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 21, No. 23 **December 1, 2019**

Subject Index

Rodway v Reardon, 2019 SKCA 99

Whitmore Schwann Leurer, October 3, 2019 (CA19098)

Family Law – Division of Family Property – Appeal
Family Law – Division of Family Property – Equitable Considerations
Family Law – Division of Family Property – Exemptions
Family Law – Division of Family Property – Family Property Act – Common-Law Relationship
Family Law – Division of Family Property – Valuation

The appellant appealed the property division decision. When the parties started their relationship in 1997, each had her or his own home. After cohabitating for a number of years, they purchased a new home. The respondent sold her home and put the proceeds towards the new home while the appellant retained his home together. The parties separated in 2013 and the appellant continued to reside in the family home. He had owned and operated a numbered company since 2006. The trial judge favoured the respondent's testimony that the relationship started in October 1997, not in May 2002 as advanced by the appellant. The date for determining family property was thus October 1999. The trial judge determined that the time of trial was the appropriate valuation date for the family home and the appellant's other home. The respondent argued for the valuation to be as at 2013, when the action was commenced. The trial judge did not allow an exemption for the appellant's home, indicating that it would be unfair to allow him an exemption when the respondent sold her home to help purchase the family home and because the appellant failed to show the value of the

Family Law – Child Support – Interspousal Contract

Family Law – Custody and Access – Appeal

Family Law – Custody and Access – Jurisdiction

Family Law – Division of Family Property

Family Law – Division of Family Property – Appeal

Professions and Occupations – Realtors

Statutes – Interpretation – Dental Disciplines Act, Section 29

Wills and Estates – Estate Administration – Application for Appointment as Administrator

Cases by Name

Bihari v Bihari

Elchuk v Gulansky

Hanson v Hanson

Kassian v Kassian

Klein v Klein

Korol v Kobussen

Lapchuk v Richter

Manderscheid v Humboldt Smiles Dental Studio Inc.

McCorriston v Hunter

McKee, Re (Bankrupt)

Ostapowich v Lacey

Pavlik v R

R v Chicoine

Rodway v Reardon

Saskatoon (City) v 101071855 Saskatchewan Ltd.

Sekerbank T.A.S. v Arslan

Smith v R

Smith v Smith

Tyacke v Tyacke

home at the relevant time. Further, he was not allowed an exemption for his corporation because he did not tender any evidence of its value at the commencement of the relationship. The trial judge found that a $226,000 line of credit was incurred to provide financing for constructing a building for the appellant's business and rejected the appellant's assertion that it was incurred to pay him back for his investment in the family home. The trial judge did not include two debts, a $150,000 debt and a $135,982 debt, in the calculation of family property after concluding that they were really debts of the corporation. The trial judge found that the appellant's interest in the corporation was 65 percent, as shown in the corporate registry. The issues were whether: 1) the trial judge erred in the valuation of the appellant's home and in not granting him an exemption; 2) the trial judge misapprehended the evidence regarding the debts; 3) the trial judge misapprehended the evidence regarding the appellant's interest in the corporation by attributing him 65 percent rather than 51 percent; and 4) the trial judge misapprehended the evidence as to the value of the corporation and erred by valuing it as at December 31, 2012 instead of the date of application.

HELD: The appeal was allowed in part. The issues were determined as follows: 1) the appeal court did not interfere with the trial judge's conclusion that the appellant failed to discharge the onus of proving his entitlement to an exemption. There was no evidence presented regarding the value of the home at the commencement of the relationship. The improvements to the family home made by the appellant's corporation were not relevant because it is excluded from consideration under s. 23 of the Family Property Act (FPA) and the appellant shared in the equity of the home. The appeal court commented that it would be contrary to the purpose of FPA to recognize any contribution that the appellant made to increasing the value of the respondent's home; 2) the appellant claimed that the $150,000 mortgage was advanced to him personally to be used for business purposes. There was evidence of the mortgage on the home in the amount of $150,000 so the appeal court concluded that the value of the home should have been reduced to reflect the encumbrance on the title. The trial judge did not err by not including the $135,982 in the calculation of family property. There was no evidence as to whether the appellant or corporation repaid the debt; 3) the corporate registry indicated that the appellant owned 65 percent of the corporation. The appellant indicated that he deliberately completed the corporate documents to reflect that he had a 65 percent interest in order to induce another shareholder to become a 34 percent shareholder of the corporation. The appellant presented conflicting evidence regarding his ownership interest. There was evidence to support the trial judge's finding; and 4) the trial judge determined the value on the basis of the petition date but accepted, as a proxy for the value on that date, the valuation of

Wolff v R

the closest year-end, which was December 31, 2012. The trial judge did so because he was unable to rely on the appellant's evidence as of May 30, 2013 as the balance sheet of the corporation was unreliable given the adjustments the appellant suggested.

 Back to top

Smith v R, 2019 SKCA 100

Richards Jackson Tholl, October 8, 2019 (CA19099)

Criminal Law – Sentencing – Appeal
Criminal Law – Sentencing – Conspiracy to Traffic – Cocaine
Criminal Law – Sentencing – Parole Eligibility – Criminal Code, Section 743.6
Criminal Law – Sentencing – Participate in Criminal Organization
Criminal Law – Sentencing – Principles of Sentencing – Totality
Criminal Law – Sentencing – Trafficking – Cocaine, Fentanyl, Heroin

The appellant appealed his 18-year sentence with no parole eligibility for nine years. He was convicted of nine offences involving cocaine, heroin and fentanyl, as well as weapons and criminal organization offences. The appellant and N.H. were members of a motorcycle club. N.H. was under police surveillance when he contacted the appellant about criminal organization activity. The appellant indicated that he was dealing in drugs. The men were arrested and released on bail. N.H. agreed to become a police agent. The appellant was charged with more offences. The Crown and the appellant submitted an "Admission of Facts" at trial. The sentencing judge outlined the sentences he would impose on each offence and then determined which would run consecutively or concurrently, reaching a total sentence of 35 years. The sentencing judge indicated that he was applying totality to arrive at a global sentence of 18 years.
HELD: The appeal was allowed. The sentence was reduced to 11 years in total, less remand credit, with no order delaying the appellant's eligibility to apply for parole. The appeal court considered the following: 1) conspiracy to traffic in cocaine (seven years) – the appellant was 32 when the charge was laid. He had a criminal record dating back to 2004 with 26 offences charged, 14 being for failure to attend court. Thirteen charges had been dismissed, stayed, or withdrawn. He was on judicial interim release when he committed the offence. The appellant started using drugs when he was 17 but had quit when he went to jail. He had three children and one stepson. The appeal court found the appropriate sentencing range to be between 18 months and four years. The appeal court could not find

