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 20, No. 18 **September 15, 2018**

Subject Index

Tsatsi v College of Physicians and Surgeons of Saskatchewan, 2018 SKCA 53

Richards Ottenbreit Herauf, July 5, 2018 (CA17164)

Civil Procedure – Summary Judgment – Appeal
Torts – Defamation – Defences – Qualified Privilege – Appeal

The appellant appealed the decision of a Queen's Bench judge to dismiss his action against the respondents, the College of Physicians and Surgeons, the then-Minister of Health and the Sunrise Heath Region (SHR) (see: 2016 SKQB 389). During a review by the college of the appellant's work as a radiologist while in the employ of the respondent SHR, concerns were raised regarding his competency. Two assessments by competency committees appointed by the college each reported that the appellant failed to demonstrate the competence required for him to practice independently as a radiologist. A formal hearing into the matter was scheduled for June of 2009. In May of 2009, the college notified the Ministry of Health of its concerns. Those respondents decided to conduct a retrospective review of all diagnostic imaging studies performed by the appellant and to make the review public. At a press conference, the minister, the SHR and the college identified the appellant. The appellant brought an action against them in defamation. The defendants were successful in their application for summary judgment to dismiss the appellant's claim. The appellant's grounds of appeal were that the chambers judge erred: 1) in deciding that the case was an appropriate one for

determination on a summary procedure basis. He argued that that process was not available to decide defamation actions were malice had been pled. As well, the chambers judge failed to give his counsel an opportunity to cross-examine the deponents of the affidavits relied upon by the respondents; 2) in finding the defence of justification. The judge improperly regarded the conclusions of the competency committee as res judicata and failed to take issue with them; and 3) in finding the defence of qualified privilege was made out. He argued the disclosure made about the findings of the second committee was premature, disproportionate and therefore malicious. As a result, the respondents' comments fell outside the reach of the protective umbrella offered by qualified privilege.
HELD: The appeal was dismissed. The court found with respect to each ground that the chambers judge had not erred in: 1) holding that a summary judgment was available. The process is not, as a matter of principle, inapplicable to defamation actions involving the allegation of malice by the plaintiff and where the defendant pleads qualified privilege. Further, based on the timing of the appellant's counsel to request to conduct cross-examination in this case, the chambers judge's decision not to accede to the request could not be faulted; 2) deciding that the defence of justification was available because the defamatory communications made by the respondent were based upon the conclusions of the second competency committee and were essentially true; and 3) finding the defence of qualified privilege had been established. The respondents' decision to name the appellant had been carefully thought out and was reasonable. The judge noted correctly that once a privileged occasion had been established, as here, the courts have been reluctant to rigorously test privileged communications to determine if they have involved excessive disclosure. Identifying the appellant was neither excessive nor indicative of malice.

 Back to top

R v Whitehawk, 2018 SKCA 54

Caldwell Herauf Whitmore, July 10, 2018 (CA17165)

Criminal Law – Murder – Second Degree – Conviction – Appeal
Criminal Law – Defences – Provocation – Appeal

The appellant appealed his conviction after trial on a charge of second degree murder. The appellant had raised the limited defence of provocation under s. 232 of the Criminal Code. He alleged that there were three incidents of conduct by the victim

Kocsis Transport Ltd. v Dominion Construction Co.

Kormos v Kormos

Neufeld v Rifle Short Oil Corp.

Ngouandi v Assemblée Communautaire Fransaskoise (A.C.F.) Inc.

Onofreychuk v Water Security Agency

Prairie Ag Petroleum Ltd. v Abo Transport Ltd.

R v Belcourt

R v D.S.

R v Goodpipe

R v Kossick

R v Maxim

R v Prokopchuk

R v Whitehawk

Royal Bank of Canada v Partridge

Tsatsi v College of Physicians and Surgeons of Saskatchewan

Veolia Water Technologies, Inc. v K+S Potash Canada General Partnership

that would have constituted the required indictable offences: breaking and entering into the accused's residence; uttering threats; and sexual assault. The judge was satisfied that the victim had not broken into the appellant's home and rejected his evidence that he had been threatened by the victim. Although the judge was left with a reasonable doubt that the victim had kissed the appellant on the shoulder and that a kiss could constitute a sexual assault, the judge concluded that it was not sufficient to deprive an ordinary person of the power of self-control and therefore he found that the Crown had negatived the defence of provocation beyond a reasonable doubt (see: 2017 SKQB 194). The appellant argued that the trial judge erred in reaching the conclusion that the Crown had satisfied its burden of disproving the defence beyond a reasonable doubt.
HELD: The appeal was dismissed. The court found that there was no basis to interfere with the trial judge's conclusions on the limited defence of provocation.

 Back to top

R v Kossick, 2018 SKCA 55

Caldwell Herauf Ryan-Froslie, July 18, 2018 (CA17166)

Constitutional Law – Charter of Rights, Section 8, Section 9, Section 24(2) – Appeal

