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 22, No. 23 **December 1, 2020**

Subject Index

Poffenroth Agri Ltd. v Brown, 2020 SKCA 121

Richards Caldwell Kalmakoff, October 27, 2020 (CA20121)

Civil Procedure - Judgments and Orders - Interpretation - Appeal
Civil Procedure - Queen's Bench Rules, Rule 4-49

The appellant appealed the Court of Queen's Bench chambers judge's decision that struck its notice of discontinuance of its claim against the respondent (see: 2020 SKQB 31). The background to the appeal was complicated. The appellant had commenced an action against the respondent in Saskatchewan and later in Alberta. The respondent moved to have the latter action struck and then successfully applied in Saskatchewan for an order compelling the appellant to produce its affidavit of documents. When the Alberta application was heard, the court ordered that the matter be stayed on the basis that the appellant would either apply in Saskatchewan for leave to discontinue its action there or apply under The Court Jurisdiction and Proceedings Transfer Act (CJPTA) to determine the forum conveniens. Only if Saskatchewan were selected would the

Saskatchewan Farm Security Act
Civil Procedure - Replevin

Civil Procedure - Pleadings - Statement of Claim - Application to Strike - Abuse of Process - Appeal
Civil Procedure - Queen's Bench Rules, Rule 7-9(2)(e)
Civil Procedure - Pleadings - Statement of Defence - Limitation Period

Constitutional Law - Charter of Rights, Section 15
Family Law - Divorce - Severance

Contract Law - Interpretation - Arbitration Clause - Appeal
Statutes - Interpretation - Arbitration Act, 1992, Section 8

Corporations - Non-profit Corporations - Oppression

Criminal Law - Motor Vehicle Offences - Driving with Blood Alcohol Exceeding .08 - Conviction - Appeal
Constitutional Law - Charter of Rights, Section 10(b), Section 24(2)

Criminal Law - Evidence - Admissibility of Statements - Voluntariness

Criminal Law - Expungement of Guilty Plea - Appeal

Family Law - Child Support - Determination of Income - Imputing Income
Family Law - Division of Family Property - Unequal Division
Statutes - Interpretation - Family Property Act, Section 22

Alberta claim be struck. The respondent applied in Saskatchewan for either an order requiring the appellant to apply for leave to discontinue or for a conference between the parties under Queen's Bench rule 4-44. The appellant then filed a notice of discontinuation of the Saskatchewan action without obtaining leave. The respondent amended his notice of application to seek an order setting aside the notice of discontinuance. At the hearing of these applications, the appellant argued that discontinuance was permitted pursuant to Queen's Bench rule 4-49(1)(a). The chambers judge concluded that the notice of discontinuance was an abuse of process and had been filed in contravention of the Alberta order. He ordered that a hearing be held to determine the appropriate forum for the adjudication of the claim. The appellant appealed on the ground that the Alberta judge's order was based on an error of fact, that leave was required under The Queen's Bench Rules of Saskatchewan to discontinue the action there.
HELD: The appeal was dismissed. The court found that the chambers judge correctly interpreted the Alberta order as directing the appellant to pursue the question of forum conveniens in the Saskatchewan Court of Queen's Bench in either the context of seeking leave to discontinue the action in this jurisdiction or making an application under CJTPA. By filing its notice of discontinuance without leave, the appellant effectively attempted to take the question of forum conveniens away from the Saskatchewan Court of Queen's Bench.

 Back to top

Alansari v Kreke, 2020 SKCA 122

Caldwell Whitmore Barrington-Foote, October 28, 2020 (CA20122)

Family Law - Custody and Access - Mobility Rights - Appeal
Family Law - Spousal Support - Imputing Income - Appeal
Family Law - Child Support - Imputing Income - Appeal

The appellant appealed two unreported Queen's Bench decisions made July 4 and 17, 2019 after trial in a divorce proceeding (DIV 423/18, Saskatoon). The first judgment addressed mobility, custody, parenting arrangements and child maintenance issues, and the second dealt with spousal support, property division, and costs. The parties married in 2010, and their son, A.B., was born a year later. The respondent wife had two children from a previous relationship, C.D. and E.F. The family resided in Saskatoon. In 2014, the parties left their employment to care for A.B. during his treatment for leukemia. While he was recovering, the appellant obtained employment in Lloydminster in 2015, and the family moved there. The respondent began working part-time, resuming her vocation as a dental therapist part-time and earning $80,000. She left her position at

---

Cases by Name

the end of May 2018. On June 1, 2018, the respondent made allegations to the RCMP that the appellant had twice physically assaulted C.D., and the parties separated the following day. Later that month, the respondent petitioned for divorce, seeking custody and child support, spousal support and division of family property. She also sought an interim order for support and to permit her to relocate to Saskatoon. The court dismissed the mobility application but granted primary residence of A.B. and C.D. to her with access provided to the appellant. The respondent failed to comply with the order regarding the appellant's access to A.B. The assault charges against the appellant were stayed after he entered into a peace bond and was assessed as not requiring treatment for anger management. At trial, the respondent requested that she be permitted to relocate to Saskatoon with A.B. and C.D. She advised that she was working part-time as a dental therapist, earning $45,000. The position was in Davidson, which required commuting, and she would continue to commute after moving to Saskatoon. She noted that her parents lived there, and a relationship with them would be good for A.B. She did not submit evidence to explain how relocating to Saskatoon would meet A.B.'s needs except for furthering his relationship with his grandparents. The judge granted the mobility application. Respecting the claim for support, the appellant had submitted at trial that the respondent could be earning much more annually because she could work full-time in North Battleford earning $130,000. The judge ordered spousal and child support based on imputing income of $45,000 to the appellant. The judge found that the respondent had been a stay-at-home parent and was entitled to time to adjust to new circumstances. Amongst his grounds of appeal, the appellant argued that the trial judge erred: 1) by failing to take into account all of the factors relevant to the consideration of custody, access and mobility; and 2) by imputing income of $45,000 to the respondent because she misapprehended the evidence respecting the respondent's employment status and employment prospects.

