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. 24 **December 15, 2017**

Subject Index

Lac La Ronge (Indian Band) v Canada (Attorney General), 2017 SKCA 64

Lane Jackson Whitmore, August 22, 2017 (CA17064)

Indian Residential Schools Settlement Agreement – Interpretation – Appeal
Aboriginal Law – Residential Schools Settlement Agreement
Contracts – Interpretation

The Lac La Ronge Indian Band appealed the refusal by the supervising judge to include the Timber Bay Children's Home as an Indian Residential School (IRS) under the Indian Residential Schools Settlement Agreement in Saskatchewan (see: 2013 SKQB 323). The band had applied to the judge for direction under s. 12.01(5) of the agreement after the defendant had denied its application pursuant to s. 12.01(1) to have the home added as an institution to Schedule F. The supervising judge found that the band had not demonstrated the home satisfied both criteria imposed by s. 12.01(1) of the agreement: the home did not provide schooling but was used exclusively as a home for children who attended school elsewhere and the evidence indicated that the defendant did not select the children who would reside in the home, but rather the Chief of the band decided; and that the defendant was not jointly or solely responsible for the operation of the home and the care of the children. After filing its factum, the band sought to introduce new documentation as fresh evidence. The documents, it argued, provided evidence regarding how children were placed in the

Family Law – Child Support – Interim – Application to Vary – Adult Child

Family Law – Custody and Access – Variation

Family Law – Family Property – Division – Interim Distribution

Indian Residential Schools Settlement Agreement – Interpretation – Appeal

Judgments and Orders – Foreign Judgments – Registration

Statutes – Interpretation – Freedom of Information and Protection of Privacy Act

Statutes – Interpretation – Saskatchewan Teachers' Federation Act, 2006, Section 28

Torts – Personal Injuries – Damages – Costs

Cases by Name

Biletski v University of Regina

Britto v University of Saskatchewan

Bublish v Turanich

HCI Ventures Ltd. v S.O.L. Acres

Herbert v Auto Connection (1993) Ltd.

Hinz v Hinz

Home Automated Living, Inc. v Securtek Monitoring Solutions Inc.

I.E. v S.G.

Kelln v Mryglod

Kolitsas v Rathod

Lac La Ronge (Indian Band) v Canada (Attorney General)

home and the defendant's involvement. The grounds of appeal were that the supervising judge erred as follows: 1) by finding that the home did not meet the criteria to be added as an IRS as prescribed by s. 12.01(2) of the agreement in that he overlooked evidence; 2) by failing to find that the defendant's refusal to add the home constituted a breach of the Crown's fiduciary duty under Treaty No. 6 and could be considered a breach of s. 7 of the Charter; and 3) by failing to find that the defendant's refusal to add the home constituted unlawful discrimination contrary to s. 15 of the Charter by withholding a benefit from former residents that was made available to other residents.
HELD: The appeal was dismissed. The court decided that the fresh evidence should not be admitted because it could not, when taken with the other evidence adduced at trial, be expected to have affected the result. The court found the following with respect to the grounds of appeal: 1) the appellant had not shown what evidence the supervising judge ignored or overlooked. He had acknowledged that there was conflicting evidence and made findings of fact. The court concluded that he had not erred in fact or law in making his finding that the home did not meet the criteria, and the fresh evidence would not have affected the result; 2) the judge may have misinterpreted the purpose of s. 12 of the agreement but reached the correct conclusion. The court found that the band was mounting a challenge to the settlement process itself and that was beyond the scope of the court's jurisdiction under the agreement; and 3) the supervising judge had not erred in finding that there was no analogous ground in this case and if there had been, it had not perpetrated prejudice. The definition of IRS under the agreement created identified classes of people but that did not mean that the class of people in this case, Indian children who were required to live in the home so that they could attend school, were not equal in the sense of s. 15 of the Charter.

 Back to top

Sautner v Saskatchewan Teachers' Federation, 2017 SKCA 65

Caldwell Herauf Whitmore, August 24, 2017 (CA17065)

Statutes – Interpretation – Saskatchewan Teachers' Federation Act, 2006, Section 28
Professions and Occupations – Teachers – Conduct – Discipline – Appeal

The appellant was found guilty of professional misconduct by the Professional Ethics Committee of the Saskatchewan Teachers'

Michel v Persson

Paquachan v Louison

R v Flett

R v Hansen

R v Irvine

Ricci, Re (Bankrupt)