The Crown appealed the acquittal of the respondent on charges of possession of methamphetamine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act and other related charges. In a voir dire, the Provincial Court judge found that police had violated the respondent's ss. 8 and 9 Charter rights and excluded certain evidence pursuant to s. 24(2) of the Charter. In the trial proper, the judge found the remaining evidence insufficient to establish the respondent's guilt and entered acquittals (see: 2017 SKPC 67). The grounds of appeal were whether the trial judge erred by: 1) finding the arrest of the respondent to be unlawful. The judge found that the officer had had subjectively reasonable grounds to arrest the respondent but that his belief was not objectively reasonable because he had not taken the time to check the police's SIMS database. He failed to find the correct information about the warrant and the arrest was thus unlawful. The Crown argued that judge relied only on R v Shinkewski for the legal test to assess objective reasonableness and that World Bank Group v Wallace created an exception to the general principles set out in Shinkewski; 2) finding the searches to be

unreasonable. The Crown argued that the judge erred because she applied the criteria set out in R v Fearon to all four of the cellphone searches conducted by the police and in the first three searches, she should have found that the the plain view doctrine applied; and 3) excluding the evidence.
HELD: The appeal was dismissed. The court found with respect to each ground that the trial judge had not erred in: 1) finding a breach of s. 9. The exception in World Bank Group was not applicable to the facts of this case. The judge correctly found that in the circumstances giving rise to the arrest had not precluded the officer from inquiring into the reliability of the information and that he had the means to do so, by checking SIMS. There was no urgency in the arrest; 2) finding a breach of s. 8 had occurred. The plain view doctrine did not apply to the facts of this case in the circumstances of the first three searches conducted by the officer. As the initial search of the cell phone was unreasonable, the fourth search pursuant to a warrant was also unreasonable because the warrant was granted on the basis of the initial searches; and 3) applying the appropriate legal framework in her s. 24(2) analysis. Her conclusion was entitled to appellate deference.

 Back to top

Karpinski v Zookewich Estate, 2018 SKCA 56

Richards Caldwell Herauf, July 23, 2018 (CA17167)

Wills and Estates – Testamentary Capacity – Appeal

The appellant appealed from the decision of a Queen's Bench judge in chambers that dismissed his application to have the will of the testator proved in solemn form. The judge held that the testator had not lacked testamentary capacity and there was no evidence of undue influence in the preparation of his will (see: 2018 SKQB 278). The appellant's grounds were that the judge erred in these findings.
HELD: The appeal was dismissed. The court agreed with the conclusions of the chambers judge.

 Back to top

R v Maxim, 2018 SKCA 57

Jackson Herauf Whitmore, July 23, 2018 (CA17168)

Constitutional Law – Charter of Rights, Section 24(2) – Appeal

The appellant appealed from his conviction of possession for the purpose of trafficking. He had raised Charter issues alleging that his ss. 8 and 9 Charter rights had been breached and after a blended voir dire was held, the trial judge concluded that they had in fact been violated. However, he held that the admission of the evidence would not bring the administration of justice into disrepute under s. 24(2) of the Charter and convicted the appellant (see: 2017 SKPC 37). The grounds of appeal included that the trial judge failed to take into account the level of experience and training that the RCMP officer had when he considered the seriousness of the breach as well as the officer's failure to employ the drug detection dog.
HELD: The appeal was dismissed. The court found that the trial judge had not erred in his s. 24(2) analysis and the admission of the evidence.

 Back to top

Neufeld v Rifle Short Oil Corp., 2018 SKCA 58

Jackson, July 26, 2018 (CA17169)

Civil Procedure – Appeal – Leave to Appeal
Statutes – Interpretation – Surface Rights Acquisition and Compensation Act, Section 30

The applicants applied for leave to appeal the decision of the Surface Rights Board under The Surface Rights Acquisition and Compensation Act (SRACA). The prospective respondent held 13 "right of entry orders" on farmland owned by the applicants. Prior to June 2016, Tuscany Energy held the orders. It had applied for a hearing before the board to fix compensation payable to the applicants in October 2014. Before the compensation payable had been determined, Tuscany made an assignment in bankruptcy. As part of the liquidation of its assets, the respondent acquired the right of entry orders pursuant to a court-ordered sale and vesting order made under the Bankruptcy and Insolvency Act (BIA). The board heard the compensation hearing in January 2018 to determine the compensation payable by the respondent to the applicants. The board selected November 1, 2016 as the effective date of the purchase of Tuscany's assets by the respondent with the consequence that the latter was not obliged to compensate the applicants regarding any claim they had against Tuscany prior to that date. The proposed grounds of appeal included the board's decision regarding compensation owed to the applicants

prior to the effective date and the board's decision to deny the applicants access to agreements filed by other operators and to challenge the board's ruling that The Freedom of Information and Protection of Privacy Act applied to the release of those agreements.
HELD: The application for leave to appeal was dismissed on the first ground and granted on the second ground. The court found with respect to the first ground that the applicants had failed to persuade it that an unregistered interest claiming an as-yet undetermined amount of compensation would survive a court order granted under the BIA expressly declaring that the purchaser acquired a right of entry order free from all interests. The applicant's second ground of appeal had sufficient merit and importance warranted for leave to appeal to be granted. The applicant's argument that FOIPPA does not apply to s. 30 agreements under the SRACA raised a question of law and a new point of law.

