determine explicitly whether its statutory authority under s. 45(1) of the Act gave it the power to decide the matter before it and it failed to do so; 2) although the appeal was dismissed on the basis of the first ground, the court found that the chambers judge had not erred in determining that the tribunal's decision was unreasonable. In dissent, Jackson, J.A., found the following with respect to the issues: 1) the chambers judge had erred by finding that there was a true question of jurisdiction regarding the appellant's appeal to it, and its decision commanded a correctness review. The tribunal's mandate was to hear a complaint from a person claiming to be aggrieved pursuant to s. 43 of the Act and, in the course of doing so, would interpret the bylaws. The appropriate standard of review to apply to the tribunal's decision was reasonableness. The matter was of importance to the health industry only and those with expertise in the field should be the ones who decide it. After reviewing the legislation, its history and the tribunal's reasons, Jackson, J.A., found the tribunal's decision to be reasonable. Ryan-Froslie, J.A., concurred that the tribunal had the authority to embark on the inquiry of whether the appellant's dismissal from his employment constructively terminated his appointment to the practitioner staff or amended, suspended or revoked his privileges. Regarding the second issue, Ryan-Froslie, J.A., concurred with Ottenbreit, J.A.; and 2) If the appellant's dismissal without cause resulted in the constructive termination of either his appointment to the practitioner staff or his privileges, such termination was wholly justified by the terms of his employment contract. The bylaws could not reasonably be interpreted as requiring the respondent to follow its procedures when dismissing the appellant without

cause. The chambers judge had not erred in finding the tribunal's decision was unreasonable.

 Back to top

R v Noname, 2017 SKCA 21

Richards Lane Whitmore, March 17, 2017 (CA17021)

Criminal Law – Appeal – Crown – Sentence
Criminal Law – Sentence – Break and Enter a Dwelling House and Commit Aggravated Assault

The respondent was convicted of aggravated assault, two counts of assault with a weapon, and breaking and entering to commit robbery when he participated in a home invasion organized by one of his cousins. He was sentenced to five years and six months' imprisonment. The Crown appealed the sentence. The respondent and three others broke into a residence to steal a vehicle and a ring. During the invasion, one of the victims was shot and wounded. The respondent's cousin, the mastermind behind the invasion, received a sentence of eight years. The Crown argued that the judge made three errors that led him to impose a demonstrably unfit sentence: 1) he failed to appreciate the severity of the crimes in issue; 2) he failed to properly assess the degree of the respondent's moral culpability; and 3) he relied on factually dissimilar cases as reference points for his sentencing analysis.
HELD: The appeal was dismissed. The court found that the sentence was unfit, but should be sustained given the respondent's exceptionally positive post-offence conduct. The Crown's arguments were discussed as follows: 1) the trial judge was well aware of and appreciated the graveness of the offences; 2) the trial judge did understand the degree of the respondent's culpability; and 3) the appeal court found that there was a flaw in the trial judge's decision because he determined that the range of available sentences for convictions of breaking and entering a dwelling house and committing aggravated assault was between 8 and 15 years, yet only sentenced the respondent to five years and six months. The sentence did not reflect the many aggravating features of the home invasion. The respondent was born in 1989 and was an Aboriginal man. His mother was unable to care for him, so he was raised by his grandmother who had serious substance abuse issues. The respondent had been in a relationship since 2011 and they had a young child. He had no criminal record prior to the offences and was released into the community for over two years before his conviction. He was

employed full-time. The respondent completed a variety of programming while in custody.

 Back to top

R v Noname, 2017 SKCA 22

Richards Lane Whitmore, March 17, 2017 (CA17022)

Criminal Law – Appeal – Conviction – Attempted Murder
Criminal Law – Appeal – Sentence – Attempted Murder
Criminal Law – Sentencing – Aggravating Factors – Home Invasion

The appellant organized a home invasion that he and three others committed. One victim was wounded when a shotgun was discharged. He was convicted of offences including attempted murder, two counts of assault with a weapon, and breaking and entering to commit the offence of robbery. The appellant was sentenced to eight years less credit for remand time. He appealed his attempted murder conviction, arguing the following: 1) the trial judge's reasons for decision were inadequate; 2) the trial judge erred in finding he had the requisite mens rea for attempted murder; and 3) the trial judge erred in failing to recognize that he had acted lawfully in defence of a third party. The Crown appealed the sentence, contending that the trial judge erred by not appreciating the gravity of the offences and also by treating the attempted murder as no more than an aggravating circumstance of the home invasion. The female victim said that she was forced to the floor and beat with a baton. She suffered bruises and bumps. The male victim indicated that he saw a male with a black handgun before he was struck from behind and was "knocked out". When he regained consciousness, he was shot in the right thigh. The female intruder testified that the appellant had a plan to go to the home and get a ring and a vehicle. She said the appellant yelled at one of the other invaders to shoot, and then they fled the scene. The appellant provided a warned statement to the police in which he said he was ordered to do the home invasion by somebody in return for $10,000. The appellant said that he recruited the other three people to assist with the invasion. The appellant said that another invader shot through the locked glass door from the outside when they could see the female invader being hit with a machete. At trial, the appellant testified that he was not involved in the home invasion and was nowhere near the scene at the material time. The trial judge rejected the appellant's testimony at trial and found him to be the instigator

