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 19, No. 17 **September 1, 2017**

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Snell, September 30, 2016 (PC16174)

Family Law – Child in Need of Protection – Child and Family Services Act – Permanent Order – Adoption

The mother consented to a finding that the child was in need of protection and that the child be permanently committed to the Ministry of Social Services, pursuant to s. 37(2) of The Child and Family Services Act. The father did not attend the hearing. He had texted a worker with the Ministry indicating he was ill. The Ministry requested that the hearing proceed ex parte because it had been adjourned on a number of occasions. The Ministry requested the permanent order because neither parent was in a position now or in the foreseeable future to parent the child, and the foster family that adopted the child's sister wanted to adopt her. The child in this case was born in 2015 at the mother's home. The mother took the child to the hospital and advised that she did not want the child and had used hydromorphone during pregnancy. The child was born addicted to hydromorphone and Ritalin. The parents had some supervised visits. Neither parent would provide drug tests to the Ministry. The father had not had contact with the child since October 25, 2015. The mother was convicted of assaulting the father and was charged with threatening a mental health worker. She did not participate in any of the parenting classes offered to her.
HELD: The court granted the request to proceed ex parte. The court found that it was clear the child was in need of protection

pursuant to s. 11(a)(1) and 11(b) of The Child and Family Services Act. The mother admitted the need and the father did not attempt to establish a bond with the child. The court found it appropriate to make an order of permanent committal to allow the adoption to proceed.

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Kovatch, November 21, 2016 (PC16175)

Criminal Law – Assault – Sexual Assault – Sentencing

The accused was charged with committing a sexual assault, contrary to s. 271 of the Criminal Code. The offence occurred when the accused was 18 years of age and the complainant was just under 14 years old. The accused and the complainant intended to have intercourse but were found and stopped by the complainant's mother. After the preliminary inquiry was held in 2009, the accused fled the jurisdiction because he was afraid of imprisonment. In 2016 the accused turned himself in and pled guilty. The Crown and the defence agreed that the accused should be sentenced in accordance with the law as it existed in 2008 when there was no mandatory minimum period of incarceration and conditional sentences were available. The Crown argued that aggravating factors were the lengthy delay caused by the accused's flight and that the complainant was underage and there was no consent in law. The accused should receive a jail sentence of nine to 15 months. The defence took the position that a two-month conditional sentence order followed by ten months of probation would be a suitable sentence. There was consent in fact if not in law, and the accused had expressed remorse and took full responsibility. The offence was at the low end of sexual assault.
HELD: The accused was sentenced to 12 months to be served conditionally and in the community and to adhere to conditions, such as staying within his approved residence 24 hours a day for the first six months of the order unless he had written permission from his supervisor. Although the court did not condone the accused's flight from the jurisdiction, it accepted his explanation that he panicked at the prospect of incarceration and did not find it a serious aggravating factor. The court found that it was a serious sexual assault because the offence was committed against an underage child, incapable of providing legal consent.

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Whitmore, May 3, 2017 (CA17031)

Civil Procedure – Court of Appeal Rules, Rule 15

The Union applied to lift the stay of execution of an order by a Queen's Bench chambers judge that quashed, in part, an arbitrator's decision (see: 2015 CanLII 85340). The chambers judge quashed one part of the arbitrator's decision that had declared a test to be discriminatory with respect to certain members of the union. However, the arbitrator's decision that the respondent had breached the terms of a letter of understanding was allowed to stand (see: 2016 SKQB 336). The union appealed the order of the chambers judge only with respect to the first part. It then sought an order pursuant to rule 15(1) of The Court of Appeal Rules, lifting the stay of execution of the chambers judge's decision. The respondent did not cross-appeal the second part of the chambers judge's order.
HELD: The court found that there was no need to make the order sought by the applicants, as the decision of the chambers judge was declaratory that the respondent must act in accordance with provisions of the letter, and therefore there was nothing to stay.