 Back to top

Jahnke v Johnson, 2018 SKCA 59

Richards Caldwell Whitmore, July 31, 2018 (CA17170)

Corporations – Shareholder Remedies – Derivative Action – Leave to Commence – Appeal
Statutes – Interpretation – Business Corporations Act, Section 232

The appellant appealed the decision of a Queen's Bench chambers judge that dismissed his application for leave to commence a derivative action on behalf of 101200723 Saskatchewan Ltd. (Sask Corp) against 1013660 B.C. Unlimited Liability Co. (BC Corp) and others (see: 2017 SKQB 13). The action proposed by the appellant was based on claims of breach of fiduciary duty, unjust enrichment and conspiracy. The appellant was a former shareholder and director of Sask Corp that purchased property for a development project. Sask Corp obtained financing from Larson Manufacturing. Sask Corp was unable to proceed with the development and marketing of the land as quickly as possible and failed to make payments on the loan to Larson. By 2014 the loan had risen to over $9 million USD. One of the directors and shareholders of Sask Corp, P.T., proposed a plan to the appellant that Larson develop the land where title would be transferred to it and it would finance the development costs. The appellant executed a share purchase agreement in September 2014 pursuant to which he transferred

all the Sask Corp shares he and his corporation owned to P.T. and his corporation for $1.00 per share a total of $178. He alleged that he sold his shares relying on P.T.'s representation there would be a written agreement with Larson whereby he and P.T. would receive 30 percent of the net profits from the development of the land. That agreement never materialized. After P.T. had acquired all of the shares of Sask Corp, he sold them to BC Corp. Sask Corp was voluntarily dissolved in September 2015. At the time of dissolution, BC Corp was its sole shareholder and its directors were the respondents. On August 12, 2016, the appellant sent a notice by registered mail to the respondents advising them of his intention to commence a derivative action on behalf of Sask Corp against P.T. and his corporation if the respondents as directors did not seek relief against the proposed defendants. On August 19, 2016, the appellant revived Sask Corp without notifying any of the other parties who had been shareholders of it. The respondent J.R. resigned as a director. The appellant then filed his application for leave to commence the derivative action on August 26, 2016. On August 29, he and his corporation filed a statement of claim naming P.T., BC Corp and others as defendants. The claim alleged that P.T. as a director of Sask Corp had a fiduciary duty to it but breached it by transferring the land to BC Corp for little or no consideration. BC Corp must then hold the lands in trust for the benefit of Sask Corp. The grounds of appeal were that the chambers judge erred in finding that under s. 232(2)(a) of The Business Corporations Act (BCA), the appellant had not given reasonable notice to Sask Corp of his intention to apply for leave to commence a derivative action if the respondents, as directors, did not bring the action. She found, firstly, that it was questionable whether valid notice could be given to the respondents because of the dissolution of Sask Corp a year before and even if the notice was valid, it had not been reasonable because the appellant had waited only two weeks before making his application for leave. The judge, relying on Shafer v International Capital Corporation, found that under s. 232(2)(c), it was not in Sask Corp's interest for the action to be brought because at the time of the sale, it was under crushing debt. Any chances that it had then to sell land were not mature sales opportunities and the appellant's assertions about the land's value were not supported by the evidence. The judge concluded that the proposed claims were aimed at redressing wrongs that the appellant believed that he had suffered personally as a result of the alleged bargain he had made with P.T.

HELD: The appeal was dismissed. The court held that the chambers judge had not erred in her findings. It agreed with her findings that: under s. 232(2)(a), the appellant had not given

sufficient notice. The respondents were not directors of Sask Corp and the 14 days between his notice to the respondents and the filing of his application was not enough time; and under s. 232(2)(c), the application was not in the interests of the corporation for the reasons she provided. There was some merit in the appellant's contentions regarding the conduct of P.T. but the proposed action would be extremely complicated. The judge's reservation that the proposed action was not in the interests of Sask Corp but was an effort on the part of the appellant to find personal redress was confirmed by the action the appellant had commenced against P.T.

 Back to top

R v Belcourt, 2018 SKCA 60

Herauf, July 31, 2018 (CA17171)

Criminal Law – Appeal – Notice of Abandonment – Withdrawal
Criminal Procedure – Court of Appeal Criminal Appeal Rules (Saskatchewan), Rule 36

The appellant made an application pursuant to s. 36 of The Court of Appeal Criminal Appeal Rules (Saskatchewan). He had been convicted of sexual assault in 2015 and sentenced to three years' imprisonment. His counsel filed a notice of appeal against conviction and sentence. The appeal was referred to the case management process in 2016 and the defence was ordered to file the factum by August 2016. The appellant's counsel at the time withdrew before that date and then filed a notice of abandonment of appeal. The appellant maintained that he never instructed his counsel to do so and that he never had any intention to abandon his appeal. His former counsel asserted that he received clear instructions to abandon the appeal from the appellant.
HELD: The application was granted. The appeal was reinstated to be heard on the merits. The court was satisfied that under rule 36(2), it was in the interests of justice to permit the appellant to withdraw the abandonment of the appeal. It found on the evidence that the appellant had not provided instructions to his counsel to abandon the appeal.

 Back to top

Veolia Water Technologies, Inc. v K+S Potash Canada General

Partnership, 2018 SKCA 61

Ottenbreit, August 7, 2018 (CA17172)

Civil Procedure – Appeal – Application Incidental to Appeal
Injunction – Interlocutory Injunction
Statutes – Interpretation – Court of Appeal Act, 2000, Section 20(1)

The appellant appealed the decision of a Queen's Bench chambers judge dismissing its application for an interlocutory order enjoining the respondent from drawing on two letters of credit. It then applied to the Court of Appeal for an interim order enjoining the respondent from drawing on the letters until the court rendered its decision on the appeal. The applicant argued that the appeal was bona fide and that a single judge in chambers had jurisdiction to hear the application based on s. 20(1) of The Court of Appeal Act, 2000. The relief it sought, which was not the same as the relief sought on the appeal proper, was incidental to its appeal and if granted would enable the appeal to proceed and be decided on its merits. Granting the application would preserve the rights of the parties because if the respondent was not enjoined from drawing down on the letters, its appeal for an injunction to prevent that from happening would be moot. The decision regarding the application would not decide the appeal.
HELD: The application was granted. The court was satisfied that the applicant had met the three-part test for injunctive relief and the respondent should be enjoined from drawing on the letters pending appeal. The court directed that the appeal should be expedited. The court held that whether a judge should exercise the power to determine incidental matters, preserve the status quo and prevent the frustration of an appeal is fact specific. In this case, the application differed from the appeal and the relief requested was incidental and subordinate to the appeal.