and organizer of the home invasion. The trial judge was satisfied, beyond a reasonable doubt, that the appellant had urged the other invader to fire the shotgun, and he was therefore able to infer a specific intent to kill.
HELD: The appellant's conviction appeal was dismissed and the Crown's sentence appeal was allowed. The appellant's sentence was increased to 12 years' imprisonment. The appeal court dealt with the appellant's arguments on conviction appeal as follows: 1) the appeal court found that the trial judge's reasons adequately explained the evidentiary basis upon which he convicted the appellant of attempted murder; 2) the appeal court stated that trial judges are entitled to infer intention from the ordinary and natural consequences of a person's acts. In this case, the trial judge's inference was reasonable; and 3) the appellant argued that he should not have been convicted of attempted murder because he was acting in defence of the female intruder when he told the other invader to shoot the male victim. Section 37 of the Criminal Code, as it stood in 2012, was the operative provision. The appeal court found that the female invader was not a person under the appellant's protection and shooting the male victim in close range with a shotgun was not a necessary or proportionate response to the female invader's situation. The trial judge's conclusion that the s. 37 argument should fail was not found to be an error. The appeal court found merit in the Crown's argument that the trial judge failed to properly appreciate the significance of the fact that the appellant was convicted of attempted murder. The trial judge somehow treated the attempted murder as aggravating a home invasion rather than the home invasion aggravating the attempted murder. The court also accepted the Crown's argument that the trial judge offended the principle of parity by basing his decision on dissimilar home invasion cases. The appellant was an Aboriginal man born in 1982. He had a grade nine education and had worked in the construction industry. He had a history of substance abuse and had a limited criminal record. Denunciation and deterrence were the primary sentencing objectives in the case. An appropriate sentence for attempted murder was found to be 12 years, with ten years and five months remaining to be served after deducting pretrial custody.

 Back to top

Bacic v Ivakic, 2017 SKCA 23

Richards Ottenbreit Jackson, March 17, 2017 (CA17023)

Family Law – Appeal

Family Law – International Child Abduction Act, 1996
Family Law – Convention on the Civil Aspects of International Child Abduction in Saskatchewan

The parties had a five-year-old child. In 2014, the appellant moved with the child from Croatia to Saskatchewan. The respondent successfully applied under The International Child Abduction Act, 1996 for the return of the child. In Croatia, the court made a temporary parenting order entrusting the appellant with the child's care. The respondent had access rights. The respondent indicated that he learned of the move in a postcard sent to him April 2014 from the airport when the appellant and child were leaving Croatia. In September 2014, the appellant sent the respondent another postcard to inform him where she and the child were living. In May 2015, the respondent emailed the appellant to inquire about the child. The chambers judge concluded that the child was not settled in Saskatchewan, largely because the immigration status of the child was uncertain. The appellant argued that the chambers judge made the following errors: 1) finding that the respondent had rights of custody in relation to the child; 2) finding that the respondent had been exercising his custodial rights at the time the child was removed from Croatia, as per article 13(a); 3) failing to consider a decision of the Croatian courts; 4) failing to consider whether returning the child to Croatia would pose a risk of harm, as per article 13(b); and 5) finding that the child was not "settled", as per article 12. The appellant also applied to admit the following fresh evidence: a 17-page document regarding matters in Croatia; an affidavit she swore suggesting the respondent was a physically abusive petty criminal; and an affidavit sworn by her mother observing the parties' relationship as physically abusive by the respondent.
HELD: The appeal was allowed. The only fresh evidence that the court decided to allow was the fact that the child and appellant became permanent residents of Canada in February 2016. The appellant's allegations of error were then considered: 1) the chambers judge made no error in finding that the respondent had rights of custody that were breached and were sufficient to invoke the Convention; 2) the court found no error in the chambers judge's conclusion that if the respondent was not taking full advantage of his custody rights in April 2014, it was because his ability to do so was being thwarted by the appellant; 3) an order of the Croatian court in February 2016 providing for contact via Skype was of no relevance to the application, and therefore, the chambers judge was found not to have erred by not factoring it into his decision; 4) the appellant did not present the domestic abuse issue before the chambers judge. The evidence was contradictory in any event and the Convention provided that the appellant had the burden to establishing a

grave risk that returning the child to Croatia would expose the child to psychological or physical harm or otherwise be intolerable. The Croatian court did not find concern for the child's safety and the appeal court was unable to find that the appellant established a grave risk that the child's return to Croatia would expose the child to physical or psychological harm as per article 13(b); and 5) the appeal court found that there were two errors in the assessment: the chambers judge used an analytical framework, which is not the preferred framework; and the judge failed to appreciate that the appellant and the child were both permanent residents of Canada at the time of the hearing. The appeal court preferred the two-stage approach to determining whether a child was settled in the new jurisdiction. Further, the court determined that "settled" should be given its plain and ordinary meaning. The court considered all of the circumstances of the child and concluded that she was settled in her new environment. The court then considered the second stage of the article 12 analysis and concluded that the prompt return of the child to her place of habitual residence in Croatia was no longer possible. Also, restoring the status quo was not compelling or practical in the circumstances of the case. The deterrent dimension of the Convention was not found to always be a trump card.

 Back to top

Fitzpatrick v Ollenberger, 2017 SKCA 24

Jackson Herauf Wilkinson, March 21, 2017 (CA17024)

Wills and Estates – Will – Revocation – Appeal
Wills and Estates – Will – Missing Will – Presumption of Animo Revocandi

The appellant appealed from the decision of the Queen's Bench trial judge dismissing his probate application and permitting the respondent to proceed with her application for letters of administration (see: 2015 SKQB 409). The trial judge found that although Robert McGlynn had made a will in 2006 naming the appellant his executor and leaving his estate to the appellant's children, that on the evidence, McGlynn later revoked that will by subsequent holographic instruments, such as his letters to the lawyer who had prepared the will. The lawyer had mailed the will to McGlynn so that the latter could destroy it. After McGlynn's death, the will could not be found. As there was evidence that McGlynn had been careful with important documents, the trial judge found that the presumption of

destruction animo revocandi applied in this case to revoke the will, and therefore, McGlynn had died intestate. The appellant's grounds of appeal were whether the trial judge had erred in the following ways: 1) in determining that McGlynn had revoked his will; and 2) in determining that the will had been revoked through the application of the presumption of destruction. HELD: The appeal was dismissed. The court observed that the appeal dealt with questions of fact and thus the standard of review was that of "palpable and overriding error". The court found with respect to each issue that the trial judge had not erred: 1) in recognizing and summarizing the applicable law. His findings of fact regarding the interpretation of McGlynn's intention, expressed in his letters to the lawyer, to revoke the 2006 will were amply supported by the extrinsic evidence that was properly admitted; and 2) in identifying and applying the civil standard of proof on a balance of probabilities regarding the presumption of destruction. Regardless of the fact that McGlynn may not have wanted to die intestate, the evidence supported that he intended to revoke the will.