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Harvard Property Management Inc. v Saskatoon (City), 2017 SKCA 34

Richards Herauf Whitmore, May 9, 2017 (CA17034)

Municipal Law – Tax Assessment – Capitalization Rate – Appeal

The appellant appealed from the decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board. The assessor had applied the capitalization rate of 7.49 percent in performing the market value assessment of the appellant's shopping mall, Preston Crossing. The appellant first appealed the assessment to the Board of Revision (board) and argued that the rate was calculated using non-comparable sales located in the Central Business District in terms of building type, zoning and net operating income. The board dismissed the appeal because it was within the assessor's discretion to use the

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approach he had chosen. The appellant then appealed to the committee, and it upheld the decision of the board, finding that the appellant's approach resulted in worse statistics, not better. The appellant argued that the committee failed to deal with the question of whether the properties used to determine the rate were comparable and improperly defaulted to considerations grounded in statistical testing alone.
HELD: The appeal was allowed. The committee's decision concerning the issue of comparability of the properties used by the assessor to determine the capitalization rate for Preston Crossing was set aside and that issue was remitted to the committee for reconsideration. The court found that s. 165(3) and (5) of The Cities Act provided that equity was the dominant factor in assessment of property and that assessments must bear a fair and just proportion to the market value of similar properties. The committee erred in relying on statistics to determine comparability before it examined whether the properties in the group assembled by the assessor were properly comparable.

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Maurice Law, Barristers & Soliciters v Sakimay First Nation, 2017 SKCA 36

Richards Herauf Ryan-Froslie, May 11, 2017 (CA17036)

Barristers and Solicitors – Fees – Assessment – Appeal

The appellant law firm appealed the assessment of a Queen's Bench judge of a retainer agreement between the appellant and the respondent First Nation. The assessment was done pursuant to s. 64 and s. 67 of The Legal Profession Act, 1990. The parties had initially entered into a retainer agreement regarding the respondent's treaty land entitlement claim and any other matter that the respondent might instruct the appellant to act on. It provided for remuneration on an hourly fee for service but did not provide for bonus or contingency payments to the appellant. The latter feature was one that had a high priority with the respondent. Three years later, the respondent became a party to the Qu'Appelle Valley Indian Development Authority (QVIDA) claim related to the flooding of the First Nation's lands. The appellant tried to negotiate a new retainer agreement with the respondent and all its proposals provided for a 3 percent bonus to it on the QVIDA claim. It advised the respondent that counsel for another band was offered a 10 percent bonus for his work on the same claim, which showed that its proposal was reasonable.

The respondent signed the QVIDA retainer agreement. When the trial judge reviewed the bill rendered by the appellant, she found that the agreement was unfair because the respondent had not understood that the first agreement still applied to the QVIDA claim, and therefore its decision to approve the new agreement was uninformed. The information regarding the bonus paid to other counsel was a misrepresentation and the reason for the respondent's acceptance of the new retainer agreement. The appellant argued that the trial judge had erred in finding that the retainer agreement was unfair and unreasonable and in her determination that the appropriate remuneration for the appellant on a quantum meruit basis to be what it had invoiced the respondent, which amount did not include a bonus (see: 2014 SKB 310).
HELD: The appeal was dismissed. The trial judge had not erred in finding that the treaty land entitlement retainer extended to the appellant's work on the QVIDA file because one of the reasons that the respondent retained the appellant was because there was no provision for a bonus or contingency fee. While the appellant was entitled to seek a change to the treaty land entitlement agreement, it was obliged to ensure that the respondent understood the terms and effect of the new agreement. The trial judge's finding of unfairness rested on the appellant's failure to inform the respondent that the first agreement did apply to the work done on the QVIDA file and that the appellant misrepresented the payment of a bonus to another lawyer. There was no basis to interfere with the trial judge's assessment of the appellant's fee on a quantum meruit basis.

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Kovatch, February 8, 2017 (PC17031)

Criminal Law – Sentencing – Assault Causing Bodily Harm
Criminal Law – Sentencing – Conditional Sentence
Criminal Law – Sentencing – Pre-sentence Report
Criminal Law – Sentencing – Sentencing Principles