 Back to top

R v D.S., 2018 SKQB 170

Layh, June 1, 2018 (QB17570)

Criminal Law – Assault – Sexual Assault

The accused was charged with sexual assault contrary to s. 271 of the Criminal Code. The complainant, 24 years old at the time of the offence, testified that she and some friends had been drinking and then went to the accused's house on the reserve

and continued drinking there. The complainant and the accused were cousins and lived on the same reserve. The complainant fell asleep on the sofa and said that she felt safe doing so because the accused was her relative. She wakened when the accused started to touch her sexually. They then moved to the bedroom and had sexual intercourse. The complainant said had said that she didn't want to have sex a number of times but did not say it loudly nor physically resist the accused because she was afraid. While driving the accused to her home, he asked the complainant if she was going to tell anyone. The accused was 58 years of age when the alleged offence occurred. He did not testify. He raised the defence of honest but mistaken belief. HELD: The accused was found guilty. The court accepted the complainant's evidence and found that the accused had not consented to any of the sexual touching or sexual activity. Under s. 273.1(2)(b), it found that although there were several instances of the complainant's evidence that gave an air of reality to the defence, on assessing the totality of the evidence, her apparent acquiescence in going to the bedroom could not satisfy s. 273.1(2)(b) of the Code. The accused was related to the complainant and he was twice her age. There was no evidence that the accused and the complainant had ever been intimate previously and the accused knew that the complainant was seriously intoxicated. He asked her if she was going to tell anyone. Even if the court had found there was an air of reality to the defence, the court found that the accused had not taken reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting.

 Back to top

R v Prokopchuk, 2018 SKQB 184

Danyliuk, June 20, 2018 (QB17577)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purposes of Trafficking – Methamphetamines

The accused was charged with one count of possession of methamphetamines contrary to s. 5(2) of the Controlled Drugs and Substances Act. The charge was brought after the police had conducted a surveillance operation involving a suspected drug trafficker, S.A. S.A. regularly drove his vehicle to a mobile home that the police believed was his stash house. The police did not see S.A. enter the trailer, but there was video footage showing him doing so. They determined that the accused lived in the trailer, but he was never seen in the company of S.A. at the

trailer or elsewhere. In an agreed statement of facts, the accused admitted that he knew S.A. and that he had visited the trailer once and was alone in part of it when the accused was getting dressed. He did not know S.A. was a drug dealer. The police obtained a search warrant for the accused's trailer and searched when he was not present. They discovered both a hidden key and a safe in a pantry. When opened, the safe was found to contain a kilogram of meth worth $25,000 to $30,000. The safe also contained some packaging materials and a digital scale. No score sheets, cash or cell phones were discovered in the trailer and the police drug expert agreed that repackaging materials, cutting agents and scales are often kept in the same location as the drugs and repackaging is done there. The day after the search, S.A. was arrested. The accused testified that he knew nothing about the safe, the key or any drugs. He never used or sold meth or helped anyone to sell meth or any drugs. He often left his door unlocked and there was a spare key hanging near the cupboard where the safe was found. He claimed that someone entered his house and hid the safe, its key and the drugs without his knowledge.
HELD: The accused was found not guilty. The court found that the Crown had not proven the case against the accused beyond a reasonable doubt. In particular, the Crown had failed to prove beyond a reasonable doubt that the accused was in constructive possession under s. 4(3) of the Criminal Code because the element of knowledge had not been proven.

 Back to top

Kocsis Transport Ltd. v Dominion Construction Co., 2018 SKQB 187

Acton, June 21, 2018 (QB17573)

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

The applicants applied pursuant to Queen's Bench rule 4-44 to dismiss the plaintiff's action for want of prosecution. The action involved a building constructed in 1999 and had been commenced in May 2010. The principal of the plaintiff was questioned in March 2015 but did not provide replies to undertaking until November 2015. The responses were inadequate and additional responses were not provided until February 2016. The corporate plaintiff and its principal had dismissed their counsel on four occasions just before pre-trial.
HELD: The action was dismissed. The court found that the delay was inordinate and inexcusable as the plaintiffs provided no real

reason for the ongoing delay in spite of the effort made by the applicants to have the matter proceed. The action was not one in which there was any particular public interest. In the 20 years since the building was constructed, many of the employees who worked on it have disappeared or retired.

 Back to top

R v Goodpipe, 2018 SKQB 189

Kalmakoff, June 26, 2018 (QB17575)

Criminal Law – Manslaughter – Sentencing – Dangerous Offender Application
Criminal Law – Sentencing – Judge – Recusal
Criminal Law – Procedure – Reasonable Apprehension of Bias

The accused was convicted of manslaughter after trial by jury. Sentencing was adjourned while the Crown considered whether to request an assessment order for an application under Part XXIV of the Criminal Code and it had decided to do so. Counsel brought to the attention of the trial judge who would be conducting the sentencing hearing that he had been the Crown prosecutor in a criminal proceeding against the accused in 2003. In that case, the accused had entered a guilty plea to a charge of armed robbery and was sentenced to 16 months' imprisonment. The defence argued that the judge should declare a mistrial or recuse himself from hearing the sentencing proceedings. Although the defence did not allege actual bias, there was a reasonable apprehension of it because of the judge's involvement in the 2003 prosecution.
HELD: The judge held that he would not declare a mistrial but recused himself from the sentencing hearing. He stated that he had no independent memory of the 2003 prosecution until the transcript of the hearing was brought to his attention, but the fact that he had been the prosecutor was insufficient to raise a reasonable apprehension of bias. With respect to sentencing though, the Part XXIV application by the Crown would involve consideration of the accused's 2003 sentencing. The judge found that although the test for disqualification had not been met, it would be appropriate for him to recuse himself from the proceeding and the accused's sentencing hearing would proceed before another judge.