 Back to top

R v Mamchur, 2017 SKPC 26

Klause, March 10, 2017 (PC17017)

Criminal Law – Break and Enter a Business Premises while Wearing a Mask
Criminal Law – Evidence – Credibility
Criminal Law – Evidence – Identification

The accused was charged with: breaking and entering a business premises; attempting to rob someone at the premises; and wearing a mask while committing the offences. The issue at trial was the identification of the accused. Three witnesses testified that the accused was drinking at a bar the night of the offences. Two of the witnesses indicated that the accused left the bar briefly and then returned. Another witness heard yelling and went to the store that was robbed. She observed someone walking towards the store wearing a hoodie over his head and khaki short pants. The witness recognized the person again as the one being arrested at the bar. The co-owner of the store testified that a male entered the store and told her to put all the money in a bag. She grabbed a pair of scissors and told the man to get out of the store. She said he appeared to go behind a building. A police dog tracked from the store to behind a building where a hoodie matching the witness's description, a

ball cap, tea towel, and knife were found. When the accused was arrested at the bar, he asked, "What did the lady say?" even though he was not advised that the complainant was a lady. The accused testified that he left the bar and went to a nearby gym to buy some marihuana. He said that when he walked by the store on the way back to the bar, two women were staring at him. HELD: The court was certain that the individual who was arrested at the bar and charged with robbery was the accused. The accused was also the person who walked past the store and stared at the women on his way back to the bar. The court accepted that the accused left the bar and walked in the general direction of the store at a point in time relatively close to the time of the incident. The court found that the only useful evidence on identification came from the complainant. The complainant did not know the accused, had never seen him before, and only observed him for less than two minutes in a stressful situation. Also, the complainant saw the accused at the bail hearing so it was possible that she based her in-court identification, in part, on what she saw at the bail hearing. There was nothing linking the accused to the items found behind the building. The court found it unusual for a robber to re-attend the scene of the crime so quickly. Further, the court found it implausible that someone would leave a bar they were drinking with friends at and go rob a store in the near vicinity and then go back to the bar and carry on with their evening. There was a hat located behind the building and the accused was wearing a hat when he was arrested. The complainant also described the robber as wearing over-the-foot strap sandals, but he was wearing between-the-toe type flip-flop sandals. The court did not necessarily believe everything the accused said but was left with a reasonable doubt as to whether or not he was the person who committed the robbery. The identification evidence was found to be too frail to meet the standard of proof that the case law required. The accused was found not guilty of all counts.

 Back to top

Saskatchewan Crop Insurance Corp. v McVeigh, 2017 SKQB 52

Dufour, February 21, 2017 (QB17067)

Civil Procedure – Queen's Bench Rules, Rule 4-44

The defendants applied to have the plaintiff's action dismissed on the basis of delay. The action was commenced in 1998. The plaintiff alleged that from 1992 to 1995 the defendants applied for and received crop insurance indemnities in the amount of

$1,117,000 to which they were not entitled because they misrepresented their actual crop production. Since the claim was issued, one defendant had died, one was of questionable cognitive capacity due to age, and six of the defendants' witnesses had died. It had been ten years since the last step taken, the exchange of statement as to documents. The plaintiff admitted that the delay was inordinate but argued the delay was excusable because the matters were complex and the defendants' lawyer had been uncooperative.
HELD: The application was granted. The court reviewed the chronology of events since the claim was issued. It applied the test established in International Capital Corporation v Robinson Twigg & Ketilson. It found that the delay was inordinate. The plaintiff's arguments that the delay was excusable because of the defendants' lawyer's tactics was dismissed. The court concluded that approximately three or four years of delay was attributable to the defendants. Their lawyer had acted in their best interests. The court assessed whether it was in the interests of justice to allow the case to trial and found the following: the defendants would not be able to properly defend against the plaintiff's claim due to the delay; the litigation was not advanced; the plaintiffs had scooped money from some of the defendants under s. 42 of The Financial Administration Act, 1993 and s. 13.1 of The Statutory Contract of Crop Insurance, which showed that the defendants might be deprived of funds that they need to support their farming operations; whether the defendants' lawyer's conduct was unprofessional was not before the court; and it was in the public interest to have crop insurance fraud claims against farmers addressed in a timely fashion.

 Back to top

Saskatchewan (Minister of Finance) v Crescent Point Resources Partnership, 2017 SKQB 54

McMurtry, February 21, 2017 (QB17066)

Administrative Law – Judicial Review – Board of Revenue Commissioners – Appeal
Administrative Law – Judicial Review – Standard of Review – Reasonableness
Statutes – Interpretation – Provincial Sales Tax Act, Section 5(7)
Tax – Provincial Sales Tax

The Minister of Finance appealed from a decision of the Board of Revenue Commissioners that had overturned the Minister's tax assessment against the respondent, an oil and gas company that drilled wells in Saskatchewan. Its drilling operations included

hydraulic fracturing and it had a contract with a sub-contractor, NCS, who owned a tool called the Mongoose Frac System. Between 2010 and 2013, NCS completed more than 600 wells for the respondent. The Minister learned while auditing NCS during that period that it regularly rented the tool to the respondent without charging provincial sales tax. Each invoice was structured by NCS to account for the cost of renting the tool, the costs of the tool technician's time, and for other associated costs. The auditor, undertaking the assessment on behalf of the Minister, assessed tax on the use of the equipment, but not on the technician's time. The Minister issued a notice of assessment to the respondent regarding the rental. The respondent appealed the assessment to the board. It determined the issue was whether NCS provided a non-taxable service to the respondent or a taxable lease of tangible personal property and that the respondent bore the onus of proving that it was not liable for payment of PST. The board agreed with the respondent that NCS provided a non-taxable service. The Minister argued that the board erred in its decision: 1) by ignoring relevant evidence; 2) in its application of the onus of proof; 3) in its interpretation of the contracts; and 4) in its interpretation of The Provincial Sales Tax Act.