Sautner v Saskatchewan Teachers' Federation

Specialist Hygiene Solutions Ltd. v Marsh

Federation (STF). The committee recommended a six-month suspension of the appellant's teacher's certificate. The STF executive accepted and endorsed the penalty recommendation. There had been two complaints regarding the appellant before the committee: 1) in June 2014, she had changed the marks of a student (her daughter) without validation and contrary to proper procedure. At the time, the appellant was the principal of the school; and 2) that in January 2015, she had made inappropriate requests of two teachers at the high school to increase the final marks of that student. The committee determined that the appellant was guilty of the first charge but not guilty on the second on the basis of insufficient evidence. Some of the appellant's grounds of appeal included the following: 1) had the committee erred in law by interpreting and applying s. 28(2) of The Teachers' Federation Act, 2006 by failing to take into account s. 28(4)(a) of the Act and failing to allow cross-examination of a teacher. The appellant had contacted her daughter's former teacher concerning the marks awarded by the teacher to her daughter. As the teacher in question was on maternity leave, she referred the matter to the teacher who replaced her. That teacher testified at the hearing about a conversation she had had with the other teacher alluding to the appellant's request to improve her daughter's marks. The appellant's counsel objected to this testimony, claiming it was hearsay and taking issue with the fact that the other teacher was not subject to cross-examination. The committee determined that it would hear the evidence pursuant to s. 28(2) of the Act but understood the natural justice concerns involved and therefore would ensure the evidence was given the proper weight; and 2) the penalty imposed by the committee was inappropriate and unfit in the circumstances. The appellant argued that the STF executive had not provided any reasons for its decision to uphold the committee's recommendation for a six-month suspension. As a result, the court should quash the decision and make its own determination. The appellant also argued that the penalty was excessive in the circumstances. HELD: The appeal was dismissed. Regarding the issues, the court found the following: 1) the committee was bound by the rules of evidence under s. 28(4) of the Act to permit cross-examination of all witnesses. However, in this case, the committee stated in its report that it was not relying on or using the evidence. It thereby cured any failure to consider the necessity of admitting the hearsay evidence. The evidence of the teacher's statements related to the second charge, which was found not to be proved and therefore the evidence was irrelevant to its analysis and finding of guilt on the first charge; and 2) the STF executive's reasons were brief but sufficient in the circumstances because it could be inferred that the full reasons provided in the committee's report were being adopted. The

penalty was not unreasonable given the findings of the committee regarding the mitigating and aggravating factors.

 Back to top

R v Irvine, 2017 SKPC 79

Rybchuk, August 31, 2017 (PC17066)

Criminal Law – Driving While Disqualified – Driving Prohibition
Criminal Law – Indictment and Information – Amendment

The accused was convicted of two counts of operating a motor vehicle with a blood alcohol concentration over .08 on December 5, 2011. He was prohibited from driving under s. 259(1) of the Criminal Code for a total period of three years from the date of conviction. He was also disqualified from driving under s. 141 of The Traffic Safety Act (TSA) from the date of conviction up to and including May 10, 2016. On May 3, 2016, he was arrested and charged with one count of operating a motor vehicle "while disqualified from doing so" by reason of an order pursuant to section 259(1) of the Criminal Code". The accused testified that he was aware that he did not have a valid driver's license on May 3, 2016, but had no knowledge that he was disqualified or suspended from driving on that date. He testified that he took all the courses and programming required of him by his probation officer following his convictions for driving over .08. He thought he had completed all the required programming by mid-2012 and that his driving prohibitions simply expired in 2014.
HELD The Crown failed to prove the offence of driving while disqualified as particularized on the information, which referred to the driving prohibitions that had expired on December 5, 2014. The accused was not disqualified from driving at that time "by reason of an order pursuant to s. 259(1) of the Criminal Code" as he has been charged, but rather by reason of a disqualification or suspension from driving imposed pursuant to s. 141 of the TSA, with which he was not charged. The accused would be misled or prejudiced in his defense if the court was to amend the information to include the provincial driving disqualification because: 1) the Crown never requested or applied for amendment before, during or after trial; and 2) the court could not know how such amendment would have affected the accused's decision not to cross-examine the Crown witnesses or whether the accused would have called other evidence or provided additional testimony himself if the amendment had been made. Further, the evidence of the accused was not contradicted and he was a credible witness. He adduced

sufficient evidence to rebut the presumption of regularity or to raise reasonable doubt as to whether he had knowledge of the provincial driving disqualification. The Crown failed to prove beyond reasonable doubt the necessary element of mens rea. For this reason also, the judge found the accused not guilty.