The accused was found guilty of assault causing bodily harm when he hit his child with a video game controller when she would not stop crying. The child had severe bruising. The accused and his wife separated due to the offence and she moved with the child out of province. The accused had Asperger's Syndrome and ADHD. The author of the pre-

sentence report concluded that the accused was a low risk for re-offending. The Crown requested incarceration of 12 to 18 months. The accused suggested the appropriate sentence was a conditional sentence order, followed by probation.
HELD: The court concluded that the accused's poor ability to cope with his daughter's crying was directly connected to his suffering from Asperger's Syndrome and ADHD. Denunciation and deterrence are particularly important in sentencing for offences of an adult assaulting a child. Aggravating factors were the position of trust the accused had in relation to the victim, abuse of a child under 18 years, and the impact of the offence on the victim. Mitigating factors were the young age of the accused, the lack of criminal record, the medical and mental health problems of the accused, a single incident occurring out of frustration, and no long-term effects upon the child. The court found the categorization of child abuse in Marks to be valid. The case was found to be a category II case with a single incident of assault. A category II case is one where the application of force is from a parent that is immature and unskilled in matters of child care, and acts out of frustration. The accused did not fully appreciate the injuries that might result from his actions. The sentencing range was found to be from a suspended sentence and probation to actual jail time. The court determined that the appropriate sentence was a conditional sentence order, followed by probation. The accused was sentenced to three months in a Provincial Correctional Centre, to be served conditionally and in the community on conditions. Following conclusion of the conditional sentence order, the accused was placed on probation for one year with all of the terms from the conditional sentence remaining except the house arrest. Ancillary orders were also made.

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R v Maurer, 2017 SKPC 24

Henning, February 24, 2017 (PC17025)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Assault – Sexual Assault
Criminal Law – Sentencing – Pre-sentence Report

The accused was convicted of a summary charge of sexual assault, contrary to s. 271 of the Criminal Code. He was 41 years old and did not have a criminal record. The accused suffered sexual assault and abuse in his early life. He had major physical and mental medical problems for which he was being treated.

The accused became aware of some First Nations/Metis ancestry later in life and indicated that it had an impact on him. The accused completed high school and had some university classes, but no degree. He had never been married and had one child. The assault was a serious and intimate sexual assault on a sleeping victim. The accused stopped the assault when the victim objected.
HELD: The accused witnessed his mother in a violent and abusive relationship that affected the accused in a way consistent with what are sometimes referred to as "Gladue Factors". The accused was sentenced to a term of imprisonment of eight months followed by probation of one year with the conditions recommended in the pre-sentence report.

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R v Flegel, 2017 SKPC 33

Kovatch, April 6, 2017 (PC17028)

Criminal Law – Driving over .08 – Certificate of Analysis – Service of True Copy
Criminal Law – Evidence

The accused was charged with driving while impaired and with driving over .08. The accused argued that the .08 charge must be dismissed because s. 258(7) of the Criminal Code was not complied with when the officer that served the Certificate of Analysis on the accused could not recall if he compared the original and the copy prior to serving the accused.
HELD: The accused's argument was found to be without merit. A side-by-side comparison of the original and copy was not necessary. The court did not accept the accused's argument that the Affidavit of Service was undermined because the officer could not recall if he did a side-by-side comparison. The officer clearly deposed that he served the accused with a copy of the Certificate of Analysis and Notice of Intention on the accused, which is all that is required by s. 258(7). The accused was found guilty.

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R v Knight, 2017 SKPC 34

Kovatch, April 6, 2017 (PC17029)

Criminal Law – Blood Alcohol Exceeding .08
Criminal Law – Care or Control over .08
Criminal Law – Defences – Charter of Rights, Section 9

The accused was charged with driving while impaired and with driving over .08. The accused argued that her Charter rights were violated when she was overheld after supplying breath samples. An officer received a call at 1:00 am regarding a possible impaired driver in a white Jeep. When the officer located the Jeep, the driver's door was open, but by the time the officer approached the Jeep it was closed. The only occupant of the Jeep was the accused. The accused was given a breath demand when she failed the ASD. The accused asked many times why she was stopped when she was not even driving. The accused blew .20 at 2:05 and 2:28 am. The accused was issued an appearance notice at 10:16 am and released immediately after. The accused argued the following: 1) she rebutted the presumption of care and control because she repeatedly objected that she was not driving; and 2) the accused was not released until at least 10:16 am even though she gave the last breath sample at 2:28 am. The accused argued that the Certificate of Analysis should be excluded as a result of the breach and the .08 charge should be stayed for noncompliance with s. 258(7) of the Criminal Code.
HELD: The accused's arguments were dealt with as follows: 1) the court found no evidence rebutting the presumption of care and control. The accused never provided evidence that she didn't occupy the seat for the purpose of setting the vehicle in motion; and 2) the court did not find a Charter breach, noting that there was no evidence as to why the accused was held as long as she was, or why she was not released earlier. Also, the court determined that the accused was not entitled to the remedy sought in any event. The Court of Appeal concluded that a stay was not appropriate in the case of overholding. There was no causal connection between the alleged overholding and the Certificate of Analysis. The accused was found guilty of driving over .08.

