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. 6 **March 15, 2018**

Subject Index

R v Perillat, 2018 SKPC 1

Anand, January 4, 2018 (PC17091)

Criminal Law – Impaired Driving – Driving Over .08 – Sufficient and Reasonable Grounds – Exclusion of Evidence – Charter Violation
Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 10(b), Section 24(2)
Constitutional Law – Charter Section 10(b) – Prosper Warning – Right to Retain Counsel

The accused was charged with impaired driving and blood alcohol exceeding .08. After receiving a tip from casino staff that the accused was impaired, the police located her vehicle, followed it and made observations of its driving pattern before stopping it. After observing the accused's behavior, the police arrested her and made a breath demand of her. Prior to providing breath samples at the detachment, the accused requested to speak with a specific lawyer. When police received no response from the requested lawyer, the accused agreed to provide the breath samples. At issue was: 1) whether the accused's s. 10(b) Charter right was violated because the officer failed to give her a Prosper warning; 2) whether the officer lacked reasonable grounds to make a breath demand of the accused pursuant to s. 254(3) of the Criminal Code and thereby infringed her s. 8 and 9 Charter rights; 3) if there was a violation of Charter rights, what was the appropriate remedy; and 4) whether the admissible evidence established, beyond a

reasonable doubt, that the accused's ability to operate a motor vehicle was impaired by alcohol. HELD: The accused was not guilty on either charge. 1) The accused's s. 10(b) right was not violated. Before police are required to give a Prosper warning, a detainee must not only have asserted her right to counsel, but also have been reasonably diligent in exercising her right to counsel. When the requested lawyer was unavailable, the accused immediately consented to the breath demand. The officer did advise the accused that they could stop and contact a lawyer, but the accused did not ask to speak to a lawyer again. There was nothing in the facts that would have estopped the Crown from raising the issue of due diligence. 2) The accused's s. 8 and 9 Charter rights were infringed. The relevant time to test whether a police office has the requisite reasonable grounds to believe a driver's ability to operate a vehicle is impaired by alcohol is the time at which the formal breath demand is made. The basis for the officer's breath demand could be summarized as consisting of the tip from the casino, the accused speeding and slightly swerving within the lane, the fact that the driver in front of the accused pulled over before the accused did when the officer activated his emergency lights, the accused's glassy eyes and her smoking a freshly lit cigarette. The officer subjectively believed that the accused was impaired, but the objective component of the s. 254(3) test was not met. The officer's reasonable suspicion coupled with his knowledge of her operation of the motor vehicle should have led him to make an approved screening device demand under s. 254(2). On the whole of the evidence relied upon by the officer in making the breath demand, the reasonable and probable grounds standard was not met. The breath samples were obtained without lawful authority resulting in a breach of the accused's s. 8 Charter rights. As the officer did not have reasonable and probable grounds to arrest the accused for an offence under s. 253, her detention violated s. 9 of the Charter. 3) The officer was clearly negligent in his failure to preserve the accused's s. 8 and 9 rights. The Charter-infringing conduct was quite pronounced. The breach of s. 9 in the guise of the unlawful arrest went to the heart of the values and interests protected by that constitutional guarantee. The accused was detained for significantly longer than a roadside sample would have taken. The impact on the accused's s. 9 rights constituted a significant interference with her right to liberty. 3) The admission of the Certificate of Analysis would bring the administration of justice into disrepute. The Certificate being excluded, the elements of the .08 charge were not made out. 4) The admissible evidence consisted of the testimony of the investigating officer and of three civilian witnesses, each of whom was a casino employee. There was no good evidence that the accused slurred her speech or struggled

with balance or coordination. Testimony indicated that she responded appropriately to questions and did not appear confused or disoriented. Her driving appeared normal. The evidence was not sufficient to establish beyond a reasonable doubt the elements of the offence of impaired driving.

 Back to top

Nicor Community Management Inc. v Lamoureux, 2018 SKPC 2

Demong, January 8, 2018 (PC17092)

Debtor and Creditor

The plaintiff sued to recover monies owing for a parking stall rental. The plaintiff was manager of a condominium association and the defendants were members thereof. The defendants rented two parking stalls and contractually agreed that payments would be made by authorized withdrawal from their bank account. Due to an accounting error, the plaintiff failed to withdraw sufficient funds from the defendants' account over a period of 31 months. Upon notice of the error, the defendants refused to pay the shortfall. The defendants counterclaimed for the sum that they were charged for their second parking stall in the last five months of 2016. HELD: The defendants were jointly and severally liable to the plaintiff for the shortfall, plus prejudgment interest thereon. The defendants contracted for and used two parking stalls during the disputed time frame. The monies withdrawn from the defendants' account during the disputed time frame was insufficient to pay for two stalls. The defendants advanced no legal argument. The counterclaim had no foundation in fact or in law and was dismissed with costs.

 Back to top

Wilchuk v Westfield Twins Condo Corp., 2018 SKQB 2

Layh, January 8, 2018 (QB17383)

Statute Interpretation – Condominium Property Act

The applicant sought an oppression remedy under s. 99.2 of The Condominium Property Act against the condominium corporation and its board of directors. He alleged that the board approved special assessments and implemented increases in condominium fees without lawful authority and the majority

Toronto-Dominion Bank v Gibbs

Wilchuk v Westfield Twins Condo Corp.

consent of the corporation. The board undertook a reserve fund study as required by s. 51.2 of the Act. On the basis of the study, the board passed a motion approving a special assessment and an increase in annual condominium fees. The applicant argued, on the basis of ss. 56, 57, 58 and 34 of the Act, that the entirety of the unit owners, not the board, was statutorily authorized to enact resolutions respecting condominium fees and assessments for the reserve fund.
HELD: The application was denied. A condominium corporation must act and exercise powers pursuant to the Act and the corporation's bylaws. The board is the directing mind of the corporation, as stated in s. 39 of the Act. Sections 54, 56, 57 and 58 impose obligations on the corporation to pay necessary expenses, levy fees, contribute condominium fees to a common expenses fund and a reserve fund and to determine the amounts needed for the reserve fund. The Condominium Property Regulations mandate the timing of reserve fund studies and provide that contributions to the two funds must be levied in proportion to the unit factor of each owner's unit. The applicant's arguments having failed, his allegation that the corporation and board acted oppressively could not stand.

 Back to top

R v Graham, 2018 SKQB 3

Tholl, January 8, 2018 (QB17384)

Criminal Law – Assault
Criminal Law – Uttering Death Threats

The accused was charged with assault contrary to s. 266 of the Criminal Code and uttering a threat to cause death contrary to s. 264.1(1)(a). The accused, a truck driver, picked up the complainant hitchhiking. While stopped for the night, the pair consumed alcohol and an altercation occurred. A witness video-recorded the altercation on his cell phone. The accused pled not guilty. He admitted to a physical altercation and stating certain things, but submitted his actions were in self-defence.
HELD: The accused was guilty on both counts. The accused intentionally applied force to the complainant during the incident without the complainant's consent. The accused admitted he had done so in his testimony and police statement. Cell phone videos and witness testimony also confirmed that the accused had done so. The Crown proved all of the elements of the offence of uttering threats. The accused uttered words to the complainant that a reasonable person, aware of the

circumstances in which the words were uttered, would consider to be a threat to cause death. The actions, words and tone of the accused were recorded and proved beyond a reasonable doubt that the accused intended his words to convey a threat, intimidate and be taken seriously. It was not relevant that the accused had no intention to kill the complainant and never would have carried out his threat. The accused was not defending himself. The complainant did not engage in any physical action to threaten the accused. The accused was not, at any point, in imminent danger of any physical force being used against him, as confirmed by video evidence.

