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.

Vol. 23, No. 24 **December 15, 2021**

Subject Index

***Taylor v Moose Jaw Downtown and Soccer/Field House Facilities Inc. (Mosaic Place)*, 2021 SKCA 123**

Richards Barrington-Foote Kalmakoff, 2021-09-13 (CA21123)

Civil Procedure - Pleadings - Statement of Claim - Striking Out - Appeal
Civil Procedure - *Queen's Bench Rules*, Rule 1-3, Rule 4-1, Rule 4-2, Rule 4-44

The appellant appealed from the 2019 decision of a Queen's Bench judge to grant the respondent's application to dismiss the appellant's statement of claim for want of prosecution. The appellant had commenced his claim against the respondent for wrongful dismissal in 2013. In February 2015, the respondent's counsel filed an application to strike the claim for want of prosecution. Soon thereafter, the appellant filed his affidavit of documents, and in March 2015, the application to strike was adjourned sine die by consent. Questioning then occurred and undertakings were given, but no step was taken until the appellant's counsel indicated that he would be

Civil Procedure - Pleadings - Statement of Defence - Application to Strike

Civil Procedure - *Queen's Bench Rules*, Rule 1-3, Rule 4-1, Rule 4-2, Rule 4-44

Civil Procedure - *Queen's Bench Rules*, Rule 6-58, Rule 7-5, Rule 7-9

Civil Procedure - Striking Statement of Claim - Jurisdiction - Appeal

Civil Procedure - Summary Judgment

Constitutional Law – *Charter of Rights*, Section 8

Contract - Private School - Expulsion

Contract Law - Interpretation - Streaming Canola Purchase Contract

Criminal Law - Assault with a Weapon - Sentencing - Crown Appeal

Criminal Law - Evidence - Admissibility

Criminal Law - Evidence - Electronic Communications

Criminal Law - Evidence - Rape Shield Law

Criminal Law - Impaired Driving - Presumption of Accuracy

Criminal Law - *Kienapple* Principle - Appeal

Criminal Law - Procedure - Sentence - Appeal - Application to Extend Time for Leave to Appeal

interested in discussing a potential settlement. The settlement proposal was made in August 2017 and rejected in September. In August 2019, the appellant's counsel filed his reply to undertakings and a notice of application for summary judgment supported by the appellant's affidavit, but without giving one month's notice as required by Queen's Bench rule 4-46(1). Matters were adjourned by consent and at the request of the respondent in October 2019. In November, the respondent filed an amended notice of application. It then applied to strike a number of paragraphs from the appellant's affidavit in support of his application for summary judgment and requested further and better particulars to two of his undertakings. The parties agreed during a conference call with the chambers judge in December 2019 that the other applications should be adjourned pending the resolution of the respondent's application to strike the claim. The matter proceeded with the judge applying the framework of analysis set out in ICC. She found that the delay had been inordinate in light of the fact that the action was a straightforward one. She also found that the delay was inexcusable, as the appellant had not provided any explanation for it except to say that he had been instructing his counsel to proceed. Respecting the question of whether it was in the interests of justice to let the claim proceed, the judge reviewed each of the factors and decided that it should be dismissed. The appellant argued that the chambers judge erred: 1) in failing to consider the respondent's actions during the course of litigation. He asserted that Queen's Bench rules 1-3, 4-1 and 4-2 promulgated in 2013 had altered a defendant's obligations regarding the conduct of litigation and therefore dictated a change in ICC's analytical framework; 2) in finding that the delay was inordinate. She failed to take into account the respondent's various actions or failures to act; 3) in finding the delay inexcusable. By failing to consider a number of relevant factors, her analysis was incomplete in that she ignored the respondent's lack of action on the file; and 4) in her assessment of the interests of justice.

HELD: The appeal was allowed, and the court ruled the appellant's claim should proceed. The court found that the chambers judge had erred in principle in assessing whether it was in the interests of justice that the appellant's claim should proceed to trial and substituted its own findings. The standard of review was deferential as the judge's decision was discretionary in nature. It found with respect to each issue that the chambers judge had: 1) not erred. It was not persuaded that the introduction of the new Queen's Bench rules relied upon by the appellant had been intended to change the responsibilities of defendants that differed from the considerations set out in ICC; 2) not erred. It was a straightforward wrongful dismissal case and the delay of six years was longer than in other similar cases where inordinate delay had been found; and 3) not erred in concluding that the delay was inexcusable; and 4) erred in her

Criminal Procedure - *Court of Appeal Criminal Appeal Rules (Saskatchewan)*, Rule 8

Debtors and Creditors - Application under *Companies' Creditors Arrangement Act*

Family Law - Custody and Access - Interim - Appeal

Family Law - Custody and Access - Interim - Determination of Status Quo

Family Law - Interim Parenting Order - Review Clause

Family Law - Interim Parenting Orders – Appeal

Family Law - Interim Parenting Orders - Interim Child Support - Mandatory Mediation

Cases by Name

Barth v Barth

Conexus Credit Union 2006 v Voyager Retirement II Genpar Inc.

E.B. v M.B.

Input Capital Corp. v TKN Company Farm Ltd.

J.A.K. v C.Q.W.

L.P. v Z.M.

findings respecting some of the factors to be considered that would weigh in favour of the action be allowed to proceed. Given that the respondent had responded to the appellant's application for summary judgment, the stage of proceedings weighed in favour of allowing the claim to proceed. She also failed to consider the context in which the delay occurred. The judge focused on the respondent's 2015 application to strike but did not take into account its inaction afterward. In light of these errors, the court reweighed the relevant considerations and found that although it was not clear cut, based upon the stage of litigation and the respondent's engagement with the summary judgment application, it would be in the interests of justice to allow the claim to proceed to trial.

***L.P. v Z.M.*, 2021 SKCA 134**

Whitmore Leurer Tholl, 2021-10-14 (CA21134)

Family Law - Custody and Access - Interim - Appeal
Family Law - Custody and Access - Interim - Determination of Status Quo

The appellant mother appealed the August 2021 interim order of a Queen's Bench chambers judge that the primary residence of one of her children, E.P., an eight-year-old boy, would be with his father, the respondent, in Brooks, Alberta. She also applied to adduce fresh evidence on appeal pursuant to Court of Appeal rule 59. The appellant and the respondent had had an intermittent relationship from 2011 to 2013 in Regina. Their son, E.P., was born in April 2013, and from that time, the appellant provided the child's care without any assistance or involvement from the respondent. In 2013, the appellant was granted sole custody of the child in the form of a consent judgment. The respondent was ordered to pay $200 per month in child support but the order made no mention of parenting time. In 2016, the respondent moved to Brooks. The appellant gave birth to a daughter in 2016, whom she also raised without the assistance of that child's father. The appellant, E.P. and his sister resided together in Regina until the appellant began to struggle with addictions, which led to the apprehension of the two children in October 2019. They were committed to the care of the Ministry of Social Services for a three-month period, during which time they lived with their maternal grandmother, A.P. After the apprehension, the respondent contacted the Ministry in December 2019 and indicated his desire to provide care for

R v Bear-Knight

R v Friesen

R v Kvasnak

R v Mehari

R v Parchomchuk

R v Roberts

Rocen v Fraser

Taylor v Moose Jaw Downtown and Soccer/Field House Facilities Inc. (Mosaic Place)

Yashcheshen v Law School Admission Council Inc.