HELD: The appeal was granted. The court set aside the order granting the mobility application and the orders granting joint custody, primary residence and parenting of A.B., which in turn required setting aside the custody and access regime specified in the trial decision in the circumstances of A.B.'s relocation to Saskatoon. The matter was remitted to the Court of Queen's Bench for a new trial. As the relocation had occurred 15 months before, and there was no fresh evidence about A.B.'s current circumstances, it would not disturb the status quo regarding his residence. It then ordered on an interim basis that the parties have joint custody of A.B., his primary residence being with the respondent in Saskatoon and the respondent having specific access times. Based upon the parties' incomes, the court ordered the appellant to pay child support for A.B. and C.D. of $1,720 per month effective July 1, 2019 and spousal support of $94 per month effective July 1, 2019 to December 31, 2020. An application to vary these orders, except for spousal support, was available to the parties if the circumstances merited it. The court found concerning each ground that the trial judge: 1) had erred in failing to consider and determine whether relocation was in A.B.'s best interest. There was no inquiry into how relocation would disrupt the child by removing him from his school, friends and community, and the Gordon v Goertz factors were not mentioned. The only identified benefit to A.B. was his relationship

with his grandparents. No evidence showed that the respondent's move and continued commute to Davidson were relevant to her ability to meet A.B.'s needs; and 2) erred in her treatment of the evidence. Her finding that the respondent was a stay-at-home mother returning to the workplace after marriage dissolution was a material misapprehension of the evidence that undermined her discretion to impute income of $45,000 to her. There was evidence that supported that the respondent could earn at least $80,000 working part-time, and thus that income amount would be imputed to the respondent. Based upon that finding and the appellant's income of $124,850, he was ordered to pay $94 per month in spousal support from July 2019 to December 2020, after which time no spousal support would be payable by either party.

 Back to top

Canadian Pacific Railway Company v Kelly Panteluk Construction Ltd., 2020 SKCA 123

Ottenbreit Caldwell Barrington-Foote, October 28, 2020 (CA20123)

Statutes - Interpretation - Builders' Lien Act, Section 17, Section 27, Section 38
Civil Procedure - Queen's Bench Rule 3-49

The appellant, Canadian Pacific Railway (CP), appealed from the unreported decision of a Queen's Bench chambers judge (QBG 2177/17 and QBG 655/18, Regina, January 31, 2019) that dismissed its application to stay an action brought against it by the respondent, Kelly Panteluk Construction, in Saskatchewan (the Saskatchewan Action: SA) and ordered it to file a statement of defence or apply to challenge the jurisdiction of the court pursuant to Queen's Bench rule 3-14 within 15 days. It also appealed the dismissal in the same decision of CP's application to stay another action the respondent brought against CP regarding the paying out of a holdback (the Holdback Action: HA). Relevant to these two actions was one commenced by CP in Alberta (the Alberta Action: AA). In March 2015, the respondent entered into a contract with CP to provide construction services in connection with CP's building of a spur line in Saskatchewan (the project). The respondent was responsible for building the embankment as well as overseeing other construction contractors. A portion of the embankment collapsed. The three actions named above commenced as follows: 1) in August 2017, the respondent filed the SA for damages based in contract, quantum meruit and unjust enrichment. It claimed that delays caused by CP in performing its duties under the contract had caused it loss. It did not claim payment of the construction price and specifically noted that it had not completed its work under the contract but expected completion by October 2017. The respondent did not serve the claim until February 2018. In March 2018, CP applied in Saskatchewan for an extension of time to file a statement of defence and to stay the

action pending the outcome of the respondent's challenge to the AA. 2) In December 2017, CP commenced the AA in the Alberta Court of Queen's Bench against the respondent and others involved in the project seeking damages resulting from the collapse, claiming both in contract and negligence. It claimed the right under a term of the contract to set-off of damages it would prove against any sums still owing to the respondent under the contract. On February 16, 2018, it advised the respondent it would be retaining the holdback monies in accordance with the claim. The defendants applied to challenge the jurisdiction of the Alberta court. The Alberta judge found that the AA should be transferred to Saskatchewan pursuant to The Court Jurisdiction and Proceedings Transfer Act and, in September 2019, the transfer was accepted. 3) On March 5, 2018, after receiving notice from CP regarding its retention of the holdback, the respondent commenced the HA, applying by originating application (OA) for an order under ss. 17 and 38 of The Builders' Lien Act (BLA), directing CP to pay out the holdback monies to it immediately or for an order pursuant to Queen's Bench rule 3-49(1)(d)(i) determining that the monies were due and payable to it immediately. CP filed an application in the HA in March 2018 seeking an order that it had neither attorned to the Saskatchewan court's jurisdiction in that action nor in the SA. It also sought an order striking the HA on the basis that it was an improper second action against CP, the subject matter of which could be addressed as part of the AA. Alternatively, it should be struck on the basis that it could not be commenced by OA under the terms of the BLA. At the chambers hearing in March 2018, CP argued instead that the HA should be stayed. The judge rendered his decision in January 2019. Regarding whether the HA should be stayed to avoid a multiplicity of proceedings, the judge determined that it would not be stayed because the issues were not identical. The relief sought in the OA was narrower than and distinct from that claimed in the SA. Respecting the issue of whether it had been properly commenced by OA under the BLA, the judge found that it had been appropriate to do under the BLA and under Queen's Bench rule 3-49(1)(d)(i). The grounds of appeal were whether the chambers judge erred: 1) in finding that the HA was not multiplicitous and not an abuse of process. The appellant argued that three separate actions were dealing with the project and embankment failure; 2) by holding that the HA was properly commenced by OA. The appellant submitted that the respondent was neither a trustee in respect of a holdback account nor a lien claimant and could not, by using an OA, avail itself of either ss. 17 or 38 of the BLA as they are relevant only to applications for directions. Even if the monies were subject to a charge under s. 33, the respondent failed to commence its claim under s. 86 of the BLA. It further argued that Queen's Bench rule 3-49(1)(d)(i) could not be used to claim the holdback monies because there was a dispute regarding a term of the contract and evidence would be required to interpret it; and 3) in allowing only 15 days for CP to file further material.

HELD: The appeal was allowed in part. The standard of review regarding the first and last issues was on the discretionary standard, while the second was subject to the correctness standard. The court found with respect to each ground that the chambers judge had: 1) not erred in finding that if the HA were allowed to proceed, the prosecution of the three actions would not bring the administration of justice into disrepute. The respondent's

HA relies on immediate payment of the holdback monies, whereas CP's claim of set-off in the AA was unproven and inchoate. The former action gave the parties access to all the procedural tools available under the BLA; 2) not erred in finding that the HA could proceed by OA, but erred only by concluding that the respondent was both a lien claimant and a trustee of the holdback account because he assumed that lien had arisen under s. 27 of the BLA and that the respondent was a trustee of the holdback account pursuant to s. 38. The respondent could not claim the holdback monies as a statutory holdback. Liens under provincial legislation cannot be registered against CP's lands, and there could be no charge on the holdback trust account under s. 38 of the BLA. However, the appellant admitted in its pleadings in the AA that the set-off it sought was against sums owing under the contract. Accordingly, the court found that the holdback monies were trust monies and that s. 17 of the BLA had been interpreted to permit the respondent to claim for relief by OA to seek resolution of the dispute between it and the appellant. With respect to Queen's Bench rule 3-49(1)(d)(i), it found that commencing the action by OA and the summary procedure under the rule were apt even where evidence was necessary. The pleading of set-off by the appellant in the AA did not prevent use of the procedure under the rule; and 3) erred in giving CP such a short time to respond. It failed to consider the effect of the transfer of the AA to Saskatchewan to assess how to proceed. CP was given 60 days from the date of the judgment to respond to the HA. In a concurring judgment, Caldwell and Barrington-Foote, J.J.A. expressed their differing view regarding the interpretation of s. 17 of the BLA. They held that s. 17 does not contemplate an application to prove and enforce a contractor's claim for payment for services or materials supplied to an improvement nor one that would require adjudication of CP's claim for damages. They found they would nevertheless dispose of the appeal in the same way as Justice Ottenbreit.