 Back to top

628356 Saskatchewan Ltd. v Water Security Agency, 2018 SKQB 4

Barrington-Foote, January 3, 2018 (QB17391)

Civil Procedure – Queen's Bench Rules, Rule 3-42, Rule 7-9

The plaintiffs sought damages against the defendant Water Security Agency (WSA) in the amount of $436,500. Before it had filed its defence, the WSA applied for an order dismissing the plaintiffs' claim under Queen's Bench rules 7-9(1) and 7-9(2). The plaintiffs then applied to amend their statement of claim pursuant to Queen's Bench rule 3-42. The action related to flood prevention and remediation work undertaken by the plaintiff WDK for the plaintiffs 628356 and Kuzub in 2014. They alleged that an employee of WSA, Puckett, promised that the WSA would provide funding for the work. In their pleadings the plaintiffs claimed that Puckett advised Kuzub that flooding in 2014 would harm his campground and resort and that a berm should be constructed around the property. He said that he was permitted to advance $150,000 at the outset and also later informed Kuzub that quotes obtained by the latter to construct the berm and conduct remediation had been approved by the WSA and that work should start immediately. Kuzub, as the sole owner of the corporation that operated the campground, instructed WDK to undertake the works. Afterward, Puckett approved draft invoices totaling $436,500. WDK sent invoices to Kuzub which he forwarded to the WSA. The WSA initially advised the plaintiffs that only two invoices were eligible for funding and then refused to pay any of the invoices. The plaintiffs claimed that the WSA thereby breached the contract and the plaintiffs suffered damages. They also claimed that the WSA was unjustly enriched because it achieved its purpose of

minimizing the costs of flood damage to the lands while not financially contributing to the costs of flood protection. As well, WSA misrepresented that it would provide funding and in reliance upon it, the plaintiffs acted accordingly, to their detriment. The WSA filed the affidavit of an employee who deposed that none of the plaintiffs filed applications for funding for the works at issue and that there was no agreement signed between them. The plaintiffs did not obtain any of the regulatory approvals that were required before undertaking the works. Kuzub deposed in his affidavit that he did not know that Puckett did not have the authority to approve the work nor that some of the work was ineligible for funding.
HELD: The applications of both parties were granted in part. The WSA's application to dismiss the plaintiffs' claims in contract and unjust enrichment were granted, but its application to dismiss the plaintiffs' claim in misrepresentation was dismissed. The plaintiffs' application to amend the statement of claim regarding misrepresentation was granted. With respect to the application to dismiss as disclosing no reasonable cause of action, the court decided that: 1) the plaintiffs' claim for breach of contract should be struck. It was unnecessary to decide whether the proposed amendments would cure the defects in the original pleadings because s. 6(2) of the Water Security Act requires that the Lieutenant Governor in Council approve grants in excess of $100,000.00 and in this case, the alleged contract was not approved and therefore was not binding; 2) the plaintiffs' claim for unjust enrichment should be struck because the WSA was not obliged to do anything to reduce the risk or impact of flooding on the lands in question whether by providing a grant to the plaintiff or otherwise; 3) the plaintiffs' claim for misrepresentation was not struck. The court allowed the proposed amendments despite finding that they were deficient regarding fraudulent misrepresentation, but exercised its discretion to permit the plaintiffs to cure the defects in their pleadings.

 Back to top

Petryshyn v National Leasing Group Inc., 2018 SKQB 5

Elson, January 3, 2018 (QB17385)

Creditors and Debtors – Lease – Farm Equipment – Saskatchewan Farm Security Act

The respondent was the secured party under two leasing agreements executed by the applicants. The applicants were in

arrears on both leases. The respondent served two Notices of Intention to Enforce Security with respect to the equipment under the leases. The applicants applied for hearings on both notices. The applicants acknowledged the arrears under both leases and agreed to return the equipment under one lease, but sought relief from forfeiture in respect of equipment under the second lease. They said that they required such equipment to seed their 2018 crop. All but one quarter of their land had been transferred from them pursuant to a collateral mortgage. They were involved in litigation proceedings from which they expected to receive some funds.
HELD: The court ordered the applicants to deliver the contested equipment to the respondent, but postponed operation of the order until April 30, 2018. The order was subject to the condition that the applicants exercised best efforts to secure a purchaser of the equipment prior to April 30, 2018. The issues raised in the application pertained to the applicant's inability to pay, thereby invoking the court's jurisdiction under s. 53 of the Saskatchewan Farm Security Act. The court could make an order it considered just, within the confines of s. 53(2). The order made struck a balance between the interest of the applicants, who sought temporary relief from their default, and the interests of the secured creditor. There was no evidence that the applicants would be able to farm any more than the single quarter of land that they still possessed. The potential benefits from the pending litigation did not assist their case. They had virtually no control over the litigation and the ability or right to collect any proceeds appeared doubtful. The only basis for relief related to the value of the equipment. The court was satisfied that the applicants should have the opportunity to sell the equipment at a price greater than the respondent's evaluation.

 Back to top

Saskatchewan (Workers' Compensation Board) v Petkau, 2018 SKQB 7

Layh, January 25, 2018 (QB17399)

Bankruptcy and Insolvency – Discharge – Application to Lift Stay
Statutes – Interpretation – Bankruptcy and Insolvency Act, Section 69, Section 178
Statutes – Interpretation – Workers' Compensation Act, 2013, Section 112, Section 170