Yildir v Athol Murray College of Notre Dame

E.P., with whom he had had no contact for seven years. As a result, E.P. visited the respondent and his spouse in Brooks in May 2020, and again in June and July. In July, a Queen's Bench chambers judge granted a consent order, agreed to by the Ministry and the appellant in advance of a pretrial conference, that committed the children to the care of the Ministry for six months. The order spoke of the plan to reunite the appellant with her children. The Ministry placed E.P. in the care of the respondent in August for an extended visit. It also applied that month to vary the July order to place the child permanently with the respondent. The appellant averred that she had not consented to this and had believed that the children would remain in the care of A.P. for the duration of the order. At the time of the July order, the appellant was making progress respecting her addictions and in October 2020, she filed a new petition in which she sought custody and residency of E.P. and applied for an order requiring that he be returned to Saskatchewan. She also sought a determination that the Ministry had been in contempt of the July order. In addition, A.P. filed an application for an order designating her a person of sufficient interest in relation to E.P. and sought to have him temporarily placed with her while the appellant continued to progress with her treatment. The respondent filed an application for interim custody and primary residency of E.P. The chambers judge hearing the applications in October 2020 dismissed the respondent's and granted A.P.'s, ordering that E.P. reside with her pending further order. After reviewing the factors set out in s. 10 of The Children's Law Act, 2020, the chambers judge decided that this would be in the best interests of E.P. He found the Ministry was not in contempt because it had taken steps to return E.P. to the province and have him placed in A.P.'s care. E.P. was returned to Regina and resided with A.P. in November 2020. The children were again apprehended by the Ministry in January 2021 because of an altercation between the appellant and A.P. while they were intoxicated. The appellant admitted this and submitted to an 11-day detoxification program that she completed in February. The children were placed in foster care and the Ministry obtained a further temporary three-month order in March 2021. This order placed E.P. with the respondent for an extended visit for the duration of the order and allowed the appellant access, subject to conditions. The effect of the pandemic, however, limited her parenting time. Throughout this period and beyond, the appellant continued to maintain her sobriety and she worked with the Ministry on her case plan. By June 2021, the Ministry advised that it had no further child protection concerns with the appellant and the children were to be returned to her care. The respondent applied in June for interim custody and primary residency of E.P. The parties reached an

agreement that they would have interim joint custody and decision-making, and an interim consent order was granted. The parties were to share parenting for two-week intervals after the child finished school in Brooks at the end of June. Because the arrangement was to be in force until the expedited pretrial conference scheduled for December 2021, the appellant applied again for a determination of the interim parenting arrangement, commencing in the fall of 2021, to enable E.P. to return to his school in Regina. The application was heard in late August 2021 and the chambers judge made the interim order for E.P. to have his primary residence with the respondent. The judge referred to s. 10 of the Act to identify the factors he must consider when determining E.P.'s best interests and found that there had been no status quo established for E.P for the previous two years, pointing out that since his apprehension from the appellant in October 2019, he had had little stability in his life. Since E.P. had completed part of the 2020-21 school year while in the respondent's care in Brooks, the judge was satisfied that beginning the new school year in the same environment would provide some continuity and stability. Although acknowledging that the appellant had made commendable progress in addressing her addiction issues, the judge noted that she currently relied on social assistance and community resources to provide food for her household. The appellant then filed her notice of appeal which stayed the August order pursuant to Court of Appeal rule 15. The respondent applied to have the stay lifted but the Court of Appeal chambers judge declined to do so and ordered that E.P. remain in the appellant's care in the interim and be enrolled in school in Regina. These arrangements were to remain in place until after the appeal was heard and the judgment released. The first issue to be resolved was 1) whether the fresh evidence should be admitted. The appellant submitted her affidavit describing how well E.P. was doing in school and in his extra-curricular activities and submitted drug screens that confirmed she had not consumed illicit drugs. The other issues were whether the chambers judge had erred: 2) in relation to his interpretation of the status quo; 3) by not considering the factors related to E.P.'s best interests; 4) by penalizing the appellant for her socio-economic status; and 5) by failing to apply mobility principles.

HELD: The appeal was allowed and the interim order set aside. The court ordered that E.P. would reside with the appellant in Regina until further order or agreement of the parties and set out the respondent's parenting time. The application to admit fresh evidence was dismissed. It found with respect to the first issue that the evidence met the test set out in *A.M.D. v M.R.M.*, 2021 SKCA 71, in that it was credible and not available before the August chambers decision, but it was not highly relevant or potentially decisive respecting E.P.'s best interests as it merely confirmed the ample evidence that already existed concerning his and the appellant's present circumstances. With respect to the remaining issues, it applied the standard of review set out in *K.G.K. v L.T.K.*, 2021 SKCA 12, for appeals from an interim parenting order, and held that it would intervene in this matter. It found with respect to the remaining issues that the chambers judge had: 2) erred by determining that there was no status quo in this matter, by relying on some recent instability in residency as a basis for finding that no status quo existed. The appellant had been E.P.'s sole caregiver until October 2019 and he and his sister had lived with her in Regina and then later with his grandmother. The exception of two brief periods spent with the respondent were not sufficient to displace the long-standing status quo. It determined that the first period of separation from the appellant was wrongfully imposed by the Ministry and during the second, the March 2021 order, the appellant was the only parent with a right to custody of E.P. at that time and reunification had to be the outcome that order was seeking; 3) erred in failing to adequately address the factors that determined E.P.'s best interests. He ignored the factors reviewed by the chambers judge in the November order that remained highly relevant to the matter and represented significant considerations regarding E.P.'s best interests that militated against a change in the status quo. He also failed to consider what had changed from E.P.'s perspective since the November order; 4) erred by considering the appellant's need to use a community food program. There

was no evidence that her ability to provide the basic necessities required by E.P. was impaired or that she was unwilling or unable to meet his needs; and 5) erred by failing to consider the impact on E.P. that could result from being moved from his family and community in Regina to Brooks. It would add uncertainty and have a negative impact on his best interests. His mother's membership in the Peter Ballantyne Cree Nation was another factor that should be considered.

 Back to top

***R v Mehari*, 2021 SKCA 139**

Jackson, 2021-10-27 (CA21139)

Criminal Law - Procedure - Sentence - Appeal - Application to Extend Time for Leave to Appeal
Criminal Procedure - *Court of Appeal Criminal Appeal Rules (Saskatchewan)*, Rule 8