anything in the circumstances of the offence or the appellant to justify doubling the sentence. The appeal court set aside the seven-year sentence and replaced it with a four-year sentence; 2) trafficking in cocaine – seven years. The sentencing judge imposed an eight-year sentence that was reduced to seven years after the totality principle was applied. Given the quality of the factual record on the count, the appeal court found that the sentence was demonstrably unfit. It was outside of the general range. A sentence of 18 months' incarceration was imposed; 3) trafficking in fentanyl – 11 years, and trafficking in heroin – 11 years. The appellant supplied N.H. with 1834 pills packaged to resemble OxyContin. The appeal court concluded that the sentence was not proportional to the gravity of the offence. The appeal court placed particular weight on the following factors: the type of drug; its addictive nature, given that heroin was mixed with the fentanyl; the financial gain motivation; the criminal organization's involvement; the appellant's record; the appellant's family support along with his remorse and guilty plea mid-trial; and the necessity of emphasizing denunciation and general and specific deterrence. The court imposed a sentence of eight years for the fentanyl trafficking charge as well as for the trafficking in heroin charge; 4) Participation in a criminal organization – 18 months. The appellant and the president of the criminal organization decided that the club had to discipline a member. The president of the club received a sentence of six months for his role and others involved received six months to a year of incarceration. All of the others also plead guilty; however, they did so a considerable time after the appellant did. The appeal court found that a sentence of one year was fit; 5) Participation in a criminal organization – 2 years. The sentencing judge did not provide any reasons for the sentence. The president of the club received a sentence of nine months and another member of an equal rank to the appellant received six months. They also pled guilty later than the appellant. The appeal court found that a fit sentence was six months; 6) totality. The combined sentence imposed would be 13.5 years. The appeal court found that a sentence of 11 years for the nine offences would be more in accord with the gravity of the offences and the appellant's degree of personal responsibility; 7) no parole eligibility until half of the sentence had been served. Section 743.6 of the Criminal Code does not apply to the weapons offences. The appeal court found that the sentencing judge's decision was not clear as to why he delayed parole as required by the section. An order under s. 743.6 was not warranted.

 Back to top

Kassian v Kassian, 2019 SKCA 101

Richards Barrington-Foote Tholl, October 15, 2019 (CA19100)

Civil Procedure – Queen's Bench Rules, Rule 10-10(b)(ii)
Family Law – Division of Family Property – Appeal
Family Law – Division of Family Property – Corporate Shares – Minority Discount
Family Law – Division of Family Property – Income Tax – Adjustment
Family Law – Division of Family Property – Valuation Date
Family Law – Spousal Support – Appeal
Family Law – Spousal Support – Duration
Family Law – Spousal Support – Health Problems
Family Law – Spousal Support – Review

The parties began living together in 1998 and married in 2001. They separated in 2011 and a petition was filed shortly thereafter. For the last eight years of the marriage, the respondent was totally financially dependent on the appellant. Her health prevented her from working. The appellant was ordered to pay interim spousal support of $10,000 per month commencing September 1, 2011. It was paid until December 2015. On the application date, the appellant owned 46 percent of a glass company (D Company). The parties owned a holding company, with the appellant owning 51 percent of the shares and the respondent owning 49 percent. The holding company had an interest in a partnership. A few years after the application date, there were numerous actions between the appellant and the other owners of the parties' business interest (the litigation). The litigation was settled and the net amount the appellant received was $600,800, which he claimed was the value of his shares in D Company. Neither party provided an expert opinion of the value as at the adjudication date: both provided values at the application date. The trial judge valued the shares in D Company at $1,713,500 without discounts for tax consequences or minority shareholdings. The issues on appeal were whether the trial judge erred: 1) in choosing the application date as the valuation date for the business interests: 2) in not applying a minority discount to the valuation of the appellant's shares in D Company; 3) in not taking the potential tax consequences of the disposition of the business interests into account; 4) in attributing a portion of the value of the business interests to the respondent; 5) in determining the duration of spousal support; and 6) in ordering a review of the spousal support.
HELD: The appeal was allowed in part. The cross-appeal was allowed. The issues were determined as follows: 1) the trial judge rejected the settlement amount because the respondent had no participation in those proceedings and there was no way of knowing how much, if any, influence the alleged breach of the appellant's fiduciary duty had. The appeal court agreed and found the determination to be well supported by the evidence. There was some evidence that some factors beyond the

appellant's control caused a decrease in the value of D Company, but there was also evidence that he remained firmly in charge of the business three years after the application date. The delay in getting the matter to trial was attributed to the appellant by the trial judge, which was not found to be an error; 2) the trial judge did not make a palpable and overriding error in preferring the expert opinion of the respondent's expert and not applying a minority discount to the D Company shares; 3) the appeal court concluded that the trial judge did not make an error in refusing an adjustment for potential tax consequences; 4) the trial judge put the amounts for the holding company ($261,391) and partnership ($71,050) that were owned by the respondent on her side of the ledger when determining the equalization payment owed by the appellant. The respondent argued that she did not have possession or control of those business interests. The respondent applied to the trial judge for a correction and he refused. The appeal court agreed that it was not a mathematical error that could be corrected under Rule 10-10(b)(ii) of The Queen's Bench Rules because the trial judge intentionally placed the amounts where he did. The appeal court found that the trial judge committed a palpable and overriding error when he split the values for the holding company and partnership and placed them in each party's column; 5) the trial judge found that the respondent was entitled to spousal support on both a compensatory and non-compensatory basis. He retroactively adjusted the amount of the support to $2,000 per month effective January 1, 2016 with the last payment on January 1, 2024. A review of the spousal support was to take place in 2023 at the application of either party. The appeal court found that that support was time-limited because the end date was after the January 1, 2024 payment; and 6) the trial judge ordered support on the low end of the quantum range and the high end of the duration range according to the Spousal Support Advisory Guidelines (SSAG). The appeal court agreed that the length of the relationship, for the purposes of the SSAG, should be calculated as commencing on the date the parties began to reside together. The appeal court also found that the respondent's personal circumstances supported ordering a duration of support at the higher end of the SSAG range. The appeal court found that the trial judge committed an error by imposing a review of the spousal support order. The appellant's appeal was allowed in part: the review of spousal support was deleted from the judgment. The respondent's cross-appeal was allowed, and the equalization payment was increased. The success of the matter was split; however, costs were awarded to the respondent in the amount of $2,000 because her success was significantly greater than the appellant's.