 Back to top

R v Flett, 2017 SKPC 80

Cardinal, September 7, 2017 (PC17067)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Assault
Criminal Law – Sentencing – Assault Causing Bodily Harm
Criminal Law – Sentencing – Assaulting a Peace Officer

The accused entered guilty pleas to the following Criminal Code offences: assault causing bodily harm, contrary to s. 267(b); assault, contrary to s. 266; assaulting a peace officer engaged in the execution of his duty, contrary to s. 270(1)(a); and resisting arrest, contrary to s. 129. The Crown proceeded by indictment on all matters. The accused was a 20-year-old status member of a First Nation. He had a grade nine education and had been briefly employed, but was unemployed at the time of the offences. His criminal record was limited to two convictions as a youth: break and enter and assaulting a police officer. He previously attempted suicide, attended anger management classes as a teenager and in the most recent 12-month period was drinking five to six times per week and smoking marihuana once or twice per day. He had been drinking at the time of the offences. The Saskatchewan Primary Risk Assessment was employed and indicated a high risk for general re-offending.
HELD Mitigating factors included the entry of guilty pleas to all offenses within a short time after their occurrence, cooperation with the preparation of the pre-sentence report, a written apology to the officer he'd assaulted, and the effect on the accused of witnessing family breakdown and alcohol abuse within his family and community. Aggravating factors included that he assaulted three people within a very short period, that all assaults were unprovoked and continued even when the victims were no longer resisting, and that he had a previous conviction for assaulting a peace officer. The officer suffered serious injuries. The accused attempted to justify his actions and did not demonstrate insight into his behavior or anger. Gladue factors did not abate his moral blameworthiness. The court must stress deterrence and denunciation in the face of gratuitous violence.

Incarceration is called for where there is a violent offence involving a peace officer. The court ordered a total sentence of 1,035 days, broken down as follows: 60 days for assault, time already served; 215 days for assault causing bodily harm, time already served, consecutive to count 1; 730 days for assaulting a peace officer, consecutive to count 2 and any other sentence; and 30 days for resisting arrest consecutive to the count related to assaulting a police officer.

 Back to top

R v Hansen, 2017 SKPC 81

Robinson, September 11, 2017 (PC17068)

Criminal Law – Resisting Arrest

The accused was charged with resisting arrest. The police attended at a house party after a noise complaint. Police officers testified that the accused was screaming and was, therefore, placed under arrest for mischief. The accused and another witness recorded the interaction between the accused and the police. Defence evidence, including audio-video evidence, contradicted Crown evidence that the accused had been screaming.
HELD The Crown did not prove that the police had a valid reason to arrest the accused. The police did not find the accused committing the offence of mischief, nor did they have reasonable grounds to believe that he had at any time committed that offence. Apart from the allegation of screaming, there was no suggestion that the accused did anything else that constituted an offence for which he could be arrested. Refusing to leave a residence where he was an invited guest, without more, could not constitute an offence. Since the police did not have a right to arrest the accused, he was within his rights to resist the police efforts to take him into custody. He was not guilty of resisting arrest. Even if the police had a right to arrest the accused, the officer failed to make a proper arrest in that he did not inform the accused of the reason for his arrest.

 Back to top

Paquachan v Louison, 2017 SKQB 239

Layh, August 17, 2017 (QB17246)

Aboriginal Law – Controverted Elections
Statutes – Interpretation – First Nations Elections Act

The applicants requested the court set aside results of an election for chief and eight councilors. The applicants alleged contravention of The First Nations Elections Act, including: 1) lack of timely list of electors; 2) failure to authenticate voters; 3) inclusion of deceased electors in the list of electors; 4) circulation of packages containing prejudicial information unrelated to the election; 5) voting booths in view of security cameras; 6) improper handling of ballots; and 7) improper counting of ballots. The applicants filed ten affidavits supporting the application. They subsequently filed seven additional affidavits seemingly alleging new or additional contraventions: 1) discrepancy between voters list and number of ballots for chief; 2) discrepancies respecting mail-in ballots; 3) improperly cast votes; and 4) timeliness of posting mail-in ballot packages. HELD The court ordered the election results to stand. Upon review of the facts, one ballot was cast by a person under the age of 18 in contravention of s. 15(1) of the Act. A second ballot was cast by another person under the age of 18 who presented herself as her cousin who was incarcerated at the time of the election. Those two ballots could not have affected the results of the election of either the chief or council. The difference between the successfully elected chief and the next runner-up was 16 votes. The difference between the last successful council position and the next closest was four ballots.

