The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
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Subject Index

City Centre Equities Inc. v Regina (City), 2018 SKCA 43

Herauf Whitmore Ryan-Froslie, June 6, 2018 (CA17154)

Municipal Law – Assessment Appeals Committee – Appeal
Statutes – Interpretation – Cities Act, Section 163, Section 165

The appellant appealed from the decision of the assessment appeals committee of the Saskatchewan Municipal Board of Revision. The appellant's non-regulated commercial office building was assessed in 2014 using an income approach. The net rental income stream determined by the assessor was capitalized using a median capitalization rate of 8.6 percent. The rate was calculated using six sales, which included the sale of a one-third interest in an office building the title to which was registered to Saskatchewan Government Insurance (SGI), SaskPen Properties Ltd. (SaskPen) and HDL investments. The relationship was governed by a co-owners' agreement. SGI's interest in the property was managed by Greystone, which was a major shareholder of SaskPen. Greystone and SaskPen had the same directors and shareholders. In 2009, SGI sold its interest in the building to SaskPen. The price was established by dividing the appraised value by three. The sale occurred without adhering to the terms of the co-owners' agreement. The assessor used this sale in determining the capitalization rate for the assessment. He checked the transfers of titles, conducted a corporate registry search of SGI and SaskPen and examined a copy of the building's appraisal and of the agreement for purchase. He sent a sales valuation questionnaire (SVQ) to both SGI and SaskPen that requested whether the sale price had been affected by sales between family members. SGI indicated no and SaskPen did not

Statutes – Interpretation – Queen's Bench Act, Section 29

Statutes – Interpretation – Saskatchewan Human Rights Code, Section 12

Cases by Name

A.S. v J.M.S.

City Centre Equities Inc. v Regina (City)

Clavet Property Estates Ltd. v K & K Land Management Ltd.

Danychuk v Piecowye

Embee Diamond Technologies Inc. v Prince Albert (City)

Forsberg v Government of Saskatchewan

Galbraith v Galbraith

K.D.O. v C.A.K.

Kennett v Diarco Farms Ltd.

Melnick v Tapp

R v Pelly

Ross v Day

Seon v Board of Education of the Regina Roman Catholic School Division No. 81

return the form. The assessor concluded that the sale was arm's length and included the purchase price multiplied by three to establish the capitalization rate and used it to determine the assessed value of the appellant's properties. The appellant appealed its assessment to the board of revision claiming the assessor erred by including the SGI sale such that the Market Valuation Standard (MVS) had not been achieved. The board considered evidence from the CFO of SGI who testified that SGI had held no discussions with other investors and it and SaskPen agreed to select and rely upon an appraised value. No discount was included despite the fact it was a sale of a partial interest. A senior official of Greystone testified that the sale was considered to be an internal sale. It was noted that the SVQ did not provide an appropriate opportunity to disclose that it was a partial sale or its other characteristics. The assessor testified that he was aware that the sale was of a partial interest but that he had no information at the time of the assessment that it was a non-arm's length transaction or that additional adjustments may have been required. After receiving further information about the sale though, he did not follow up because he believed it was a valid arm's length sale. The board found that in light of the information that it had received, the sale was a non-arm's length transaction between two corporate affiliates that were linked through Greystone and agreed with the appellant that the sale should be removed from the median capitalization rate calculation. In doing so, the MVS would have been achieved. The respondent, the City of Regina, appealed to the committee that then overturned the board's decision and restored the assessor's original assessment that included the sale. The committee concluded that the board had made a mistake by excluding the property sale because it had no evidence before it to conclude that SGI and SaskPen were corporate affiliates. The sale met the MVS because it was an arm's length transaction, cash had been exchanged and the vendor and purchaser were independent and had relied upon a reasonable appraisal. The board should have been satisfied that the assessor exercised diligence and failed to acknowledge his discretion. The appellant appealed the committee's decision, arguing that it erred by: 1) failing to apply the correct standard of review with respect to the board's factual findings; 2) finding that whether a sale was arm's length was within the reasonable discretion of the assessor as opposed to a question to be determined by the board based on the evidence before it; and 3) failing to identify and apply the correct legal test for determining an arm's length sale.
HELD: The appeal was allowed. The committee's decision was quashed and the board's decision affirmed. The court found with respect to the issues that the committee erred: 1) in applying the correctness standard to the board's decision when it appeared to reweigh the evidence and reach different factual conclusions. Based upon the Legislature's intention regarding the role of the committee, the court held that the appropriate standard of review to be applied by the committee is reasonableness with respect to the board's factual findings and to