 Back to top

Hanson v Hanson, 2019 SKCA 102

Barrington-Foote Richards Tholl, October 15, 2019 (CA19101)

Family Law – Child Support – Interspousal Contract

The appellant ex-wife appealed from the decision of a Queen's Bench judge in chambers. The parties had executed an interspousal agreement shortly after their separation in 2010. It expressly stated that the respondent had agreed to an unequal division of the family property that favoured the appellant. In consideration, the respondent would not pay child support, as the unequal division was a direct benefit to the child, and s. 15.1(5) of the Divorce Act had been taken into consideration. The net value of the appellant's share was $363,000. The agreement stated that the respondent agreed to pay 100 percent of s. 7 expenses within the meaning of the Guidelines including sporting activity fees (registration, team, tournament fees and equipment), camp registration costs, and medical and dental expenses not covered by insurance. The appellant would pay the expenses and be reimbursed by the respondent upon presenting expense receipts. In January 2018, the appellant applied for an order that the respondent pay child support in accordance with s. 3 of the Guidelines going forward. She also requested only retroactive s. 7 and RESP expenses in the amount of $15,600 pursuant to the agreement from 2014 to 2017, because she had submitted her statements to the respondent for payment, but he had not reimbursed her. In his March 2018 affidavit in response, the respondent deposed that the appellant had spent too much on equipment and activities he could not afford and he said he was bankrupt. However, there was no evidence that he had objected prior to the date of his affidavit. At the first hearing of the appellant's application, the chambers judge ordered that the respondent pay $400 per month in s. 3 child support based on his estimated annual income of $54,000 and that he provide income information from 2016 to 2018, reserving his decision with respect to retroactive s. 7 expenses. When the decision was issued, the judge incorrectly said that the appellant had applied for retroactive child support and that because of the agreement between the parties, the respondent was not required to pay s. 3 support. The judge disallowed the appellant's claim for s. 7 expenses except for medical/dental costs and RESP contributions. However, the appellant was barred from seeking reimbursement relating to those costs if incurred prior to two years before the date of the hearing because The Limitations Act (LA) applied to the agreement. The appellant argued that the judge erred in: 1) failing to award s. 3 child support; 2) failing to award retroactive expenses within the meaning of s. 7 of the Guidelines and in accordance with the agreement; and 3) limiting the award for medical, dental and

RESP contributions to those incurred within the two year period before the applications pursuant to the LA.
HELD: The appeal was allowed. The court ordered that the respondent pay $400 per month in interim child support and reimburse her for s. 7 expenses in an amount to be determined by the parties and further ordered that the LA was not applicable to the award to the appellant for medical, dental and RESP contributions. It found with respect to each issue that the judge erred in: 1) failing to award s. 3 child support in accordance with the Guidelines. It made an interim order that the respondent pay monthly child support based on imputed annual income of $54,000. The judge clearly misapprehended the evidence when he treated the application as one for retroactive support. The appellant sought s. 3 support because the respondent had breached the agreement by failing to pay s. 7 expenses that had been an integral part of the agreement as to child support and unequal property division. He failed to consider the effect of the agreement on the application for prospective child support pursuant to s. 15.1(5) of the Divorce Act and whether it would be inequitable to order the respondent to pay support in the Guideline amount going forward. The agreement clearly fell within s. 15.1(5) and it was open to the judge to find that the application of the Guidelines would not be inequitable; 2) interpreting the provision in the agreement as he did, to mean that the respondent was obliged to pay the expenses referred to in the provision only if such expenses exceeded those that the appellant should reasonably cover, taking account of her income and the amount she would receive under the applicable table. His interpretation rendered the provision meaningless as it resulted in the appellant receiving nothing. The court found that the provision should be interpreted to mean that the respondent would pay for extraordinary expenses as defined by s. 7(1.1) of the Guidelines and for all of the expenses specifically listed in the agreement, regardless of whether they were caught by the definition of "extraordinary expenses"; and 3) the judge erred in limiting the expenses to the previous two-year period under the LA. The appellant's claim for s. 7 expenses was not commenced by a statement of claim or originating notice, but by a notice of application filed in a divorce action commenced by the petitioner. Therefore, the LA did not apply.

 Back to top

Wolff v R, 2019 SKCA 103

Kalmakoff Whitmore Leurer, October 16, 2019 (CA19102)

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

The appellant appealed his conviction of second degree murder of the victim after trial in the court of Queen's Bench by judge alone (see: 2018 SKQB 220). The victim had been arrested for possession of illegal drugs and gave a statement to the police that led to the appellant being charged with possession for the purpose of trafficking. The victim was scheduled to testify at the appellant's preliminary hearing, but he disappeared before it was held in 2008. His body was never found. The case against the appellant was based on circumstantial evidence. The appellant raised numerous grounds of appeal, amongst which were that the trial judge erred: 1) by finding the evidence of two key Crown witnesses to be credible and failing to specifically consider the issue of reliability of their evidence; 2) in his assessment of circumstantial evidence by failing to apply the test set out in R v Villaroman to consider whether the evidence supported reasonable inferences other than his guilt. The appellant provided a detailed list of evidence that the judge failed to properly consider; and 3) in failing to find that the defences of provocation and self-defence should apply. This argument was based upon the judge's acceptance of the second key Crown witness's testimony that the appellant had confessed to her that he had gone to the victim's house to confront him, the victim had come at him with a sword and he had shot him. The appellant had not raised the defence of self-defence at trial but contended that the judge ought to have considered it because of the evidence.

HELD: The appeal was dismissed. The court found with respect to each ground of appeal that: 1) the judge had not erred in his assessment of the credibility or reliability of either of the two witnesses. He explained why he found each of them credible and his conclusions were reasonable and supported by the evidence. Although the judge did not use the word "reliability", his reasons demonstrated that he considered it in assessing the accuracy of the testimony of each witness; 2) the judge had not erred in reaching the decision that the other inferences were not reasonable in accordance with Villaroman. His reasons demonstrated that he fully considered both the inculpatory and exculpatory portions of the evidence and considered the alternative theories advanced by the defence; and 3) the judge had not erred in finding that the defence of provocation had been disproved. He considered the appellant's defence under s. 232 of the Criminal Code and correctly determined that there was an air of reality to it and therefore the Crown had to disprove the defence beyond a reasonable doubt. He reviewed the evidence relevant to the defence and drew inferences from which he concluded that the defence did not apply because the appellant had been the aggressor in going to the victim's house with a firearm in order to have a confrontation. The court considered the appellant's defence of self-defence against the requirements of ss. 34 and 35 of the Criminal Code in effect at the time of the offence. Under s. 34, there was no evidence that

the appellant apprehended a risk of death or grievous bodily harm as a result of the victim wielding a sword and that he could only protect himself by shooting the victim. Therefore, there was no air of reality to his defence and the judge had not erred by failing to consider it. Similarly, there was no air of reality to the defence under s. 35 because there was no evidence to support it and thus the judge had not erred in failing to consider it.