 Back to top

Bublish v Turanich, 2017 SKQB 240

Smith, August 17, 2017 (QB17229)

Contract Law – Agreement for Sale – Breach – Specific Performance

The plaintiff applied for an order for specific performance of a contract he made with the defendant for the sale of three parcels of farmland. The parties had reached an oral agreement regarding the lands, the deposit, the price and the timeline for financing. The defendant was to prepare the written contract and email it to the plaintiff. The plaintiff stated that he told the defendant that he had to have received the contract before the evening of February 6 because he was going to be away for several days and would not have access to email until his return home on February 10. Before sending the email, the defendant telephoned the plaintiff to tell him that he needed to increase the

purchase price by $10,000 and the plaintiff agreed. The defendant sent the email with the contract, set up as an offer from the plaintiff to the defendant as seller and signed by him as the vendor but it arrived after the plaintiff had left his home. When he reviewed it on February 10, he advised the defendant there were errors in the legal description. The defendant informed him the deal was off because the plaintiff had not signed the offer in time. In the written offer, the defendant had also unilaterally added a clause that increased the deposit amount by $60,000 with conditions regarding non-refundability and that the offer was open until 5:00 pm on February 7. The plaintiff then learned that someone else was buying the lands from the defendant. The plaintiff argued that the contract should be enforced by specific performance because the lands in question were contiguous to his farmlands and their acquisition would support his farming operations. He asked for rectification of the provisions that were added by the defendant. He suggested that the defendant had added them to thwart the sale because he knew that the plaintiff could not sign the offer in time and that the change to the deposit provision would be unacceptable. The defendant said that as the agreement had not been signed, it was unenforceable under the Statute of Frauds. HELD: The court ordered specific performance of the sale of the lands. It found the plaintiff to be a more credible witness than the defendant. The defendant had memorialized the oral agreement and signed it and the Statute did not apply. The parties had reached consensus ad idem on all material terms regarding the sale and the additions made by the defendant afterward were found to be inoperative and did not bar the claim for specific performance. The plaintiff had discharged his burden of proving that ordering specific performance was the only appropriate remedy.

 Back to top

Kelln v Mryglod, 2017 SKQB 241

Tholl, August 17, 2017 (QB17230)

Family Law – Family Property – Division – Interim Distribution
Family Law – Spousal Support – Interim

The petitioner applied for interim spousal support and exclusive possession of the family home or in the alternative, an interim distribution of family property in the amount of $50,000 to permit her to obtain new accommodations. The parties met when the petitioner began work in the business owned by the

respondent. The parties became involved in a relationship in 2002. In 2006 they jointly purchased a house in which they resided together until 2017. The parties signed an agreement at the time of purchase indicating that the petitioner would own 10 percent of the value of the house and that the purchase was a business arrangement. The petitioner was to provide secretarial and housekeeping services with payment going towards the monthly rent. The agreement was prepared by the respondent and the petitioner did not receive legal advice. She deposed that the respondent never mentioned any such business arrangement again until 2016. In her evidence, the petitioner stated that the parties shared a bedroom and had a sexual relationship. She made the meals, looked after the house, travelled with the respondent and spent a lot of time with his family. She was dependent on the respondent financially during their relationship but now held a full-time job as an office manager and earned approximately $56,000 per annum. The respondent denied that the parties had ever been in a spousal relationship. His income tax return showed a line 150 income of $258,000. HELD: The application was granted in part. The court found on the basis of the evidence provided by the petitioner that she was a spouse within the meaning of s. 2(1)(c) of The Family Property Act (FPA) and had been in a spousal relationship with the respondent by cohabiting continuously for over two years within the meaning of s. 2(d)(i) of The Family Maintenance Act, 1997(FMA). The agreement was evidence of the parties' intentions in 2006, but it was not determinative because of the absence of independent legal advice and did not reflect the way that the relationship developed over time. The house was found to be the family home. The respondent was granted exclusive possession of it because he had de facto possession and the petitioner had been residing elsewhere and had sufficient resources to do so. The court declined to order interim distribution of family property because it did not have sufficient evidence of the value and extent of the property. The petitioner's request for interim spousal support under s. 5 of the FMA was granted on non-compensatory grounds. Based upon the parties' annual incomes, the respondent was ordered to pay the petitioner $2,000 per month until the matter was settled at trial.

 Back to top

Herbert v Auto Connection (1993) Ltd., 2017 SKQB 242

Brown, August 17, 2017 (QB17225)

Torts – Personal Injuries – Damages – Costs

Civil Procedure – Queen's Bench Rules, Rule 11-1

The parties applied for an order regarding costs following the judgment (see: 2017 SKQB 110). The court issued this addendum to its decision. The court had awarded general damages to the plaintiff in the amount $55,000 and added an inflationary adjustment to it up to 2017. In addition to the damages for personal injuries suffered by the plaintiff, the court found that his SHSP costs totaled $16,000 and deducted from it his portion of contributory negligence, thereby reducing it to $9,600. Regarding costs, the issues were as follows: 1) which column of the schedule/tariff should be used; and 2) whether discretion ought to be used to deviate from the legislative scheme for apportioning costs in s. 12 of The Contributory Negligence Act. HELD: The plaintiff was awarded costs in the amount of $26,428 using Column 2 and the items identified in his draft Bill of Costs. The plaintiff's claim for disbursements for $29,878 was allowed as it was not an unreasonable amount in light of the issues involved and the expert evidence required to prove his claim. The court applied the factors set out in 1348623 Alberta Ltd. v Choubal in determining that Column 2 was appropriate because the case was of moderate complexity. The court exercised its discretion to override the s. 12 default provisions of the Act. The plaintiff had not sought unrealistically high amounts for his injury and his conduct of the lawsuit was not unreasonable.