The applicant, Petkau, a discharged bankrupt, applied for discharge of a judgment that had been entered against him by the Workers' Compensation Board (WCB) in September 2015 as

well as the resulting enforcement charge. The WCB sought an order pursuant to s. 69.4 of the Bankruptcy and Insolvency Act (BIA) 1) lifting the stay of proceedings against Petkau nunc pro tunc; and 2) declaring pursuant to s. 178(1)(e) of the BIA that Petkau's discharge from bankruptcy did not release him from the judgment. The background to the applications was complicated. Petkau had been injured in an accident in 2007 and became entitled to compensation from the WCB. Between 2011 and 2012, he received benefits from them but also worked on a casual basis and failed to report his earnings. This failure led to Petkau being charged in September 2014 with defrauding the WCB in the amount of $50,000 contrary to s. 380(1) of the Criminal Code. In January 2014, Petkau made an assignment in bankruptcy and listed the WCB as an unsecured creditor for $20,000. At the same time, the WCB submitted a proof of claim in the bankruptcy for payment in the amount of $44,000. Petkau pled guilty in June 2015 to the criminal charge, but the judge was unable to determine from the evidence the amount of fraudulently unreported income Petkau had earned in his casual employment, so set it at $5,001. The WCB issued an order in September 2015 stating that Petkau owed it $39,000 in overpayment, acting under s. 112(1) and s. 170 of The Workers' Compensation Act, 2013, and filed the order with the Court of Queen's Bench as a judgment. It also registered an enforcement charge in that amount against land that Petkau was in the process of selling. Petkau's trustee advised the purchaser that the charge would disappear, but it remained extant against the land after the sale was completed. In October 2015, the trustee discharged the bankrupt and advised the WCB that as it had not proceeded properly under s. 69.3 of the BIA, the proceedings were stayed, and creditors could not continue or commence any action for recovery of a claim provable in bankruptcy, and for the WCB to have done so would have required it to obtain leave of the court and then prove that the debt fell under s. 178 of the BIA. The WCB had not followed this procedure but refused to remove the lien. The issues were: 1) whether s. 178(1)(e) of the BIA had been proven. Had Petkau incurred a debt arising out of false pretences? If no, the debt would not have survived the discharge. If yes, then what was the amount of the debt attributable to Petkau's fraud; and 2) should the court exercise its discretion under s. 69.4 of the BIA and lift the stay of proceedings?

HELD: The court granted both applications. It found with respect to each issue that: 1) the debt survived the bankruptcy in that s. 178(1)(e) of the BIA had been proven, not as a result of the WCB's order, as it had not conducted a hearing, but by Petkau's guilty plea to the charge under the Code. The court accepted the findings of the criminal trial judge regarding the amount of debt

incurred through Petkau's fraud; and 2) it would exercise its discretion and lift the stay of proceedings because the WCB had established that it had been materially prejudiced under s. 69.4(b) of the BIA as it had found fraudulent misrepresentation. However, the WCB had waited for over two years before applying to lift the stay. In the circumstances, the court ordered that upon payment of $5,001 to the WCB, Petkau would be relieved of any further obligations to it and WCB would withdraw the enforcement charge against the land.

 Back to top

Stubbings v Stubbings, 2018 SKQB 8

Layh, January 4, 2018 (QB17386)

Real Property – Partition and Sale

The applicant requested that the court grant a vesting order, vesting title to his residence solely in his name without any consideration or alternatively a sale of one-half the value of the property to the respondent. The applicant and the respondent were father and son. In 2014, the applicant transferred the title to his condominium residence into the joint names with right of survivorship with his son. The applicant had been advised that the transfer would save probate fees. The respondent asked the applicant at the time of transfer whether he owed anything to the applicant and was told that he did not. The parties had a falling out following the transfer and the applicant began to suffer health problems and wanted to move into assisted living. He needed the proceeds of sale from the condominium to pay for his care. The issues were: 1) what was the respondent's legal status as a gratuitous transferee of a joint interest in the property; 2) whether the applicant had the right to seek partition or sale of the property; and 3) if the sale were ordered, could the applicant buy it and how should the proceeds of sale be divided?
HELD: The application for sale was granted and the court ordered a sale in lieu of partition of the property pursuant to s. 4 of the Partition Act, 1868. Upon payment into court of half the value of the property, the applicant would be able to order the Information Services Corporation to issue a new title registered in his sole name whereupon the funds in court would be paid out to the respondent. The court found with respect to each issue that: 1) the respondent was a gratuitous transferee and that he had rebutted the presumption of resulting trust because of the evidence of the applicant's intention at the time that he placed the title in joint tenancy; 2) the applicant was entitled to request a

sale of the property under s. 4 of the Act as he held a half-interest in it and it would be impossible to partition a condominium. In the circumstances of this case, there were no grounds that would permit the court to refuse an order for sale. Under s. 5 of the Act, the court had the discretion to allow the applicant to purchase the respondent's interest; and 3) there was no evidence to rebut the presumption that the parties held equal interests in the property and thus the sale of the proceeds should be shared equally.

 Back to top

Shinkaruk Enterprises Ltd. v City of Saskatoon, 2018 SKQB 9

Scherman, January 4, 2018 (QB17393)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike
Statutes – Interpretation – The Cities Act, Section 329, Section 347
Civil Procedure – Queen's Bench Rules, Rule 3-14

The defendant, City of Saskatoon, and the individual defendants, employees of the City, applied to strike out the plaintiffs' statement of claim on the grounds that the court had no jurisdiction with respect to the claims, it disclosed no reasonable cause of action and was an abuse of process. Acting pursuant to the City's property maintenance bylaw, one of the defendant employees issued an Order to Remedy Contravention (ORC) on September 21st against the plaintiff corporation regarding property owned by it and posted the notice on the door of the property, sending another notice by registered mail. The ORC stated that the contraventions had to be remedied by October 13th. The appeal deadline for the ORC was October 6th, but no appeal was taken. On October 6th, the defendant Shinkaruk spoke to the officer about the ORC and then on October 12th requested that she extend the time to remedy, but she advised him orally and by letter on October 12th that the deadline remained in effect. He contacted the other employee defendants during the appeal period, requesting their assistance, but they declined to intervene. On behalf of the corporation, Shinkaruk sent a notice of appeal on October 21st to the Property Maintenance Appeal Board, requesting a stay of the ORC's date of remedy. Shinkaruk deposed in his affidavit that he delivered the notice on the same date. However, the date stamp of the City Clerk's office indicated October 27th. The board advised the plaintiffs that the appeal was not accepted as it had not been

filed within the permitted 15-day period for an appeal. On October 25th, the City cleaned up the property. It assessed its costs to do so in accordance with ss. 57 to 59 of the bylaw and s. 330 of The Cities Act. The plaintiffs commenced their action, alleging that the City and its employees were not entitled to proceed as they did under the bylaw and the Act because the plaintiffs were never properly served with the ORC. If it had been served, then it was on October 9th when Shinkaruk signed for receipt of registered mail and as a consequence, the appeal period expired on October 24th. As they had appealed to the board by October 21st, the City proceeded unlawfully to remedy. The plaintiffs argued that there was an agreement to extend the time for compliance with the ORC and that a reasonable cause of action existed because of the agreement. The City argued that: 1) under Queen's Bench rule 3-14, it objected to the jurisdiction of the court. The Act and the bylaw created a complete code and appeals were only allowed under s. 329 of the former. Because the plaintiff failed to appeal within the 15-day period, there was no decision by the board to appeal to the court; 2) the claim did not plead a cause of action in contract; 3) the claim was an abuse of process.

HELD: The application to strike the plaintiffs' claims was allowed. The court found with respect to each ground of the application that: 1) the plaintiffs had not appealed the ORC within the 15 days provided by the bylaw and as there was no decision of the board, the court did not have jurisdiction; 2) the evidence showed that the City served the plaintiffs properly in accordance with s. 347 of the Act. The City had the right to remedy the nuisances to which the ORC related and there was no basis on which the corporate plaintiff could succeed in its action. The claim was struck on this basis. The claim against the employee defendants was struck as they were protected by immunity provided by s. 317 of the Act; and 3) the evidence showed that Shinkaruk knew of the ORC on October 6th because of his discussions with the employee defendant and simply ignored the requirement to appeal. Therefore, this claim was an abuse of process and would be struck on that basis as well.