The applicant applied to the Court of Appeal to extend the time for leave to appeal his sentence. He had been convicted of sexual assault and sentenced to three years' imprisonment, less credit for time on remand, in May 2019. He appealed his conviction (the conviction appeal) but not his sentence in June 2019. Pending the hearing of his conviction appeal, the applicant was granted judicial interim release, but within five months he was arrested and charged with 13 new offences involving drugs and weapons and returned to custody. His conviction appeal resulted in the Court of Appeal setting aside his conviction and ordering a new trial, and the applicant was subsequently released. The Crown appealed the Court of Appeal's decision. The Supreme Court allowed it and remitted the matter back to the Court of Appeal to consider the remaining grounds of the applicant's conviction appeal. He remained on judicial interim release until the Court of Appeal dismissed his conviction appeal after considering the remaining grounds, and the applicant was returned to custody. The applicant's application to the Supreme Court for leave to appeal the Court of Appeal's dismissal of his conviction appeal was dismissed in July 2021. In September 2021, he brought this application to extend the time for leave to appeal his sentence, 27 months after it was imposed. The applicant stated that he had had the intention to appeal within the time period but put his resources into his conviction appeal until it was finally determined. It was impossible for him to bring the sentence appeal earlier because the grounds that gave rise to it were not present during the appeal period. He advanced two proposed grounds of appeal: 1) that he should be entitled to enhanced credit for the time spent in remand conditions after he was taken into custody due to the 13 new charges and before the Court of Appeal set aside his conviction for sexual assault. He described the suspension of many of his rights for the 174 days from October 2019 to April 2020, while he was held on post-sentence remand in the Regina Correctional Centre (RCC). When he was taken into custody again in February 2021, the Saskatchewan Penitentiary should have given him credit at 1:1.5 for his sexual assault sentence because of the harsh treatment he received at the RCC; and 2) his sentence was rendered unfit because of the effects of COVID-19 on his time in custody. When in custody in the Saskatchewan Penitentiary many of his rights were restricted because of COVID-19. The prison staff were not wearing appropriate personal protection equipment and he had no access to medical staff. He contracted COVID in April 2021,

which caused him to have breathing difficulties, and he suffered other lingering effects.
HELD: The application was denied. The court found that the interests of justice did not require that an extension be granted. Under ss. 482 and 678(1) of the *Criminal Code*, the Court of Appeal passed the *Court of Appeal Criminal Appeal Rules (Saskatchewan)* (*Rules of Court*). Subsection 8(1) of the *Rules of Court* provides that an application for leave to appeal and a notice of appeal are combined in one document and governed by a single time period, and an offender has 30 days after a sentence is imposed to file notice of appeal. The permissive discretionary power to extend the time is found in s. 678(2) of the Code and rule 7(2) of *The Court of Appeal Rules*. The manner in which the power is exercised is subject to the tests set out in *Morin* (2005 SKCA 37) and *Roberge* (2005 SCC 48). The former case requires findings that include that: i) a bona fide intention existed to appeal before the time expired; ii) there is a satisfactory explanation why the right of appeal was not exercised within the prescribed time; iii) the respondent is not unduly prejudiced by an extension; iv) there is merit in the proposed appeal, in that it raises a reasonably arguable issue; and v) the interests of justice weigh in favour of extending the time. Applying the tests to the application, it found that: i) the applicant did not have an intention to appeal his sentence based on his acknowledgement that his sentence was fit when it was imposed and the basis to appeal it arose later. It rejected his argument that an intention to dispute a conviction equates with a good faith intention to appeal a sentence within the allotted time; ii) the applicant had not provided a satisfactory explanation why he did not exercise his right of appeal within the prescribed period. He only formed the intention after he exhausted his conviction appeal; iii) the Crown would not be unduly prejudiced if the extension were granted; iv) the applicant's proposed grounds of appeal had no merit. His position that that he was entitled to enhanced remand credit for his post-sentence remand time was not reasonably arguable. That issue might be relevant at the time of his sentencing for the drugs and weapons charges, should he be convicted of them. Although the relevance of COVID-19 in the prison system to the fitness of sentence remains an open question, the applicant had not provided any evidence regarding the impact of COVID-19 upon him that distinguished him from other inmates; and v) the interests of justice did not require or favour that the applicant be granted an extension. The delay of 27 months was not excused by the applicant's strategy to bifurcate his appeal from conviction and sentence, contrary to rule 8 of the *Rules of Court*. Bifurcation of appeal is not encouraged because it undermines certainty in criminal proceedings. Hearing the application for leave with the appeal enhances the court's efficiency, avoids the possibility of contradictory outcomes and ensures the hearing panel has the benefit of the full context of the appeal.

 Back to top

***R v Parchomchuk*, 2021 SKCA 145**

Jackson Ryan-Froslie Tholl, 2021-11-01 (CA21145)

Criminal Law - *Kienapple* Principle - Appeal

The accused initially appealed his sentence to the Court of Appeal (court) following his guilty plea in Provincial Court to the offence of break and enter and commit the indictable offence of theft of a truck, for which he was sentenced to 10 months' incarceration consecutive to a six-month sentence he had received for being unlawfully in possession of the same truck. He had not appealed his conviction. The court extended his time to appeal the conviction, which was taken primarily on the ground that his guilty plea should

be expunged because his counsel had not fully explained to him the possibility of consecutive time being imposed. The court, however, was more concerned that neither the Crown, counsel for the appellant, nor the sentencing judge had considered the application of the *Kienapple* principle in the circumstances.
HELD: The appeal judgment was written for the court by Jackson J.A., who allowed the appeal. She ruled that the offences of unlawfully possessing the truck while knowing it was stolen, and of breaking and entering and stealing the same truck, engaged that principle. After a reference to the law with respect to expungement of guilty pleas as set out in *R v Arcand*, 2000 SKCA 60, and more recent cases within its orbit, she turned to the court's primary concern, the application of the *Kienapple* principle to the appeal, and was satisfied that the "cause, matter, or delict" involved in both offences was the same, and so the Provincial Court judge was required by law to stay the possession of the stolen truck conditionally as it was the lesser charge. (See: *R v Prince*, [1986] 2 SCR 480.) However, the appellant had pled guilty to it, and so the court had no alternative for remedying the error but to expunge the information charging the break and enter, which resulted in the ten-month sentence being set aside.

 Back to top

***R v Roberts*, 2021 SKCA 146**

Jackson Ryan-Froslie Tholl, 2021-11-04 (CA21146)

Criminal Law - Assault with a Weapon - Sentencing - Crown Appeal

The Crown appealed the imposition of a suspended sentence and three-year probation order imposed in the Provincial Court on an 18-year-old person who committed the *Criminal Code* offence of assault with a weapon. The Crown argued that a term of incarceration needed to be imposed to emphasize the primary sentencing objectives of general and specific deterrence and denunciation. The court reviewed the reasons and considerations of the sentencing judge in deciding the sentence, in particular her *Gladue* factors, such as the prevalence of alcohol in her home community; drug abuse and suicides – she had been part of a suicide pact at the age of 11; her alcohol abuse from the age of 13; that her father was a residential school survivor; her youth; her desire to change; and her not having reoffended for two years since the date of the offence.
HELD: The appeal was dismissed. The court referred to *R v Lacasse*, 2015 SCC 64 as to the standard of appeal on sentencing, that the court cannot interfere with a sentencing judge's weighing and balancing of factors unless "if by overemphasizing one factor or by not giving enough weight to another, the sentencing judge exercises his or her discretion unreasonably." In this case, the court found that the sentencing judge did consider the appropriate factors, especially her diminished moral culpability due to her age and *Gladue* factors, her desire to change for the better, that she did not reoffend while in the community and the deterrent effect of the lengthy probation order. Thus, the court did not interfere with the trial judge's sentence.