 Back to top

R v Chicoine, 2019 SKCA 104

Jackson Whitmore Ryan-Froslie Schwann Barrington-Foote, October 16, 2019 (CA19103)

Criminal Law – Child Pornography – Accessing
Criminal Law – Child Pornography – Luring
Criminal Law – Child Pornography – Making
Criminal Law – Child Pornography – Possessing
Constitutional Law – Charter of Rights, Section 11(i)
Criminal Law – Conspiracy

The Crown appealed the sentence imposed upon the respondent by a Provincial Court judge of 12 years of incarceration less remand time as well as one of the ancillary orders that restricted the respondent's contact with children. The respondent pleaded guilty to 40 sexual offences against children. They included one count of possession of child pornography (CP) (s. 163.1(4)); one of accessing CP; 14 counts of distributing CP; one count of making CP (s. 163.1(2)); seven counts of luring (s. 72.1(1)(a) and (b)); five counts of making sexually explicit material available to persons under the age of 18 (s. 171.1(1)(a)); three counts of agreeing by means of telecommunications to commit a sexual offence against a child, i.e., making CP (s. 172.2(1)(a)); three counts of agreeing by means of telecommunications to commit a sexual offence against a child, i.e., sexual assault (s. 172.2(1)(b)); four counts of conspiring to make CP (s. 465(1)(c)); and two counts of conspiring to sexually assault a child (s. 465(1)(c)). The offences were committed over six years from January 2011 to March 2017. At the time of sentencing, the respondent was 28 years of age. The sentencing judge reviewed the sentencing requirements for each offence and calculated the aggregate global sentence to be 32 years of incarceration. She concluded that length of it was not in keeping with the respondent's record and would extinguish his rehabilitative potential. To determine an appropriate global sentence, the sentencing judge considered the ranges put forward by the Crown and the defence: the former submitted a sentence of 17 years was appropriate relying

on a number of cases involving "hands-on" sexual assaults such as R v Snook and the latter argued that seven years was appropriate based upon R v Pitts. The judge disregarded cases cited by the Crown other than Snook, as she did not view the respondent's conduct with respect to ss. 172.2(1) or 465(1)(c) offences as involving "hands-on" sexual offending and because he had not been in a position of trust with respect to the children he abused. She determined that a fit and proper sentence was 12 years after concluding that Snook could be distinguished and the respondent's conduct was similar to that of the offender in Pitts. The issues on appeal were whether the sentencing judge erred: 1) by failing to apply s. 718.3(7) of the Code because she failed to apply it to counts 7 and 8 by imposing concurrent sentences. The provision came into effect in July 2015 with the enactment of the Tougher Penalties for Child Predators Act. The respondent's telecommunication agreements to make CP and sexually assault a child contrary to ss. 172.2(1)(a) and (b) occurred from 2014 to 2017 and 2015 to 2016 respectively and both began before s. 718.3(7) came into effect but continued thereafter. The Crown argued that the provision mandated consecutive sentences for those offences in accordance with the Court of Appeal's decision in V.I.C. The defence contended that V.I.C. was wrongly decided and relied on the Ontario Court of Appeal's decision in Lalonde that found, under s. 11(i) of the Charter, the "time of commission " of an offence is determined when both the required actus reus and mens rea are present regardless of the continuing nature of the offence; 2) in calculating the appropriate sentences for the 11 offences committed under ss. 172.2(1) and 465(1)(c) offences, and thus erring in her determination of the ultimate sentence. She treated the 11 offences as related to the one count of making CP so that the sentences should run concurrently to it; 3) in her application of the totality principle as to the appropriate sentence; and 4) in imposing only a 10-year prohibition order under s. 161 of the Code. She erred by taking into account irrelevant factors and failed to meet the primary objective of protecting the public.

HELD: The appeal was allowed in part. The respondent's sentence was varied from 12 to 15 years of incarceration, but the 10-year prohibition order was confirmed. The court found with respect to each issue that: 1) it had wrongly decided V.I.C. and agreed with the reasoning in Lalonde. Therefore, the sentencing judge had not erred by failing to apply s. 718.3(7) of the Code. The respondent committed the offences under s. 172.2(1) when he entered into agreements with other parties to make CP and to commit sexual assaults of children and although the agreements continued, they were made before s. 718.3(7) came into effect; 2) the sentencing judge erred in characterizing the ss. 172.2(1) and 465(1)(c) as relating to making CP and erred by imposing concurrent sentences, by failing to recognize the gravity of the offences and failing to find that the respondent's

conduct was equivalent to "hands-on" sexual offending. As a result, the judge erred in her application of the totality principle and in the calculation of 32 years for the global sentence. The court found the proper calculation to be 40 years of incarceration; 3) an appropriate sentence was 15 years less time on remand because of the gravity of the offences. It was in keeping with the principle of proportionality and emphasized deterrence and denunciation. The consideration of aggravating factors included the duration of time of the respondent's offending behavior and that as part of his ss. 172.2(1) and 465(1)(c) offences, he had hired the mothers of the children against whom sexual offences were to be perpetrated, had paid for offences to be committed against children and that at least 40 children had been involved. His collection of pornography included images wherein violence against children was depicted. The mitigating factors were that the respondent did not have a criminal record, pleaded guilty and expressed genuine remorse and a desire for treatment; and 4) the 10-year prohibition order under s. 161 of the Code was appropriate.

 Back to top

Saskatoon (City) v 101071855 Saskatchewan Ltd., 2019 SKCA 105

Leurer, October 17, 2019 (CA19104)

Administrative Law – Municipal Board Act – Assessment Appeals
Municipal Law – Appeal – Property Taxes – Assessment
Municipal Law – Assessment Appeal
Statutes – Interpretation – Cities Act

The City sought leave to appeal the decision of the Saskatchewan Municipal Board Assessment Appeals Committee (committee) relating to the 2017 and 2018 property tax assessments of an apartment tower (building) owned by the respondent (owner). The City used a model built on an income approach to determine valuation of the building. The owner argued that the market rents used by the assessor to calculate potential gross rent did not accurately reflect the actual characteristics of the building and, therefore, there was an error in the assessment model. The owner appealed the assessments to the board pursuant to s. 197 of The Cities Act. The board ruled that the Assessor's model was in error for not achieving equity as required by The Cities Act. The City appealed the board's decisions to the committee on two grounds: the board erred in allowing evidence and argument outside their jurisdiction; and the board erred by concluding the potential gross rent could be based on contract rents. The committee remitted the matter to the assessor with instructions to asses in