 Back to top

Biletski v University of Regina, 2017 SKQB 243

Zarzeczny, August 18, 2017 (QB17231)

Civil Procedure – Queen's Bench Rules, Rule 3-72, Rule 9-14

The defendant applied for an order adjourning the trial of the plaintiff's case to no earlier than January 2018 pursuant to Queen's Bench rule 9-14(1) and requiring the third party to apply to amend their statement of defence pursuant to Queen's Bench rule 3-72(1)(c). The trial was scheduled to commence in September 2017. The plaintiff had claimed compensation from the defendant for injuries that she sustained in the defendant's swimming pool in 2005. The accident occurred while the plaintiff was a member of the third party, the Piranhas Swim Club (Piranhas) and was practicing with them. The defendant commenced a third-party claim against the Piranhas. In June 2017 the Piranhas filed an expert report regarding liability, in which the opinion expressed was that the Piranhas were adverse to both the defendant's position and what the defendant

Back to top

understood was the joint position taken by it and the Piranhas in opposition to the plaintiff's claim. The report contradicted and conflicted with an admission made by the Piranhas in their defence to the third-party claim. The defendant submitted that the report made a significant change and left it in a position where it had insufficient time to respond. It would need an adjournment to possibly obtain its own liability expert. The plaintiff had provided her liability expert opinion to the defendant in June 2016.
HELD: The application was dismissed. The defendant knew that it and the Piranhas were in adverse positions on the issue of liability and knew Piranhas would commission its own liability expert in late 2016. The defendant had received the plaintiff's expert opinion in 2016 as well. The defendant chose not to obtain its own expert opinion regarding liability and it could still do so in time for the scheduled date of trial.

 Back to top

Michel v Persson, 2017 SKQB 244

McIntyre, August 18, 2017 (QB17232)

Family Law – Child Support – Interim – Application to Vary – Adult Child

The petitioner applied for an order varying an interim child support order made in 2003. The petitioner sought support to reflect the respondent's income and their daughter's post-secondary expenses as well as an order for retroactive support for the past three years. The respondent had voluntarily increased the support payment to $1,500 per month but the parties had never exchanged financial information as required by the original order. The cost of the daughter's university tuition, residence and other expenses incurred during the academic year was estimated at $20,000. She would return home to live with the petitioner for the summer. The petitioner's tax returns showed her 2016 income as $73,000. The respondent was an employee and 50 percent shareholder in a corporation through which he provided consulting services. The respondent had remarried in 2015 and his second wife now owned the other shares. In 2015, the respondent received dividends in the amount of $165,500 (out of the corporation's pre-tax earnings of $206,900), and in 2016, the respondent's dividends were $98,800 (out of pre-tax earnings of $212,900). The respondent did not dispute his obligation to pay child support. The issues were as follows: 1) the income of the parties and the respondent's child

support obligation; and 2) retroactive child support.
HELD: The application to vary the child support order was granted. The court found the following with respect to each issue: 1) the petitioner's income was as provided. The court determined that the respondent had not satisfied the onus of establishing why a substantial portion of the corporate pre-tax income should not be attributed to him and determined that his income for the purposes of the Guidelines was $200,000. Since the daughter was attending school away from home, s. 3(2)(b) of the Guidelines applied and the respondent's proportionate share of the parties' combined income was 73 percent. The respondent was ordered to pay the table amount of $1,616 per month in child support to the petitioner for the summer months of the current year, and during the school year of 2017/2018, the respondent was to pay his proportionate share of the daughter's university tuition and residence fees; and 2) if the parties proceeded to a pre-trial conference, the issues would include retroactive child support.