 Back to top

P.M. v S.M., 2018 SKQB 10

Krogan, January 5, 2018 (QB17387)

Family Law – Spousal Support – Review

The parties separated in 2007 after 29 years of marriage. Issues of

division of family property, child and spousal support were settled at trial in 2011 (see: 2011 SKQB 126). The trial judge established that the respondent wife was entitled to support and that on the basis that the petitioner's average income from 2007 to 2009 was $431,000, he should pay support in the amount of $8,000 per month. The petitioner appealed the trial judge's decision to the Court of Appeal. On the issue of spousal support, the court modified the decision by allowing a review of the petitioner's obligation after December 31, 2014 when he turned 60 for the purpose of revisiting the issue when his retirement situation was clearer (see: 2012 SKCA 55). The respondent applied at that date to have spousal support continued and the petitioner resisted. The petitioner had ceased working full-time as a commercial real estate broker and intended only to dabble during his retirement. He sought to have his spousal support reduced to $2,500 retroactive to March 2015 and to have his obligation terminate as of January 2017. He argued that his annual income would be dropping from the $431,000 upon which the current payment was based and the respondent had been adequately compensated for any hardship resulting from the parties' marriage and its breakdown through the division of family property. The judge considered the petitioner's average income from 2012 to 2015 and concluded that continued spousal support in the amount of $8,000 was warranted until such time as the petitioner's 2016 income was known. The review was adjourned until the date of this hearing. At it, the petitioner's income for 2016 was set at $211,200. The court learned that in addition to his personal income, the petitioner was also a sole shareholder in a corporation through which he acted as a real estate broker. In 2015 the corporation had become a holding company for the petitioner's investments. The company had accumulated $1,500,600 in retained earnings. The respondent argued that although the petitioner's income had decreased due to his change in work status, he could supplement his personal income by drawing dividends from his holding company. She also submitted that the petitioner's decision to retire was unreasonable.

HELD: The respondent's application was granted. The court ordered the petitioner to continue paying spousal support of $8,000 per month until October 2019 when the matter could be brought back before the court for further consideration. The court found that the respondent's decision to retire was not unreasonable, but his reduced income did not automatically result in an inability to continue paying spousal support. The original order setting the amount of support had been based upon the petitioner's average annual income, but he had in fact had a much higher income. The increase in the petitioner's income after trial was due to the contributions made by the

respondent to his career during the marriage.

 Back to top

Feng v Saskatchewan (Ministry of the Economy), 2018 SKQB 11

Gabrielson, January 9, 2018 (QB17400)

Administrative Law – Judicial Review

The applicant applied for judicial review of the decision of the Government of Saskatchewan revoking its approval of his immigration to Saskatchewan pursuant to the Saskatchewan Immigrant Nominee Program (SINP). In January 2014, his prospective employer, OK Tire in Saskatoon, received approval from SINP for international recruitment for the position of mechanical engineering technologist and the approval was valid for six months. The applicant then applied to SINP for approval of his immigration to Canada. SINP received the application in February 2014. In September, the Saskatchewan Ministry of the Economy advised the applicant that his application under SINP had been approved and he then applied for permanent residency through Citizenship and Immigration Canada (CIC). After CIC expressed concern to the ministry in September 2015 regarding the validity of the job offer, the ministry investigated. It left two telephone voice messages with OK Tire but received no response. In early 2016, the ministry notified the applicant that his offer from OK Tire was no longer valid and that he had to acquire a new one. The applicant notified OK Tire, they advised the ministry that they had not withdrawn the job offer, and the ministry began an investigation into the revocation of the nomination. However, before it was completed, OK informed the ministry that it no longer required the engineering technologist position. The applicant was again advised in June 2016 that he needed a new offer from a different employer to maintain his nomination with SINP and the nominee approval process was extended until December. During that month, the applicant advised SINP that a new Saskatchewan employer was prepared to hire him and he was told by the ministry that he must provide confirmation of the job offer by mid-January 2017. When the ministry had not received any of the documentation required, it notified the applicant in April that his nomination had been revoked on the basis that he did not have a valid job offer. CIC then refused the applicant's application for permanent residence in Canada because of the nomination revocation. The issues were: 1) what was the standard of review for this judicial review; 2) was the decision to invalidate the job offer subject to review by

the court; 3) was the decision to revoke the applicant's nomination under the SINP reasonable; and 4) was the applicant afforded procedural fairness?
HELD: The application was dismissed. The court found with respect to each issue that: 1) the standard of review to be applied to the actions of the ministry was reasonableness; 2) the applicant did not have standing to challenge whether a decision to invalidate the job offer was reasonable, as the matter was between OK Tire and the ministry; 3) the ministry's decision was justifiable, transparent and intelligibly-made and fell within the range of acceptable outcomes. The applicant knew that his nomination was subject to maintaining his job offer from OK Tire. Regardless of why it was revoked, it occurred before his immigration approval was finalized. He was given additional time to seek an approved job, but was unable to find one; and 4) the applicant was afforded procedural fairness. The court assessed the five factors set out in Baker v Canada and found that the ministry had followed its policies and procedures. The applicant had no right to continued nomination after OK Tire had withdrawn its employment offer. The ministry had afforded him the opportunity to find a new position.

 Back to top

Toronto-Dominion Bank v Gibbs, 2018 SKQB 12

Barrington-Foote, January 9, 2018 (QB17394)

Mortgages – Judicial Sale – Deficiency Judgment

The plaintiff bank applied for an order for payment out of proceeds realized from the sale of the defendant mortgagor's property in the course of this foreclosure action. The amount paid in was $132,700 representing the net proceeds from the sale price of $140,000 after adjustment for the real estate commission and taxes. The plaintiff sought a deficiency judgment and payment out of $124,300 which included principal, interest and taxes (PIT) accruing during the 31 days following payment in of the proceeds and $7,300 in legal fees. The plaintiff also sought recovery for costs from October 2015 to October 2017 for legal fees of $11,300 plus disbursements and taxes for a total of $14,270. The action was commenced in May 2014 and an application for leave to commence was made in June 2014. Because of problems encountered with serving the defendant, the plaintiff applied for substitutional service eight months later, but it was refused on the basis that there was insufficient evidence the proposed method would be effective. Two more