Back to top

 Back to top

Onofreychuk v Water Security Agency, 2018 SKQB 190

Scherman, June 26, 2018 (QB17578)

Statutes – Interpretation – Water Security Act

The applicants brought this application against the respondent, the Water Security Agency, in which they sought an order: 1) of mandamus requiring it to determine the outstanding complaints filed by the applicants on Februrary 2016; 2) of mandamus pursuant to s. 80(4) of The Water Security Act (WSA) directing it to conduct an investigation and make a determination within 30 days of the order in regard to the drainage works affecting the applicant's lands; and 3) of mandamus directing it to issue an order pursuant to s. 62(1)(c) of the WSA to alter or remove the drainage works causing flooding to applicants' lands. One applicant had made formal drainage complaints regarding flooding of some of his farmland alleging unauthorized drainage works installed on upstream lands. He stated that in the two years since submitting his complaint, the respondent had not done what it was required to do under s. 82 of the WSA as it existed at the time of his filing. It had failed in its statutory duty to act and it should be ordered to do so. The respondent argued that the applicant had never made a complaint or request for assistance under either the previous s. 81 or the current s. 80 (the WSA was amended effective May 17, 2017) and thus had no status to bring a mandamus application. Furthermore, mandamus was not available because under the legislation it had discretion as to how it would exercise its statutory duty. It has adopted a policy approach to dealing with water drainage issues through management approved by affected landowners. If there was a statutory duty under s. 82 of the WSA, it had ceased to exist, in respect of the applicants' February 2016 complaints, by virtue of the repeal of s. 82. HELD: The application was granted. The court found that the respondent had failed to perform its statutory duty. The court found that the appropriate order to make was to direct the respondent to perform it by investigating the complaint and either make recommendations for resolving the issues or dismiss the applicant's complaint and provide a copy of the recommendations or the decision to dismiss with written reasons as required by s. 80(5) of the WSA. The applicants' request for the third item of relief was declined. The applicants were awarded taxable costs in the amount of $8,000 pursuant to Tariff items 6 and 7, Column 3.

 Back to top

Keyes v Keyes, 2018 SKQB 191

McIntyre, June 27, 2018 (QB17576)

Civil Procedure – Contempt

The petitioner and respondent entered into minutes of settlement in January 2016 regarding the division of their matrimonial property. Both parties were represented by experienced counsel. The petitioner filed an application for a judgment of divorce shortly thereafter with a copy of the minutes appended to his affidavit. A consent judgment and consent order were executed. Under the agreement the respondent was to transfer her interest in property that the parties owned in Mexico to the petitioner. The lawyer in Mexico who was responsible for the transfer advised the respondent's counsel that since she would not be in Mexico to effect the transaction, a power of attorney must be given to the petitioner to enable the transaction to proceed. The respondent objected to executing the power of attorney because she did not want to give the petitioner an opportunity to defraud her of other property. A chambers judge suggested that the parties consider an amended order identifying the exact documents that the respondent was to sign and the lawyer in Mexico supplied them. The amended version of the order was filed by the petitioner and the chambers judge indicated that the order would have to be by consent or on notice. The respondent replied in her affidavit that she was not prepared to provide the petitioner with a power of attorney. The petitioner then applied for the respondent to be found in contempt of the court's amended judgement as a result of her failure to transfer her interest in the Mexican property.
HELD: The respondent was found to be in contempt. However, the court granted her the opportunity to purge her contempt by signing the identified documents and delivering them to the petitioner within six weeks of the date of the judgment.

 Back to top

Ngouandi v Assemblée Communautaire Fransaskoise (A.C.F.) Inc., 2018 SKQB 192

Chicoine, July 3, 2018 (QB17579)

Corporations – Non-Profit Corporations – Elections

The applicant, a member of the respondent, Assemblée Communautaire Fransaskoise (ACF), filed an originating