accordance with the directions given by it in the committee decision. The issues on appeal were whether the committee: 1) erred by upholding the board's decision to admit evidence on suite size; 2) erred by upholding the board's decision and making its own decision in the absence of evidence; 3) erred by applying the wrong standard of review to the admissibility of evidence; and 4) breached procedural fairness; 5) in deciding the appeal based on methods that do not accord with: a) standard appraisal methods pursuant to s. 163(f.3) of The Cities Act; b) mass appraisal pursuant to ss. 163(f.3) and 165(1) of The Cities Act, and/or c) the market valuation standard pursuant to ss. 163(f.1) and 165(5) of The Cities Act; 6) erred by upholding the board's decision that the assessment did not achieve equity; and 7) the committee erred in law by providing inadequate reasons that were unintelligible and were internally inconsistent.
HELD: The application was dismissed. The issues were determined as follows: 1) the City argued that the owner's original notice of appeal did not put suite size into issue, so evidence on the subject should not have been admitted. The appeal court concluded that the issue was of dubious merit and was not sufficiently important to justify a grant of leave to appeal. The City's argument ignored two things: a) the owner's notice of appeal was supplemented by a letter in accordance with The Cities Act; and b) the board allowed evidence on suite size because that was put into issue when the notice of appeal and letter were looked at together; 2) this issue was not successful in gaining leave to appeal because it was a proposed appeal to the board's decision while the City could only appeal from the committee decision; and 3) this issue was found to be a recast of the City's first proposed ground of appeal; 4) a) the City was again attempting to recast its objection to the board allowing evidence of suite size; and b) the City did not indicate how its evidence would have been different if the committee had given prior indication that it intended to clarify the remittal. The appeal court concluded that the proposed ground of appeal was destined to fail, nor was there anything that was of any importance outside of this case; 5) the City argued that there was an error when the committee exceeded its jurisdiction by "allowing the building to be appraised on its own using single property appraisal techniques". The City did not identify the specific question that it wanted to raise. The appeal court was not able to identify the extricable question of law the City sought to advance. Also, the appeal court was not convinced of the importance to justify leave to appeal; 6) the City failed to identify a question of law arising from the committee's decision associated with the proposed ground of appeal; and 7) the ground of appeal was found to be of dubious merit and to lack importance to justify a grant of leave to appeal. The City's application for leave to appeal was dismissed. The owner was entitled to costs in the usual way.

 Back to top

McCorriston v Hunter, 2019 SKCA 106

Leurer Richards Whitmore, October 17, 2019 (CA19105)

Family Law – Custody and Access – Appeal
Civil Procedure – Queen's Bench Rules, Rule 7-5, Rule 15-2

The appellant appealed the decision of a Queen's Bench judge in chambers that granted the respondent's application for summary judgment for an order regarding custody and access, child support and s. 7 expenses (see: 2018 SKQB 335). The appellant argued on appeal that: 1) summary judgment is available to resolve issues of parenting and child support; 2) the chambers judge erred in granting judgment regarding issues of parenting on a summary basis; and 3) he erred in granting the child support order on a summary basis.
HELD: The appeal was allowed and the matter remitted to the Court of Queen's Bench. The court found with respect to each issue, that: 1) summary judgment under Queen's Bench rule 7-5(1) is available to resolve family law disputes pursuant to Queen's Bench rule 15-2(2); 2) the chambers judge erred in granting summary judgment with respect to issues of parenting in this case in concluding that there was no genuine issue requiring trial. The affidavit evidence provided by each party regarding parenting was in conflict. The judge first failed to determine whether there was a genuine issue for trial, then failed to either resolve the conflict in the evidence or find that the conflict in the evidence was irrelevant to the determination of the parenting issue; and 3) as a consequence of its decision on the second issue, it was inappropriate to make a final order of s. 3 support. The order was set aside.

 Back to top

Pavlik v R, 2019 SKCA 107

Caldwell Whitmore Leurer, October 17, 2019 (CA19106)

Criminal Law – Evidence – Admissibility
Constitutional Law – Charter of Rights, Section 9, Section 24(2)

The appellant appealed his convictions for firearms offences after trial in Provincial Court (see: 2018 SKPC 4). The appellant was arrested after a constable contacted the staff sergeant on duty to advise that he had just received information from a confidential informant that the appellant would arrive soon at a local bar in a red car owned and driven by his girlfriend. They

would have methamphetamine in their possession that they intended to sell. When asked by the sergeant whether the tip was reliable, the constable replied that the appellant was "arrestable". The sergeant then instructed police officers to go to the bar to surveil it. When the appellant did arrive in a red car with his girlfriend, the officers arrested them for possession for the purpose of trafficking. A search of the appellant discovered nothing of evidentiary importance. When the vehicle was searched, a sawed-off shotgun was found in the trunk. The appellant gave a warned statement admitting that he owned the gun. He said that his girlfriend knew nothing about it and that he did not want her to get into trouble. At trial, the appellant sought to exclude the shotgun and the warned statement on the grounds that his arrest and the vehicle search were unlawful. The judge applied the factors set out in R v Debot and held that the tip was precise and detailed enough to support the arrest although there was limited evidence regarding the tipster's reliability. The police had corroborated most of the information in the tip, the arresting officer had reasonable subjective grounds to arrest the appellant and his belief was reasonable. Having found no breaches of the Charter, the judge admitted the gun and the warned statement into evidence. The grounds of appeal were that: 1) the trial judge erred by concluding that the police had not breached s. 9 of the Charter in the circumstances of the appellant's arrest because he misapplied the law with respect to warrantless searches based on informant tips; and 2) if s. 9 of the Charter had been breached, should the evidence have been excluded from the trial?
HELD: The appeal was allowed, the convictions set aside and acquittals entered. The court found that the appellant's arrest was unlawful, his s. 9 Charter rights had been violated and the evidence should have been excluded after conducting a Grant analysis under s. 24(2) of the Charter. It found with respect to each issue that: 1) the judge erred in finding that the Crown had discharged its burden of proof in this matter. It reviewed the evidence adduced at trial and noted specifically that the officer who had provided the tip had not testified and there was no evidence as to the basis of his subjective belief that the tipster was credible. The absence of his evidence or any evidence regarding the credibility of the tipster undermined the Crown's ability to prove that it was objectively reasonable in the circumstances for the police to have arrested the appellant without a warrant pursuant to s. 495(1)(a) of the Code; and 2) the evidence should be excluded after consideration of the three Grant factors. The police were not acting in bad faith, but because of the absence of evidence regarding the tipster at trial, the court could not condone it. The impact of the breach upon the appellant was serious. The police obtained all the incriminating evidence subsequent to his unlawful arrest while he was being arbitrarily detained. The reliability of the warned statement was also questionable. Admitting the evidence would

bring the administration of justice into disrepute because of the effect of the absence of evidence regarding the credibility of the tipster.

 Back to top

Elchuk v Gulansky, 2019 SKCA 108

Jackson Caldwell Tholl, October 8, 2019 (CA19107)

Administrative Law – Judicial Review – Appeal

The appellant appealed from the decision of a Queen's Bench judge in chambers that dismissed his application for judicial review of an arbitrator's award (see: 2019 SKQB 23). On appeal he argued that the chambers judge had applied the incorrect standard of review to the arbitrator's award and incorrectly applied the reasonableness standard to her review of the award.
HELD: The appeal was dismissed. The court found that the judge had correctly reviewed the award on the reasonableness standard. It could find no reason to interfere with her conclusion that the arbitrator's decision was reasonable based on her assessment that it fell within the range of possible acceptable outcomes.