HELD: The appeal was dismissed. The court determined that the standard of review to be applied to the board's decision was reasonableness regarding its interpretation of the Act with regard to the use of the tool and its interpretation of the agreement between the parties. Regarding each issue, the court found that the board had not erred: 1) in its understanding of the evidence that the tool was under the control of NCS. It did not ignore evidence that the respondent was liable for loss or damage to the tool. The respondent and NCS had discussed whether the former should own the tool but then decided it was more effective to use the services of NCS; 2) in its application of the onus of proof. The board had not reversed the onus. It found that the respondent proved on a balance of probabilities that the assumptions on which the assessment were based were wrong, particularly in showing that the possession of the tool had not passed from NCS to the respondent during the fracturing process; 3) in its findings with respect to the contracts between the parties. The board reasonably reviewed the documentary evidence and other evidence before concluding that NCS's invoices did not fully represent the contract between the respondent and NCS; and 4) in finding that it there was no transfer of possession or of liability. It reasonably applied the Act in this case as the transactions were neither leases nor sales.

Back to top

Back to top

Babatunde v Bank of Canada, 2017 SKQB 62

Allbright, February 28, 2017 (QB17063)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike
Civil Procedure – Queen's Bench Rules, Rule 7-9(2), Rule 11-28

The plaintiff issued three statements of claim in August, October, and December of 2016. In the August 2016 claim, the plaintiff sued defendants in Australia acting in their official governmental capacity relating to unclaimed funds held in accounts by the Central Banking Agency. The plaintiff alleged that they had approved his claims but failed to pay him. He sought a vast sum in various kinds of damages as a result of their alleged failure. The defendants applied for and obtained an order from Layh, J, of the Saskatchewan Court of Queen's Bench that the action be dismissed for lack of territorial competence or jurisdiction (see: 2017 SKQB 3). The plaintiff did not appeal from this decision. In the October 2016 action, the plaintiff sued a number of defendants acting in their official capacities with the Bank of Canada for their refusal to pay him the funds in eight unclaimed accounts and sought significant quantities of damages. The defendants' law firm, represented by Douglas Hodson, applied for an order pursuant to Queen's Bench rule 7-9 that the plaintiff's claim be struck. The notice of application also advised that as a result of information provided by one of the defendants, the plaintiff had been charged with fraud, contrary to s. 380(1)(a) of the Criminal Code, and other offences. Layh, J, granted the defendants' application pursuant to s. 438(4) of the Bank Act and found that he was satisfied that the claim was fraudulent, scandalous and vexatious. The plaintiff did not appeal the decision. In December 2016, he issued another statement of claim in which he sued the same defendants named in the October 2016 action on the same grounds and added new defendants: the defendants' law firm and Hodson; the RCMP; the RCMP officer in charge of the criminal investigation of his alleged fraud; and Layh, J. The plaintiff framed his claim for damages against the law firm and Hodson on the basis of the former's responsibility for the latter's defamatory statements regarding the plaintiff's fraudulent claims. The claim for damages against the RCMP and the investigating officer were based on the plaintiff's assertion that the Bank of Canada defendant had made false accusations against him that resulted in malicious prosecution of him. The false accusations caused the charges against him, his arrest, and the criminal proceedings against him. The plaintiff asserted his claim for damages against Layh, J, for defamation and on the basis that the judgment was

wrong and actionable. All the defendants in the December action sought to have the plaintiff's claim against them dismissed for a variety of reasons, and collectively supported an order from the court pursuant to Queen's Bench rule 11-28 barring the plaintiff from instituting any further proceedings without leave of the court.
HELD: The claims against each of the defendants were dismissed. The court ordered pursuant to rule 11-28 that the plaintiff obtain leave of the court before instituting any future proceedings. The court found with respect to the bank defendants that the matter was res judicata. It was dismissed for that reason and because the statement of claim disclosed no reasonable cause of action. The court also dismissed it pursuant to Queen's Bench rule 7-9(2)(b) and (c) as scandalous, etc., and an abuse of process. Regarding the claim against the bank defendants' law firm and Hodson, the court found that the latter's conduct was protected by absolute privilege and struck the claim on that basis. It was also struck pursuant to Queen's Bench rule 7-9(2)(a), (b) and (c). As the RCMP is not a legal entity the claim against it was removed. The court found that the claim in malicious prosecution and negligent investigation against the RCMP officer had not crystallized in law as the proceedings had not been resolved. The claim was premature and disclosed no cause of action under rule 7-9(2)(a). It should also be struck under rule 7-9(2)(b) and (c). The claim against Layh, J, was struck on the basis of judicial immunity and was struck as showing no reasonable cause of action pursuant to rule 7-9(2)(a) and under rule 7-9(2)(b) and (c). The plaintiff was ordered to pay $3,000 in costs with respect to each of his claims against the defendants.

 Back to top

Buhl v Saskatoon (City), 2017 SKQB 70

Scherman, March 7, 2017 (QB17068)

Municipal Law – Property Maintenance Appeals Board – Appeal
Administrative Law – Judicial Review

The appellant appealed from the decisions of the City of Saskatoon Property Maintenance Appeals Board pursuant to s. 329(4) of The Cities Act. An inspector employed by the respondent issued orders to remedy four contraventions of The Property Maintenance & Nuisance Abatement Bylaw 8175 with respect to properties owned by the appellant. He appealed the contravention orders to the board as permitted by s. 56 of the

bylaw. The board dismissed the appeals on the grounds that the orders to remedy had not been complied with and that its authority did not allow it to overturn an order to remedy contravention.
HELD: The appeal was allowed. The court found that s. 329(3) of the Act expressly states that on an appeal to the board it may confirm, modify or repeal the order appealed from. The board failed to assume its jurisdiction under the bylaw and erred in law as to what its duty and responsibility was when hearing the appeals. The court ordered, pursuant to s. 329(5) of the Act, that the board's decision be set aside and the appellant's appeal be returned to it for proper determination.
CORRIGENDUM dated March 10, 2017: [10] In my decision of March 7, 2017, I made what were in essence typographical errors. I was dealing with three appeals but unfortunately wrote the decision as if I was dealing with a singular appeal. Sub-paragraphs (a) and (b) of para. 8 of my decision are amended to read as follows:
>>>c. The Property Maintenance Appeals Board's decision in Appeal Nos. 15-2016, 16-2016 and 17-2016 is repealed or set aside;
>>>d. Sherman Buhl's appeals of the Orders to Remedy Contraventions shall be returned to The Property Maintenance Appeals Board for a proper determination of the appeals.
[11] Further, my decision shall be amended throughout to reflect the fact that there were appeals as opposed to one appeal.