application that sought an order pursuant to s. 135 of The Non-Profit Corporations Act, 1995 to set aside the election of the President (Gauthier) and the Saskatoon community representative (Proulx-Cullen) of the ACF. The applicant requested that two other electoral candidates (Simard and Afane) be declared the President and the Saskatoon representative respectively. The controversy regarding the election, held in November 2017, arose because of questions regarding advance poll ballots. The electoral regulations for the ACF provide for advance polling by mail-in ballots. On the day of the election the applicant discovered that there were 100 unaccounted-for mail-in ballots. After investigating the matter, 105 ballots were found in the ACF mailbox. The declaration of the election results was postponed by the CEO of ACF because she was concerned about the process by which they had been collected and mailed. She referred the matter to the Independent Commission of the ACF. It advised the CEO that it did not have jurisdiction to intervene before the close of the election process that included the count of all advance ballots. After counting the 105 ballots, 39 were rejected, leaving 66 ballots to be included in the total count that resulted in Simard having the plurality of the votes for President and Afane taking second place in the balloting for one of the two community representatives for Saskatoon. A number of candidates applied to the Independent Commission to contest the election. The commission was created by the ACF's articles of incorporation and the electoral regulations gave it responsibility for any official recount and to hear any appeals from elections. Neither the articles nor the regulations provided guidance on the commission's procedures. The commission determined that under the regulations there were a number of irregularities in the manner in which the advance poll process occurred. Amongst its findings, the commission decided that the CEO had the responsibility to enquire of each person requesting an advance poll ballot why they would be incapable of voting on election day before she could provide such a ballot to them and that advance ballots had to be posted personally by each elector, which had not happened in this election. The commission decided that all of the 105 ballots were invalid and should not be counted. It confirmed the election of Gauthier as President instead of Simard and Proulx-Cullen as second representative for Saskatoon instead of Afane. The issue was whether the commission's decision was itself an irregularity and whether that irregularity affected the results of the election.
HELD: The application was granted. The court found that the alleged irregularities relied upon the commission to reject all of the mail-in ballots found in the ACF's mailbox were either not irregularities or not substantial irregularities calculated to affect

the result of the election. The 66 ballots were to be included in the total count for the election and therefore the court declared that Simard and Afane were elected President and Saskatoon community representative respectively. The court held that the purpose of an advance poll is to enable as many people as possible to vote in an election. The applicant was entitled to complete indemnification of his costs for bringing the application. He was awarded his reasonable solicitor-client costs.

 Back to top

Prairie Ag Petroleum Ltd. v Abo Transport Ltd., 2018 SKQB 193

Zarzeczny, June 29, 2018 (QB17580)

Contract Law – Rectification
Civil Procedure – Queen's Bench Rules, Rule 1-3

The plaintiff sought judgment to enforce a debt claimed due and owing by the corporate defendant (ABO) and judgment against the individual defendants for the amount of the corporate defendant's debt pursuant to a personal guarantee that they had each signed. The plaintiff, a wholesale distributor of petroleum products for Husky Oil and ABO, a trucking company, began a business relationship through a commercial application for credit document which was followed by the execution of a cardlock agreement that identified 10 credit cards assigned for use by ABO and its employees when purchasing bulk fuel from the plaintiff. After two months of purchases, ABO owed $64,900. The plaintiff then sent another credit application to ABO because it had engaged a new collection agency to assist it with collecting accounts. The agreement included a guarantee. The guarantee was improperly filled out, both by one of the principals of the plaintiff and by the individual defendants. The principal testified that she had had no training in completing such a document and later, when she showed it to her lawyer, he advised her of her error. She corrected the form to show that ABO was the borrower. The individual defendants testified that they had not understood the guarantee either when they signed it. They believed that the principal of ABO was guaranteeing his son's personal use of ABO's credit card under the cardlock agreement. The plaintiff brought an application to amend the claim to include a plea of rectification. Its counsel had given verbal notice to counsel for the defendants long before the trial. It was acknowledged and agreed that the application would made before trial and dealt with at trial.

HELD: The plaintiff was granted judgment against the defendant for the amount of the debt. The court granted the application to amend the claim to allow the plea for rectification pursuant to the purpose of Queen's Bench rules 1-3(2)(a) and 1-3(3)(a). However, the court found that the legal requirements for rectification of the guarantee had not been met and therefore, rectification was denied. There was no evidence that discussions occurred between a representative of the plaintiff and ABO relating to the completion of the second credit application and/or the guarantee it contained. None of the witnesses appeared to have any clear understanding or comprehension of the second credit application document and the guarantee. The failure to properly complete the documents did not support a finding that there was a meeting of the minds or a mutual agreement reached between the parties.

 Back to top

K.J.B.S. v S.G.S., 2018 SKQB 194

Megaw, June 29, 2018 (QB17581)

Family Law – Custody and Access – Variation

The petitioner mother brought an application for variation of a final order regarding custody of and access to the four children of the marriage, aged 16, 14, 12 and nine years old respectively. The final order issued in 2015 and provided that the parties would have joint custody of the children with the two oldest children, boys, having their primary residence with the respondent and the primary residence of the two youngest children, a boy and a girl, with the petitioner. The parties were to have parenting time with the non-resident children every second weekend. The terms of the order reflected a recommendation made by a psychologist who had prepared a custody and access report. The petitioner brought her application for variation in June 2016 and the court ordered an updated custody and access report. The petitioner wanted to move to a small town in Alberta about five hours away from the town where the parties resided and where all the children had been raised. She requested that all of the children move with her but, in the alternative, she would take the two youngest children and have regular access to the two eldest children. Since the parties separated in 2011, they had lived in neighbouring houses and the petitioner testified that the respondent had threatened and harassed her. She asserted that the respondent had engaged in parental alienation. The two oldest sons had treated her with