 Back to top

Kolitsas v Rathod, 2017 SKQB 245

Brown, August 18, 2017 (QB17226)

Family Law – Child Support – Interim
Family Law – Spousal Support – Interim
Family Law – Family Property – Interim Distribution

The parties married in 2011 and had one child in 2013. They resided in Regina. They separated in 2014 when the respondent wife left with the child to live in Denver. In April 2017, the petitioner was granted primary residence of the child in Regina. The decision was appealed and, pending the outcome, the parties were sharing parenting. In this application the respondent sought orders for child and spousal support and interim distribution of family property of $200,000 from the petitioner. To determine the amount of support, evidence was provided regarding the income of each party. Both parties submitted that the other should be attributed with a higher income than they admitted. The petitioner contended that income of $242,000 should be imputed to the respondent because she had held high-paying positions in the past as a pharmacist and owned properties in the United Kingdom and the United States. The respondent gave her income as $40,000 and said that she gained no income from her properties because they were encumbered by debt. She argued that she could not work at the

present because she was caring for her daughter, which was complicated by the shared parenting arrangements that involved flying between Denver and Regina every two weeks. In addition, she was not qualified to practice pharmacy at this point. She had left her position in England to marry the petitioner and live in Regina. The petitioner was a successful business man and was a sole shareholder of some corporations and held various interests in other corporations. He submitted that his annual income should be set at $396,000. The respondent argued that income of $786,000 should be imputed to him based upon attribution of pre-tax corporate income. Each party submitted reports prepared by accountants regarding the petitioner's income from various sources and their calculations of his 2015 income as his 2016 income information was not yet complete.

HELD: The application was granted. The court determined that the petitioner had $575,000 available to him for provision of support on this interim application. The court accepted the petitioner's expert's method of calculating pre-tax corporate income available to him. The court imputed income to the respondent in the amount of $105,000 composed of $45,000 in income from her properties and $60,000 from employment. The court found that due to her training and experience, the respondent should be able to obtain a job. Her parenting situation should not prevent her from working after being separated for 32 months. If the respondent's properties could not generate 3 percent in addition to the debt they carried, they should be sold and the proceeds used to generate income in a different way. The court awarded child support in the amount of $3,507 per month based upon s. 3 of the Guidelines. The respondent was entitled to interim spousal support of $6,500 per month. The award was based on a compensatory and non-compensatory basis. The respondent gave up lucrative employment in the United States to marry the petitioner and live in Canada and was financially disadvantaged by the breakdown of the relationship. In order to maintain a lifestyle similar to what the parties enjoyed before the separation and because of the high legal costs associated with the breakdown, the petitioner was ordered to pay the respondent $50,000 in an interim distribution of family property.

 Back to top

Hinz v Hinz, 2017 SKQB 248

Goebel, August 21, 2017 (QB17233)

Family Law – Custody and Access – Variation

Family Law – Child Support – Variation

The respondent mother applied to vary a 2015 judgment respecting shared parenting for the parties' eldest daughter, aged 12, and to vary the child support order based upon a shared parenting arrangement for the four children of the marriage. The judgment contained a provision that the parties agreed to follow any recommendations made by the psychologist who was treating the eldest daughter. She had lived with each parent under the shared parenting regime until the winter of 2017 when she insisted that she would live primarily with the respondent. The respondent had taken a leave of absence from her employment for 12 months to pursue a PhD. As she would have no income during this period, she requested that her child support obligations be reduced to take into account this change for the coming year regarding her support obligations. The petitioner argued that income should be imputed to the respondent in the circumstances.
HELD: The application to vary the judgment regarding the eldest daughter was adjourned sine die because of the provision. Under it, the court instructed the parents to comply with any recommendation made concerning the eldest daughter by the child's psychologist. As she had been living exclusively with the respondent for some time, the court determined that based upon his 2016 income, the petitioner should pay the respondent $733 per month under s. 3(1) of the Guidelines. The court found that pursuant to s. 19 of the Guidelines the respondent remained responsible for her share of child support payments during the period in which she attended school.

 Back to top

Home Automated Living, Inc. v Securtek Monitoring Solutions Inc., 2017 SKQB 249

Kalmakoff, August 22, 2017 (QB17234)

Contract Law – Arbitration Clause
Statutes – Interpretation – Arbitration Act, 1992 – Section 45(2)

The applicant sought leave to appeal the decision of an arbitration panel. The panel was constituted to resolve a commercial contractual dispute between the applicant and the respondent. After a dispute arose between the parties regarding the meaning of a provision in their contract, the panel ruled that the respondent had not breached the provision and dismissed the applicant's claim. Although the contract between the parties did not contain an express right of appeal from the panel's

decision, the applicant argued that leave to appeal should be granted pursuant to s. 45(2) of The Arbitration Act, 1992 because there was an implied condition in the contract that permitted such an appeal with leave on the basis of errors of law made by the panel. The respondent submitted that the contract contained a dispute resolution mechanism through final and binding arbitration that contracted out of s. 45(2) and, alternatively, the proposed ground of appeal was one of mixed law and fact, not a question of law as required by the section.
HELD: The application for leave to appeal was dismissed. The court found that a term permitting an appeal from an arbitrator's decision on an error of law did not fall into the category of the obvious and was not the same as an implied term, such as that of good workmanship in contracts for repair. The contractual language used by the parties was clear that they intended to resolve disputes by final and binding arbitration. Even if it had found that the parties had not contracted out of s. 45(2) of the Act, the application for leave would have been dismissed because the proposed grounds of appeal did not raise a pure issue of law.