questions of mixed fact and law where there is no extricable question of law; 2) in interfering with the board's factual findings that the sale was not arm's length - finding that it was reasonable and supported by the evidence. The board accepted that SGI had not looked elsewhere to sell its interest, had not considered a discount and that it was a client of Greystone, which was in turn connected to SaskPen via their common directors. The committee erred in focusing on whether the assessor had reasonably found the relationship between SGI and SaskPen to mean that they were not acting at arm's length. The committee was required to consider whether as a result of new evidence presented to the board, it had erred in determining the assessment was in error as there were material facts not known to the assessor that would have affected his assessment. At hearings before the board and at this hearing, appellants have the opportunity to provide evidence for the first time and there is no requirement that such evidence must have been known to the assessor previously. If new evidence demonstrates that an assessor's conclusions were wrong, it would be inconsistent with the legislative framework to disallow the board from intervening; and 3) in its identification of the correct legal test for determining an arm's length sale. The court held that the question should be whether the sale was for market value within the meaning of s. 163(f.2) of The Cities Act, which is required by s. 163(f.1). In this case, the sale did not satisfy the requirement that it be arrived at as a result of a free, competitive and open market. The property was never intended to be sold to anyone other than SaskPen and neither party sought to obtain the highest possible price. The court accepted the appellant's argument that the assessment could not be upheld as equity had not been achieved as required by s. 165(3) of the Act, because the assessor could not satisfy the MVS because of its use of a non-market value sale.

 Back to top

Embee Diamond Technologies Inc. v Prince Albert (City), 2018 SKCA 44

Richards Caldwell Herauf, June 5, 2018 (CA17155)

Statutes – Interpretation – Landlord and Tenant Act, Section 50
Statutes – Interpretation – Tax Enforcement Act, Section 36
Civil Procedure – Queen's Bench Rules, Rule 11-1

The appellant appealed from the decision of a Queen's Bench chambers judge that dismissed its claim that the respondent had not complied with The Landlord and Tenant Act (LTA) when it took possession of premises in which the appellant had been a tenant (see: 2017 SKQB 128). The respondent had taken possession because the registered owner of the building, MFN, was in arrear of taxes. The appellant and MFN were related companies. The respondent directed its tax notices

and notification to quit the building to E.B., who was involved in both companies. The appellant argued that the judge failed to find that it was a tenant of the registered owner of the building, MFN. As it was, then s. 36 of The Tax Enforcement Act (TEA) applied and the appellant was deemed to be a tenant of the respondent and the LTA applied. Under s. 50 of the LTA, the respondent was required to apply for judicial relief if it wanted to take possession and the appellant had been entitled to seek injunctions against the respondent pursuant to s. 10 of the LTA.
HELD: The appeal was dismissed. The court found that the judge had not erred in finding that the appellant was not a tenant. However, the issue of whether there had been a lease was not material because s. 36(1) of the TEA is not based upon the existence of a lease between a tax debtor who has lost title to a property and a tenant of the tax-debtor. Section 36(1) applied if a person is "in occupation of" the land for which title has passed to a municipality by virtue of tax enforcement proceedings. In this case the appellant had established that it was in occupation and under s. 36(1) was deemed to be a tenant when the respondent took title to the property. The appellant acknowledged that it was a week-to-week tenant under the LTA and pursuant to s. 18 of it, the appellant was given notice to quit by the respondent when it sent a letter to E.B. that he was required to vacate. The court decided that it was unnecessary to resolve how s. 50(1) of the LTA should be construed. It would not interfere with the chambers judge's award of costs of $5,000 to the respondent given the scope of his discretion to grant costs contemplated by Queen's Bench rule 11-1.