applications relating to service were refused. Eventually, six months later, the plaintiff obtained an order for substitutional service and leave to commence was granted in October 2015. The defendant was noted for default in November. In February 2016 the plaintiff's application for an order nisi for sale was granted and it gave judgement for $105,700 which included PIT and the $7,300 in legal fees. The upset price was set at $196,000 based upon a drive-by appraisal of $235,000 to $245,000. The property was not listed and 12 months later the plaintiff made another application without notice for a further order for sale with an upset price of $115,000, based on a comparative appraisal of $139,000 that was made after a physical examination of the residence showed that the earlier appraisal was too high. The judge refused the application and instructed the plaintiff to apply on notice and to provide further evidence of its efforts to sell the property. Another application without notice was also refused as was another application for a new order nisi for sale. In June 2017, a second order was granted with the upset price of $115,200 and judgment was given in the amount of $115,900 including the same PIT and legal fees. An order approving sale for $140,000 was granted in September 2017. The plaintiff did not provide evidence explaining any of the delays. HELD: The application was granted. The court granted a deficiency judgment plus PIT, but not legal fees, to December 31, 2015, being 19 months after the action was commenced. The court determined that the matter should have been completed within 18 months after the action was commenced rather than the 43 months it had taken due to the plaintiff's missteps. The plaintiff was granted leave to submit a detailed calculation of the deficiency on that basis. Costs were assessed at $6,500 plus disbursements on the basis of the numerous applications required and that disbursements were increased by the plaintiff's missteps. As in the case of Wolff, the mortgagor should not be obliged to bear the increased PIT and costs that resulted from the inordinate delay caused by the plaintiff. The account rendered for legal fees reflected the inordinate time spent as a result of the missteps and was not sufficiently particularized.

Back to top

 Back to top

Geissler v Geissler, 2018 SKQB 14

Megaw, January 10, 2018 (QB17388)

Family Law – Spousal Support
Statutes – Interpretation – Court Jurisdiction and Court Proceedings Transfer Act

The parties entered into an interspousal contract and separation agreement in 2010. A judgment for divorce was granted in Saskatchewan in 2011. The separation agreement provided for payment of child support from the respondent to the petitioner and payment of spousal support from the petitioner to the respondent. Under the agreement, spousal support was to terminate in May 2017. In 2012, the respondent relocated to Halifax. At some point she brought an application in Nova Scotia (N.S.) pursuant to the Divorce Act to terminate her child support obligations under the agreement and to obtain an order for spousal support. The court made a number of different orders but eventually determined that the respondent's obligation to pay child support was terminated and the petitioner was to continue paying spousal support in the amount of $750 per month. The petitioner brought this application in Saskatchewan for an order terminating the payment of spousal support by varying the order of the N.S. court. The respondent applied to have the court decline jurisdiction over the matter and have the variation application proceed in N.S. pursuant to the provisions of The Court Jurisdiction and Proceedings Transfer Act (CJPTA). The respondent deposed that her annual income was $8,200 and that she continued to suffer economic hardship resulting from the breakdown of the marriage. She did not have the resources to pay for her psychiatrist, psychologist and physician to attend as witnesses in the proceedings in Saskatchewan. Their evidence would be offered to support her claim that spousal support should be continued. The petitioner did not object to the application of the CJPTA nor to the procedure advanced by the respondent. The only evidence he intended to present was his own testimony.

HELD: The respondent's application was granted. Under s. 13 of the CJPTA, the court determined that it would request the N.S. Supreme Court (Family Division) to accept a transfer of the proceeding. It found that it had jurisdiction over the proceedings under the Divorce Act and decided that the transfer provisions in Part 3 of the CJPTA applied to the application to vary the spousal support order rather than following s. 18 of the Divorce Act. Under s. 10(2)(a) of the CJPTA, the comparative convenience and expense to the parties and their witnesses favoured the request to transfer the proceedings to N.S.

 Back to top

Casbohm v Winacott Spring Western Star Trucks, 2018 SKQB 15

Kalmakoff, January 11, 2018 (QB17389)

Civil Procedure – Pleadings – Statement of Claim – Application to Amend
Civil Procedure – Applications – Affidavits – Application to Cross-Examine
Civil Procedure – Summary Judgment
Civil Procedure – Queen's Bench Rules, Rule 1-3, Rule 5-20, Rule 6-13, Rule 7-2, Rule 7-3, Rule 7-5

The applicant sought leave to amend his statement of claim pursuant to Queen's Bench rule 3-72 and an order permitting cross-examination of the deponents of three affidavits filed by the defendants in support of their application for summary judgment. In 2004, the plaintiff had been injured in a fall from a stepladder that had been provided to him by the defendant and used by him on their business premises. The plaintiff's statement of claim, issued in 2006, was framed both in the tort of negligence and in occupier's liability, and he sought general and special damages and specific sums owing both under the Department of Health Act and to his private healthcare insurer. The defendants denied liability and alleged contributory negligence. In July 2017, the defendants filed an application for summary judgment, requesting that the plaintiff's claim be dismissed on the basis that he caused his own injuries because they had provided him with a ladder of the appropriate height, but he had chosen to use a shorter ladder. In November 2017, the plaintiff filed his own application for summary judgment that sought a finding of liability on the part of the defendants. He submitted that the ladder supplied to him by the defendants was inadequate to the task and must have had pre-existing damage. That application was accompanied by this application for leave to amend his claim and the order to cross-examine the defendants' deponents on their affidavits. The defendants objected to the plaintiff's proposed amendments, saying that they asserted new causes of action, and as the limitation period had expired, they would be subject to s. 20 of The Limitations Act. Regarding the plaintiff's request to cross-examine on affidavits filed by the defendants in support of the application for summary judgment, the defendants argued that such application was premature, could only be properly heard and determined by the judge who would hear the applications for summary judgment, and only after the judge had determined that there was a genuine issue requiring a trial as set out in rule 7-5. They further argued that: by filing his competing application for summary judgment, the plaintiff had represented to the court that all evidence necessary to decide the matter was already before it, and therefore he had abandoned his opportunity to cross-examine; cross-examination would not assist in resolving the issues before the court; there was no provision in the Rules permitting cross-examination of an expert on an affidavit,

thereby preventing the plaintiff from cross-examining one of the deponents who offered opinion evidence; and in the case of another deponent who was a non-party, rule 5-20 did not permit him to be cross-examined.
HELD: The application was granted. The court gave leave to the plaintiff to amend his statement of claim and ordered that he could cross-examine the deponents on their affidavits. It found with respect to the proposed amendments that none of them asserted new causes of action and were thus subject to Queen's Bench rule 3-72. The court exercised its discretion and decided that it would permit the amendments to be made, as it would not cause any injustice to the defendants that could not be adequately compensated through costs. The court found that Part 7 of the Queen's Bench Rules was silent respecting the procedure and timing of cross-examination on affidavits in summary judgment applications. However, the plaintiff could cross-examine the deponents under Queen's Bench rule 6-13(1) and there was authority to support the idea that such cross-examination should occur before the summary judgment application was heard so as to allow the parties to put their best evidentiary foot forward. The court found with respect to the defendants' other objections that: the plaintiff had not precluded himself from making application to cross-examine on the affidavits by filing his own application for summary judgment because to interpret the Rules in that manner was contrary to their spirit and purpose. In addition, rule 7-3(1) contemplated that summary judgment applicants could challenge the evidence given by another party; the plaintiff had demonstrated that cross-examination of the expert would assist in resolving the issue of liability and met the principle set out in rule 1-3; and rule 5-20 and rule 5-43 only apply to questioning within the scope of Part 5 and not to examination on affidavits in relation to an application governed by rule 6-13.