 Back to top

I.E. v S.G., 2017 SKQB 257

McMurtry, August 29, 2017 (QB17243)

Family Law – Child Support – Interim
Family Law – Spousal Support – Interim
Family Law – Division of Family Property – Interim Distribution

The parties married in Libya and immigrated to Canada. They have three sons, aged 18, 15 and 12. The father is a surgeon and high-income earner. The mother was trained as a nurse in Libya, but has never sought employment in Canada. She deposed that her English was poor and that she was not capable of supporting herself. She is primary caregiver to the children. She alleged that the father had been physically abusive to her and was trying to influence the children against her. The father alleged that the mother was verbally abusive to him and that her relationship with the children was poor. The parties agreed that the children should obtain counselling. The mother sought primary care of the children, child support, spousal support, exclusive possession of the family home and interim distribution of property. The father sought primary residency of the two oldest children and shared parenting of the youngest. He did not object to the mother continuing to have exclusive possession of the

family home, but wanted a no-contact provision removed. He did not agree to an interim distribution of the magnitude requested by the mother.
HELD The mother was awarded primary care of the children on an interim basis, with reasonable parenting time to the father upon reasonable notice. She had been the children's full-time caregiver since birth and remained in the family home, whereas he had not made housing arrangements suitable for the children and carried on a busy medical practice. A Voices Report was not appropriate for the older children; they are old enough to choose where they wish to live. A Voices Report for the youngest child may be appropriate, but after counselling has occurred. Child support under s. 4(a) of the Guidelines was appropriate given the parties' lifestyle when the marriage was intact. The mother was entitled to spousal support given the nature of her role in the family. In the circumstances, an amount lower than that suggested by the Spousal Support Advisory Guidelines would provide the mother with reasonable cash flow and would divide the available resources in an equitable manner. In light of the property already received by the mother, a further interim distribution was not necessary or appropriate. The no-contact condition would remain in place, but with a further exception allowing the father contact with the mother for the purpose of arranging parenting time.

 Back to top

Specialist Hygiene Solutions Ltd. v Marsh, 2017 SKQB 258

Barrington-Foote, August 30, 2017 (QB17244)

Judgments and Orders – Foreign Judgments – Registration

The parties entered into an agreement to settle a dispute, which included a provision that an order be filed with the High Court of Justice of England and Wales. The order was in the form of a Tomlin order, which stays all further proceedings on agreed terms. The agreed terms are not part of a Tomlin order, so they cannot be directly enforced as an order of the court. The applicant applied pursuant to The Enforcement of Foreign Judgments Act to register a portion of the order wherein the court ordered the respondent to comply with his undertaking.
HELD The application was dismissed. The Act can be used to enforce undertakings. However, at issue was whether the order included an undertaking. Evidence from the British counsel to the applicant could not be qualified as expert evidence. Thus, there was no evidence of English law and the court must assume

that English law is the same as Saskatchewan law in accordance with s. 4(4) of the Act. The High Court ordered a stay. The court could not conclude, based on the form of the High Court order and Saskatchewan law, that the High Court had ordered an undertaking.

 Back to top

Britto v University of Saskatchewan, 2017 SKQB 259

Danyliuk, August 31, 2017 (QB17249)

Statutes – Interpretation – Freedom of Information and Protection of Privacy Act
Privilege – Litigant Privilege – Solicitor-Client Privilege

The appellant applied to the respondent for disclosure of certain records pursuant to The Local Authority Freedom of Information and Protection of Privacy Act. The respondent provided some requested records and withheld others based on exemptions from disclosure, in particular, claims of privilege. The appellant sought review of the respondent's decision to withhold certain records. The Information and Privacy Commissioner conducted a review and held that some of the respondent's exemption claims were valid and some were not. The commissioner recommended that the respondent release certain records to the appellant. Under legislation, the commissioner's recommendations are not binding. The respondent continued to refuse to release the documents. The appellant sought to have the documents released to his solicitor to enable the within appeal to be properly argued.
HELD The appeal is a de novo proceeding under s. 46 and 47 of the Act. Because it is a de novo hearing and because the decision of the commissioner is non-binding, there is no duty of substantial deference to the commissioner's decision. It is appropriate for the court to review the records in question. The respondent's claims of privilege fall within the ambit of the Act. The record shows litigation both extant and anticipated. The appellant's solicitor represents him in his disputes with the respondent. Releasing the documents to him would vitiate any privilege claim. However, more information is required so that the court can determine the type of privilege claimed. The respondent must prove, on a balance of probabilities, that the documents qualify as privileged. The court directed the respondent to provide further information regarding the documents in question and its claims of privilege to the appellant and to the court. The court will hold such information

under seal. Within 45 days, both parties shall file further argument with the court on the main disclosure issue. The parties' briefs are to be filed independently and in camera. The court will render a decision and, if needed, provide further direction, upon receipt of the briefs.