 Back to top

***Barth v Barth*, 2021 SKCA 147**

Richards Caldwell Barrington-Foote, 2021-11-22 (CA21147)

Family Law - Interim Parenting Orders - Appeal

The appellant, T.A.B., had numerous appeals pending in the Court of Appeal (court) at the time he was declared to be a vexatious litigant pursuant to Rule 46.2(1) of The Court of Appeal Rules: Barth v Saskatchewan (Social Services), 2021 SKCA 41. The court then consolidated all the appeals – seven in total – and heard them together. In the main, the court viewed these as an unwarranted and protracted siege by T.A.B. on the respondent, L.F.B., the mother of the child of their marriage. Richards C.J.S., speaking for the court, reviewed all seven appeals in detail.
HELD: All appeals were dismissed, except for one with respect to an interim child and spousal support order. T.A.B. abandoned his appeal concerning child support, and L.F.B did not oppose reinstating T.A.B.'s spousal support. The court dismissed the balance of the appeals. These were: 1) an appeal from a judgment of the Court of Queen's Bench (court below) ruling that an application to find L.F.B. in contempt of an interim custody and access order by "withholding [the child]" had been dismissed previously, and was therefore res judicata; 2) an interim order from a judge of the court below drastically reducing T.A.B.'s parenting time from 50% to reduced supervised access because the child was thriving in L.F.B.'s sole custody, and T.A.B. had "lost sight of the basic responsibilities of parenting" due to his all-consuming obsession with prosecuting L.F.B. for child abuse, the justification for which, he claimed, were incidents of bruising on the child from two years prior to the application, which compelled him to strip the child naked and photograph him after every access visit; 3) an appeal from a judge in the court below dismissing T.A.B.'s application for production of third party records in the possession of the Minister of Education, the child's daycare, and the RCMP to assist him with a prosecution against these bodies for not protecting the child from abuse by L.F.B., which the court dismissed because, among other reasons, he was requesting the documents "for a purpose disconnected from the proceedings in which the application for production was made"; 4) an appeal to remove lawyers for L.F.B. from the proceedings because of alleged conflicts of interest, which the court ruled did not exist, as there could no breach of confidentiality in the circumstances; and 5) an appeal concerning the purported invalidity of the divorce because of the alleged untruthfulness of L.F.B. during the divorce application, which was dismissed because the divorce petition was based on the grounds of separation for one year, which event T.A.B. did not contest.

 Back to top

***Yashcheshen v Law School Admission Council Inc.*, 2021 SKCA 149**

Ryan-Froslie Tholl Kalmakoff, 2021-11-24 (CA21149)

Civil Procedure - Striking Statement of Claim - Jurisdiction - Appeal

The appellant, A.Y., appealed the decision of a judge of the Court of Queen's Bench in chambers (chambers judge), who struck out her claim on the basis that he had no jurisdiction to hear the matter because *The Saskatchewan Human Rights Code* (Code) did not cloak him with the power to adjudicate a claim outside of its legislative framework when in essence the claim was one alleging

discrimination. It was not in issue that the appellant issued a statement of claim in contract as well as other causes of action directly to the Court of Queen's Bench, and bypassed the complaint procedure established in the Code; that she claimed damages against the respondent, Law School Admission Council Inc. (LSAC), the body that administered the Law School Admission Test (LSAT), because it failed to accommodate her disabilities, which caused her to obtain lower scores on the LSAT than she would have obtained had her needs been accommodated; and that s. 12 of the Code specifically provides that it is discriminatory for any person to deny another person "any accommodation, service or facility to which the public is customarily admitted or that is offered to the public" and s. 15 of the Code prohibited any person from offering a contract to another person which discriminates against that person "on the basis of a prohibited ground." Before the chambers judge, LSAC had advanced several arguments as to why the statement of claim should be struck other than the jurisdictional one, but he ruled only on it.

HELD: The court, under the pen of Tholl J.A., allowed the appeal and returned the matter to the chambers judge to rule on the other issues advanced by LSAC in its application to strike the appellant's statement of claim. He decided that on a standard of correctness the chambers judge had erred in that, though he found correctly that the jurisdiction of the court was not explicitly "pre-empt[ed]" by the Code, he nonetheless erred in finding that the claim of the appellant had the essential character of a claim in discrimination that ousted the Court of Queen's Bench from considering the claim. The appellant did not plead a contravention of the Code as a cause of action. Instead, the appeal court ruled, her pleadings supported an action in damages for breach of contract, which the court had inherent jurisdiction to hear.

Back to top

***R v Bear-Knight*, 2021 SKQB 258** (not yet available on CanLII)

Elson, 2021-10-06 (QB21250)

Criminal Law - Evidence - Electronic Communications
Constitutional Law – *Charter of Rights*, Section 8

The trial judge delivered his decision following a voir dire on the admissibility of an inculpatory apology sent by the accused through the Facebook messaging service solely to the complainant the day following events which led to charges of sexual assault and assault against him. The complainant did not reply to him but copied the Facebook message and gave it to the police about two weeks following her receipt of it. On the voir dire, the accused admitted he had composed and sent the message to the complainant and testified that he did not expect her to share it as he intended it for her eyes only. He admitted he knew that such messages were easily exchanged with other persons. The police did not obtain a search warrant before looking at the Facebook message. The accused sought exclusion of the apology pursuant to s. 8 of the Charter on the basis that the search and seizure were unreasonable and unlawfully infringed his right to be free from state intrusion into his private life.

HELD: The trial judge ruled that the accused did not have an expectation of privacy in the apology, and alternatively, if he did, his rights under s. 8 were little disturbed and did not justify its exclusion as evidence at the trial under s. 24(2) of the Charter. The trial judge's analysis of the question was centered on the decisions of the Supreme Court in *R v Edwards*, [1996] 1 SCR 128 (*Edwards*),

R v Marakah, 2017 SCC 59, (*Marakah*) and *R v Mills*, 2019 SCC 22 (*Mills*), and a decision of the Alberta Court of Appeal in *R v King*, 2021 ABCA 271 (*King*). First, he referred to *Edwards*, and the Supreme Court's four factors which were to guide his analysis to determine, on a totality of circumstances, whether a party with standing had a right to a reasonable expectation in the privacy of the subject matter of the search and seizure. The four factors are: 1) the subject matter of the search, 2) the claimant's interest in the subject matter, 3) the claimant's subjective expectation of privacy in the subject matter, and 4) whether the subjective expectation of privacy is objectively reasonable, having regard to the totality of the circumstances. He then turned to a consideration of *Marakah*, and its application of the four factors. *Marakah* concerned electronic communications between the appellant and an accomplice in the furtherance of an illegal firearms transaction. The police obtained a search warrant to search the houses of the appellant and the accomplice. The search resulted in the seizure of the accomplice's cell phone with the subject electronic communications on it. The trial judge ruled that the warrant to search the appellant's house was not valid, and excluded the fruits of the search, including the appellant's electronic communications with his accomplice. The Crown sought to have admitted into evidence the electronic communications on the accomplice's phone. The *Marakah* decision was not unanimous on the fourth *Edwards* factor, whether the appellant's subjective expectation of privacy in the communication was objectively reasonable in the totality of the circumstances. The court broke down this factor into three sub-factors, the third of which the trial judge decided was the most germane to his analysis, being whether the appellant exercised control of the electronic conversations on the accomplice's phone. The majority decision in *Marakah* was to the effect that the fact that the appellant had assumed the risk the electronic conversation might be shared did not negate the fact that he sent it by way of a "private medium to a designated person" and had not assumed the risk that his right to privacy would be interfered with by the intrusion of the state. The trial judge referred to *Mills* and *King* as two examples of courts distinguishing the majority decision in *Marakah*. The trial judge also distinguished the case before him from *Marakah* because of the nature of the relationship between the accused and the complainant and the nature of the communication. Their relationship was very short, only 24 hours long; no evidence was provided by him to justify his belief that she would not share the message; and the apology was an expression of regret that he had harmed her, which by its nature could result in the communication being shared. As such it was not objectively reasonable that he expected that the message would remain private. The trial judge also emphasized that the case before him did not involve state intrusion; that the evidence was not obtained by state action but was provided voluntarily by the complainant independent of the police. He also had little hesitation in dismissing the argument that the police needed judicial authorization in the form of a warrant to even look at the message.