 Back to top

Bryson v Bryson, 2017 SKQB 71

Scherman, March 7, 2017 (QB17069)

Statutes – Interpretation – Saskatchewan Farm Security Act

The applicant applied for an order under s. 11 of The Saskatchewan Farm Security Act that clause 9(1)(a) of the Act did not apply to an action that she wished to commence regarding the validity of an agreement of land sale. The applicant wanted to challenge the validity and enforceability of the agreement on the basis that she had entered into the agreement with the respondents, her son and his wife, because of their undue influence and duress. The agreement provided that the respondents purchased four quarter sections of farm land from the applicant for the sum of $376,000. They would pay the price by annual payments of $12,000 per year from 2013 to 2044. In the event of the applicant's death, the debt would be

forgiven. The applicant deposed that prior to 2013, her son had pressured her to sell the farm land to him. After she informed her family that she would be remarrying, the respondents insisted that she sell the lands to them. The applicant explained that she was in an emotional state when she signed the agreement. When the applicant later told her son that the agreement did not reflect the terms that she thought they had agreed upon earlier, he refused to cancel the agreement or discuss changes to it, and as a result, she applied to the court for an order so that she could commence legal action to challenge the validity of the agreement. The respondents denied any pressure or undue influence. They argued that the report of the Farm Land Security Board indicated that they had a reasonable possibility to meet their obligations and were making a sincere and reasonable effort to meet them under the agreement. As the applicant had not presented evidence to rebut this conclusion, she should not be permitted to commence an action.
HELD: The application was granted and the court ordered that pursuant to s. 11 of the Act, clause 9 (1)(d) was not applicable to the agreement. The legislative intention of the Act was not to prevent an owner of farm land from challenging whether an underlying agreement was valid and enforceable. The action contemplated by the applicant was not to enforce payment under a security agreement but was intended to construe and determine the validity of the agreement itself. It would not be just and equitable to deny the applicant the opportunity to do so. Whether the respondents were making the required effort to meet their obligations under the agreement would become a consideration only if the agreement was first established to be valid.

 Back to top

Menke Holdings Ltd. v Aguirre, 2017 SKQB 72

Snith, March 7, 2017 (QB17070)

Residential Tenancies Act – Appeal
Residential Tenancies Act – Notice to Terminate – Service

The appellant sought to overturn a decision of a hearing officer under The Residential Tenancies Act, 2006. The issue was whether the respondents gave proper notice of their intention to end the tenancy. On April 30, 2016, the tenants sent an email to the appellant indicating their intention to terminate the monthly tenancy on May 31, 2016. The appellant said that he did not open the email until May 2, 2016. The appellant based his argument

on s. 82(5), which he said deemed service to have been effected on the business day following the date the email was sent. The business day following the date the email was sent was May 2, 2016, which would not be sufficient notice pursuant to s. 56(1)(a)(ii) of the Act. The officer found that since the last day to give notice, April 30, 2016, fell on a Saturday, The Interpretation Act, 1995 operated to extend the time to Monday, May 2, 2016, the next day the appellant's office was open for business.
HELD: The court reviewed case law and concluded that it was clear that where there was a conflict between the provisions of specific legislation and an act of general application, the provisions of the specific legislation prevailed. The Interpretation Act, 1995 was of general application, while the Act was specific. Section 82(5) was clear that the date of service in the circumstances was next business day, May 2. The court did not automatically grant the appellant rent for the next month. The appellant had a duty to take all steps to minimize his loss by re-letting the property. It was also unclear whether there was other evidence regarding the possibility that the appellant knew the tenants were intending to leave the property prior to May 2. The court ordered that the Office of Residential Tenancies set the matter down for a rehearing if the appellant requested.

 Back to top

R v Carter, 2017 SKQB 74

Megaw, March 10, 2017 (QB17064)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine – Conviction – Sentencing

The accused was convicted of possession of cocaine for the purpose of trafficking contrary to ss. 5(2) of the Controlled Drugs and Substances Act (see: 2016 SKQB 403). The Crown submitted that a prison sentence of three years would be appropriate on the facts of the case. The defence position was that the court should consider a suspended sentence because of the accused's particular circumstances. The accused, a 53-year-old woman, did not have a criminal record until she committed this offence. She had been a productive member of society. She requested leniency and continued to deny any involvement in the transport of cocaine or that she had done anything wrong.
HELD: The accused was sentenced to an 18-month term of imprisonment to be served in a provincial correctional centre. The court noted the applicable range of sentences was between

18 months and 4 years' incarceration and that the range was influenced by the following: type and quantity of drug involved; the sophistication of the drug operation; and the personal circumstances of the accused. A conditional sentence was not available under s. 742.1 of the Code. The court considered the mitigating factors to be that the accused was a mature individual who had been a productive member of society, had no criminal record and was assessed at being at low risk to reoffend. She was not involved with the drug trafficking trade nor did she use drugs. During the three years of release conditions, the accused had not committed any breaches. The aggravating circumstances were the character and volume of the drug. Although a low-level participant in the drug trade, her role as a courier was a necessary one. The court found that in the circumstances it would not consider the option of a suspended sentence but did not determine the availability of such a sentence generally.