 Back to top

Ricci, Re (Bankrupt), 2017 SKQB 260

Thompson, August 31, 2017 (QB17245)

Bankruptcy and Insolvency – Conditional Discharge

The bankrupt incurred liability for personal income tax, penalties and interest when she failed to disclose capital gains as income and failed to pay outstanding tax liabilities over time. She did not have sufficient and clear records at the time of audit. She made a proposal to her creditors, but it was rejected. She made a counter-offer, but it was also rejected. The bankrupt was thereby deemed to have made an assignment in bankruptcy pursuant to s. 57 of the Bankruptcy and Insolvency Act. The Crown opposed discharge of the bankrupt, primarily because of its tax-driven nature pursuant to s. 172.1 of the Act.
HELD Refusal of discharge was not warranted. As the bankruptcy falls under s. 172.1 of the Act, the court does not have authority to discharge the bankrupt without condition. The considerations in a high–income tax bankruptcy are the same as a commercial loan bankruptcy in terms of balancing the need for rehabilitation with deterrence. However, a bankrupt with significant income tax liability is presumed to have conducted himself inappropriately and, therefore, deterrence is a greater consideration. The court must also consider four prescribed factors in s. 172.1 cases: 1) the bankrupt's circumstances at the time the income tax debt was incurred; 2) the efforts the bankrupt made to deal with the income tax debt; 3) whether the bankrupt preferred other creditors while owing income tax; and 4) the bankrupt's prospects. At the time she incurred the debt, the bankrupt was running a construction business with her brother. She was unable to deal with the complexities of the business and failed to separate her personal financial affairs from those of the business. The bankrupt did make efforts to deal with the tax liability once she received assessments, as she made a voluntary payment and a proposal. The bankrupt was 50 years old and grosses approximately $84,000 per year, as does her spouse. She supports four children. In addition to the debts in the bankruptcy, she is a 50 percent owner of a company with

considerable tax liabilities. The court concluded that a payment commensurate with the terms of her original proposal as well as a two-year suspension, from the date of the hearing, was a sufficient deterrent.

 Back to top

Biletski v University of Regina, 2017 SKQB 262

Zarzeczny, September 5, 2017 (QB17247)

Evidence – Expert Evidence – Qualifications

A defendant filed a notice of objection to the appointment of a proposed expert qualified to give opinions on the conduct of elite competition swimmer training exercises at pool facilities. The matter concerned an accident at a swimming pool facility owned by the defendant.
HELD The court held that the proposed expert was qualified to give opinion in the field of aquatics and aquatics safety, including aquatic risk management, facility adequacy and issues relating to coaching and supervision at a swimming pool facility. The general practice of the courts when dealing with the qualification of an expert and the identification of the scope of opinion evidence an expert is qualified to give is not intended to encompass an advance ruling by the court respecting the admissibility of the opinions given. Nor is the qualification exercise intended to address the weight that a jury may give to any opinions expressed.

 Back to top

HCI Ventures Ltd. v S.O.L. Acres, 2017 SKQB 264

Barrington-Foote, September 5, 2017 (QB17248)

Agriculture – Farm Debt Mediation

The plaintiff sought summary judgment for recovery of damages. The defendant failed to pay rent, interest and taxes pursuant to a lease and a guarantee agreement. The defendants did not deny that they breached the lease and guarantee, but submitted that the action was a nullity as the plaintiff failed to comply with s. 21 of The Farm Debt Mediation Act.
HELD The plaintiff is a secured creditor within the meaning of the Act. The definition of secured creditor in the Act includes a

security interest of the type granted by the lease and the guarantee. It also includes any debt relating to the farming operation at issue. Section 21 of the Act applies, and rent, taxes and interest payable under the lease constitute a debt under s. 21. The action is one for recovery of a debt, despite that it is cast as a claim for damages. The court has no authority to relieve against the failure to give notice pursuant to s. 21. Therefore, the plaintiff is not entitled to summary judgment as the action is a nullity pursuant to s. 22 of the Act.

 Back to top