 Back to top

Ross v Day, 2018 SKQB 153

Barrington-Foote, May 17, 2018 (QB17541)

Bankruptcy and Insolvency – Conditional Discharge – Appeal
Civil Procedure – Queen's Bench Rules, Rule 4-44

The bankrupt was discharged in 2014 on the condition that he pay $200 per month to the trustee for 14 years. He filed a notice of appeal within a month of the decision pursuant to s. 194(2) of the Bankruptcy and Insolvency Act (BIA) and s. 30 of the Bankruptcy and Insolvency General Rules. He had not taken any steps since to advance the appeal. The applicant, the bankrupt's single largest creditor, had obtained a judgment against the bankrupt in 2010 for $75,000 for defamation and $10,000 in costs. He applied for an order that the bankrupt's appeal be dismissed. The bankrupt testified that he had not pursued his appeal because he had been suffering from depression and, when he learned that the applicant had new counsel, he did not know the correct

address for service. Evidence was presented that the delay had no effect on the applicant.
HELD: The appeal was dismissed. The court found that the BIA did not provide for applications to strike appeals for delay or want of prosecution and under the BIA Rules, s. 3 provided that in cases not provided for in the BIA or the Rules, the ordinary procedure of the court should apply. Therefore, Queen's Bench rule 4-44 was applicable. The applicant was guilty of inordinate delay and his explanations were insufficient. Although there was no evidence of prejudice to the applicant if the appeal proceeded, the court concluded that it was in the interests of justice to dismiss the appeal.

 Back to top

Galbraith v Galbraith, 2018 SKQB 157

Dufour, May 22, 2018 (QB17547)

Family Law – Child Support – Adult Child

The respondent father brought an application to determine whether his two children, aged 22 and 21 respectively and enrolled in post-secondary courses, were "children of the marriage" within the meaning of the Divorce Act and if not, when they ceased to be. The petitioner then applied for an order that the respondent continue to pay s. 3 support under the Federal Child Support Guidelines and contribute proportionally to each child's education, past and future. The parties were divorced in 1998 and the children resided with the petitioner since then. The respondent had had no contact with his daughters. In 2001, he was ordered to pay s. 3 child support and a share of s. 7 expenses. By 2011 he was in arrears in the amount of $16,000 and the parties entered into agreement that the respondent would pay $300 per month towards his arrears and $700 per month in child support without review or contest until August 2016. The agreement stipulated that on that date the ongoing child support would be determined under s. 3 of the Guidelines and applicable case law regarding the payment of child support for children over the age of majority. The same arrangement was applied to how the children's university expenses would be calculated pursuant to s. 7. The respondent was still paying $700 per month in child support. He earned approximately $50,000 per year as a bus driver and the petitioner earned $76,000 as a registered nurse. In 2014 the oldest daughter enrolled in a two-year legal assistant program but after three years, had not completed the program. Her academic record was very poor. The respondent had paid $2,600 towards her 2014/2015 tuition but had not made any other contributions. The youngest daughter had a diagnosed cognitive disability. In 2016 she enrolled in a two-year justice studies program but had to withdraw in

her first term because of her disability. In the winter of 2017 she began a 12-month hair-styling program that cost $15,800 in tuition. No information was provided as to whether she was going to be able to complete the program. Neither of the daughters had contributed to the costs of their own education and had never obtained full-time employment during the periods where they were not attending school.
HELD: The court found that the children were not children of the marriage under the Act and had ceased to be when they left high school. The petitioner had not discharged the onus on her to establish that the children were unable to withdraw from their parents' charge after high school. The petitioner's application that the respondent be required to pay a share of the children's education expenses was dismissed as was her application for an order that he continue to pay s. 3 Guidelines support. Any money paid after the date of his application in December 2017 was to be returned to him.