 Back to top

***J.A.K. v C.Q.W.*, 2021 SKQB 272** (not yet available on CanLII)

Turcotte, 2021-10-15 (QB21259)

Family Law - Interim Parenting Order - Review Clause

The petitioner, J.A.K., the father of three infant children of the marriage (children), sought a review of the interim parenting order granted by a Queen's Bench judge in chambers on August 5, 2020 pursuant to the Divorce Act, to increase his parenting time with the children. (See: *J.A.K. v C.Q.W.* (5 August 2020), Saskatoon, Div 654/2019 (Sask QB) (August 2020 order).) The chambers judge

crafting the August 2020 order built in a review clause and ordered a custody and access assessment be prepared. The respondent, C.Q.W., J.A.K.'s former spouse and the mother of the children, was the parent with whom the children had primary residence. She opposed the application to review the parenting arrangement. The chambers judge first reviewed the record of the court proceedings, and found that the evidence of both parties as contained in their affidavits was contradictory, combative, aimed primarily at blaming each other for the marriage breakup, or attacking the other party's parenting of the children. He found in particular that they had failed to address the sole question which should have been paramount in their evidence, being the living arrangement in these particular circumstances that would best meet the needs of the children (see: *Gordon v Goertz*, [1996] 2 SCR 27, and the line of cases following it including *Olfert v Olfert*, 2013 SKCA 89). The chambers judge indicated he would need to consider the application as best he could with the unsatisfactory evidence available, which also included the custody and access report on file. He also was of the view that the children appeared to be contented and happy with the present arrangement.
HELD: The chambers judge allowed the application to the extent that he increased the petitioner's parenting time by making him the "caregiver of choice" when C.Q.W. was unable to parent the children during her parenting time, and by giving him extended parenting time around school days off, statutory holidays and school holidays. He was first required to determine how he was to apply the review clause with the best interests of the children in mind. After a thorough review of the relevant case law, in particular *Babich v Babich*, 2020 SKCA 25, he concluded that he was to ask himself if the parent seeking the review has shown an "identifiable change" since the order was made. J.A.K. need not show the more onerous "material change in circumstances" required for a variation of an existing order. He determined that it was not clear what the parameters of this particular review clause were. Was a full review contemplated by the chambers judge, as might be suggested by the order for preparation of a full custody and access assessment? If so, the conflicting and prolix affidavits upon which the author based the assessment made it unhelpful for that purpose. As he could not conduct a full review of the parenting arrangement because of these evidentiary limitations, which may have been foreseen by the chambers judge granting the August 2020 order, he concluded the review clause was intended primarily to examine whether it would be in the children's best interests to increase the petitioner's parenting time.

 Back to top

***Input Capital Corp. v TKN Company Farm Ltd.*, 2021 SKQB 275**

Layh, 2021-10-21 (QB21261)

Civil Procedure - Summary Judgment
Civil Procedure - Pleadings - Statement of Defence - Application to Strike
Civil Procedure - Queen's Bench Rules, Rule 6-58, Rule 7-5, Rule 7-9
Contract Law - Interpretation - Streaming Canola Purchase Contract

The plaintiff, Input Capital Corp., a self-described "canola trader" farm credit business, applied to have the statement of defence and counterclaim of the defendant, a farming corporation, struck for either disclosing no reasonable defence under Queen's Bench rule 7-9(2)(a) or being frivolous, vexatious and an abuse of process under Queen's Bench rule 7-9(2)(b). It also sought summary

judgment, asserting that the defendant's defence and counterclaim had not raised a genuine issue requiring trial under Queen's Bench rule 7-5(1)(a). The defendant opposed the application to strike on either ground and respecting the summary judgment application, asserted that a full adjudication at trial was necessary to resolve the conflicting evidence. The plaintiff's claim rested on the defendant defaulting on the terms of the streaming canola purchase contract that had been entered into in May 2015. Between that date and March 2016, the plaintiff advanced upfront payments in the amount of $1,406,253 to the defendant, but the defendant stopped further canola deliveries in December 2017. It then served statute-required demand notices on the defendant in August 2018. The plaintiff submitted evidence supporting its claim and refuting the defendant's defence through affidavits sworn by two of its senior officials describing the terms of the contract and the history of its communications with the principal of the defendant. The defendant proffered as evidence an affidavit from one of its officers, T.N., and another one sworn by a former employee of the plaintiff who had worked as one of its sales representatives in Saskatchewan. Amongst his averments, the latter stated that he sold the streaming program to the defendant, describing him as like most others to whom he sold the program, usually in financial difficulty and needing the money to farm because they were unable to obtain credit from other institutions. He told T.N. that the program was based on an advance on tonnes of canola to be delivered in the future and represented that the plaintiff would roll the delivery to future years if the full delivery could not be made in a particular year. The transcripts of the questioning of the parties were also before the court. On behalf of the defendant, T.N. did not dispute that the contract was properly signed, that it was bound by amending agreements and that all the loans were advanced by the plaintiff. He stated that it had not been his intention to default on the loan but he had had problems with financing arrangements on his farm. The defendant raised the following defences: i) of accounting, stating that the plaintiff had not allocated the proper value for the canola that it delivered; ii) that the plaintiff had not mitigated its damages because it refused to go to the canola market and buy sufficient canola to replace what it had not delivered; iii) of contra proferentum, non es factum and lack of consensus ad idem in the parties' agreement. It also alleged that the plaintiff forced it into an unconscionable transaction by pressuring it to sign the contract without independent legal representation. In its counterclaim, the defendant's pleadings relied upon the facts pled in its statement of defence. It alleged, too, that the plaintiff owed it a duty of care to properly represent and explain the business model the contract was based upon. The plaintiff had misrepresented the percentage share of the market value of its canola each crop year that the defendant would receive. The defendant alleged that the plaintiff misrepresented to it that it would advance a crop payment each year and even if canola could not be delivered in a given year, the plaintiff would roll over any deficiency to the following year to allow the defendant to make a later delivery. Because the plaintiff did not pay the defendant a crop payment in 2017, it did not have enough capital to purchase the required inputs to fulfil the contract. As a result, the defendant suffered damages. The issue was whether the plaintiff's claim and the defendants' defence and counterclaim raised a genuine issue requiring trial.