disrespect and outright hostility and the respondent had not supported the terms of access by enforcing them with the boys. Her proposed move would give her a fresh start where her sister lived. She would be able to work for her sister until she was able to find employment as a teaching assistant. In her proposal, she indicated that initially the children would have no contact with respondent for five months and after that, access would be reintroduced. The respondent opposed the move and denied the allegations. He took the position that the order should be varied so that he would have the two youngest children on a week-on, week-off basis while still being primarily responsible for the two oldest children. The updated custody and access report prepared by the same psychologist found that the two oldest children's attitudes towards the petitioner were almost exclusively negative whereas their feelings towards the respondent were almost exclusively positive. The same situation existed at the time of his first report and he believed that the relationship between the children and the petitioner had worsened. He concluded that the respondent had continued a pattern of discouraging the children from having a relationship with the petitioner. There was some evidence that the youngest son, who now expressed a desire to live with the respondent, was being influenced as well. After reading the report, the respondent acknowledged that he was contributing to the problem and needed help. He arranged to have the children placed in counselling together with the whole family.
HELD: The variation application was not granted. The court found that it would not be in the children's best interests to move to a new location because they had spent their entire lives in the area, were doing well in school and had many friends. It would not be in the best interests of any of the children for the two youngest children to move away either. Nor was there any basis upon which to change the status quo to permit the change requested by the respondent. Even though the court accepted that the respondent had engaged in inappropriate behavior, it was unable to conclude that he was involved in a concerted effort to alienate the children from the petitioner and thus this was not a material change in circumstances that would warrant a variation of the existing order. The court directed the parties to immediately engage in counselling and in six months it would review the matter as a continuation of the variation application.

 Back to top

Kormos v Kormos, 2018 SKQB 195

Brown, July 4, 2018 (QB17583)

Family Law – Family Property – Valuation
Family Law – Spousal Support

The parties married in 1991 and separated in 2014. During the marriage the respondent worked for CN and the petitioner initially stayed home with the children. In 1993 she began working in the food services industry, first operating a cafeteria and in 2010, acquiring a three-year contract providing food services for a large institution. At one point she owned a food truck and did very well with cash sales. Between 2010 and 2013, the petitioner's income tax returns showed business income between $525,000 and 1,000,000. From 2003 to 2012, the petitioner showed net income of $280,000. Her contract was terminated in 2013 because she failed to find someone to run the facility in her absence. The petitioner then bought a small resort for the sum of $894,000. The petitioner put in $240,000 of her savings and the credit union financed the acquisition of the property. It obtained personal guarantees from both parties as well as taking the parties' home and lands as security. The respondent was not in favour of this purchase because the resort's location made it difficult for him to live there and be able to fulfill his employment responsibilities with CN. The petitioner spent all of her time running her new business and although it did well in the first summer, it began to fail thereafter. The respondent's advice regarding cost-cutting measures was disregarded by the petitioner and she repeated the conduct that had cost her food services contract in that she would not delegate responsibility. The petitioner found a purchaser in 2015 and a potential sale in the amount of $949,000 was arranged with a possession date on September 1, 2015. The possession date was changed to December but instead of staying and keeping the business operating until then, the petitioner left it in September and the operation deteriorated. It was eventually sold to the purchasers for $890,000. As the mortgage was in arrears, the credit union took possession of the property and placed the petitioner's company into receivership. Because the petitioner did not attend to these matters, the credit union brought action against her and the respondent on their personal guarantees. The respondent negotiated the obligation down to $75,000 and paid the settlement off by remortgaging his farmland. The petitioner had only worked part-time occasionally since her business failed and reported her income was $12,000. She filed her petition in July 2014. Before this trial, she had made an interim application for spousal support and child support, despite the fact that their child was living with the respondent, and the court attributed income to her of $40,000 per annum. The respondent's income was set at $130,000. Amongst the issues before the court were the date or dates upon

which the family property would be valued and the appropriate division of same and whether the petitioner was entitled to spousal support.
HELD: The court held that for the purposes of the date of valuation of family property, it would use the date of petition to value the resort. It found that it was the petitioner's decision to purchase and operate the business. Thus, it was fair and equitable to use the date of application to determine its value, since the drop in its value from the date of petition to the date of adjudication was caused by her. Using that date, the resort was valued at $910,000 with debts of $765,700. The equity remaining as at the date of petition was $144,200 and it belonged on the petitioner's side of the ledger. The court used the date of adjudication to value the family home and farmland. The respondent's pension had been divided by agreement in 2016. As at February 1, 2018, the petitioner was entitled to begin receiving half of it on a monthly basis or to receive a lump sum of $197,900 and that amount was attributed to her share of the family property. As far as debts were concerned, the court decided that the petitioner was responsible for the $75,000 paid by the respondent in settling their personal guarantees with the credit union. The debt had resulted from the petitioner's abandonment of the resort. As the petitioner's credit card debts had been dealt with as business debts in the valuation of the resort, the respondent did not share them. With respect to whether the petitioner was entitled to spousal support, the court reviewed her income information from 2011 to 2016 and found it was not an accurate indicator of her ability to generate income. She had not reported her full earnings on her income tax returns. The court imputed income to her of $65,000 per year. Although she had not given up any career opportunities due to the marriage, her standard of living and had deteriorated since its breakdown. As the respondent had greater means, the court ordered him to pay spousal support in the amount of $2,500 monthly from June 2014 to February 2018 when the petitioner began receiving the pension benefit.

 Back to top

Carlson v Carlson Estate, 2018 SKQB 196

Brown, July 4, 2018 (QB17582)