 Back to top

Forsberg v Government of Saskatchewan, 2018 SKQB 159

Krogan, May 24, 2018 (QB17546)

Statutes – Interpretation – Saskatchewan Human Rights Code, Section 12
Statutes – Interpretation – Vital Statistics Act, Section 31, Section 65

The chief commissioner of the Saskatchewan Human Rights Commission applied to the court for a hearing under s. 29.6 of The Saskatchewan Human Rights Code. The application was made with the consent of all parties to the action and on the basis of an agreed statement of facts that would conclude the matter without the necessity for a hearing. The complainants filed complaints against the Government of Saskatchewan and eHealth Saskatchewan due to specific provisions in The Vital Statistics Act. Under s. 65 of the Act, a birth certificate sets out the sex of an individual. If a person is over the age of 18, s. 31 permits them to apply to the registrar of Vital Statistics to have the designation of sex amended on the certificate, but the Act did not contain a mechanism for anyone under 18 to amend. Further the Act did not permit an individual, regardless of age, to choose not to identify as either male or female. The complainants were transgender individuals under the age of 18.
HELD: The court found that ss. 31 and 65 of the Act breached the rights of each complainant under s. 12 of the Code and ordered that their respective birth certificates be amended to show a female sex designation and one was to be issued without a sex designation.

 Back to top

R v Pelly, 2018 SKQB 160

Pritchard, May 24, 2018 (QB17545)

Criminal Law – Assault – Aggravated Assault – Sentencing – Dangerous Offender
Criminal Law – Sentencing – Aboriginal Offender

The accused was found guilty of aggravated assault contrary to s. 268 of the Criminal Code. The Crown sought and obtained a hearing pursuant to s. 753 of the Code to determine whether the accused was a dangerous offender subject to receiving a sentence of indeterminate detention. The Crown relied upon ss. 753(1)(a)(i) and (ii). The court ordered a psychiatric assessment and a Gladue report for the purposes of the hearing. The accused admitted that the predicate offence was a serious personal injury offence under s. 752(a) of the Code. The victim suffered serious wounds to his head and face after the accused attacked him with a stick to which a hammer and hook had been attached. The accused conceded that the predicate offence and his past offences showed a pattern of his failure to restrain his behaviour under s. 753(a)(i) but disputed that the pattern established a likelihood that a similar failure to restrain it in the future would result in injury to other persons. He testified that he was not a dangerous offender because, with treatment for his violence and substance abuse, he might not pose a threat to other persons in the future. He pointed to the fact that in his previous penitentiary sentence, he had abandoned his gang affiliations, showing that he was capable of change. He also relied upon the Gladue report that disclosed that sexual assaults, beatings, poverty, neglect and dysfunctional community all contributed to placing him in a cycle of drug and alcohol addictions and offending behaviour from an extremely young age. At the time of sentencing the accused was 35 years old. He had been raised in Cumberland House in an impoverished family suffering from alcohol and domestic abuse. He experienced abandonment, neglect and physical abuse. He stopped attending school in grade four and was introduced to marijuana and alcohol at 10 and since then, his lifestyle centred on getting high. From the age of 13, the accused spent most of his life in custody. He stole as a means to purchase food or alcohol. The accused also sniffed gasoline between the ages of 13 and 19. His criminal record included 52 convictions. In his psychiatric testing the accused scored very high on the risk factors for acts of violence. The accused had served two prison sentences and received some treatment but the programs were limited and superficial. In order to succeed in lowering his risk to reoffend, the accused would have to commit to abstinence from drugs and alcohol for the rest of his life. He suffered from perception disturbance, a condition caused by substance abuse that caused his perceptions and memory of events to be distorted. In the psychiatrist's opinion, the