 Back to top

J.E.S. v J.G.B., 2018 SKQB 17

Wilkinson, January 15, 2018 (QB17401)

Family Law – Family Property – Evaluation
Family Law – Spousal Support- Determination of Income

The parties separated after 26 years of marriage and two children, aged 19 and 17 at the time of trial. For the first ten years of the marriage, the petitioner wife worked as a lawyer and the respondent as an investment advisor with RBC Dominion

Securities. After the birth of their children, the petitioner focused predominantly on the children while continuing to work in positions that were flexible in terms of time. In 2008, she returned to work full-time as an executive with a credit union and earned over $200,000 per annum. However, in 2013 the petitioner's position was eliminated and she received a payout of $104,400. During the marriage the respondent stayed in his position and flourished as an investment advisor. In 2014 the petitioner left the marriage and after issuing her petition for divorce and division of property (child and spousal), the parties reached a consent order in July 2014 based upon the petitioner's income of $104,400 (representing her severance payment) and the respondent's income of $614,400. The order provided for joint custody and a hybrid parenting arrangement, spousal support of $4,000 per month, child support of $6,689 per month and allocation of s. 7 expenses at 21 and 79 percent to the petitioner and respondent respectively. In the event that the petitioner was unable to obtain employment at a minimum income of $104,400 by January 1, 2015, she was entitled to seek a review of spousal support. She found contract employment in the spring of 2015 that paid $60,000 but left after two months because the work atmosphere was unsatisfactory and then obtained casual employment in a clothing store. By the end of 2015 the petitioner applied to increase spousal support. It was increased to $11,000 per month based upon her income of $5,000 and the respondent's income of $685,000. Shortly thereafter the petitioner obtained an executive position in Vancouver with a salary of $175,000. However, the petitioner was terminated from this position within two months. The petitioner continued to reside in Vancouver but had not been able to secure another job. Among the numerous issues between the parties were: 1) the valuation of the respondent's book of business with RBC Dominion Securities. At valuation date of April 30, 2014, the assets under management in his book of business totaled $191 million and of this, some $102.6 million consisted of fee-based accounts. The petitioner's expert valued the book of business between $1.77 million to $1.94 million, adopting a fair market value approach if sale occurred at the valuation date in the open market subject to a non-competition covenant to either prevent the respondent from working or to work exclusively for the purchaser for two to three years. The respondent's expert determined the value of the book of business at $290,000 (net of tax) under the terms of the RBC Dominion Business Succession Plan if the respondent retired at 65, 18 years from the date of valuation. He assumed that a bank-associated investment advisor would be unable to transact his book of business in the open market and that there was significant value to the respondent to work until retirement date and take advantage of

the plan; and 2) the quantum of spousal support to which the petitioner was entitled. She argued that based upon her income of nil and the respondent's of $700,000, support should be in the range of $25,000 to $29,000 per month. The respondent took the position that $11,000 per month was appropriate and it should terminate in three years. He also requested that $175,000 in income be imputed to the petitioner on the basis that she was intentionally underemployed.
HELD: The court found with respect to each issue that: 1) it would utilize the termination method to value the respondent's book of business at $650,000 based on the fact that he had vested and matured benefits under his employer's plan to which he would be entitled if he terminated his interest at the application date. The court chose this method under s. 2(1)(b) of The Family Property Act because it determined that the fair market value could not reliably nor reasonably be determined and the retirement method was unsatisfactory considering the lengthy interval between the valuation date and the respondent's date of retirement; and 2) there was evidence to support imputation of income to the petitioner in the amount of $175,000 per year based on the salary she would have received at her position in Vancouver. Her recent employment problems appeared to be ones of her own creation. Regarding quantum and duration of support, the court ordered the respondent to pay $11,000 per month indefinitely. The court considered the parties' current respective incomes, the long-term marriage and the interruptions in the petitioner's career due to her childcare and domestic responsibilities. The parties lived a comfortable but not excessive lifestyle. The court found that the petitioner had the ability to improve her employment.

 Back to top

R v MacDonald, 2018 SKQB 18

Keene, January 16, 2018 (QB17395)

Criminal Law – Child Pornography – Possession - Sentencing

The accused was charged with and pled guilty to one count of possession of child pornography contrary to s. 163.1(4) of the Criminal Code. The police seized electronic devices belonging to the accused under search warrants and found 4,500 child pornography images and 52 child pornography videos. The evidence indicated that the accused had been accessing and compiling the images for approximately 10 years. The materials included mild, medium and hard core examples of sexual

exploitation of children. A pre-sentence report indicated that the accused was 73 years old. He had been sexually assaulted as a small child. He did not have a criminal record and was grateful that he had been caught so that he could get help. He had voluntarily sought counselling. As he had never touched a child he was unsure why viewing pornography was regarded as the equivalent of the former, but he was trying to learn and realized that what he did was wrong. His risk to reoffend was classified as low but he received a high needs assessment. The Crown requested an 18-month incarceral sentence followed by three years of probation. The defence stressed the age of the accused and argued that his poor health and his potential for rehabilitation warranted only a six-month sentence followed by three years' probation.
HELD: The accused was sentenced to 16 months' imprisonment to be followed by three years of probation. He was ordered not to access the internet or to have to any electronic devices capable of accessing it and to attend the sex offender treatment program amongst other conditions imposed upon him. The primary consideration in sentencing in this case was denouncement and deterrence. The court found that the aggravating factors included: the size and nature of the accused's collection; the length of time that he had engaged in the pursuit; his difficulty in understanding that his behaviour was wrong; and his sophisticated use of computers. The mitigating factors were: his guilty plea; the absence of a criminal record; his age and health; and his voluntary attendance upon counsellors after he was charged.

 Back to top

Northrock Resources v ExxonMobil Canada Energy, 2018 SKQB 19

Currie, January 16, 2018 (QB17402)

Civil Procedure – Queen's Bench Rules, Rule 4-31, Rule 11-1

The plaintiff's claim had been dismissed after trial (2016 SKQB 188; aff'd 2017 SKCA 60). The defendants, Crescent Point (CP), applied to the court to determine costs. The issues were: 1) which column of The Queen's Bench Rules Tariff of Costs applied. CP argued that Column 3 should apply while Northrock submitted that costs fells fell more appropriately between Columns 2 and 3; 2) whether a multiplier should be applied to the tariff column. CP took the position that under Queen's Bench rule 11-1(3), the court should consider whether the application of the tariff came