 Back to top

Daniels Investments Saskatoon Ltd. v Houk, 2017 SKQB 75

Zuk, March 14, 2017 (QB17065)

Real Property – Certificate of Pending Litigation – Discharge Statutes – Interpretation – Queen's Bench Act, 1998, Section 47(1)(a)

The defendant applied under s. 47(1)(a) and s. 47(1)(d) of the Queen's Bench Act, 1998 for an order vacating a Certificate of Pending Litigation (CPL) registered against the property owned by her and her husband. In February 2008, the plaintiff issued a claim against the defendant alleging that she had misappropriated funds from her employment with it and then registered the CPL against two properties in which the defendant held an interest, an investment property and the matrimonial home. She held a 20 percent interest in the first property, and pursuant to an agreement between the parties in 2015, the plaintiff consented to an order vacating the CPL against it. It was sold and the defendant's share was held in trust. In July 2015, the defendant applied to have the plaintiff's claim dismissed pursuant to Queen's Bench rule 4-44, arguing that the plaintiff was guilty of inordinate and inexcusable delay. The court dismissed the application, determining that the delay was inordinate, but it was excusable because of the plaintiff's time-consuming involvement with police in the ongoing criminal investigation into the defendant's activities. The court also dismissed the defendant's application to vacate the CPL without

specifically considering s. 47 of the Act (see: 2015 SKQB 251). The defendant appealed and the Court of Appeal directed that the court hear the defendant's application to vacate the CPL against the matrimonial home (see: 2016 SKCA 147). At the hearing, the plaintiff submitted a brief explaining its delay because it continued to devote extensive amounts of time to the criminal proceedings and waited for the resolution of the defendant's appeal. The unsworn statement of fact contained in the brief regarding how it had committed its time was not admitted by counsel for the defendant.
HELD: The application was granted under s. 47(1)(a) of the Act, but the application under s. 47(1)(d) was dismissed because the defendant had not raised any other grounds. The court ordered the registrar of Land Titles to discharge the CPL against the defendant's second property and that the funds held in trust from the sale of the first property be released upon expiry of the appeal period. The court found that the plaintiff had taken no steps to proceed with its civil claim since the original application and found its explanations were not adequate to explain the inordinate delay and the resulting inference of bad faith.

 Back to top

R v Morrisseau, 2017 SKQB 76

Dawson, March 15, 2017 (QB17071)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Break and Enter – Robbery
Criminal Law – Sentencing – Impede the Administration of Justice
Criminal Law – Sentencing – Leave the Scene of Accident
Criminal Law – Sentencing – Sentencing Principles
Criminal Law – Sentencing – Use Firearm While Committing Indictable Offence

The accused pled guilty to four Criminal Code charges: breaking and entering a dwelling house and committing the indictable offence of robbery, contrary to s. 348(1)(b); leaving the scene of an accident, contrary to s. 252(1.1); using a firearm while committing the indictable offence or robbery, contrary to s. 85(1); and provoking a state of fear in two people in order to impede the administration of criminal justice, contrary to s. 423.1(1)(a). The break and enter and commit robbery charge was the subject of a sentencing hearing already dealt with in February 2017. The Crown and accused made a joint submission that the accused should be sentenced to 12 months' incarceration, to be served, consecutively, on the s. 423.1(1)(a) conviction. In July 2015, the

two victims were asleep when they heard a knock on their door. Two men dressed in orange "worker" clothing said that they needed to check the gas lines. Once inside, one assailant pulled out a gun and pointed it at the male victim. His hands were tied. One of the assailants then went to the bedroom and tied the female victim up. They repeatedly threatened to stab or shoot the victims. They took the victims' wallets and bank cards. The accused pled guilty to the charge on the basis that he was the driver of the vehicle that waited out front while the assailants committed the robbery. After leaving the scene, a vehicle registered to the accused's spouse rear-ended another vehicle and left the scene. The evidence for the fourth charge indicated that the accused made phone calls to the victims' home asking to speak to them. He had his mother write a note to the victims indicating that if they showed up at court to testify they would lose their businesses. There was no threat of physical harm to the victims from the accused. The accused was a 27-year-old First Nation individual with four children. He experienced poverty, neglect, physical abuse, substance abuse, and cultural schism. The accused had a previous criminal record dating back to 2004. The accused was under the influence of drugs during the commission of the offences. The accused's partner continued to support him.

HELD: The accused knew the victims. The gravity of the break and enter offence was significant as was the accused's degree of moral culpability. The aggravating factors regarding the invasion were as follows: it was a home invasion; it was a very violent offence; it was perpetrated on people the accused knew; it took place in the early morning hours; a weapon was used to threaten but not to injure; the victims were threatened and tied up; the accused had a previous related record; and the emotional and financial consequences to the victims were significant. The mitigating circumstances were as follows: the accused entered the guilty plea; he had some history of employment as a functioning member of society; he had the support of his partner; he continued to parent his young child; and he accepted responsibility for his actions. The accused's moral culpability was reduced to some extent by the systemic factors experienced by the accused. The court determined that the fit and proper sentence for the offence of break and enter a dwelling house and commit robbery was five years. The appropriate sentence for the leaving the scene of an accident charge was 90 days to be served concurrently. The mandatory minimum sentence of one year for the s. 85(1)(a) conviction was imposed to be served consecutively. The joint submission of the parties was accepted for the conviction under s. 423.1(1)(a). The totality of the appropriate sentence was seven years. The accused spent 596 days in custody and he was found to be entitled to credit at 1:1.5

for a total credit of 894 days. The accused would have to serve a further period of incarceration of 4 years and 201 days.