accused suffered from previously undiagnosed and untreated mental health problems.
HELD: The accused was declared a dangerous offender under s. 753(1)(a) of the Criminal Code. The court found that he had exhibited a pattern of repetitive behaviour showing an inability to restrain himself from causing personal injury to others and it would likely continue into the future. As there was no presumption that an indeterminate sentence was appropriate for a dangerous offender under s. 753(4.1) following the Supreme Court's decision in Boutilier, the accused was given a determinate sentence. Although the accused had committed serious assaults, none of the offences resulted in intentional or accidental deaths of his victims. His moral culpability could be considered as high because the accused's self-control vanished when he consumed alcohol and drugs, but his mental issues impacted not only his self-control but his ability to understand, learn and effectively utilize alternate coping strategies. His treatment prospects were not promising but they were not negligible. In addition, the court considered that the Gladue factors were relevant in the personal circumstances of the accused and to his sentencing. The court decided that this was a case where the degree of protection that society would consider adequate must be informed by a collective desire to stem the systemic over incarceration of Aboriginal peoples. Based on the totality of the evidence the court was satisfied that there was a reasonable expectation that a sentence imposed in accordance with s. 753(4) would adequately protect the public from the threat of future serious harm from him. The accused was sentenced to 66 months after remand credit on an even basis for 679 days of time served. The accused would be subject to a long-term supervision order of 10 years. The court recommended that the accused be screened for personality disorder and a learning disability and that dialectical behaviour therapy be made available to him.

 Back to top

Clavet Property Estates Ltd. v K & K Land Management Ltd., 2018 SKQB 161

Currie, May 24, 2018 (QB17548)

Statutes – Interpretation – Builders' Lien Act, Section 64

The applicants applied for an order directing the discharge of 61 builders' liens registered by the respondents against title to lands held by the applicants because the liens were the same as previous liens registered and then discharged by the respondents in 2017. The applicants submitted that the respondents were therefore prohibited from reviving the 2017 liens under s. 64(1) of The Builders' Lien Act. The respondents argued that s. 64 was not applicable because by virtue

of the reference to s. 50 in that section, s. 64 applies only if the previously discharged lien was valid. The respondents claimed that their 2017 liens were not valid and therefore were not the same as the 2018 liens. In an affidavit filed in support of their position, the affiant deposed that the 2017 liens contained provision for a contractual obligation that was not properly the subject of a builders' lien and thus they were invalid in their entirety.
HELD: The application was granted. The court examined the 2017 and 2018 claim of lien forms and found that they each provided the same description of the same services or materials. It found that there was no factual foundation for the respondent's argument. The 2018 registration constituted an attempt to revive the 2017 liens. Section 64 applied so as to prohibit them. The applicants' request for solicitor and client costs pursuant to the Act was denied. The court noted that the applicants' claim for such costs was based on the assumption that the respondents were familiar with all the provisions of the Act and therefore would have known that it was improper to attempt to revive the liens. In many cases, people rely on parts of statutes without being aware of other parts of the same statute. The applicants were granted costs of $4,000 assessed on column 2.

 Back to top

Melnick v Tapp, 2018 SKQB 163

Elson, May 25, 2018 (QB17550)

Civil Procedure – Queen's Bench Rules, Rule 7-2
Contract Law – Condition of Sale – Breach
Statutes – Interpretation – Sale of Goods Act, Section 16.1

The plaintiff applied for summary judgment pursuant to Queen's Bench rule 7-2 of his action against the defendant alleging a breach of contract of sale and negligent misrepresentation. The defendant agreed that the matter could be appropriately determined by way of summary judgment. The defendant owned horses and rode them in barrel racing as a hobby. In 2013 she purchased a quarter horse that was five years old that had competed in barrel racing and other events. Shortly afterward the horse experienced one episode of colic after a race. A veterinarian treated the horse successfully and the colic symptoms ceased and did not recur. In the spring of 2016 the plaintiff purchased the horse from the defendant for $11,000. The evidence of the parties conflicted on what they had discussed before the sale. The plaintiff deposed that he told the defendant he wanted to acquire a horse for barrel racing and that she told him the horse was in good health and could be used for such a purpose. The defendant stated that the plaintiff said he was acquiring a horse for his daughter and that he did