 Back to top

Bihari v Bihari, 2019 SKQB 240

Currie, September 17, 2019 (QB19233)

Wills and Estates – Estate Administration –
Application for Appointment as Administrator
Civil Procedure – Applications - Adjournment

The applicants applied for an order appointing them as administrators of the estate of their father, whose will named the respondent as executor. The respondent had obtained a month-long adjournment of the application as peremptory against him. At the date of hearing, a lawyer appeared on behalf of the respondent advising that a partner in his law firm had been consulted by the respondent the previous day regarding retaining him in this matter. The lawyer asked that the application be adjourned to allow time to learn whether the respondent would retain counsel from his firm. He further advised that the respondent told the partner that he was ill. The applicants provided uncontroverted evidence in support of their application.
HELD: The application was granted. The court found that it

would not be appropriate to grant a further adjournment as peremptory against the respondent. It did not regard the respondent's delay in acquiring counsel or his putative illness as reasons to grant the request for a further adjournment. The court concluded that appointing the respondent would be contrary to the interests of his mother, the sole beneficiary of the estate. It found that the applicants' evidence established that the respondent, as power of attorney for his mother, had not dealt properly with her funds.

 Back to top

Klein v Klein, 2019 SKQB 268

Scherman, October 7, 2019 (QB19250)

Family Law – Child Support – Imputing Income

The parties separated and entered into an agreement that they would exercise shared equal parenting and joint custody of their children. Because their incomes were approximately equal, they agreed no child support would be paid either way and they agreed to split s. 7 expenses equally. The respondent brought an application requesting that the court determine the petitioner's annual income to be $104,200 and hers to be $26,500 and to order that the petitioner pay her monthly child support in the set-off amount of $1,340 per month, 80 percent of s. 7 expenses as well as retroactive child support from July 2018 to the present. The respondent had worked full-time as a teacher at an on-reserve school, but after one of her students committed suicide in January 2017, she went on stress leave and then took a leave of absence. In September 2017, she began working as a substitute teacher in the local school division and estimated that in that position she would be able earn $2,000 per month. In her affidavit, the respondent deposed that she could not return to the reserve school because her mental health would suffer. She took the position that substitute teaching was the only teaching employment available to her, given where she resided and her childcare responsibilities during her parenting week. The petitioner acknowledged that his income was $104,200 but opposed the respondent's application, arguing that she was intentionally underemployed and the court should be impute income to her of $90,000 that she could earn at a First Nations school and with that, the terms of the separation agreement should continue to operate so that no child support was payable by either. The petitioner advised that the respondent was about to marry someone who lived in Ohio and that she had obtained a licence to sell real estate there.
HELD: The application was dismissed. The court found that the respondent was intentionally underemployed. She had not

provided sufficient medical evidence to support her explanation that for her to return to available employment at the reserve school would be detrimental to her mental health. The court also concluded that the respondent's intention to work in Ohio during her non-parenting week was a significant factor in her decision not to seek full-time teaching employment.

 Back to top

McKee, Re (Bankrupt), 2019 SKQB 270

Thompson, October 11, 2019 (QB19251)

Bankruptcy and Insolvency – Conditional Discharge

The bankrupt applied for discharge but the Canada Revenue Agency (CRA) objected. It held a judgment for $437,300 against the bankrupt for unpaid personal income tax and had a proven unsecured claim for $409,550, established to make up 86 percent of the proven unsecured claims in bankruptcy. As a result, the bankrupt lost his entitlement to automatic discharge. The CRA's objections to discharge were that it was a tax-driven bankruptcy pursuant to s. 172.1 of the Bankruptcy and Insolvency Act and the bankrupt's assets were not of an equal value to 50 cents on the dollar of his unsecured liabilities, and this fact had arisen from circumstances for which he could justly be held responsible. The bankrupt said that he was an honest but unfortunate debtor. He had believed the ongoing misrepresentations made by his bookkeeper and that led to insurmountable personal income tax debt and bankruptcy. The bankrupt had been self-employed for many years as a heavy equipment operator. His wife was responsible for the business's finances. He admitted that his tax returns between 2007 and 2017 were not filed on time but believed that they were being filed due to his reliance on the assurances given by the bookkeeper who had taken over his accountant's firm. When they received unusually high assessments, she offered plausible explanations. The bankrupt did not realize that she was not a chartered accountant and was unaware that the tax services she offered did not require any accreditation. By 2018, the bankrupt realized that he would have to obtain the services of an accountant.
HELD: The bankrupt was required to pay $30,000 with a two-year suspension. Once the amount was paid to the trustee, the bankrupt would be eligible for discharge. The court considered the factors set out in s. 172.1 of the BIA and found that the bankrupt had some responsibility for his personal income tax because he and his wife relied on the bookkeeper for a number of years after they ought to have known that she was exposing them to significant liability without solution.

 Back to top

Tyacke v Tyacke, 2019 SKQB 271

Goebel, October 25, 2019 (QB19259)

Family Law – Division of Family Property
Family Law – Spousal Support

The petitioner petitioned in 2015 for divorce and spousal support and sought division of family property pursuant to The Family Property Act (FPA). The parties separated in 2015 after 30 years of marriage during which time they operated a farm. The petitioner was responsible for caring for their three children but helped with the farm as well by managing the finances. She acquired a full-time position in 2015 and her current annual income was $50,000. In 2018, she obtained an order for interim spousal support for $1,500 per month. After the separation, the respondent began suffering from many health problems and he gave his mother power-of-attorney to manage his and the farm's finances. At the time of application, the parties jointly owned 10 quarter sections and were joint owners of the home quarter with the respondent's mother. The petitioner also jointly owned a two quarter sections of farmland with her mother. Among the issues were: 1) whether the petitioner's interest in the farmland she owned with her mother was family property and, if so, whether it should be equally divided. The respondent argued that the petitioner's interest constituted family property. It had been transferred to her by her mother in 1997 as a gift so that upon the mother's death, it would become hers as the surviving tenant. Therefore, the entire value of it should be ascribed to the petitioner; 2) what was the value of the parties' interest in the home quarter? The petitioner asked that two-thirds of the appraised valued be accounted for in the property division while the respondent argued that the value should be divided in half with one half belonging to his mother and the other half being included in the family property calculation; 3) whether the farmland should be divided or the respondent directed to pay the petitioner an equalization amount. The petitioner asked to retain a portion of the land to provide her with consistent rental income to supplement her employment income. The respondent proposed to pay an equalization amount because it would not be practical to reduce the size of the farming operation; and 4) whether the petitioner was entitled to spousal support. She sought a lump sum award through the transfer of two quarter sections of farmland worth $268,000 into her name, free of encumbrances, because it would alleviate the uncertainty about the respondent's future income-earning capacity caused by his poor health. The award was justified because, under the Guidelines, she would be entitled to as much as $4,000 per