Wills and Estate – Testamentary Capacity
Wills and Estates – Undue Influence

The applicant sought an order directing a trial to prove the will

of his deceased mother in solemn form and a trial to determine whether there was undue influence in the execution. The testatrix died in 2017. In her will, executed in May 2011, she left the bulk of her estate to the respondent and made him executor. In an earlier will executed in 1975, the testatrix left her property to be divided equally between all her children, should her husband predecease her. When the respondent proceeded to probate the 2011 will, the applicant learned that the will had changed substantially and brought this application. His position regarding the testatrix's competency was based upon the drastic change in the disposition of her property in 2011 and the fact that the respondent had become very involved with their mother around the time of the new will. He filed information from a neurologist who examined the testatrix in October 2012 and diagnosed her as having Parkinson's disease and related mild dementia. The lawyer who had attended upon the testatrix on two occasions to draft two codicils to her 1975 will in 1999 and 2001 and in 2011 to prepare her new will, deposed that the respondent accompanied the testatrix and that she gave him oral instructions whereas in 1999 and 2001, the testatrix had provided handwritten instructions. The lawyer stated the testatrix was of sound mind, knew who her children were and the extent of her property. The testatrix's sister-in-law deposed that the testatrix became more dependent on others as she aged and was more easily influenced as a result. The affiant stated that she witnessed the respondent demanding that the testatrix sign a document without allowing her to read it. She observed the testatrix would often do what he said even if she didn't agree with it or fully understand the consequences.
HELD: The application to have the will proved in solemn form based on the alleged incompetency of the testatrix was dismissed. The application for a trial of the issue of whether undue influence was exercised over the testatrix was allowed. With regard to the testatrix's competence, the court found that there were suspicious circumstances because the 2011 will did not distribute the property equally between the testatrix's children as had her earlier will. However, there was no medical evidence provided regarding the testatrix's condition coincident with the time of execution of her will and the lawyer's evidence was sufficient to establish that the testatrix had testamentary capacity when she signed her 2011 will. The applicant was successful in meeting the burden of proof that there was a triable interest on the issue of undue influence and a trial was ordered.

 Back to top

Firm Capital Mortgage Fund Inc. v West Canadian Development Kensington Project Ltd., 2018 SKQB 198

Mills, July 10, 2018 (QB17584)

Statutes – Interpretation – Land Titles Act, 2000, Section 107, Section 109

This application was part of the proceedings of a foreclosure action brought by the plaintiff against the defendant. It had entered into a mortgage with the defendant developer (Kensington) to secure funds that were used for the purpose and development of property in Saskatoon. The original mortgage property was subdivided in 2015 and 2017. The last subdivision resulted in the creation of 42 individual residential lots. The plaintiff advanced funds from the mortgage to facilitate the creation of the lots which would then be sold to home builders. When the subdivision was registered, it was expected to be registered against all of the 42 lots, but when the 2015 subdivision occurred, the land affected was owned by the defendant and the City of Saskatoon except for two lots, 29 and 30. When the 2017 subdivision was completed with the title for the 42 lots issuing in the name of the defendant, the mortgage of the plaintiff did not register against lots 29 and 30. When the plaintiff discovered this, two charges had already been registered against the lots, one enforcing a provincial judgment and the other pursuant to a federal judgment by the Canada Revenue Agency. The plaintiff then registered its mortgage as a charge. It sought an order under ss. 107 and 109 of The Land Titles Act, 2000 to rectify the original mortgage by adding the titles to lots 29 and 30 to the mortgage and have the same registered under the Act effective the date of registration of the mortgage. In order to retain priority, the plaintiff sought to postpone the interest of the two judgment creditors' interests registered in priority to the plaintiff. Alternatively, they sought a declaration that they had a valid equitable mortgage over the land and directing the registrar of titles to register it in priority to the creditors' claims. The defendant supported the application while the two judgment creditors opposed it. Under Queen's Bench rule 3-84 the registrar applied to be added as a party to the action.
HELD: The plaintiff's application was dismissed. The registrar's application to be added as a party was granted. The court decided that the plaintiff's mortgage could not be registered and backdated to give it a priority over intervening registered interests.

 Back to top

Hampton v Hampton Estate, 2018 SKQB 200

Elson, July 12, 2018 (QB17585)

Wills and Estates

The applicants sought an order that probate issue to them in respect of the will of the testatrix, who died in February 2017. The testatrix and her husband had executed mirror wills in 2012. The husband died in June 2017. The two named each other as the first-named executors and first-named beneficiaries; after that, the contingent beneficiaries and alternate executors were the same. Neither will specified a time required for one spouse to survive the other before the alternate executorship and bequests were to take effect.
HELD: The application was dismissed. The court found that it was necessary for the applicants to first obtain probate for the will of the husband.

 Back to top

Royal Bank of Canada v Partridge, 2018 SKQB 216

Rothery, July 31, 2018 (QB17600)

Statutes – Interpretation – Limitation of Civil Rights Act, Section 2

The plaintiff bank applied by notice of application for a deficiency judgment against the defendant pertaining to the non-purchase money portion of the outstanding indebtedness to the plaintiff pursuant to her mortgage and to some other costs related to the mortgage. The original mortgage executed by the plaintiff was for $191,000 of which $176,000 was advanced to purchase her condominium and $15,000, eight per cent of the total, was advanced for other purchases. The property sold for $156,000 pursuant to a judicial sale. The sale proceeds were distributed to pay outstanding property taxes, commission, and the principal and interest due under the mortgage in the amount of $141,945 and the net sale proceeds were to be distributed pro rata. As at November 1, 2017, the principal and interest owing on the non-purchase money portion of the mortgage was $21,250. The plaintiff requested judgment for the deficiency in the amount of $9,900 with interest to the date of judgment. It claimed it was entitled to solicitor-client costs and other costs accrued by it under the mortgage. The issue was whether such costs should be subject to the pro rata calculation for the

nonpurchase portion of the mortgage, that is, 8 percent of the total costs incurred.

HELD: The application was granted. The court found that the plaintiff was entitled to a deficiency judgment for principal and interest owed under the mortgage in the amount requested. It was also entitled to judgment against the mortgagee for eight percent of the solicitor-client costs, condominium fees and property management charges.

Back to top