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Tournier v Hildebrandt, 2017 SKPC 44

Agnew, May 8, 2017 (PC17033)

Contracts – Breach

The plaintiff and her husband contracted with the defendant to build a log cabin. The discussions between the parties were not

reduced to writing, and they disputed both the general and specific terms of their contract. The plaintiffs alleged that the defendant overcharged them and the defendant counter-claimed for money still owed to him by the plaintiffs.
HELD: The plaintiffs' claim and the defendant's counterclaim were both dismissed. The court found that neither party had been able to prove their claim and had provided insufficient evidence.

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Chorneyko v Switzer, 2017 SKQB 65

Elson, February 28, 2017 (QB17056)

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

The parties resided together in a common law relationship and had two children. The petitioner requested that the court exercise jurisdiction with respect to the children because they had been born and resided in Saskatchewan until September 16, 2016. On September 8, 2016, the petitioner was charged with sexual assault, uttering threats and attempting to choke the respondent in order to commit an indictable offence. A week after the offences occurred, the respondent moved to British Columbia with the two children to live with her sister and obtained custody of both children from the Provincial Court of B.C. without notice to the petitioner. The petitioner sought the parenting orders in the province, asserting that it was the more appropriate jurisdiction as the children were habitually resident in Saskatchewan at the time he issued his petition on September 27, 2016, under s. 15(4) of The Children's Law Act (CLA). The respondent argued that the children were habitually resident in B.C. at the time the petition was filed based upon the fact that the court there exercised jurisdiction. In the face of the orders granted by it, s. 15(4) of the CLA had no impact. The respondent explained that she fled Saskatchewan, fearing for her safety and that of the children.
HELD: The court declined to exercise jurisdiction. The court interpreted s. 15(2)(b) of the CLA and found that it applied as of September 16, 2016, when the B.C. court assumed jurisdiction and issued the guardianship and protection orders, and the children had been living with the respondent since then. Therefore, the children had been habitually resident in B.C. since that time. The court reviewed the factors set out in s. 15(1)(b) to determine whether it could exercise jurisdiction despite the

finding of habitual residence. It found that the petitioner had not been able to establish the presence of s. 15(1)(b)(i) and (iii). The court held that it was required to consider s. 15(4) as it could not decline jurisdiction only because a court outside Saskatchewan made a custody order, particularly when it was without notice. In this case, before September 8, the petitioner was a joint custodial parent to the children within the meaning of s. 15(4), and that fact nullified the finding of habitual residence in B.C. made pursuant to s. 15(1). Therefore, the children's habitual residence in Saskatchewan was preserved, as was the jurisdiction of the court. However, under s. 16 of the Act, the court exercised it discretion to decline jurisdiction in favour of the B.C. court in the circumstances of this case, relying upon why the parties had separated and the respondent's reasons to leave Saskatchewan.

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R v Maurer, 2017 SKQB 73

Kalmakoff, March 8, 2017 (QB17062)

Criminal Law – Judicial Interim Release Pending Appeal

The appellant was convicted of sexual assault after trial and was sentenced to eight months' imprisonment. He appealed his conviction and applied to be released on bail pending the hearing of the appeal. His grounds of appeal were that his representation at trial was ineffective because his counsel failed to call certain evidence and that the trial judge failed to properly deal with inconsistent and contradictory evidence when assessing the credibility of witnesses.
HELD: The application was granted and the appellant was released on a recognizance of $2,000 with conditions. The court was satisfied that the preconditions to release pending appeal, set out in s. 679(3) of the Criminal Code, had been met. The appeal was not frivolous, the appellant had met all of his bail conditions before trial and had no history of failing to appear in court. His detention was not necessary in the public interest as he had been assessed at low risk to reoffend. It was also noted that because of the nature of his appeal, it might take longer for it to be heard and determined, which might mean that he would have served his entire sentence before the appeal would be heard.