 Back to top

Wilson Olive and Friends of the Aquifer v Keys (Rural Municipality), 2020 SKCA 124

Richards Caldwell Kalmakoff, November 4, 2020 (CA20124)

Civil Procedure - Appeal - Moot

The applicant respondent, the Rural Municipality of Keys, applied to quash the appellants' appeal on the ground that it was moot. The dispute between the parties originated when the Hutterian Brethren of Crystal Lake (HBCL) sought permission from the applicant to construct a collective dwelling. Because the applicant had to consider the official community plan (OCP) and its zoning bylaw as part of the application, it concluded that the bylaw should be amended to include collective dwellings in its definition of "farmsteads." In 2018, it

passed a resolution approving what the minutes of the council meeting referred to as HBCL's "development application." The respondents appealed to the local Development Appeals Board pursuant to s. 219(1)(a) of The Planning and Development Act, 2007 requesting that the "development permit" issued by the applicant be cancelled and held to be of no effect for so long as the zoning bylaw, as amended, was inconsistent with the OCP. The board dismissed the appeal as it found no inconsistency between the OCP and the amended zoning bylaw. The respondents then appealed to the Planning Appeals Committee of the Saskatchewan Municipal Board, arguing the that zoning bylaw was invalid for inconsistency with the OCP and that the amendment of the bylaw was invalid because the members of the council voting on it had been in a conflict of interest and because the HBCL had not applied for it. The committee dismissed the appeal because under s. 219(1)(a) of the Act, it lacked jurisdiction either to entertain the appeal or to consider the validity of amendments to bylaws, as that jurisdiction belonged to the courts (see: 2019 SKMB 76). The respondents applied for and obtained leave to appeal to the Court of Appeal on the grounds of whether the committee erred when it found it did not have jurisdiction under s. 219 of the Act and because it declined to address the respondent's assertion of a denial of procedural fairness at the board level. After leave was granted, the applicant amended the zoning bylaw to provide forms described as "development application" and "permit," respectively. The applicant's development officer then issued a development permit to HBCL. The respondent appealed again to the board on the basis that no application form had been filed, but it was denied because the period for appealing the 2020 permit had expired. The applicant argued at the hearing before the Court of Appeal that the issuance of the 2020 permit and its development officer's decision not to interfere with HBCL's project rendered the respondents' appeal moot, and the court should decline to exercise its discretion to hear the appeal. The respondent argued that the 2020 permit was tied to the applicant's council's resolution in 2018. The issues were: 1) whether the appeal involved a live controversy between the parties; and 2) whether the appeal should be heard regardless of mootness.

HELD: The application was granted, and the respondent's appeal quashed. The court found concerning each issue that: 1) the appeal was moot. The validity of the applicant's purported approval of the development in 2018 was no longer a live issue. Since the appeal had been undertaken, the applicant amended the zoning bylaw to provide development forms, and the development officer had issued the 2020 permit form. Thus the legal basis of HBCL's development turned on the 2020 permit, not on the applicant's resolution made in 2018 that was at issue in this appeal. HBCL's existing authorization to proceed flowed from the permit, not from the council's purported approval in 2018. Because of this finding, it was unnecessary to deal with the issue of whether a development officer can lawfully limit or fetter his or her authority as proposed by the applicant; and 2) the appeal should not be heard. It assessed the factors set out in Borowski and determined that the issue of judicial economy and the proper role of the judiciary weighed against proceeding with the appeal. The respondent was awarded solicitor-client costs for the preparation of the factum but not for the application for leave to appeal. The court agreed that as the applicant had contended from the outset that the appeal was moot

but then obliged the respondents to file their factum and brought the application to quash, that warranted an award of costs against it, but that the applicant was entitled to oppose the respondent's attempt to obtain leave.

 Back to top

Abbey Resources Corp. v Andjelic Land Inc., 2020 SKCA 125

Richards Caldwell Kalmakoff, November 4, 2020 (CA20125)

Contract Law - Interpretation - Arbitration Clause - Appeal
Statutes - Interpretation - Arbitration Act, 1992, Section 8

The appellant, a natural resource producer, appealed the decision of a Queen's Bench chambers judge (QB 158/18, Swift Current) to award summary judgment to the respondent, a lessor of lands to natural resources producers. The parties had signed 27 surface lease agreements, which contained clauses regarding periodic review of annual rent payable. The clause in the majority of the agreements (22 of the 27) stated that the amount of rent could be reviewed at the end of each three-year period upon notice to the parties by request in writing and, if disagreement occurred, the matter would be determined by the board of arbitrators appointed pursuant to The Surface Rights Acquisitions and Compensation Act. The clause in the other five leases provided for rent review under the Act. Under s. 77, the review of compensation in agreements occurs every three years. The parties conducted the reviews of rent payable under the two different types of leases every three years, the last one having been undertaken in December 2017. In March 2018, the appellant advised that due to the low price of natural gas, it proposed to reduce its payment of rent by 50 percent, but the respondent did not agree. It received payment from the appellant in the reduced amount but did not cash the cheque. It then issued a statement of claim seeking damages in the amount of rent due and later sought summary judgment. Three days before the hearing, the appellant filed a notice of application to stay proceedings pursuant to s. 8 of The Arbitration Act, 1992 (AA). The trial judge directed the removal of that application because of its late filing. He found that, as there was no genuine issue requiring trial, summary judgment was available. Although the AA application was not involved, the judge addressed whether the parties were required to resort to arbitration to deal with the issue raised by the appellant's claim. He considered the wording of the clause in the 22 leases but did not allude to the clause in the other five leases and found that the review of rent was prescribed at only the end of three-year periods, which did not give the parties the ability to raise new issues during the course of the contract, including unilateral change to the rent or resort to arbitration under the AA. The appellant had breached the agreement, and the respondent was awarded judgment for the

outstanding rent. The issues on appeal were whether the appellant was precluded from an appeal by s. 8(6) of the AA and, if not, whether the trial judge committed a reviewable error in deciding not to stay the respondent's action.
HELD: The appeal was dismissed. The court found that the trial judge had not made a decision pursuant to s. 8(6) of the AA, and thus the appellant was not barred from pursuing this appeal. It adopted the jurisprudence from other provinces regarding provisions equivalent to s. 8(6), finding that the appeals were not barred from decisions that found no arbitration agreement or no applicable arbitration agreement. The trial judge had not erred in deciding whether the arbitration clauses applied. He correctly interpreted the arbitration clauses in each type of lease as pertaining only to three-year cycles.