not inquire about the horse's medical history. She claimed there was no discussion at all and she did not disclose the earlier episode of colic. In September 2016, the horse experienced severe colic after a race. The veterinarian diagnosed the horse as suffering from serious conditions: colon torsion; and large colon displacement. Because the animal was not a good candidate for surgery, it had to be euthanized. No necropsy was performed. The plaintiff told the defendant that if he had known that the horse had a colic problem he would have purchased it nonetheless but would have treated the horse for colic to manage the problem. A veterinarian, qualified as an expert, submitted in his affidavit that horses can develop colic as a symptom of various gastric problems and this case, the diagnoses given by the attending veterinarian was reasonable but that without a necropsy, it would be impossible to determine the cause of the colic more definitively. The issues were: 1) whether the plaintiff had established on the balance of probabilities that the horse was suffering from a disease process capable of producing symptoms of colic at the time of sale; 2) if so, was the defendant in breach of any implied warranty as to the horse's health; and 3) if the horse was suffering from a disease condition, was the defendant liable for any negligent misrepresentation made by her leading up to the purchase and sale.

HELD: The application for summary judgment was granted as the court found that this was an appropriate case for determination under Queen's Bench rule 7-2. The court dismissed the plaintiff's action. It found with respect to each issue that: 1) the plaintiff had not established that the defendant knew or ought to have known of the horse's poor health because of her admitted knowledge of the colic episode suffered in 2013. The evidence showed that colic was not a disease process but rather is a symptom and not a diagnosis. The plaintiff had failed to prove that the disease or condition that caused the 2013 episode was the same or connected to the disease or condition that caused the horse's death in 2016 and that the horse was suffering from it at the time of sale; 2) although the previous finding disposed of the matter, it determined that there was no basis in law on which an implied warranty regarding the horse's health could be said to exist under s.16.1 of The Sale of Goods Act because the defendant was not engaged in the business of selling horses or any other implied warranty. The defendant gave an express warranty that the horse was suitable for barrel racing at the time of sale, which was justified. A warranty cannot be implied on the health of an animal sold to a purchaser; and 3) the plaintiff had not met the condition set out in Cognos to establish negligent representation as it had found that the defendant's express warranty was true and the plaintiff had admitted that he would have purchased the horse if he had known about the earlier episode of colic.

 Back to top

Danychuk v Piecowye, 2018 SKQB 164

Dawson, May 28, 2018 (QB17551)

Civil Procedure – Small Claims – Appeal – Standard of Review

The appellant appealed from the decision of a Provincial Court judge that dismissed his action under The Small Claims Act, 1997. The appeal was brought pursuant to s. 39 of the Act. The trial judge found that he could not make a finding of liability in favour of either party, based upon the evidence that had been presented. The appellant argued that the respondent had not put forward any compelling evidence whereas he had.
HELD: The appeal was dismissed. Under s. 40 of the Act, it was confined to the record. The appellant had taken issue with the judge's findings of fact and after review, the court concluded that pursuant to the proper standard of review, the judge made no palpable or overriding error.

 Back to top

Seon v Board of Education of the Regina Roman Catholic School Division No. 81, 2018 SKQB 166

McCreary, May 31, 2018 (QB17556)

Statutes – Interpretation – Local Authority Freedom of Information and Protection of Privacy Act, Section 18

The applicant appealed pursuant to s. 46(1) of The Local Authority Freedom of Information and Protection of Privacy Act (LAFOIPPA) from the respondent's decision to refuse to provide him with access to information contained in a record that related to the respondent's tender for quotations to supply computer hardware. The applicant and a number of other vendors made bids on the tender. At the close, the respondent prepared the record to use as a tool to compare and assess information contained in the bids. The record contained the unit prices submitted by each vendor, the delivery date and the point scores assigned by the respondent to evaluate each bid based upon that information. The bid was awarded and the unsuccessful vendors notified. The respondent did not provide any other information. The applicant made an access to information request to the respondent and sought information related to the tender, including the record, list of vendors evaluated, point score, vendor bid amounts and product selected. The respondent denied the request but did supply the list of vendors and a redacted copy of the record that masked the unit prices, delivery times and point scores. He was also provided with an explanation of how the respondent calculated the point scores.