month based upon the respondent's estimated annual income of $161,000. The respondent argued that a lump sum award would thwart his ability to apply for variation if he could no longer work due to his health. He proposed periodic support in the amount of $2,000 per month for 10 years.
HELD: The court granted the divorce, established the value of the family property and ordered that the respondent to pay an equalization amount of $215,400 to the petitioner. The application for spousal support was denied. It found with respect to the issues that: 1) the petitioner's interest in the farmland was family property but as she had met the onus of establishing that it would be unfair to divide the value of it equally pursuant to s. 23 of the FPA, the value of her interest would not be factored into the property distribution. The parties never viewed the gift as being under their control or of benefit to them during the mother's lifetime; 2) the parties should share one-half of the value of the home quarter. It would be inappropriate to divide the beneficial ownership on an equal basis between the three joint owners; 3) the petitioner should receive ownership of four quarter sections. The farmland was divided in specie so that the petitioner would have the opportunity to directly benefit from land ownership after contributing to the family farming operation; and 4) the petitioner was entitled to support on a compensatory basis. However, the means and needs of the parties were going to be affected by the property division as the petitioner would have income from four quarter sections of farmland, free of encumbrances. The respondent retained six quarter sections and farm machinery but had no off-farm income and was responsible for the jointly accumulated farm debt exceeding $500,000 and the obligation to make an equalization payment to the petitioner. Therefore, the petitioner would not be entitled to spousal support once the income-generating property had been divided. The interim support order would then terminate and no further support would be payable.

 Back to top

Lapchuk v Richter, 2019 SKQB 272

Popescul, October 11, 2019 (QB19252)

Civil Procedure – Queen's Bench Rules, Rule 5-49
Statutes – Interpretation – Queen's Bench Act, 1998, Section 36

The plaintiff was involved in two separate motor vehicle accidents with the individual defendants. They brought an application for an order requiring the plaintiff to submit to an independent psychological assessment to provide an opinion on the causal relationship, if any, between the plaintiff's post-

traumatic stress disorder (PTSD) diagnosis and the accidents. The application was based upon s. 36 of The Queen's Bench Act, 1998 and Queen's Bench rule 5-49 or alternatively, the court's inherent jurisdiction. They proposed the names of several psychologists and offered to bear the cost of the assessment. The plaintiff consented to the assessment but objected to the psychologists suggested because it would involve him traveling to Calgary or Saskatoon from Regina for the assessment. The defendants then proposed that the Saskatoon psychologist would be prepared to travel to Regina to make the assessment. The plaintiff expressed his preference for another psychologist who had been recommended to him by his support group. HELD: The application was granted. The court made the order for a psychological assessment pursuant to its inherent jurisdiction: neither s. 36 of the Act nor Queen's Bench rule 5-49 were applicable because the proposed assessors were not "duly qualified medical practitioners". It selected the defendants' proposed assessor to conduct the assessment because he was eminently qualified and willing to travel to Regina. The defendants had raised a legitimate concern about whether the psychologist preferred by the plaintiff might be regarded as an advocate for people diagnosed with PTSD.

 Back to top

Ostapowich v Lacey, 2019 SKQB 273

Dawson, October 11, 2019 (QB19255)

Professions and Occupations – Realtors
Real Estate – Sale of House – Negligent Representation
Torts – Negligent Misrepresentation
Contract – Breach – Privity of Contract

The appellant, a real estate agent, appealed the decision rendered in Small Claims Court that found him liable in negligence to the respondents and granted judgment in their favour in the amount of $5,000 (see: 2017 SKPC 91). The respondents purchased a house in 2011 and when they sold it in 2017, they discovered that the square footage was 100 square feet less than what had been shown in the 2011 listing and home features sheet (documents) prepared by the appellant. They sued him alleging negligence in that he failed to exercise due care in preparing those documents. The appellant testified that he measured the house twice but then twice made errors in addition. The appellant conceded that he owed the respondents a duty of care and did not challenge the trial judge's finding that his representation concerning square footage was inaccurate. Based on that finding, the trial judge held that the appellant acted negligently. The appellant argued on appeal that: 1) the

judge erred in that finding based only on the fact that he had made an error in addition and without expert evidence or any evidence of the reasonable conduct, industry practice of a real estate agent against which the appellant's conduct was to be measured; 2) the trial judge erred in finding that the respondents' reliance on the documents was reasonable because there were disclaimers on the documents and there was a limitation of liability clause in the purchase/sale contract. In the case of the latter, the appellant argued that it was a complete defence to the respondents' claim in tort and that the trial judge erred in law by not undertaking the proper analysis of the issue of the limitation of liability clause. The respondents took the position that the clause did not protect the appellant because he was not a party to the contract. The clause only protected the vendor's broker and not the appellant who was the vendor's real estate agent; and 3) the trial judge erred in assessing $5,000 in damages as loss because his finding of fact was contrary to the evidence.

HELD: The appeal was allowed. The respondents' action was dismissed. The court reviewed the requirements to prove the tort of negligent misrepresentation provided in Cognos. It found that the trial judge erred: 1) in finding that the appellant breached the standard of care without expert evidence to inform the court as to how a reasonable agent would have conducted him- or herself; 2) in law, by not undertaking the proper analysis in respect of the limitation of liability clause as set out in the Supreme Court's decision in Fraser River to determine whether a contract could be enforced by a third-party beneficiary. It substituted its own analysis and found that the waiver in the contract given by the respondents was to the seller's brokerage. The Real Estate Act, s. 2 provides that a brokerage includes a salesperson who trades in real estate and therefore the appellant was included in the clause. It found that the clause limited the liability of the appellant for his representation concerning the square footage of the lot. Thus, the appellant met the requirements set out in Fraser River for the doctrine of privity to be relaxed. The respondents contracted away the cause of action against the appellant for the tort of representation; and 3) in assessing damages because he misapprehended the evidence on which he based the award.

 Back to top

Korol v Kobussen, 2019 SKQB 276

Currie, October 16, 2019 (QB19254)

Civil Procedure – Queen's Bench Rules, Rule 7-5
Civil Procedure – Queen's Bench Rules – Summary Judgment

The plaintiff applied for summary judgment for an order for partition and sale of a condominium. She and the defendant purchased it together in 2016. They were joint tenants and paid the mortgage and condominium expenses from a joint account. The plaintiff moved to Calgary in 2018 and continued to meet her financial obligations but wanted the defendant to take over full ownership of the property and responsibility for the mortgage. The defendant was unable to assume the financial obligation and resisted selling the condominium. The plaintiff brought this application. The defendant alleged that the parties had made an oral agreement before they purchased the property that they would not sell it unless they each agreed and would re-evaluate after the mortgage matured in five years. The plaintiff denied that such an agreement was made and pointed to the fact that a written agreement made between the parties at the time she moved out made no mention of the alleged oral agreement in it. She argued that the court should use its power under Queen's Bench rule 7-5(2) to infer from this that there was no oral agreement and a trial was not necessary.
HELD: The application was dismissed. It was not appropriate to determine the matter on a summary basis. The court found that there was a genuine issue requiring trial and in order to resolve the dispute regarding the oral agreement, it was necessary to receive testimony from the witnesses. It reviewed the possibility that the witnesses could be heard within the summary judgment procedure under Queen's Bench rule 7-5(2) to avoid going to trial but decided that it would inefficient and disproportionate in the circumstances to do so.