 Back to top

Walker v Mitchell, 2020 SKCA 127

Whitmore Tholl Kalmakoff, November 16, 2020 (CA20127)

Civil Procedure - Pleadings - Statement of Claim - Application to Strike - Abuse of Process - Appeal
Civil Procedure - Queen's Bench Rules, Rule 7-9(2)(e)
Civil Procedure - Pleadings - Statement of Defence - Limitation Period

The appellant appealed from the order of a Queen's Bench judge to strike his statement of claim because it was an abuse of process. The appellant had obtained advice in 2011 from the respondent, a lawyer, that a judge would likely enforce an oral agreement between him and his common-law spouse that she would not be entitled to an equal division of the value of a house they were purchasing. The agreement included that the appellant would repay his spouse any funds that she contributed to its purchase. When the appellant and his spouse separated in June 2015, she commenced an action for division of family property and equal division of the family home. She refused to accept an offer to be paid the amount she had contributed to the house purchase. By September 15, 2015, the appellant was contemplating legal action against the respondent and his law firm for damages for losses he suffered as a result of the respondent's negligence in failing to provide him with correct advice as to his and his spouse's rights under The Family Property Act, 1997. On December 21, 2015, the appellant issued his statement of claim. The respondent filed a statement of defence, pleading The Limitations Act (LA), and then applied for an order pursuant to Queen's Bench rule 7-9(1) to strike the statement of claim pursuant to Queen's Bench rule 7-9(2)(e) for being an abuse of process on the basis that it was statute-barred under the LA. The judge found that the appellant had knowledge of the necessary facts

regarding the potential claim on September 16, 2015. The two-year limitation period commenced then and ended on the same date in 2017. As the appellant had not brought himself within s. 6(2) of the LA, the action was statute-barred by s. 5, and as the respondent had pleaded the LA in his defence, it would be an abuse of process not to strike the claim. The appellant appealed on the basis that the chambers judge should not have struck the claim pursuant to Queen's Bench rule 7-9(2)(e), but should instead have dismissed the application on the basis that the respondent could only properly have obtained the relief he sought by applying for a determination of a point of law under Queen's Bench rule 7-1 or by applying for summary judgment under rule 7-2.
HELD: The appeal was dismissed. The court found that the chambers judge had not erred in striking the claim. He found that the plaintiff had knowledge of all the facts that would cause the plaintiff's claim to be statute-barred, and it was within his discretion to strike it as an abuse of process under Queen's Bench rule 7-9(2)(e). The judge was not required to direct the respondent to the processes established in Queen's Bench rules 7â€‘1 or 7â€‘2.

 Back to top

Larocque v Yahoo Inc., 2020 SKQB 263

Elson, October 14, 2020 (QB20248)

Civil Procedure - Class Actions - Certification - Application to Adjourn

The representative plaintiff in a proposed class action issued in May 2017 applied to have the action certified. Another class action against the defendants had been commenced in the Ontario Superior Court of Justice in December 2016. It had recently been conditionally certified as a class action. Both the Saskatchewan and the Ontario actions purported to be national class actions arising from the same alleged wrongful conduct on the defendants' part. The certification hearing for this action had been scheduled for November 2020. The parties to the Ontario action filed applications to stay the Saskatchewan action on a conditional basis in favour of the Ontario proceeding. They had entered into a settlement agreement, following which the Ontario court issued a consent certification order for settlement purposes. An application for court approval of the order was scheduled for hearing on January 8, 2021. The agreement contained a condition that if it were terminated, the certification order would be set aside. The agreement also contained a condition precedent that the Saskatchewan action be permanently stayed as a class action but could continue as an individual action. The Ontario plaintiffs requested that this certification action be adjourned until after the Ontario court determined

the request for settlement approval or, alternatively, that it be stayed. The plaintiff in the Saskatchewan action opposed the request. She argued that it was not appropriate for the courts of other provinces to make decisions contrary to the Saskatchewan legislation's intent.
HELD: The Ontario plaintiffs' application for an adjournment of the certification application was granted. The application was adjourned sine die until after the Ontario court rendered its decision regarding approval of the settlement agreement. The court found that deference to another court's exercise of jurisdiction with respect to a similarly based multi-jurisdictional class action was recognized in ss. 6(2) and (3) of The Class Actions Act.

 Back to top

Royal Bank of Canada v Sharma, 2020 SKQB 264

Gabrielson, October 15, 2020 (QB20249)

Bankruptcy and Insolvency - Conditional Discharge - Appeal

The appellant, the Royal Bank of Canada, appealed the decision of the Registrar in Bankruptcy in which the Registrar granted a conditional discharge in bankruptcy to the respondent on the condition that he pay $61,000 to the trustee (see: 2019 SKQB 237). In 2025, the trustee could apply for the respondent's discharge if it were satisfied that he did not have the ability to complete the payment. The respondent had been accepted into a four-year dentistry program in 2014 and obtained a $200,000 line of credit (LOC) from the appellant to be used to pay his costs in obtaining his dental degree. He then purchased a luxury vehicle with a down payment of $17,000 and a condominium with a down payment of $10,000. He exhausted the LOC by July 2015 and was also asked to withdraw from his studies because he failed his second-year exams. In December 2015, he was admitted for drug addiction treatment. In April 2016, the respondent assigned in bankruptcy and listed drug addiction and mental health issues as reasons for his financial difficulties. At the bankruptcy hearing, the appellant argued the respondent should not be discharged because he was not an honest but unfortunate debtor but a drug addict who supported his habit by dealing in drugs, and that he failed to disclose this to the appellant when he applied for the LOC. The registrar found that the respondent did have a serious addiction which he did not disclose to the appellant when he applied for the LOC but determined that neither party considered this to be a material factor. He had contributed to his bankruptcy by unjustifiable extravagances and a conditional discharge would be appropriate. The amount of the payment of $61,000 represented the value of the extravagant items. The appellant argued on appeal that the registrar had erred by finding a link between the respondent's drug addiction and his drug dealing. The respondent had been financing his drug use through drug

sales prior to his acquisition of the LOC. The registrar had erred in finding that the respondent's behaviour was driven by addictions. He made his assignment to evade his debt to the appellant. The registrar's decision should be set aside and discharge of the respondent be made conditional upon payment of the full amount owing to the appellant.
HELD: The application was dismissed. The court found that the standard of review on the appeal of a registrar's decision is palpable and overriding error in respect to findings of fact made by the registrar and correctness on questions of law and matters of principle. In this case the registrar noted that s. 173(1) of the Bankruptcy and Insolvency Act does not identify non-gambling substance addiction as an aggravating factor that precludes ordering an absolute discharge. Upon review of the registrar's findings of fact, all of which fell within the realm of reasonable findings, the court found that she had not committed a palpable or overriding error that would warrant interference by the court.