near to compensating it for the costs incurred in the action. It also argued that this case was more complex than an ordinary complex case and the costs award should be adjusted to reflect that unusual complexity; 3) whether the formal offer to settle led to an increase in costs. The defendants had made a joint formal offer to settle Northrock's claim, which was rejected. Under Queen's Bench rule 4-31, CP was therefore entitled to double costs from the date of the offer, being 12 days before the trial commenced. Northrock argued that the trial had actually started four months earlier because the parties began cross-examination on affidavits that were expressly for use at trial. Under Queen's Bench rule 4-31(3)(c), the offer was served long after the trial had started and CP was not entitled to double costs; and 4) whether unproven allegations against CP led to an increase in costs because Northrock had alleged fraud, thereby harming CP's reputation, and it was unable to recover damages from Northrock because of litigation privilege.
HELD: The plaintiff was ordered to pay the assessable costs of CP. The court found with respect to each issue that: 1) after applying the considerations set out in Choubal in determining party and party costs, it would be appropriate to award costs to CP under Column 3; 2) it would not apply a multiplier. Under the current tariff, an attempt to approximate the successful party's actual costs is not a consideration in determining party and party costs. This action was not so complex as to take it outside of Column 3 costs; 3) CP was entitled to double costs from the date upon which it served its formal offer to settle, 12 days prior to trial. At the time the parties began cross-examination on affidavits, they could not agree whether that constituted the start of the trial, and the court had determined that the procedure was prior to trial; and 4) that the unproven allegations of breach of duty of good faith and of conspiracy did not attract an additional award of costs. The allegations were not reprehensible or motivated by bad faith, nor had they damaged CP's reputation.

 Back to top

JA Tech Inc. v Strike Group Inc., 2018 SKQB 22

Rothery, January 17, 2018 (QB17404)

Civil Procedure – Queen's Bench Rules, Rule 3-81

The plaintiff sought an order pursuant to Queen's Bench rule 3-81(a) to consolidate two actions. The defendant, Saskatchewan Government Insurance (SGI) and the defendant, Affinity

Insurance, did not oppose the application. The defendant, Strike Group (Strike), opposed the application on the ground that their part of the action was suitable for a summary judgment application and if the actions were consolidated, it would be drawn into a complex insurance coverage dispute in which it had no involvement. The plaintiff, Strike's subcontractor, was performing work for Strike pursuant to its prime contract with the Saskatchewan Power Corporation (SPC). During the work, the plaintiff damaged the equipment it was installing. SPC charged back the costs of repair to Strike. After paying same, Strike alleged it was entitled to withhold that amount from the plaintiff pursuant to the set-off provisions of the contract between them. The plaintiff sued SGI for refusing to provide insurance coverage and Affinity for breach of contract in failing to obtain the requisite insurance to cover the incident.
HELD: The application was granted. The court found that the two claims converged on the question of damages in that both SGI and Affinity denied the extent of damages claimed by the plaintiff. The plaintiff had to prove the amount of damages sustained by it in the incident and it could not do so without the facts before the court proving damages incurred by SPC resulting from the incident. Only by consolidating the two actions could the plaintiff garner that evidence at trial.

 Back to top

Sherwood (Rural Municipality No. 159) v Probe, 2018 SKQB 24

Popescul, January 18, 2018 (QB17406)

Statutes – Interpretation – The Municipalities Act, Section 141.1, Section 143, Section 144, Section 149

The applicant, Council of the Rural Municipality of Sherwood, applied pursuant to s. 148(2) of The Municipalities Act for an order declaring that the respondent be disqualified from the RM Council and that his position on it be proclaimed vacant. The respondent was a member of the council when the Minister of Government Relations ordered an inspection and later an inquiry into whether any members of the council had a pecuniary interest in a development then being proposed on lands governed by the council. The respondent and other members of the council engaged legal counsel to represent them at the inquiry. In October 2014, the council passed a bylaw that authorized the council to indemnify members for their legal expenses and the respondent was paid $49,999 as reimbursement. In September 2015, a group of ratepayers

challenged the bylaw and the court quashed it (see: 2015 SKQB 301). In subsequent council meetings held in October 2015, the respondent recused himself when the matter of reimbursement was being discussed. However, in a council meeting held in January 2016 regarding reimbursement, the respondent did not declare a conflict of interest and remained in the council chambers and cast his vote.
HELD: The application was granted. The court granted the declaration and ordered pursuant to s. 148(2)(b) and s. 148(6)(a) of the Act that the respondent be disqualified from council and his position be declared vacant. It found that the respondent was in a conflict of interest under s. 141.1 of the Act because he possessed a financial interest in the matter before council in the January meetings, as defined by s. 143(2) of the Act. The respondent failed to declare his financial interest, leave the council chambers and abstain from voting as required by s. 144 of the Act, thereby disqualifying himself from the council. The court found that s. 149 of the Act did not apply because the respondent's disqualification did not arise through inadvertence or honest mistake, as he had recused himself in the October meeting and therefore he knew or should have known to do so again at the January meeting.

 Back to top

Elite Property Management Ltd. v Fleury, 2018 SKQB 25

Rothery, January 18, 2018 (QB17407)

Statutes – Interpretation - Residential Tenancies Act, 2006, Section 70, Section 76

The appellant property management company appealed the decision of a hearing officer of the Residential Tenancies Office (RTO) who had reduced the damages claimed by the appellant from $9,500 to $3,100. The appellant argued that the hearing officer failed to award damages based on the actual invoices charged by it to the landlord for cleaning and erred by factoring in depreciation, using the RTO's Depreciation Table, when determining the replacement value of property.
HELD: The appeal was dismissed. The court found that the hearing officer's order for the cost of cleaning was just and equitable, in accordance with s. 70(6)(c) of The Residential Tenancies Act, 2006. It was a finding of fact not subject to review by an appellate court. Similarly the officer was entitled to use the Depreciation Table to establish a depreciation rate as evidence as permitted by s. 75(a) of the Act.

 Back to top

Reid v Ellis-Reid, 2018 SKQB 29

Zarzeczny, January 24, 2018 (QB17409)

Family Law – Spousal Support – Variation
Family Law – Child Support – Variation

The petitioner applied for an order varying a consent interim order regarding spousal and child support issued in 2007. The applicant's income at that time was $48,200 and the respondent had no income. The applicant was ordered to pay child support and s. 7 expenses in the amount of $150 per month for as long as the child was a child within the meaning of the Divorce Act. Spousal support was set at $1,250 per month to continue until further order or agreement. The order provided that spousal support was reviewable if the respondent wife's CPP claim was successful and could be recalculated retroactively. The applicant was employed by the Canadian Armed Forces at the time of the first order and was, at the time of this application, two years away from the mandatory retirement age of 60. He advised the court that he wished to retire a year early. He requested that his spousal support obligation be terminated as his income would be reduced from $67,000 to $37,000 per annum and because the respondent had failed to obtain employment and pursue an application for CPP disability benefits as required by the first order. He indicated a willingness to provide child support until their daughter received her first university degree. The respondent argued that there had been no material change in circumstances from the time of the first order. She submitted that she was still disabled and unable to work. She would be prepared to take reasonable steps and to pursue the CPP application. She had tried to obtain it earlier but it was denied because she did not have sufficient credits, but as the applicant was willing to apply for or agree to split his CPP credits, she would reapply.
HELD: The application was dismissed. The court found that the applicant had not proven that there was a material change in circumstances as voluntary early retirements do not constitute material change of circumstance. It ordered the respondent to immediately proceed to complete an application to split the applicant's CPP credits.