HELD: The application for summary judgment was granted. The defendant's defences and counterclaim were struck. The plaintiff had proven the streaming contract was a valid and enforceable agreement. It had amended its claim to increase the amount of damages it sought to $1,245,155, but had not provided evidentiary proof of the increase, so the court left the quantum to be addressed by the parties and the matter could be returned to it for further adjudication if they could not reach agreement. It noted the principle that the plaintiff bore the burden of proving that neither its claim nor the defendant's defence and counterclaim raised a genuine issue requiring trial. The onus then fell to the defendant to counter the plaintiff's evidence. Based on the evidence presented by the plaintiff, the court was satisfied that the plaintiff had proven that its claim against the defendant did not raise a genuine issue requiring trial. It was also satisfied that the plaintiff had proven that no genuine issue requiring trial existed to resolve the defendant's

defences. It found with respect to each of the defences that: i) an accounting defence involving questioning the amount owing under a mortgage is not a valid defence under Queen's Bench rule 6-58 and could be dealt with through the registrar's office; ii) the scant evidence it had provided had not met the onus of proving lack of mitigation; iii) contra proferentum was not applicable. The defendant had not pled any specific provisions of the contract that were ambiguous. Similarly, non est factum was not a genuine issue. The evidence did not show that the defendant was fundamentally mistaken as to the nature and character of the contract or that the plaintiff made the alleged misrepresentations regarding its terms. It did not accept that the plaintiff's representatives told the defendant's principal not to seek legal advice. Concerning consensus ad idem, the defendant failed to present evidence as to what it thought the contract was about. Its conduct in fulfilling the contract's terms in 2016 and 2017 belied the notion that the parties were at odds about its fundamental meaning. The defendant's evidence did not support its defence that the contract was unconscionable because of inequality of bargaining power considering the decisions of the Supreme Court in *Uber Technologies Inc. v Heller*, 2020 SCC 16; the Court of Appeal in *Input Capital Corp. v Gustafson*, 2021 SKCA 56; and the Queen's Bench in *Input Capital Corp. v Berglund*, 2019 SKQB 179. The defendant's pleadings in its counterclaim relying upon the facts pled in its statement of defence were found to disclose no reasonable defence under Queen's Bench rule 7-9(2)(a) and did not raise a genuine issue requiring trial. It would not accept the defendant's argument that the plaintiff owed a duty to the defendant to explain the terms of the contract because to do so would create chaos in terms of contract formation and interpretation.

 Back to top

***E.B. v M.B.*, 2021 SKQB 277**

Richmond, 2021-10-26 (QB21270)

Family Law - Interim Parenting Orders - Interim Child Support - Mandatory Mediation

E.B., the mother of three children of her relationship with M.B., aged 11, seven, and six (children), applied to the chambers judge for the following relief: 1) an order dispensing with further mandatory family mediation, as allowed by s. 44.01(6) of *The Queen's Bench Act*; 2) an order pursuant to *The Children's Law Act, 2020* that she be the primary care-giver of the children and M.B. have limited parenting time due to alleged family violence in the form of M.B.'s controlling behaviour towards her; and 3) an interim order pursuant to *The Family Maintenance Act* for ongoing child support and an order for payment of arrears of child support to June 2021, the date of the petition. The chambers judge made the following findings of fact based on the court record, the affidavits of the parties, and counsel submissions: E.B. arranged for family mediation with an approved mediator, and though reluctant initially, M.B. participated voluntarily and in good faith, as did E.B., in a number of mediation sessions; E.B. ceased attending mediation due to loss of confidence in the mediator and due to her belief that mediation would not be fruitful in resolving the issues between her and M.B.; the mediator refused to provide a certificate of mediation because she was of the view that the process was not concluded; though contested by M.B., E.B. was the primary caregiver of the children before and after separation; M.B. exercised weekend parenting; both parties made allegations of family violence against each other; M.B. had not paid child support except for two payments; M.B.'s income was not significantly more than E.B.'s; the eldest child was violent towards his immediate sibling to the point that the Ministry

of Social Services had intervened and required that the parents keep them apart; E.B. was a citizen of France and M.B. of Chad; they were both French-speaking; they held foreign passports; and qualified French-language mediators were not readily available in the jurisdiction.

HELD: As to the first request for relief, that further mediation be dispensed with, the chambers judge recognized that the Rule required the parties to participate in good faith in a mediation process with the aim of attempting to resolve the issues between them, and that more was required than simply making an appearance before the mediator. The chambers judge did not agree with the mediator that she should withhold the certificate of mediation in this case, ruling that extraordinary circumstances existed which allowed her to dispense with the certificate, specifically, that French-language mediators with the required credentials were hard to come by and engaging one to step in would unjustifiably delay proceedings and increase cost to the parties. She ordered that the filing of the certificate of mediation be dispensed with. As to the second ground of relief, the determination of parenting rights, the chambers judge was cognizant of the principle as set out in the applicable binding case law that established that maintaining the status quo with regards to parenting of children prior to a final determination at trial is generally in the best interests of the children and is not to be disturbed except in the case of a compelling reason to do so or if the children are at risk. Though parenting was complicated by the need to separate the eldest children from each other, she did not see that such could not be accommodated within the parenting structure now in place and chose not to disturb the status quo except to extend M.B.'s weekend parenting. Lastly, as concerned child support pursuant to *The Family Maintenance Act*, she reviewed the respective incomes claimed by the parties, determined that they were not so different and, given the disagreement between them as to their respective incomes, based her calculation on M.B.'s stated income on an interim basis. She also ordered that the parties exchange income tax returns, that M.B. pay arrears of child support, and that the parties have leave to recalculate that amount of child support with the assistance of the Child Support Recalculation Service.

 Back to top

***Yildir v Athol Murray College of Notre Dame*, 2021 SKQB 278**

Robertson, 2021-10-28 (QB21271)

Contract - Private School - Expulsion

The applicants, the parents and litigation guardians of a student who was expelled from a private school (school), brought an action in breach of contract and unjust enrichment, applying for summary judgment based on affidavit material pursuant to Rules 7-2 to 7-8 of The Queen's Bench Rules and Practice Directive #9. The presiding judge first determined that he was able to "parse facts from the affidavits" and apply the law to the facts to decide the application for summary judgment. (See: Hryniak v Mauldin, 2014 SCC 7.) He found as facts that: the school was incorporated by a private Act, and its rules of discipline were not subject to The Education Act; the applicants and the school entered into a contract (financial agreement) by which the applicants were to pay tuition and boarding fees totalling $33,915.00 for the 2017 school year, which commenced September 4; soon after his arrival, the student committed his first disciplinary infraction; these infractions continued until December 14, when he was expelled, and included slamming a door and yelling, chewing tobacco, skipping mandatory masses, lying to staff, breaking into a locker and stealing food, bullying, using a cell phone in breach of the rules respecting their use, one instance of threatening another student,

and being in possession of contraband; the applicant parents were kept informed of the infractions and the disciplinary measures taken by the school, which included withdrawal of leave privileges, community service, and formal suspension; the student signed a performance contract after a ten-day suspension and breached it by having contraband in his room, which resulted in his suspension; the applicants were informed of the expulsion by letter; and neither they or the student were given an opportunity by the school to address the decision to expel him before it was made.
HELD: Although the judge dismissed the claim for unjust enrichment and found the expulsion was justified and reasonable, being required for the good of the school and the other students, he allowed the claim for breach of contract and ordered damages in the amount of $23,205.00, pre-judgment interest, and costs. In doing so, he referred to cases in Ontario and Alberta concerning student expulsions, since there appeared to be no cases in Saskatchewan dealing with the question. He agreed with those authorities that the law recognizes an implied term in these types of contracts of a duty of procedural fairness owed by the school authorities to a student they are considering expelling. He ruled in this case that the school's failure to give the applicants an opportunity to be heard and to give their side of the story before making the decision to impose the most serious penalty of expulsion was a breach of the implied term of fairness in the financial agreement. Damages were awarded, not representing the full year's tuition and boarding fees, but an amount prorated from the expulsion date to the end of the school year.