 Back to top

Sunshadows Campground v Good Lake (Rural Municipality No. 24), 2020 SKQB 268

Layh, October 21, 2020 (QB20246)

Municipal Law - Bylaws - Application to Quash

The applicants, owners and operators of seasonal campgrounds located within the respondent Rural Municipality of Good Lake, applied to have a recently-passed bylaw quashed. The applicant had operated its campsites since 2009 and, at various times since then, had paid the respondent differing permit or service fees as prescribed by bylaws. In 2019, the respondent, the applicant and other campground owners discussed the costs that campsite users were occasioning the respondent and how fees should be levied. The respondent suggested an annual flat fee per site per annum. The parties could not agree, and the respondent commissioned a study conducted by a consulting firm to assess the cost of municipal infrastructure provided to campsites. It found that the annual cost per campsite to the respondent was $197.06, comprised of the cost of lagoons, road and miscellaneous items. Based on the report, the respondent passed the Campground Regulations Bylaw in 2020, whereby it adopted the fees suggested in the report. The applicant then sought to quash the bylaw.
HELD: The application was dismissed. The court found that it was unable to discern the precise grounds that the applicant relied upon to have the bylaw quashed but addressed the application in terms of whether it was compliant with The Municipalities Act, particularly concerning the grounds on which bylaws may be quashed under s. 358 of the Act. In this case, the only possible ground would be that the bylaw was illegal in substance

or form and, in particular, illegal for vagueness. The court held that it was clear and understandable to campground owners and the obligations were precise.

 Back to top

Carlson Agricultural Enterprises Ltd. v MFI Ag Services Ltd., 2020 SKQB 269

McCreary, October 22, 2020 (QB20247)

Civil Procedure - Queen's Bench Rules, Rule 6-69
Statutes - Interpretation - Saskatchewan Farm Security Act
Civil Procedure - Replevin

The applicant sought an order directing the sheriff to replevy four pieces of farm equipment detained by the respondents. They opposed the application on the grounds that the order should not be granted because the requirements under Queen's Bench rule 6-69 had not been satisfied and because the seizure of the equipment was governed by The Saskatchewan Farm Security Act (SFSA), which requires proper notice prior to seizure. HELD: The court granted the application and made an order of replevin, having found that the applicant had met the requirements of Queen's Bench rule 6-69 to obtain an order for goods unlawfully detained. It rejected the respondent's argument that the SFSA applies to the seizure of all farm implements held by farmers. Section 2 and ss. 47 to 64 of the SFSA only apply if the party seizing an implement is a secured party. There was no evidence that the applicant was a secured party, nor that any security agreement existed to create a security interest in the equipment.

 Back to top

Bank of Nova Scotia v Roe, 2020 SKQB 271

Layh, October 26, 2020 (QB20251)

Statutes - Interpretation - Saskatchewan Farm Security Act, Section 9(1)(d), Section 18, Section 19

The applicant, the Bank of Nova Scotia, sought an order permitting it to commence an action against the respondents respecting a defaulted mortgage against four quarters of their farmland, on the basis that s. 9(1)(d) of The Saskatchewan Farm Security Act (SFSA) was not applicable. The applicant provided a mortgage to the respondents in 2007 that charged four quarters. In 2011, the respondents defaulted, and the applicant served notice under the SFSA. The parties reached a settlement requiring the respondents to make a $10,000 payment each year, and the applicant then discontinued enforcement proceedings. The respondents withheld their payments in 2018 and 2019 because they objected to the applicant's failure to provide them with information about the calculation of the balance owing on the mortgage. The applicant then served a new notice in August 2019. Mediation failed, and the applicant requested the Farmland Security Board to prepare the court report. It noted that the respondents had listed the four quarters for sale before this application. The board reviewed the respondent's debt servicing requirements to determine whether they had a reasonable possibility of meeting the mortgage obligations of $155,000. In light of their other debts, it concluded that they could not but that the sale of land might provide a reasonable possibility of meeting their obligation. The applicant argued that the board's finding that the respondents did not have a reasonable possibility of meeting their obligation was sufficient to support its request, but the respondents pointed to the board's remarks that the land sale would enable them to do so, which meant that the application should be dismissed under s. 18 of the SFSA. They also argued that a measure of the mortgagor's reasonable ability should be whether the equity in the land exceeds the amount of the debt. Here, the sale price for the land was $1,200,000.
HELD: The application was granted. The court ordered that s. 9(1)(d) of the SFSA did not apply, and the applicant could commence its action, but, given equitable considerations, it could not do so until after January 1, 2021. Under s. 19 of the SFSA, the court had the authority to consider all the circumstances to make an order that was just and equitable. The respondents were given an opportunity to market and sell their land at the best price within the next two months. It rejected the respondent's interpretation of the measure of a mortgagor's reasonable ability as being whether the equity in the land exceeded the debt.

 Back to top

Martin v Martin, 2020 SKQB 272

Mills, October 26, 2020 (QB20255)

Real Property - Partition
Statutes - Interpretation - Land Titles Act, 2000, Section 152, Section 156

The plaintiffs, Martha and Kenneth Martin, commenced an action for partition in 2011. After Kenneth died, Martha applied individually and in her capacity as executrix of her deceased husband for an order of partition and sale under s. 4 of The Partition Act, 1868, 31 & 32 Vict., c. 40 (UK) of property jointly owned with the defendant, Richard Martin, the son of the plaintiffs. The property consisted of surface and subsurface parcels of land and a house, all of which were purchased by the defendant in 1997 and 1999 respectively. When the defendant married, the title to the land was transferred into a joint tenancy and they granted a mortgage of $170,000 to the credit union to support a construction loan for improvements on the land. They separated in 2001 and in 2002, the defendant's wife filed for bankruptcy and the credit union demanded payment of the loan. As part of the divorce negotiation and final settlement, the title to the lands and house was transferred jointly to the defendant and his parents and they all assumed the mortgage. The defendant and his lawyer at that time testified that there was no intention to create a trust such that the plaintiffs would hold title for the benefit of the defendant. The defendant and his father both contributed money and labour to improve the house but the evidence submitted by the parties was conflicting and not accepted by the court. There was no evidence as to the fair market value of the land at the time that the court action for partition was started or at the time of trial. The defendant alleged that the action was commenced out of malice or to be oppressive and that as he resided on the land, a sale would cause him serious hardship. The plaintiff said that she was trying to get her affairs in order and suggested that the defendant be given the opportunity to purchase her interest and that of the estate in the property.