HELD: The application was dismissed. The court found that pursuant to ss. 18(1)(b) and (c) of LAFOIPPA, the respondent correctly refused to provide access to the record because it contained commercial information that was supplied in confidence by third parties. Disclosure could reasonably be expected to result in financial loss or gain or prejudice to the competitive position of a third party.

 Back to top

K.D.O. v C.A.K., 2018 SKQB 167

Brown, May 30, 2018 (QB17553)

Family Law – Custody and Access – Variation

The parties had two children, aged eight and five, at the time of the petitioner's application for sole custody of them, and proposed that the respondent have supervised access. The respondent sought shared parenting or, alternatively, an increase in access to be unsupervised. The parties had cohabited for two periods: between 2006 and 2007 and again in 2008 until their second child was born in 2012, when they separated permanently. The respondent mother found parenting very stressful and would often call the petitioner's mother to assist with the children. The petitioner supported the family, performed the cooking and housecleaning duties as well as caring for their first child when he was at home. The children were in the primary care of the respondent after the parties separated. The petitioner's mother continued to help with the children whenever the respondent asked her to take them. The children were apprehended by the Ministry of Social Services (MSS) in 2014 and after that time, they had their primary residence with the petitioner with the respondent having supervised access to them. The Ministry had been alerted by a friend of the respondent's that after the youngest child, still an infant, had fallen and hit her head, the respondent resisted taking the child to the hospital but was convinced to do so by her friend. The baby was discovered to have suffered a hairline fracture to her skull causing swelling and bruising. On another occasion, a friend witnessed the respondent trip the oldest child and then kick him in the rib cage when he was on the ground. After the friend reported her to the MSS, the respondent was charged and convicted of assault. When the children were taken to the petitioner for care they were filthy, covered in sores and extreme eczema. The oldest child had many physical, emotional and developmental issues. With the help of various professionals and the petitioner's care, the child's conditions improved significantly and he was able to play with other children and did well in school. In 2015, the petitioner remarried and his second wife became a very loving mother to the children. The respondent's supervised access was arranged primarily through friends

but the respondent discarded each of them as supervisors after they would not do as she required. A number of witnesses provided evidence of the problems that the respondent had as a parent. She was unable to keep her residence clean and provide a healthy environment. In previous court proceedings brought by the petitioner in 2012, the court awarded joint custody with the children's primary residence to be with the respondent and extended weekend access given to the petitioner. He brought another application in 2015 where the court determined that custody of the children should be joint, their primary residence with the petitioner and the respondent to have supervised access. At trial, the respondent had counsel but decided when it commenced not to participate.
HELD: The application was granted. The court found that the petitioner should retain primary residence of the children and have sole custody of them. It was in their best interests for the respondent to have reasonable, supervised access and reasonable access by phone and Skype. This limited access would continue until the respondent could establish that she was capable of parenting her children in a way that did not put them at risk.

 Back to top

A.S. v J.M.S., 2018 SKQB 171

Tholl, June 1, 2018 (QB17554)

Family Law – Custody and Access – Variation
Family Law – Child Support – Variation

The petitioner and respondent married in 2005 and had two children, one born in 2008 and the youngest in 2011. The parties separated in 2011. In 2014 the court ordered that the parents have joint custody. Based upon the petitioner's work schedule as a police officer, the children spent five out of every 14 nights with him. The petitioner was to pay $1,000 per month in child support and 57 percent of all activity expenses. The petitioner applied in late 2015 to vary that parenting arrangement and requested that the court order a shared parenting schedule consisting of a week-on, week-off basis and that child support be varied to amounts calculated pursuant to ss. 7 and 9 of the Guidelines based on equal shared parenting and the parties' current incomes. The respondent opposed a change to the parenting schedule. Previous to this trial, the court determined that there had been a material change in circumstances as a result of major changes to the petitioner's work schedule as he had received a new posting that provided a permanent schedule of working business hours from Monday to Friday. The parties were given an opportunity to discuss a resolution, the application was stayed and the parties referred to the