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Baraniski v Youzwa, 2017 SKQB 104

Turcotte, April 17, 2017 (QB17113)

Statutes – Interpretation – Local Elections Government Act, Section 36(1)(f), Section 42(d)(ii)
Elections – Controverted Elections

The relator applied for an order under The Controverted Municipal Elections Act, declaring invalid the election of the mayor and councillors of the Resort Village of Tobin Lake (village) held in July 2016. He had been an unsuccessful candidate for one of the four positions of councillor. The respondent Richardson was elected as a councillor. He owned a campground in the village that contained 155 sites. Historically, the sites had been rented out on a seasonal basis from May to October, but in 2015 Richardson notified the site holders that the sites would be rented on a yearly basis. The respondent Youzwa, a site holder in the campground, was also elected as a councillor. Both he and Richardson were nominated by site holders. At the time of election, in excess of 200 votes were cast by site holders from the campground. The relator argued that the site holders of the campground were ineligible to vote in the local election and that Youzwa was ineligible as a candidate in the election on the grounds that none of the site holders qualified as residents of the village in order to nominate him nor was he an owner or lessee of land in it for three consecutive months immediately preceding the election to be eligible to vote under s. 36(1)(f) of The Local Government Elections Act (LGEA) or to be eligible as a candidate as required by s. 42(d)(ii) of the LGEA. Due to the large number of site holders who cast ballots during the election, the election must be invalidated and a new election held.
HELD: The court declared that the respective candidacies of each respondent in the election were valid and the votes cast by the site holders were valid. The election was declared valid and the mayor and council were to be installed. The court found that the LGEA did not contain a definition of land and assessable land but that it incorporated by reference definitions from other provincial statutes, including s. 194 of The Municipalities Act, which meant that land in the campground would be considered as both "land" and "assessable land" in the village for the purposes of the LGEA. The agreement between Richardson and the individual site holders created leases and the relationship of landlord and tenant. They were eligible to nominate candidates and to vote in the election because they were lessees of land for the three months immediately preceding the day of the election within the meaning of s. 36(1)(f) and s. 42(d)(ii) of the LGEA.

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Herbert v Auto Connection (1993) Ltd., 2017 SKQB 110

Brown, April 20, 2017 (QB17108)

Damages – Damages in Tort – Personal Injury – Slip and Fall
Damages – Pre-Existing Condition – Contributory Negligence
Torts – Negligence – Duty of Care
Torts – Negligence – Personal Injury – Damages

In February 2014, the plaintiff attended at his friend's business and fell and broke his right femur. The defendants in the action were the friend and his business. The plaintiff slipped and fell on a small patch of ice in the parking lot that was caused by an idling truck the day before. The defendant did not use salt or sand on his business yard. The plaintiff had a fractured hip, which was replaced with a prosthetic hip. He also had two procedures done on his knee. The plaintiff did not injure his knee during the fall, but there was a question whether the knee problems were caused by the hip injury and recovery. The plaintiff's son lived with him and helped him after the fall and up to September 2016. An expert said that the fractured hip caused the pain to develop in the plaintiff's groin and knees. The plaintiff did not undertake any rehabilitation program even though it was recommended. The plaintiff quit his night stock job at Walmart in 2012 due to arthritis. He was placed on long-term disability and continued to receive the payments at trial. He said that he planned to return to work at Walmart in spring 2014 due to a successful new medication. An expert indicated that the plaintiff would not have been able to stock shelves to age 70 in any event, and he would have had to perform a different task before he retired. The issues were as follows: 1) duty of care; 2) breach of standard of care, causation; 3) loss of income; 4) non-pecuniary damages; 5) pecuniary loss; 6) contributory negligence; 7) double recovery; and 8) mitigation. HELD: The court found that the plaintiff's arthritis was under control at the time of the fall and it would have been reasonable for him to return to work May 1, 2014. The issues were determined as follows: 1) the relationship between the parties was one of licensee not invitee. The icy spot was found to constitute an unusual danger. It was exceptionally smooth and slippery. The defendant knew of the glare ice at this spot and it required either sand or salt. The defendant's refusal to ever use sand or salt was below the standard required; 2) a significant issue was causation, specifically whether the broken hip caused the numerous other health issues. The appropriate test was the