HELD: The application was granted. The court granted an order severing the joint tenancy to the property with each of the parties owing an undivided one-third interest because it determined that since the action had been commenced prior to Kenneth Martin's death, his estate was entitled to proceed with the action after his death under ss. 152 and 156 of The Land Titles Act, 2000. Thus, his estate was entitled to be the owner of a one-third interest in the property. It found that there was nothing in the factual situation of the case that overrode its direction to order partition. Under s. 5 of the Act, the order was made to give the defendant an opportunity to purchase the plaintiffs' interests and set out the terms for the parties to agree to a realtor and a listing price. The defendant would then have 30 days to purchase both of the plaintiffs' interests, failing which the property would be listed for sale.

Back to top

Big River First Nation v Agency Chiefs Tribal Council Inc., 2020 SKQB 273

McCreary, October 26, 2020 (QB20252)

Corporations - Non-profit Corporations - Oppression

The applicant, Big River First Nation (BRFN), applied for relief from the alleged oppressive conduct of the respondent, Agency Chiefs Tribal Council (ACTC), pursuant to the oppression remedy provided under The Non-Profit Corporations Act, 1995 (NPCA). The ACTC was formed as a non-profit corporation whose membership was comprised of the applicant and several other First Nations. Its purpose was to conduct business and deliver community services to member Nations and their constituents. Representatives from the member Nations signed the Agency Chiefs' Tribal Council Convention Act (Convention Act), designed to govern the relationship between the members and based on traditional Cree values and customs. The Act required ratification to come into force, and the parties did not agree whether it had ever been ratified. Each member Nation nominated two representatives to be appointed to ACTC's board of directors, and the board was responsible for directing ACTC's activities for the benefit of each Nation. In 2019, BRFN decided it would take steps to resign its membership to have exclusive control over its funding, business and community services. In September 2019, the Chief and Council of the BRFN passed a resolution to terminate its membership pursuant to s. 116 of the NPCA, to take effect only after certain conditions were met. A copy of the resolution was sent to the ACTC. It decided that the BRFN was not entitled to make its resignation subject to conditions, and therefore, it took effect immediately. It then removed BRFN's two representatives. The issues were whether: 1) BRFN resigned its membership in ACTC; 2) ACTC engaged in oppressive conduct when it removed BRFN's representatives; and 3) BRFN was entitled to relief pursuant to NPCA's oppression remedy.

HELD: The application was granted. The court ordered that BRFN be added to the register and records of the ACTC as a member of the corporation and that two representatives from it be added to the board of directors. It found with respect to each issue that: 1) BRFN had not resigned its membership. While taking the Convention Act's intent into account in interpreting the NPCA, neither piece of legislation nor the bylaws of the ACTC contained provisions as to how members could resign. In accordance with the common law, member resignation from a non-profit corporation becomes effective when it specifies that it is to be effective. BRFN was entitled to make its resignation conditional and effective when the conditions were met and, as they had not yet been realized, BRFN had not resigned its membership; 2) ACTC engaged in oppressive conduct when it treated BRFN's notice as an immediate resignation and unilaterally removed its directors from the board. ACTC had not followed the requirements provided in ss. 95, 96 and 97 of the NPCA and had engaged in oppressive conduct under s. 225; and 3) BRFN was entitled to relief under the NPCA's oppression remedy under s. 225(2).

Back to top

Canadian Imperial Bank of Commerce v Doan, 2020 SKQB 274

Robertson, October 26, 2020 (QB20253)

Mortgages - Foreclosure - Application for Order Nisi for Sale by Real Estate Listing - Reduction of Upset Price

The plaintiff bank applied for an order nisi for sale by real estate listing of residential property in Oxbow owned by the defendant. The application stated that the proposed minimum sale price was $16,000. The plaintiff had loaned $120,000 to the defendant secured by a mortgage agreement regarding the property in 2017. The defendant defaulted and the amount owing on the mortgage loan as of September 2020 was $124,500. Leave to commence the action was granted to the plaintiff in February 2020. In August, the plaintiff filed its notice of application for an order nisi by real estate listing and submitted a drive-by appraisal estimating the market value of the property as being $20,000 to $32,000. The judge adjourned the application because of her concern with the proposed upset price of $16,000 and directed that a full appraisal of the interior and exterior of the house be conducted. The plaintiff filed an affidavit sworn by a realtor that attached a Comparative Mortgage Analysis advising a suggested listing price between $43,000 and $63,000. At the next hearing, another judge adjourned the application to permit the realtor to file an affidavit regarding the interior of the home. After it was filed, this hearing of the application occurred.
HELD: The application was dismissed. The court found that plaintiff had not explained the drastic devaluation of the property since the time of the mortgage loan and why the estimates of its value varied. The plaintiff would not be awarded costs and was given leave to reapply for judicial sale or foreclosure.

 Back to top

Irvine v Beausoleil, 2020 SKQB 281

Goebel, October 29, 2020 (QB20257)

Family Law - Child Support - Determination of Income - Imputing Income
Family Law - Division of Family Property - Unequal Division
Statutes - Interpretation - Family Property Act, Section 22

The parties separated in 2016 after a fourteen-year spousal relationship and two children, now aged 15 and 17. The respondent wife sought retroactive and ongoing child support, s. 7 expenses and retroactive and ongoing

spousal support. The petitioner had not paid any support since the separation. He argued that he had paid $595 per month on the loan on the respondent's vehicle, and that amount exceeded any past support obligation. In addition, the parties disagreed on the petitioner's income for the purposes of determining any past or ongoing support obligations. The parties met in Calgary in 2000, and at that time, the respondent owned her own home and was economically self-sufficient because of her home-based daycare. The petitioner worked as a hardwood flooring installer and earned approximately $100,000 per annum. After they began living together, the petitioner experienced financial and legal challenges that resulted in him moving to Saskatoon and the respondent reluctantly followed with their two young children. The parties bought a quarter section of farmland near the city along with a mobile home. Because she had to care for the children, the respondent was only able to commence paid employment in 2012. From 2016 until the trial, the respondent earned $40,000 per annum as a full-time school custodian. The petitioner continued working as a flooring installer but quit in 2015 to work as a car salesman for the next two years, earning commission income of $43,600 until 2017, when he quit and collected employment insurance. He returned to Calgary in 2018 and again worked as a flooring installer. His 2018 income tax showed income of $37,100 comprised of business income and EI benefits. In 2019, he submitted his pay stubs as evidence of his income of $35,700. The respondent argued that annual income of $60,000 should be imputed to him because he had many years of experience and had been able to earn at least $100,000. The parties also disputed the value and division of the family property, specifically the family home and the land on which it was situated. After the separation, the petitioner remained in the mobile home, and the respondent and the children moved into the home of friends and later subsidized housing. During his residency, the petitioner failed to pay for insurance, utilities and property taxes, and the respondent paid them at various times. In 2018, the respondent brought a successful application for interim exclusive possession of the family home, and the petitioner vacated it but left it in an appalling state. The respondent asked the court to account for the property's condition by awarding an unequal division of family property. She also requested that the court indefinitely delay any home and adjacent land distribution while the children were still in her care. Among the issues were: 1) what past, present and ongoing child support was payable by the petitioner; 2) whether the respondent was entitled to spousal support and should further adjustment be made to account for the vehicle loan payments made by the petitioner; and 3) what property distribution was appropriate pursuant to The Family Property Act?