 Back to top

Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212, 2018 SKQB 30

Layh, January 24, 2018 (QB17410)

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

The plaintiff, Good Spirit School Division (GSSD), sought costs arising from a complex action and ensuing lengthy trial (see: 2017 SKQB 109). The judgment has been appealed by the defendants, the Government of Saskatchewan and Christ the Teacher Roman Catholic Separate School Division (CTT). The GSSD prepared a Bill of Costs based on Column Three of the Tariff of Costs totaling $540,000 and disbursements of $213,500. The legal fees incurred were $2,800,400. It argued that because the litigation involved fundamental and novel legal questions, special costs in the amount of $2.1 million should be awarded. Alternatively, it requested costs on a threefold multiple of the tariff or approximately $1,600,000. The Government argued that costs should not be awarded before the appeal was decided. HELD: The application was granted. The court followed Queen's Bench rule 11-1(3)(e) and ordered that the defendants should pay costs for the GSSD's legal fees in the amount of Column 3 of the Tariff multiplied by 1.5 for a total of $810,000. The Government should bear 70 per cent of the costs and CTT should bear 30 per cent. It decided that costs could be determined before the appeal was determined. Costs could join the appeal on the substantive matters. The court found that special costs were not warranted on the grounds of public interest and that the Tariff provided an appropriate starting point to determine them. The court considered that an award of increased costs was warranted because under Queen's Bench rule 11-1(4)(g), (h) and (i) it found that the conduct of the Government unnecessarily lengthened, and added steps to, the proceedings. The court accepted the plaintiff's legal fees as provided without a detailed statement of account because of the length and complexity of the proceedings and because it used a multiple of the Tariff and not a percentage of full indemnification.

 Back to top

Klassen v Wiers Estate, 2018 SKQB 32

McMurtry, January 25, 2018 (QB17412)

Wills and Estates – Testamentary Capacity

The applicant requested a determination of the testamentary

intentions of her deceased father or alternatively, an order for proof in solemn form of his last will and testament. The deceased made a will in August 2015, naming the pastor of his church as his executor. He died in December 2016 and the executor obtained letters probate. The applicant claimed that the deceased had dementia or Alzheimer's at the time he executed his will and therefore did not have capacity. Further, she alleged that her sister-in-law (her brother's widow) unduly influenced him in the making of the will. The applicant deposed that she had visited her father in 2014 and found his living quarters to be disorganized and dirty. She provided medical evidence from a neurologist who had tested the deceased in 2015. He had described the deceased as suffering from severe dementia but able to function at a very good level. In their affidavits, the executor, the deceased's daughter-in-law and his financial advisor provided evidence that conflicted with that offered by the applicant. They all deposed that the deceased understood what property he owned and knew how he wanted his estate distributed. He had indicated that he wanted his real property to go to his daughter-in-law and her children and the remaining property to go to the applicant. The daughter-in-law deposed that she had not known the terms of the will.
HELD: The application was dismissed. The court held that it first had to determine whether a trial should be held and decided that there was no genuine issue requiring a trial. It found that it was not satisfied that the applicant had put forward evidence which if accepted at trial would tend to negative testamentary capacity or support a finding of undue influence. The will was consistent with the deceased's long-standing wishes expressed to both his financial advisor and to the executor and how he had handled his real property before his death. The medical report and the evidence of the executor both indicated that the deceased had capacity. There was no evidence that the executor or the deceased's daughter-in-law were involved in the preparation of the will.

 Back to top

Pelletier v Harripersad, 2018 SKQB 33

Leurer, January 25, 2018 (QB17413)

Landlord and Tenant – Residential Tenancies Act – Order for Possession – Appeal
Administrative Law – Procedural Fairness – Breach of Duty

The appellant tenant appealed the decision of a hearing officer

who granted an order of possession to the respondent landlord. After the appellant failed to pay the monthly rent for September 2017, the respondent served notice under s. 57 of The Residential Tenancies Act, 2006 to end the tenancy. When she failed to vacate the premises, the respondent served a notice requesting a hearing for an order of possession pursuant to s. 70 of the Act. The hearing was held and the officer granted an order for possession. The appellant successfully appealed that decision to the Court of Queen's Bench. The judge found that the officer failed to determine whether it was just and equitable pursuant to s. 70(6)(d) of the Act to make the order in the circumstances as he had not dealt with the issues raised by the appellant. The matter was remitted for a new hearing to be conducted via telephone. At the date set for the hearing, the officer could not reach the appellant at the number provided. The officer decided to proceed as the respondent attended by telephone. The officer determined that the appellant was in arrears for three months' rent and the respondent had proven he was entitled to immediate possession. The appellant had failed to comply with the rental agreement which had caused the respondent to suffer significant difficulty. The appellant had made no apparent effort to participate in the hearing. The appellant appealed the decision on the ground that the officer's procedure in going ahead without her was not fair, although she acknowledged that the phone number he called for the purposes of conducting the hearing was correct.
HELD: The appeal was dismissed. The standard of review was correctness. The hearing could be conducted by telephone pursuant to s. 70(2) of the Act. The appellant had notice of the hearing and the officer tried twice to contact her at her telephone number. His decision to proceed in her absence was reasonable and correct.

 Back to top

Kleisinger, Re (Bankrupt), 2018 SKQB 37

Thompson, January 29, 2018 (QB17416)

Bankruptcy and Insolvency - Discharge

The bankrupt applied for discharge and the application was supported by the Trustee but opposed by the Royal Bank of Canada (RBC), which was a proven creditor in the bankruptcy. It argued that the bankrupt's assets were not an equal value to 50 cents on the dollar on the amount of his unsecured liabilities and that he had assigned in bankruptcy for the primary purpose of

evading his debt to the RBC, his primary creditor. RBC had loaned money to the bankrupt to obtain his Master's degree in Cultures and Development Studies and it was therefore entitled to the priority given by the courts to non-government student loans. The bankrupt made his assignment in November 2016 when his assets were worth $4,000 with his debts totaled $91,000. In 2015, the bankrupt suffered a serious arm injury while living in Taiwan. After undergoing two surgeries there, the bankrupt returned to Canada to obtain further treatment that might allow him to regain the use of his arm. Until his injury, the bankrupt had kept his loans in good standing.

HELD: The bankrupt was granted an absolute discharge. The court found that this was not a case wherein the bankrupt's conduct would support an order refusing discharge. Regarding the RBC's position that a fact under s. 173 of the Bankruptcy and Insolvency Act existed, the court found that it had not established it. Although the courts had acknowledged that non-government student loans warranted special consideration, RBC had not provided evidence that the bankrupt in this case had assigned in order to avoid his debt to it as his primary creditor, unlike the facts in Insley. The court found that the bankrupt could not justly be held responsible for his asset value of less than 50 cents on the dollar on the amount of his unsecured liabilities. His financial circumstances were the result of misfortune. Assuming that he would be able to work again and utilize his degree, his earnings would not be more than $70,000 per year. He had no surplus income and would not be able to contribute to his bankruptcy estate for three years.

 Back to top