"but for" test. The plaintiff's pre-existing knee issue was not found to be a crumbling skull scenario, but it was a thin skull scenario. The back issues affecting the plaintiff after the slip and fall were not caused by the broken hip, they were independent of the fall and were crumbling skull scenarios. The hip and knee were found to be compensable for two years' time; 3) the court found that the plaintiff would have been capable of resuming employment in March 2015 if he had diligently undergone the recommended rehabilitation; 4) the court found the amount for loss of amenities and pain and suffering to be $77,876.64; 5) the court found it reasonable for the plaintiff to have weekly housekeeping assistance for the first three months after returning home from hospital and every two weeks for 20 months thereafter. The court found that the plaintiff should have been able to have yardwork done for $1,764 for the first year with an additional $136.50 for annual hedge trimming. The court attributed $1,764 for yardwork for the second year as well. The plaintiff was also to be reimbursed up to $3,814.01 for rehabilitation if and when it was undertaken. A total of $2,198 was awarded for dog-walking services that would have been required; 6) the plaintiff had appropriate footwear on. The plaintiff would have had notice that as an ordinary person, paying reasonable attention, there was a potential presence of a slippery surface. The plaintiff was also aware of the slippery patch, and it, therefore, created a situation of contributory negligence. The court determined that the plaintiff was 40 percent responsible; 7) the exceptions to the rule against double recovery fit the disability income the plaintiff was receiving so they were not deducted; and 8) the plaintiff was found to have failed to mitigate his damages by July 2015. Therefore, the court found that the damages the defendants were responsible for were limited to those that ought to reasonable have ended by March 31, 2016. The total damages awarded were $157,976.04 and 60 percent were awarded to the plaintiff for a total damage award of $83,975.42.

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Trondson v Kreutz, 2017 SKQB 112

Smith, April 21, 2017 (QB17109)

Family Law – Child Support – Adult Child – Adult Student
Family Law – Child Support – Determination of Income
Family Law – Child Support – Family Maintenance Act

The parties entered into a child support agreement in May 1998,

providing for the payment of child support by the respondent in the amount of $200 for the child, pursuant to The Family Maintenance Act, 1997. The respondent argued that he was no longer responsible for child support because the child was 20 years old. The petitioner argued that child support was still payable because the child was in full-time attendance at university. The child had an annual income of $20,000 per year. She had a student loan in excess of $12,000. The child was taking a Bachelor of Fine Arts and it was going to take her five years to complete, rather than the usual four years. The petitioner provided the child with room and board and money if the child ran out of her own funds. The child also received some scholarships.
HELD: The court found that the child was completely unable to stand on her own financially. It was not inappropriate to order Guideline table support. The court found the respondent's income to be $84,000, noting that the income information provided by the respondent was less than adequate. The Guideline amount for the Alberta payor was $725 per month and the court ordered that amount be paid. The court also ordered that the respondent provide his income tax returns and copies of financial statements of his corporation for every year that he continued to be obligated to provide support. The court ordered costs payable by the respondent in the amount of $1,700.

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R v McCullough, 2017 SKQB 113

Rothery, April 25, 2017 (QB17110)

Constitutional Law – Charter of Rights, Section 7, Section 11(b)

The accused applied for a judicial stay of proceedings on the basis that his rights under ss. 7 and 11(b) of the Charter had been breached. An information had been laid in August 2005, alleging that he had sexually assaulted a child. The accused was interviewed by the police regarding the offence at the time, but he then left the address that he had given to the police and began living on the street. The police were subsequently unable to locate him in Saskatoon. A warrant was issued for the province and it was placed on a Canada-wide basis in 2014. The accused was finally arrested in March 2015. His trial was scheduled to proceed in February 2017. Counsel for the accused submitted that the starting date for calculating delay in proceeding to trial was not the day that the accused was arrested but the date the information was laid, in this case 10 years prior. This extensive

delay was the basis of the application. In the case of the alleged breach of s. 11(b), the defence relied on R v Kalanj. The burden rested on the Crown to rebut the presumption of delay as required by Jordan. The defence also argued that the police should have done more to locate the accused. The accused's memory had been impaired by the passage of time and alcoholism.
HELD: The application was dismissed. With respect to the alleged breach of s. 11(b), the court found that in light of the ratio in Jordan, the calculation of the delay must commence from the time of arrest because as the ceiling shifts the burden to the Crown to rebut the presumption, it would be illogical to allocate the time period where the police cannot locate an accused against the Crown. Regarding the alleged breach of s. 7 of the Charter, the court found that there was no evidence of abuse of process by the Crown. An assessment of how well or poorly the police tried to trace the accused was not pertinent to the inquiry of whether the accused's s. 7 rights had been breached. The court was not convinced by the accused's arguments that his memory loss affected his ability to make full answer and defence.