 Back to top

Holmes v Jastek Master Builder 2004 Inc., 2017 SKQB 78

Mills, March 21, 2017 (QB17073)

Civil Procedure – Costs
Class Action – Costs

The court decided on the applications by all parties for summary judgment, and granted each party one month after the summary judgment determination to present written argument on the issue of costs. Portions of the summary judgment decision were appealed by each of the parties. The action was a class action proceeding, so costs were governed by s. 40 of The Class Actions Act. The four summary judgment decisions made by the court were as follows: 1) the plaintiffs were successful against defendants 1 and 2 for breach of contract; 2) the plaintiffs' claim for breach of contract against defendants 3 and 4 was dismissed; 3) the claims against defendants 5, 6, and 7 were dismissed in their entirety; and 4) the counterclaim by defendants 5, 6, and 7 was dismissed.
HELD: The court dealt with costs in relation to each of the summary judgment decisions: 1) the court found that it would be inappropriate to make a decision respecting costs because the matter had not been concluded. There were issues yet to be determined, including damages; 2) the court also declined to make an order for costs with respect to the dismissal of the breach of contract claim against defendants 3 and 4 because defendants 1 and 2 were solely owned and operated by defendant 4, as was defendant 3. The costs would be determined once the costs in the first issue were dealt with; 3) it was appropriate to make a final determination based on the criteria under s. 40 of the Act respecting defendants 5, 6, and 7; and 4) it was also appropriate to make a costs determination on the dismissed counterclaim. The court considered the following to be the most important factors pursuant to s. 40(2)(e): a) the public has an interest in holding developers of property accountable for their actions as they relate to purchases of property; b) the access to justice for members of the public issue had to be considered with the fact that there were fewer than 40 people who would benefit so there were other avenues, such as the Small Claims Court, that they could have used to pursue their claim. The access to justice issue was not as great in this

case as it may be in others; c) defendants 5, 6, and 7 comprised a small developer. There was also lack of merit to the plaintiffs' claim of conspiracy and the counterclaim appeared to be put forward on a tactical basis. Defendants 5, 6, and 7 were found to be entitled to their taxed costs under Column 3 for those steps taken before August 1, 2015, and Column 2 for steps taken after August 1, 2015. The court exercised its discretion as authorized in s. 40 and reduced the costs by 45 percent to account for the unsuccessful counterclaim.

 Back to top

Ehman v Albony Place Condominium Corp., 2017 SKQB 82

Elson, March 22, 2017 (QB17077)

Condominiums – Condominium Fees
Condominiums – Condominium Property Act – Bylaws – Amendment

The applicants, owners of condominium units, sought an order prohibiting the respondents, the condominium corporation, from amending its bylaws to change the apportionment scheme for the collection of contributions to the common expenses for the corporation. The bylaw amendment would change the default scheme from one based on unit factor to one where certain expenses would be apportioned by unit factor and others would be equally paid by units, irrespective of unit factor. The president of the respondent corporation indicated that the amendment supporters found that some common expenses were equally benefitting all unit owners while others benefitted owners of larger units more. The respondent obtained an interpretation from the Office of the Public Registry Administration (OPRA) as to the method to conduct the vote on the amendment. The vote was conducted on the basis of unit factor and 7803 unit factors voted for the amendment while 2197 unit factors voted against the amendment. Therefore, 75 percent of the total unit factors supported the amendment, but only 63.63 percent of the owners supported it. The applicants argued that the method of the vote was oppressive and unfairly prejudicial to them. The sole issue was whether the vote for the bylaw amendment was to be by unit factor or on the basis of one vote per owner.
HELD: The applicants established their case. The court determined the application solely on the interpretation of the Act and the Regulations, it did not consider whether the respondent's actions were oppressive or unfairly prejudicial.

Section 48 of the Regulations sets out the requirements to establish an alternate apportionment scheme. The provision requires written consent from at least 75 percent of the owners. Section 48 of the Regulations was found to be properly delegated legislation. The court found that as long as the Regulations did not provide for lesser standards to amend the bylaws on a particular matter, they were not inconsistent with the requirements of s. 46(2) of the Act. Further, the court found that s. 48 of the Regulations was not to be read in combination with the voting rights provisions in s. 41 of the Act. The court concluded that s. 48 requires consent of 75 percent of the registered owners, without regard to the unit factor. The application was allowed and the amendment to the bylaw was quashed.

 Back to top

Stoney; Burns v Sound Stage Performance Inc., 2017 SKQB 84

Schwann, March 23, 2017 (QB17079)

Torts – Negligence
Civil Procedure – Queen's Bench Rules, Rule 3-31
Civil Procedure – Parties – Application to Add Third Party Defendant
Statutes – Interpretation – Contributory Negligence Act, Section 7, Section 10
Courts and Judges – Stare Decisis

The defendants applied pursuant to Queen's Bench rule 3-31 to add a third party defendant in the actions commenced by the plaintiffs who opposed the application. The plaintiffs were patrons of the defendant, the Pump Roadhouse. While they were in the bar, the proposed third party defendant, Haji-Hussein, entered the bar and shot both the plaintiffs. The plaintiff's claims alleged that the defendants were negligent in failing to conduct security assessments and owed a duty of care to provide attendees at the Pump with a reasonably safe environment and to protect them from foreseeable harm and criminal victimization. The defendants alleged in the proposed third party claim that Haji-Hussein entered the premises without their knowledge with specific intent to cause harm to the plaintiffs. His shooting of the plaintiffs constituted an intentional act carried out by Haji-Hussein. The defendants pled and relied upon s. 7 and s. 10 of The Contributory Negligence Act. When s. 7 is invoked, leave of the court is required to add a third party. The plaintiffs argued that Chernesky v Armadale, the authority in Saskatchewan related to the adding of third party tortfeasors

pursuant to s. 10 of the Act for contribution and indemnity purposes, held that there was no right of contribution or indemnity as between joint tortfeasors at common law except in relation to claims in negligence. Liability for negligence cannot be apportioned by way of contribution and indemnity with a third party whose only alleged liability arises from the commission of an intentional tort. The defendant applicants argued that Chernesky did not stand as a restriction against adding intentional tortfeasors as third party defendants to claims in negligence. Further, Chernesky was distinguishable as it involved allegations of libel against the defendant and proposed third party and this application arose from a negligence action. HELD: The application was dismissed. Following the principle of stare decisis, the court found that the Court of Appeal's decision in Chernesky continued to be good law in Saskatchewan. Therefore, the defendants had no right of contribution and indemnity from joint tortfeasors except in negligence. As the purported third party claim against Haji-Hussein was framed as one for contribution and indemnity arising from an intentional tort, s. 10 of the Act did not apply and he could not be added as a third party to the actions.