 Back to top

***R v Kvasnak*, 2021 SKQB 283**

Crooks, 2021-11-01 (QB21276)

Criminal Law - Impaired Driving - Presumption of Accuracy

This matter was a summary conviction appeal taken by the appellant following his conviction for the offence of operating a conveyance over the legal limit, contrary to s 320.14(1)(b) of the *Criminal Code*. There was no dispute about the facts, which the summary conviction appeal court judge (judge) summarized as follows: a call about a minor collision in a parking lot was made to police by the complainant; the police arrived on scene and detained and arrested the appellant for impaired driving, and in due course, he provided samples of breath in an approved instrument, resulting in two suitable samples, with the lowest blood alcohol reading being 210 mg alcohol per 100 mL of blood; the Crown at trial entered a certificate of qualified technician (CQT) into evidence which the Crown claimed conformed with the requirements of 320.31(1)(a) of the *Criminal Code*, one of such requirements being that the alcohol standard used to calibrate the instrument within the required tolerance had been certified by an analyst to be suitable for that purpose, and as such, the CQT was conclusive proof of the appellant's blood alcohol level within two hours of ceasing to drive the motor vehicle. It was agreed by the parties that the Crown did not disclose the certificate of an analyst (COA) to defence counsel and did not tender it in evidence at trial. At trial, the appellant did not dispute the admissibility of the CQT but argued that as the COA had not been disclosed to him in accordance with s 320.34(1) of the *Criminal Code*, the Crown was not entitled to rely on the presumption of accuracy created by the CQT. The trial judge ruled that the CQT, being a statutory exception to the hearsay rule, was conclusive proof that the alcohol standard had been certified by an analyst, and that evidence need not be provided by the

analyst or by the filing of the COA as evidence at trial. He stated further that the disclosure section provided no remedy for non-disclosure of the COA and did not negate the presumption of accuracy. He commented that the Crown or defence should have applied for an adjournment to allow for disclosure of the COA, which neither did. Both Crown and defence agreed that the standard of appeal to be applied by the appeal judge was correctness because the appeal involved the interpretation of legislation. (See: *R v Helm*, 2011 SKQB 32.)
HELD: The court allowed the appeal and entered an acquittal. In doing so, the appeal judge fully endorsed a decision of the Alberta Court of Appeal, *R v Goldson*, 2021 ABCA 193 (Goldson), reported between the decision of the trial judge and the appeal hearing. Once he dismissed the arguments of the Crown: (1) that Parliament could not have intended, in enacting legislation with the goal of streamlining the prosecution of drinking and driving offences, to require additional evidence to be tendered at trial; or (2) that the information provided in the CQT is not hearsay evidence, and even if it is, the law was settled by the Saskatchewan Court of Appeal in *R v Kroeger* (1992), 97 Sask R 263 (CA), which permitted a qualified technician to provide such evidence. The statutory exception to the hearsay rule created by the former provisions allowing the qualified technician to state for its truth by way of a certificate that the alcohol standard was certified as being suitable for its purpose, as decided in *Kroeger*, was repealed by necessary implication, the appeal court judge ruled. The failure by the Crown to file the COA or call the analyst to testify at trial did not nullify the presumption of accuracy, but the Crown's failure to disclose the COA to the defence indeed nullified the presumption. The court concluded that "the learned trial judge erred in allowing the Crown to rely on the presumption of accuracy without meeting the legislated disclosure requirements under s. 320.34(1)."

 Back to top

***R v Friesen*, 2021 SKQB 293** (not yet available on CanLII)

Robertson, 2021-11-08 (QB21275)

Criminal Law - Evidence - Rape Shield Law
Criminal Law - Evidence - Admissibility

The trial judge was required to make two admissibility rulings, one with respect to the rape shield provisions in s. 276(2) of the *Criminal Code*, and another with respect to the related provisions in s. 278.93 concerning the admissibility of "records relating to [the] complainant" in proceedings involving sexual offences. In *R v Friesen*, 2021 SKQB 168 (Friesen #1), he had ruled that the evidence of other sexual activity met the threshold requirement for admissibility required by s. 276(1) which, he was satisfied from his review of the relevant authorities, imposed an absolute bar to the admissibility of any evidence of sexual activity of the complainant invoking the "twin myths," these being that, due to her past sexual activity, a complainant 1) "is more likely to have consented to the sexual activity that forms the subject-matter of the charge" or 2) "is less worthy of belief." He stated he was now to go on to rule as to whether the evidence proffered by the accused met the threshold of admissibility set out in s. 276(2). As to s. 278.93, in Friesen #1, he ruled that the principle of comity mandated that he include the photograph in evidence because the provision imposing conditions on the admissibility of the photograph had been struck as unconstitutional in *R v Anderson*, 2019 SKQB 304. He now reconsidered

this ruling in light of the general principles governing relevance versus prejudice.
HELD: The trial judge allowed four questions to be asked by the accused of the complainant and ruled he would not admit the photograph. The accused sought to cross-examine the complainant on one instance of sexual activity, being an instance of sexual intercourse with her boyfriend from the date of the sexual activity that formed the subject-matter of the charge and her medical examinations, which showed “abrasions or injuries in and around her vaginal area.” The specific purpose of the proposed questioning was to provide an alternate reason for the injuries other than the alleged sexual assault. After a review of the case law germane to ss. 276(2) and (3) of the *Criminal Code*, in particular *R v M.T.*, 2012 ONCA 511, he was satisfied that the proposed evidence met the three conditions of admissibility, being: a specific instance of sexual activity; a clear evidentiary purpose exclusive of the twin myths; and significant probative value that was “not substantially outweighed by the danger of prejudice to the proper administration of justice.” He was aware that the Crown would also be examining the complainant on the other sexual activity, which might eliminate the need for cross-examination with respect to the four questions. The photograph in issue was of very poor quality and depicted the complainant in a sexually suggestive pose at some unknown time but alleged to be close in time to the sexual assault accusation. The accused asked that the photograph be admitted as it tended to prove that the complainant was more likely to have consented. The trial judge performed the admissibility analysis based only on general principles, ruling the photograph inadmissible because it was of little probative value and was prejudicial to the proper administration of justice for several reasons, including giving credence to the discredited notions of implied and advanced consent. `

 Back to top

***Rocen v Fraser*, 2021 SKQB 296**

Layh, 2021-11-15 (QB21277)

Civil Procedure - Pleadings - Statement of Claim - Application to Amend
Civil Procedure - Application to Strike Statement of Claim - Scandalous, Frivolous, or Vexatious

The defendant nurses in an action in which the plaintiffs, the wife and son of a deceased man who had been cared for in hospital (G.R.), and who claimed relief against them akin to defamation, applied for summary judgment dismissing the claim. In advance of the summary judgment application, the plaintiffs brought an application for leave to amend the statement of claim. The chambers judge reviewed the affidavits and pleadings filed by both sides and reviewed the facts and proceedings. He found: that as a result of what the plaintiffs believed was ill treatment of them at the hands of the defendants during the convalescence of G.R. at the hospital, the plaintiffs made a formal report to the investigation committee of the Saskatchewan Registered Nurses Association (SRNA), who investigated the matter and found no misconduct on the part of the nurses; by necessity, in order to investigate the matter fully, the investigator was required to speak to the defendants, who provided their response to the allegations, in the course of which they said that the plaintiff wife of G.R. “would yell at and belittle hospital staff,” that “she would pace, glare and use an aggressive tone,” and the plaintiff son, C.R., became “very angry in his father’s hospital room…[and] waved his hands and blocked [the nurses’] exit from

the room;" pursuant to s. 28(7) of *The Registered Nurses Act* (Act), the written report of the investigation committee was privileged and the use of statements or evidence given by the defendant nurses during the investigation was absolutely barred from being used in any other proceeding; the plaintiffs never accepted the findings of the investigation committee, launching a sustained verbal attack on the SRNA, involving complaints to the SHA, various persons at SRNA, numerous agencies, government departments, and media, the recurring theme of which was that the defendant nurses had lied about them, and the SRNA accepted these lies; and the statement of claim quoted large sections of the SRNA written report. The defendants opposed the application for amendment because they argued the proposed amendments would be struck pursuant to Rule 7-9 as they did not disclose a reasonable cause of action and were scandalous, frivolous, or vexatious.