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Larson v Frontier Peterbuilt Sales Ltd., 2017 SKQB 114

Scherman, April 21, 2017 (QB17111)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike – Want of Prosecution
Civil Procedure – Queen's Bench Rules, Rule 4-44 – Application to Strike Claim – Want of Prosecution

The defendant applied, pursuant to rule 4-44 of The Queen's Bench Rules, to strike or dismiss the plaintiff's claim for want of prosecution. The claim was commenced February 12, 2008 and there were no substantive steps taken that advanced the action to trial since June 2012's delivery of documents. There was a trial date set for May 16, 2012; however, it was adjourned by consent to allow sufficient time for new elements of disclosure and discovery to be pursued. The plaintiff's counsel did, however, contact the defendant's counsel on numerous occasions, but rarely received a response.
HELD: The court had to determine whether the delay from the original trial date was inordinate and inexcusable. The court found that the delay was inordinate. The plaintiff's burden to advance the claim was found to still apply, but its application did not have the same vigour and weight since the introduction

of the Foundational Rules. Rule 1-3(3) of The Queen's Bench Rules requires that both parties identify and facilitate the quickest means of resolving the claim at the least expense. The court found that the plaintiff could have and should have been more aggressive in advancing the action. The delay, however, was excusable because of the failure of the defendant's counsel to respond. It would be in the interests of justice for the claim to proceed. The defendant's application was dismissed.

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Mosaic Potash Colonsay ULC v United Steel Workers, Local 7656, 2017 SKQB 116

Currie, April 24, 2017 (QB17114)

Labour Law – Arbitration Award – Judicial Review
Labour Law – Collective Agreement – Interpretation – Seniority

The applicant employer asked for judicial review of an arbitrator's supplementary award, which he made following a judicial review of his original award (see: 2016 SKQB 195). The original arbitration was based upon a grievance that the applicant had violated the seniority provision in the collective agreement by selecting the grievor for a 12-hour shift when there were other employees more junior to him who were qualified to do the job even though they would have required some additional training. The Queen's Bench judge who conducted the judicial review found that the arbitrator's reasons were inadequate and not reasonable because evidence provided by the applicant had been ignored when interpreting the seniority provision of the collective agreement. She remitted the matter to the arbitrator to address the following issues: whether the applicant had violated the seniority provisions; whether he had failed to consider evidence provided by the applicant's human resource manager that the reason that the longer shift was imposed upon the grievor was because the parties were engaged in collective bargaining and the employees were unwilling to work voluntarily; and dependent upon the decision regarding the seniority issue, whether the damages issue was remitted back for re-consideration. The arbitrator's supplementary award found that the reference in the provision of the agreement to "the requirements of the operations" did not create an exception to the seniority principle in the context of the applicant directing a change in the grievor's work schedule. The applicant argued that the arbitrator ignored the express direction of the judge that the meaning of that phrase in the provision could displace the

seniority principle in the circumstances. The arbitrator found upon review of the human resource manager's evidence that the applicant had established only that it had a need to have someone working in the position that it directed the grievor to fill but had not established that the need was so immediate or urgent as to justify displacing the seniority principle. The arbitrator concluded that there was no change to his decision as to breach and therefore there was no reason to change the damages assessment.

HELD: The application to quash the supplementary award with respect to the interpretation of the provision in the agreement and the application of the evidence was quashed. The application to quash the supplementary award regarding the assessment of damages was allowed to the extent that the matter of damages was remitted to the arbitrator for him to provide the analysis behind the award of damages. The court applied the reasonableness standard in its review of the supplementary award. It found that the arbitrator's interpretation of the agreement and the application of the evidence both met the reasonableness test. The reviewing judge had not decided the meaning of the provision but had only identified it as an issue for determination by the arbitrator. The court found that the arbitrator based his damages assessment on calculations as to loss provided by the grievor but had not provided an explanation of why he had accepted them. Without an analysis of the damages, this portion of the supplementary award had not met the standard of reasonableness.