HELD: The court ordered that the parties have joint custody of the children. They would remain in the respondent's primary care with reasonable access provided to the petitioner. He was ordered to pay the respondent $31,960 for past child support and ongoing monthly child support of $723 from November 2020 until the children remained "children of the relationship" as defined in The Family Maintenance Act, 1997 and for his proportionate share of s. 7 expenses for the same period. The respondent could hold back the sum of $15,000 from the equalization payment owing to the petitioner as security for these payments. The respondent's claim for past and ongoing spousal support was dismissed. The respondent owed the petitioner

$183,900 in an equalization payment to effect family property division, subject to adjustments, before the end of March 2021. If the respondent decided to sell the property, it would have to be listed by February 2021. Costs of $10,000 were awarded to the respondent. The court found concerning each issue that: 1) the respondent's income was set at $40,000, and income of $43,650 was imputed to the petitioner for his 2016 and 2017 support obligations and at $50,000 thereafter under s. 19 of the Guidelines because he was intentionally underemployed since he quit his job in 2017. 2) Although the evidence established the respondent's right to compensatory entitlement, there was no disparity between the parties' current incomes. The respondent's sacrifices were noted but found not to translate into an ongoing financial advantage for the petitioner. In addition, the petitioner's payment of the vehicle loan had been taken into account in the property calculation, but no further adjustments would be made to account for them; and 3) it accepted the appraisal values of the family home and a nine-acre parcel and a second parcel of 150 acres of $205,000 and $165,000 respectively. The respondent had met the onus under s. 22 of the FPA that the petitioner's failure to maintain the property constituted an "extraordinary circumstance," supporting an unequal division of $5,000 in her favour as well as accounting for the payments she made when the petitioner had exclusive possession. It would be inappropriate to delay the distribution of the property, but a reasonable period was given to the respondent either to pay the equalization amount or to list the property.

 Back to top

R v Bilash, 2020 SKQB 279

Popescul, October 29, 2020 (QB20263)

Criminal Law - Expungement of Guilty Plea - Appeal

The self-represented appellant filed a summary conviction appeal following his guilty plea in Provincial Court to a charge of driving a vehicle without due care and attention contrary to s. 213(1) of The Traffic Safety Act. The appellant wanted to appeal his conviction on the basis that he did not intend to plead guilty and would like to contest the charge and proceed to trial. An RCMP officer stopped the appellant because he saw the appellant swerving and weaving on the highway. The appellant passed the ASD test and the officer issued the ticket for the infraction of the Act. Prior to attending court, the Crown and the appellant had discussed that if the latter pleaded guilty, he would receive a fine of $225 rather than the voluntary payment option of $280. In court, the judge asked the appellant how he wished to plead and he replied that the Crown had given him a deal and he was going to take it and reiterated that response when pressed as to whether he was admitting that he had been

driving without due care and attention. The issues were: 1) whether the summary conviction appeal procedure was the correct process or should the appellant seek to expunge his plea in Provincial Court; and 2) if this appeal were the correct process, had the appellant established that his guilty plea was invalid?
HELD: The appeal was dismissed. The court found that the appellant's decision to plead guilty was voluntary, unequivocal and informed. It found with respect to each issue that: 1) the appellant had used the proper procedure. Once an accused has been convicted and sentenced after entering a guilty plea, the judge of first instance loses jurisdiction and any subsequent attempt to expunge the guilty plea can only be considered on appeal; and 2) the appellant had not met the onus of establishing that his guilty plea was either involuntary, uninformed or equivocal. As he had not led any evidence, the court reviewed the transcript. Pleading guilty in response to an offer from the Crown to reduce the fine does not in itself constitute an inducement that renders the guilty plea involuntary.

 Back to top

R v Forrester, 2020 SKQB 283

Robertson, October 30, 2020 (QB20264)

Criminal Law - Motor Vehicle Offences - Driving with Blood Alcohol Exceeding .08 - Conviction - Appeal
Constitutional Law - Charter of Rights, Section 10(b), Section 24(2)

The appellant appealed her conviction under s. 320.14(1)(b) of the Criminal Code after trial in Provincial Court. At trial, the appellant had brought a Charter application alleging that her s. 10(b) Charter rights had been violated and sought an exclusion of the certificate of analysis under s. 24(2) of the Charter. A blended voir dire and trial was held. The appellant testified that when the police officer advised her of right to counsel while she was seated in the back seat of the police vehicle, she could not hear him properly because of the plexi-glass screen between them. Further, she had not understood her rights because of anxiety and because she might have suffered a head injury that occurred earlier in the evening. As part of the Crown's evidence, it submitted the in-car video of the exchange between the officer and appellant. After watching it, the trial judge found that he did not believe the appellant's testimony because the audio recording indicated that the appellant heard and understood what the officer said. The judge found that there had been no breach of the appellant's Charter rights and admitted the certificate into evidence at the trial proper.

HELD: The appeal was dismissed. The court found that the trial judge's findings of fact and credibility were entitled to deference. There was evidence to support those findings and there were no reason to interfere.

 Back to top

Van Burgesteden v Jewitt, 2020 SKQB 284

Turcotte, October 30, 2020 (QB20259)

Constitutional Law - Charter of Rights, Section 15
Family Law - Divorce - Severance

The parties married in 1991 and separated in 2015. The petitioner husband commenced divorce proceedings for a civil divorce under the Divorce Act (DA) and sought an equal division of the family home and property under The Family Property Act (FPA). The respondent filed an answer and counter-petition in 2018, opposing the divorce and seeking spousal support under the DA and The Family Maintenance Act, 1997 (FMA) and an unequal division of the family home and property under the FPA. She and the petitioner were married in the Evangelical Lutheran Church of Canada, and she submitted evidence that showed that the church denies the dissolution of the covenant of marriage. The petitioner applied to have the divorce proceedings severed from the parties' other proceedings. He argued that the respondent had delayed the matter repeatedly, and he wanted to remarry and deposed that reconciliation with the respondent was not possible. The self-represented respondent opposed his application on constitutional and other grounds. She raised the following issues: 1) that a civil divorce discriminated against her on the basis of religion and did not uphold the right to equal protection and benefit of the law as divorce was inconsistent with her religious beliefs; 2) that a civil divorce violated her right to equal protection of the law on the basis of mental disability because it would contribute to her mental instability; 3) that the DA was inconsistent with the Constitution Act, 1982 and the Civil Marriage Act because the first invokes the supremacy of God in its preamble, and marriage ordained by God is a permanent institution severable only by death, and the second recognizes marriage as a fundamental institution which Parliament has a responsibility to support; 4) that if the constitutional arguments failed, the court could not grant a severed divorce judgment without the consent of both parties. Further, severance would prejudice her other claims. If the petitioner died before the resolution of the corollary relief proceedings, she would not be able to pursue her support claim against his estate.
HELD: The application for severance was granted. The court found concerning each issue: 1) the respondent's challenge related to equal protection based on religious belief under s. 15(1) of the Charter was dismissed. The