 Back to top

Fecyk v Bracken, 2017 SKQB 85

Currie, March 24, 2017 (QB17080)

Landlord and Tenant – Residential Tenancies Act – Appeal
Statutes – Interpretation – Residential Tenancies Act, 2006
Statutes – Interpretation – Limitations Act, Section 3
Administrative Law – Judicial Review – Standard of Review – Correctness

The tenant appealed from the decision of a hearing officer of the Office of the Rentalsman, dismissing his claim under The Residential Tenancies Act, 2006. The appellant made his claim on February 19, 2016. In it he asserted that the respondent had failed to provide a rental unit that was fit for habitation, use and enjoyment. The officer decided that the claim was barred by the expiration of the limitation period. The appellant's period of tenancy extended back to 2011. Before July 1, 2015, the Act did not include a limitation period. The officer ruled that in the absence of a limitation period in the Act, the provisions of The Limitations Act applied. Thus, the appellant's claim relating to the period before February 19, 2014, was statute-barred by operation of the two-year limitation period set out in the

Limitations Act. The appellant argued that there was no limitation period in the Residential Tenancies Act prior to July 1, 2015, and that the standard of review of the hearing officer's decision was correctness because the possible application of The Limitations Act to a statute that does not provide for a limitation period raised a question of general law and was outside the hearing officer's area of expertise. The respondent argued that the standard of review was reasonableness and because of the restricted topic of the appeal, it was unlikely to arise again in litigation.
HELD: The appeal was allowed and the matter remitted to the officer for determination in accordance with the judgment. The court found that the standard of review for the officer's decision was correctness. The consideration by the officer of the application of The Limitations Act to a claim under the Residential Tenancies Act, 2006 was beyond the area of the officer's expertise. The issue was a question of general law of central importance to the legal system. The court held that the officer's decision was incorrect. The Legislature clearly intended that there was no limitation period for a claim such as the appellant's arising prior to July 1, 2015.

 Back to top

Thompson Estate v Thomspon, 2017 SKQB 87

Scherman, March 24, 2017 (QB17082)

Corporations – Shareholder Remedies – Derivative Action
Statutes – Interpretation – Business Corporations Act, Section 232
Civil Procedure – Queen's Bench Rules, Rule 1-3

The applicant applied for an order nunc pro tunc pursuant to s. 232 of The Business Corporations Act that her statement of claim filed in October 2016 be recognized and continue as a derivative action in the name of and on behalf of the corporation, Thomson Ranching Company Ltd., and that she be authorized to control the action. The respondents opposed the application on the grounds that the applicant as a complainant had not established the conditions precedent of s. 232 of the Act granting leave to commence a derivative action had been met. The preconditions were that reasonable notice had been given to the directors of the corporation, that the complainant was acting in good faith, and that it appeared to be in the interests of the corporation that the action be brought.
HELD: The application was granted. The court found that the

directors waived the requirement for a formal notice when they had consented to the applicant's claim issued in October and therefore they had been given reasonable notice. The court decided it was satisfied from the evidence provided that the preconditions of good faith and the best interests of the corporation were satisfied despite some deficiencies in the applicant's pleadings. Under Queen's Bench rule 1-3, it would be contrary to the purpose of proportionality and efficiency in proceedings to dismiss the application on the grounds that the applicant had not expressly sworn to her good faith in her affidavit or that personal knowledge of the wrongs done was not precisely demonstrated.

 Back to top

Picketts v Picketts Estate, 2017 SKQB 93

Mills, March 29, 2017 (QB17087)

Wills and Estates – Accounting
Wills and Estates – Costs – Solicitor and Client Costs
Wills and Estates – Estate Administration – Appointment of Administrator Ad Litem
Wills and Estates – Property – Joint – Resulting Trust

The deceased was survived by his spouse, four adult daughters, and an adult son. His spouse and son applied for probate of two documents. The first document, dated July 23, 2004, was a fill-in-the-blank type will with typewritten and handwritten portions and was witnessed by two lawyers. The second document, dated nine years later than the first, appeared to be an instruction document as to the deceased's intentions. The daughters opposed the application, maintaining that the deceased made a will in 2008 that was lost and presumed destroyed. They submitted that the 2008 will revoked the 2004 will, and since the 2008 will was deemed revoked by destruction, the estate was in intestacy. They argued that the estate planning document was just a planning document and not a will. A trial of the issue was directed. The total value of the estate was listed at $751,000, with another $4,323,000 as jointly owned property, with the majority listed as land jointly owned by the deceased and the son, with a right of survivorship. The daughters commenced a separate action, arguing that the jointly owned property was held by the son in a resulting trust for the benefit of the estate. At the time of his death, the deceased was a shareholder in a company valued at $290,000. The daughters applied for the following: 1) an order appointing one of them, A.S., as interim administrator of the

estate pursuant to s. 17(1) of The Administration of Estates Act; 2) alternatively, an order that the son and their mother provide a full accounting of the company from 2009 to 2016; and 3) alternatively, an order appointing A.S. as administrator ad litem of the estate for the purpose of acting as plaintiff in the resulting trust action.

HELD: The court dealt with the daughters' applications as follows: 1) the court found that the daughters' concern that the corporation was dealt with inappropriately by the son and mother was well founded. The court found that the son was acting as if he had authority to act as an executor of the estate and he was refusing to provide updated financial information regarding his activities. The court treated the application as being made pursuant to s. 19 of the Act. The court concluded that appointing A.S. as administrator under s. 19 was unlikely to advance the case in the most efficient fashion because it would require the son's cooperation, which was unlikely; 2) the court had inherent jurisdiction to deal with the estate matters when no administrator was appointed. The court ordered that the son and mother provide the daughters' solicitor with a full accounting of actions in relation to the assets of the deceased since the date of his death to February 28, 2017, including a list of specific items to be provided, within 90 days of the decision; and 3) the court adjourned the application sine die to be brought back on 14 days' notice, but only after the financial disclosure was provided as ordered. The daughters' solicitor and client costs were ordered to be paid by the estate within 30 days. The son was ordered to be responsible for his own legal costs.

 Back to top