high conflict mediation program. As they were unable to resolve their issues, the petitioner brought another application in late 2016 that sought the same remedies. A chambers judge referred the matter to pre-trial conference on the basis of the finding of material change. Nothing was resolved at the pre-trial and the matter proceeded to trial. The petitioner had been in a relationship with his second wife since 2011. They were married in 2014 and had two children of their own. The petitioner's new spouse was self-employed and worked at home. Because of her flexible schedule she arranged her work around the needs of the family. She and her children had a very good relationship with the petitioner's children. A number of the members of their extended families lived nearby. Their home was large enough to allow each of the petitioner's children to have their own bedrooms during their period of residing there. The children continued to attend the same school and daycare regardless of which parent they were living with. The respondent worked business hours in her employment but her schedule was very flexible. She continued to reside in the family home with the children. They had many friends there and the respondent had the support of family and friends. The children were doing very well in school, academically and socially. The oldest child, a girl, suffered from Type I diabetes and her condition had to be managed very carefully. The respondent coordinated the monitoring of her blood sugar, carbohydrate intake and administering insulin with the school and with the petitioner and his wife. The petitioner (who also suffered from diabetes) and his spouse were well-informed about the disease and conscientious about its management. The petitioner submitted that shared parenting would be the best parenting arrangement for the children particularly because it would limit the conflict between the parties. The respondent objected to changing the status quo. She argued that one week was too long for the children to go without seeing her and she feared that the petitioner's work schedule would change again and create instability. She was also concerned that due to the poor communications between the parties, the change would negatively affect their child's diabetic care.
HELD: The application was granted. The court ordered that it was in the best interests of the children for them to live with each of their parents on alternate weeks. The court found that the petitioner and his wife and the respondent all provided excellent care to the children and that the diabetic care required by their daughter would not be negatively affected. Although communication between the parties had been less than ideal, the problems had not reached a level that would bar a shared parenting arrangement. Based upon their 2017 incomes, the appellant's child support obligations were $1,600 and the respondent's would be $1,560 per month under the Guidelines. As the court ordered shared parenting, child support would be governed by s. 9 of the Guidelines. The court found that a straight set-off amount of child support was appropriate in this case so that the petitioner would pay $73 per month to the respondent. The petitioner was ordered to

pay a set amount for s. 7 expenses to eliminate conflict.

 Back to top

Kennett v Diarco Farms Ltd., 2018 SKQB 179

Leurer, June 11, 2018 (QB17555)

Statutes – Interpretation – Queen's Bench Act, Section 29
Contract Law – Formation – Intentions of Parties

The plaintiff applied to enforce an agreement with the defendants by way of summary application pursuant to s. 29 of The Queen's Bench Act, 1998. His application was made in the context of an existing action and he had not sought an amendment to his statement of claim. The defendants argued that this was inappropriate and that the plaintiff should amend his claim or issue a new one. The substantive issue between the parties was whether they had reached an enforceable agreement. The counsel for each party had agreed in December 2017 to settle the plaintiff's lawsuit in exchange for payment of $500,000 to him by the defendants. At issue was the status of the payment under applicable tax law. The plaintiff submitted that he was to receive it on a tax-free basis. The defendants said that their understanding was the payment was to be deductible by them as an expense and subject to taxation in the hands of the plaintiff. The plaintiff pointed that the defendants' lawyer never told his lawyer that they were proposing a taxable payment. There was no evidence that the plaintiff's lawyer expressly communicated to the defendant's lawyers that the payment they were discussing must be received by the plaintiff on a tax-free basis. The issues were: 1) was the dispute properly before the court; and 2) if so, had a settlement been achieved.
HELD: The court found with respect to each issue that: 1) the dispute was properly before it because since the decision of the Court of Appeal in Childs, a party may seek summary enforcement of a putative settlement in the context of the settled action without amending the pleadings or commencing a new action under s. 29 of the Act. It was therefore unnecessary to decide whether Queen's Bench rules 7-1 and 7-2 applied; and 2) the agreement was not enforceable. Looking at all of the surrounding circumstances, an objective reasonable bystander could not find agreement by the parties on the essential term of the contract: the tax status of the payment. The court was unable to refine the contract by implying a term.

 Back to top