DA does not violate the s. 15(1) right to equal protection and benefit of the law on the basis of religion. The granting of civil divorce has no impact on religious marriages and divorces and cannot infringe on freedom of religion. In this case, the parties will remain married in the Evangelical Lutheran Church, and the DA does not force the parties to obtain a religious divorce; 2) the DA does not discriminate against the respondent on the basis of mental disability, thereby infringing her s. 15(1) Charter rights. She had not presented any evidence to establish that the effect of the DA has a disproportionate impact on people with mental disabilities, regardless of the impact on her mental state, which was insufficient to demonstrate a distinction on the basis of her being a member of a group of people with mental disabilities. Had the respondent presented sufficient evidence of infringement under this issue or the first, the remedy she requested was still not available. Section 52 of the Constitution Act, 1982 does not permit individualized remedies; 3) the words in the preamble to the Constitution Act, 1982, â€œsupremacy of Godâ€ does not incorporate God's law in the laws of Canada and thus the DA provision for the dissolution of a civil marriage is not conflict with those words. The DA was not in conflict with the Civil Marriage Act. It was created to allow same-sex couples to marry and divorce legally and civilly; and 4) that it had the jurisdiction to grant a severed divorce where both parties do not consent, and it had the discretion to permit severance. It was appropriate to do so in this case where the petitioner wished to remarry, and the respondent had caused delay. The respondent's claim of prejudice she might suffer if the petitioner were to die, without evidence that he was in poor health, was not persuasive. Regardless, she could continue her claims for division of family property against his estate under s. 51 of the FPA.

 Back to top

R v Dillon, 2020 SKPC 35

Daunt, September 1, 2020 (PC20038)

Criminal Law - Evidence - Admissibility of Statements - Voluntariness

The accused was charged with stabbing the victim. The Crown sought to tender into evidence the accused's videotaped statement to the police and a voir dire was held to determine whether the statement was voluntarily given. The accused had been arrested by a police officer who testified that although she was injured, she did not seem intoxicated. After he arrested her, however, her demeanour changed. He placed her in his police vehicle and asked her if she wished to consult a lawyer and she said that she did. He then read her the police warning, which she said that she understood. The officer stated that the accused placed a call to Legal Aid and after completing it, she was taken to an interview room. There was some conflict between the time that the

officer said that telephone call to the lawyer was made and the time at which he commenced the interview. In the video, neither the accused nor the officer mention the call to a lawyer, and the officer did not ask her if she wanted to make a statement but said to her: â€œTell me what happened,â€ nor did he did not reiterate the police warning. The accused's responses were rambling and incomprehensible.
HELD: The statement was inadmissible because the court found that the Crown had not proven beyond a reasonable doubt that it was voluntary. It expressed the reasons for the decision as being: the time at which the accused was given the police warning occurred at a different time from when she gave the statement, and she might not have understood her right to remain silent; the concern it had regarding the evidence of the accused's exercise of her right to counsel, since there was conflict as to whether she had spoken to a lawyer before the officer began questioning her; and it was not satisfied that the accused understood what she was saying or that what she said could be used against her as she seemed to be suffering either some sort of psychosis or the effects of drug intoxication.

 Back to top

Leland Campbell Kondratoff Persick LLP v Kowalyshyn, 2020 SKPC 42

Green, October 29, 2020 (PC20040)

Professions - Barristers and Solicitors - Fees
Statutes - Interpretation - Legal Profession Act, 1990, Section 73.1

The plaintiff law firm sued the defendants pursuant to The Small Claims Act, 2016 in the civil division of Provincial Court. It claimed the sum of $18,338 for fees for legal services. It stated that the parties agreed that it would apply to the Court of Queen's Bench to remove the defendants' sibling as executor of their father's estate. There was no written agreement. The defendant, Joyce Kowalyshyn (Joyce), who resided in Vancouver, testified that she telephoned a lawyer in the plaintiff's law firm and hired him to bring the application. They agreed that it would cost $3,500, and no retainer would be charged. When the lawyer rendered his account a year after the proceedings, she refused to pay it based upon the alleged agreement that it would only cost the sum mentioned by the lawyer. The defendant, Walter Kowalyshyn (Walter), a resident of Regina, said that he did not hire or give instructions to the lawyer to provide legal services and should not have been named a defendant. He had agreed to swear an affidavit the lawyer had prepared and to attend the chambers proceedings on behalf of the family. The lawyer testified that during the initial conversation with Joyce, it was agreed that Walter, a Saskatchewan resident, should be the applicant. He further testified that he informed

Joyce that his hourly rate was $400 per hour and that he estimated a single uncomplicated chambers application would cost $2,500. Having provided his hourly rate, the lawyer argued that the parties proceeded on a fee for service basis. He submitted evidence that in follow-up email correspondence, he told Joyce that it would be difficult to determine what the fees would end up being and asked for a retainer of $2,500 because it was not clear that the matter would be concluded with one court appearance. After Joyce objected to paying the retainer, the lawyer agreed to work without one if the account were paid upon rendering, and Joyce agreed. The lawyer had to make three applications in the matter, and in the end, the executor was not removed. The issues were: 1) whether Walter was properly named as a defendant in the action; 2) whether there was an agreement between the lawyer and Joyce for a fixed fee or a fee for service; 3) regardless of the form of the agreement, what was a fair and reasonable amount for the legal services provided; and 4) what costs should be awarded?

HELD: The plaintiff was awarded judgment in the amount of $8,297. The court had the jurisdiction to determine the amount of the plaintiff's account. It found with respect to each issue that: 1) the plaintiff had not met the onus of showing that it had an enforceable claim for legal services against Walter and the action against him was dismissed; 2) it preferred the lawyer's evidence to that of Joyce and found that they had agreed that legal services would be provided on a fee for service basis; 3) based upon factors set out in Vo, a fair and reasonable fee for the legal services provided was $7,500, being three times the amount estimated by the lawyer for one application, but it discounted $500 because there had been a lack of results. The costs for taxes and disbursements were reduced to $700; and 4) the plaintiff was entitled to the cost of commencing the action of $100. Walter's travel expenses were allowed because he should not have been named a defendant, but those of Joyce were not allowed.

Back to top