 Back to top

Smith v Smith, 2019 SKQB 280

Wilkinson, October 24, 2019 (QB19256)

Family Law – Custody and Access – Jurisdiction
Statutes – Interpretation – Children's Law Act, 1997, Section 15

The parties separated in June 2018. The petitioner father moved out of the family home while the respondent continued to reside there with the two children of the marriage. Both parties had been raised in New Brunswick (NB) and after the separation, the respondent expressed her desire to return there with the children. The respondent submitted a record of numerous conversations she had with the petitioner, conducted by text messages. During the spring of 2019, the respondent asked the petitioner numerous times about his feelings regarding her intention to move and he indicated that he accepted her decision to do so. In June 2019, the respondent advised the petitioner that she would be able to work as a teacher in NB and

the petitioner responded that it was "her call". The respondent moved to NB with the children in July 2019 and then inquired about child support. The petitioner replied that she should return to Saskatchewan if she wanted support. He consulted a lawyer and commenced this proceeding in August 2019, stating that he sought return of the children to his primary care if the respondent chose not return. His made his interim application, pursuant to s. 15 of The Children's Law Act, 1997 (CLA), for an order that at the time of his application, the two children of the marriage were habitually resident in Saskatchewan and that the court had jurisdiction. He argued that he never intended to agree to the respondent's move, regardless of what he had said. The respondent notified the court that her lawyer would appear on her behalf but that she was not submitting to the jurisdiction of the court as the children were now habitually resident in NB with the consent of the petitioner. She argued that if the court had jurisdiction, it should decline to exercise it pursuant to s. 16 of the CLA as NB was the more appropriate forum. The issue was whether the children had been living in NB with the consent, implied consent or acquiescence of the petitioner for the purposes of determining their habitual residence under s. 15(2)(b) of the CLA.
HELD: The application was dismissed. The court adopted the definition of "habitual residence" in s. 15(2) of the CLA as operative following the B.C. Court of Appeal's decision in Kong because the Hague Convention was not engaged in this proceeding. It found that the children were not habitually resident in Saskatchewan at the time of the petitioner's application. The petitioner's responses to the respondent's inquiries indicated that he was granting permission for the move and there was no basis to find that the consent was invalid.

 Back to top

Sekerbank T.A.S. v Arslan, 2019 SKQB 283

Layh, October 31, 2019 (QB19257)

Civil Procedure – Queen's Bench Rules, Rule 4-6, Rule 4-7
Debtor and Creditor – Preservation Order – Application to Terminate
Statutes – Interpretation – Enforcement of Money Judgments Act, Section 5(5), Section 8

The defendants applied for an order pursuant to s. 8 of The Enforcement of Money Judgments Act (EMJA) to terminate a preservation order (PO) issued by consent under s. 5 of the EMJA in January 2014. Although they had been unsuccessful in four earlier applications, the defendants suggested that the

grounds they had previously argued had gained strength as the Turkish courts had now rendered a final decision and the plaintiffs had failed to take any steps furthering their fraudulent conveyance (FC) action against them. In support of their claim that a final decision had been reached in the Turkish courts respecting the claim of the plaintiff, Sekerbank, against the defendant Arslan as a guarantor of certain corporate debts, the defendants submitted the affidavits of a Turkish lawyer who deposed that the Supreme Court of Appeal of Turkey had ordered that Arslan's suretyships were not valid or enforceable based on the lack of spousal consent. There was no further right of appeal, but the lower court might resist that decision, although it was highly unlikely, or the plaintiff might appeal the rulings back to the Supreme Court, although that was also highly unlikely. The deponent did not advise of the time frame for either of the highly unlikely scenarios. The plaintiff's legal counsel in the Turkish lawsuit said in his affidavit that he had submitted a petition to the Supreme Court for a reexamination because its ruling regarding the guarantee was mistaken, as consent had been signed by the spouse but filed in a different court file. If the plaintiff were successful in its petition, then the action would be concluded with a judgment against Arslan. Regarding the defendants' position that the PO should be terminated because of the plaintiff's lack of diligence in prosecuting its FC action since the date of its last application in May 2019, the court had indicated then that the plaintiff must proceed to questioning so that the action could be concluded as soon as reasonably possible. The defendants pointed out that the anticipated questioning had not yet occurred. The issues were: 1) whether the Turkish courts had rendered a final decision; and 2) whether the plaintiffs failed to prosecute their FC action in Saskatchewan without unreasonable delay.
HELD: The court ordered pursuant to s. 8(4) of the EMJA that the PO would continue and that the local registrar was to convene a case management meeting for the parties to review the status of the Turkish action and what steps should be taken in the FC action. It found with respect to each issue that: 1) it could not determine whether the Turkish courts had reached a final decision as the affidavit evidence was confusing and highly contradictory; and 2) neither of the parties had yet made use of the powers of the case management judge. The plaintiff's reluctance to move ahead with the FC action without a final ruling in the Turkish action was understandable. The defendants consented to the PO and acknowledged at that time that the Turkish action might take five years.

 Back to top

Manderscheid v Humboldt Smiles Dental Studio Inc., 2019 SKQB 284

McMurtry, October 31, 2019 (QB19258)

Statutes – Interpretation – Dental Disciplines Act, Section 29
Civil Procedure – Disclosure of Documents – Privilege

The plaintiff commenced an action in 2017 against the defendants, claiming that he had developed a brain abscess following dental surgery performed by the defendant dentist. In 2016, he filed a complaint against the dentist with the College of Dental Surgeons. It referred the complaint to its Professional Conduct Committee (PCC). The registrar informed the dentist of the complaint, advising her that the PCC would investigate it and file a report to the Discipline Committee pursuant to s. 29(2) of The Dental Disciplines Act. He advised her that the PCC recommended that most matters be resolved under s. 29(2)(b)(i) of the Act wherein the matter would be resolved with the consent of the complainant and the dentist. The PCC advised the dentist that the complaint could be resolved by signing a "consent to conditions agreement" (CCA). The dentist deposed that she signed a CCA and that she understood that it was confidential and would be kept between herself and the College. The plaintiff sought disclosure of the CCA and an order permitting him to question the dentist on the document. The dentist opposed the application on the ground that the CCA fell within settlement privilege.
HELD: The application was dismissed. The court found that the CCA was bound by settlement privilege and should not be disclosed to the plaintiff.

 Back to top