HELD: The chambers judge dismissed the application to amend the claim, concluding that the amendments were a disguised attempt to circumvent s. 28(7) of the Act by redrafting the quoted sections of the written report, removing any reference to the SRNA, and adding persons to whom the libelous words were allegedly repeated. The proposed pleadings, he said, were entirely too vague as to "when, where, and to whom the [defamatory words] were spoken" to give the defendants proper notice of the claim against them and did not plead any allegation which would amount to harm to the plaintiffs' reputation. He also decided that the proposed amended claim was scandalous, frivolous, or vexatious because it was a collateral attack on the decision of the SRNA and not brought for a legitimate claim for relief under a recognized cause of action but as a tactic by the plaintiffs in their ongoing siege on the SRNA.

 Back to top

***Conexus Credit Union 2006 v Voyager Retirement II Genpar Inc.*, 2021 SKQB 273**

Elson, 2021-10-19 (QB21260)

Bankruptcy and Insolvency - Receiver - Application to Appoint
Debtors and Creditors - Application under *Companies' Creditors Arrangement Act*

The plaintiff, Connexus Credit Union, made two applications pursuant to s. 243 of the *Bankruptcy and Insolvency Act* (BIA) for orders appointing a receiver respecting two seniors' residences located in Tisdale and Melville respectively. The proposed receiverships related to outstanding indebtedness incurred by the defendants, closely-associated limited partnerships, described herein as the Voyageur defendants, that included: Voyageur Retirement II LP (Tisdale LP) and its general partner Voyager Retirement II Genpar II (collectively described as Voyageur II) and Voyageur Retirement III LP (Melville LP) and its general partner, Voyageur Retirement III Genpar Inc. (Voyageur III). They incurred their indebtedness to the plaintiff for the construction of the residences in 2012 and their operation thereafter. Each of the residences consisted of 94 residential units and of those, Voyageur II owned 67 units and Voyageur III owned 64 units. Another defendant, Caleb Management Ltd., was the majority partnership unit holder in each of the limited partnerships within Voyageur II and III. The Voyageur defendants entered into management agreements with Caleb for it to provide food preparation, maintenance and operating services for the residences. S.T., the principal, sole director and president of the general partners in the Voyageur defendants, was also the director and president of Caleb. The plaintiff

originally loaned $10 million to the Voyageur defendants and at July 5, 2021, Voyageur II owed $6,319,561 and Voyageur III owed $5,968,421. These businesses had ceased making regular payments on the loans in January 2017 and had not made a payment since January 2019. The terms of each loan expired on January 4, 2020 and all amounts due and owing were in arrears. The plaintiff made written demands for payment on January 9, 2020 and issued its statements of claim in December 15, 2020. It obtained appraisals of the residential units owned by Voyageur II and III as at March 2021 and it determined their aggregate value at $8,940,000 and $8,515,000 for the Tisdale and Melville buildings if the units were sold separately. However, the value would drop by approximately one half if the properties were sold as a block. The plaintiff pointed to the Voyageur defendants' failure to pay property taxes after 2017 when their tax abatement period expired, or to make payments to other creditors, particularly to Caleb, that held subordinate mortgages registered against various units in the two residences. The Voyageur defendants brought an application for an initial order pursuant to the *Companies' Creditors Arrangement Act* (CCAA) to permit them to remain in possession of their current and future assets and to carry on operations under the oversight of the Bowra Group Inc. as the proposed monitor. They sought the court's authorization to seek and obtain interim "debtor-in-possession" (DIP) financing under which the proposed interim lender, Caleb, would have a charge on certain of their property that would rank in priority to all other interests, including the plaintiff's secured interest. They also requested a stay on any proceedings that might be commenced or continued against them. In support of the application under the CCAA, S.T. deposed that amongst the reasons for the insolvency was the recent impact of the pandemic on the businesses. He explained that Caleb had acquired the majority of the partnership interests in each of the two limited partners, 80 percent in Tisdale LP and 86 percent in Melville LP, to permit it to take the necessary steps to improve circumstances and that it would provide the Voyageur defendants with the DIP financing. He advanced his opinion, although not qualified by the court as an expert, that selling the businesses as going concerns would maximize value. In her affidavit, the Chief Executive Officer of Caleb expressed concern that the appointment of the proposed receiver would imperil Caleb's ability to continue to provide managerial services to the retirement communities because it would be required to cooperate with the receiver. The receivership might also negatively impact its security. The Bowra Group's pre-filing report advised that, assuming an initial order was granted and payments to creditors for pre-filing arrears stayed, without DIP financing from Caleb of $200,000 per residence, there would be insufficient funds to continue operations during the initial stay period. As the Voyageur defendants were insolvent, the CCAA proceedings would provide them with a meaningful opportunity to successfully restructure their business and financial affairs, including by proposing a sale and investment solicitation process to market their assets for consideration by stakeholders, creditors and the court.

HELD: The plaintiff's application for the appointment of a receiver was allowed. The defendants' application for an initial stay under the CCAA was dismissed. The plaintiff had established that the defendants were insolvent within the meaning of the BIA and had persuaded the court that it was just to appoint a receiver based upon considerations set out in Paragon Capital. With respect to the Voyageur defendants' application, it found that relief under the CCAA was neither warranted nor justified. They had not satisfied the requirements of s. 11.02(3) of the CCAA. It did not accept their position that a sale as a going concern would generate more sale proceeds than a forced liquidation under a receivership because it was not supported by any evidence. The plaintiff's opposing position had been supported by its submission of appraisals of the properties. The opinion offered by S.T. did not meaningfully contradict the appraisal evidence and he had not been qualified as an expert on valuation. Further, the court was not persuaded that the Voyageur defendants had acted with due diligence. They had ignored their property tax obligations since 2017 and had not made any efforts to address their serious cash flow crisis. Additionally, in the absence of any meaningful valuation from the Voyageur defendants, it was satisfied that under s. 11.2 of the CCAA, the prejudice that the plaintiff would likely experience from the

subordination of its security to Caleb would outweigh the benefit of the Voyageur defendants obtaining DIP financing. Finally, it found it problematic that Caleb, as the proposed interim lender, did not have an arm's-length relationship with the debtors. It was concerned that Caleb would potentially manage and operate both Voyageur II and III for its own benefit with less than due regard to the plaintiff's interests.

 Back to top