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Zhao v 2055190 Ontario Ltd., 2017 SKQB 117

Mills, April 25, 2017 (QB17115)

Debtor-Creditor – Preservation Order – Application to Extend Statutes – Interpretation – Enforcement of Money Judgments Act, Section 5, Section 8

The plaintiffs brought an application without notice under s. 5 of The Enforcement of Money Judgments Act (EMJA) for an order directing that the net proceeds of sale of the defendant's only asset in Saskatchewan to a maximum of $859,000 be preserved. The order was granted, and under s. 7(1)(a) of the EMJA, it was set to expire 21 days later. The plaintiffs then applied to extend the order under s. 8 of the EMJA. The defendant acknowledged that the criteria set out in s. 5 for the granting of a preservation order had been met but took issue with the amount that the

plaintiffs sought to preserve. The affidavit filed by a director of one of the plaintiffs provided his opinion as to the calculations of damages the plaintiffs would have incurred if the lease agreement had continued to its ultimate expiry date. They were forced to close their business due to the defendant's breach of the restrictive covenant, allowing a competitor into the retail mall in which their leased premises were located. The defendant filed a detailed affidavit in response, including an affidavit from an expert witness who critiqued the plaintiffs' calculation of damages. The affidavit included its cost of sale percentage, length of time for the calculation of damages, monthly sales projections, and monthly income statements.
HELD: The application to extend the preservation order was granted. The court reduced the amount of the preservation order to $292,000, which was to be held in trust by counsel handling the sale of the defendant. The defendant was directed not to disburse the excess funds currently in trust until the expiry of the 30-day appeal period. The court found that the reduced amount of the preservation order was appropriate because it reflected the plaintiffs' expectations when it entered into the lease agreement that was breached shortly thereafter and the plaintiffs' calculation of its losses sustained as a result of a venture that failed because of the defendant.

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Khaira v Sidhu, 2017 SKQB 122

Wilson, April 28, 2017 (QB17116)

Family Law – Spousal Support

The petitioner was granted a divorce in 2015. Her former husband, the respondent, then brought this application for spousal support. The parties were married in India in 2010, and almost immediately the petitioner moved to Canada to attend school. In 2012 the petitioner commenced employment in Saskatchewan and had worked since that time, currently earning $29,000 per annum. The respondent was able to come to Canada in 2013 because of what he described as his wife's sponsorship of him. He obtained work immediately and currently earned $38,000 per annum. He argued that the petitioner should repay him the sum of $14,000, which represented the sum of amounts that he "loaned" to her after their marriage to enable her to travel to and attend school in Canada and other funds that he borrowed to give to her while she resided in Canada. The petitioner disputed that the respondent had paid for her

education and also provided evidence that she had sent monies to the respondent while he resided in India. The petitioner testified that the marriage was over within days but the respondent said that he only learned that the petitioner was of that opinion after he arrived in Canada in 2013.
HELD: The application was dismissed. The court found that there was no basis for an order for spousal support. The court considered that there was evidence that both parties had provided funds to the other during the course of the short marriage and both had achieved self-sufficiency and there did not appear to be a contractual basis for support as there was no formal sponsorship arrangement on which the respondent could rely.

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Shen v Saskatchewan (Ministry of the Economy), 2017 SKQB 124

Dufour, May 5, 2017 (QB17122)

Administrative Law – Judicial Review

The applicant, a foreign national living in China, applied to be nominated under the Saskatchewan Immigrant Nominee Program (SINP) in January 2014 to live and work in the province under the skilled worker category. He applied as an industrial electrician, as one of the occupations identified by Saskatchewan as being in demand. His application was rejected. He applied unsuccessfully for a review of the rejection and then brought this application for judicial review of both decisions. The SINP Application Guide set out minimum requirements for applicants. In 2014 when the applicant first applied for nomination, one requirement stated that the appropriate Saskatchewan licensure must have been obtained by applicants to enable them to work in that profession. As industrial electricians are a compulsory apprenticeship trade, the applicant had to have his Saskatchewan licensure at the time he submitted his application. This policy was amended in December 2014, approximately two months before his application was rejected. The amendment stated that applicants were required to obtain proof of eligibility for Saskatchewan licensure. The Guidelines also provided that applications would be reviewed at a pre-screening stage to ensure that all of the required documentation had been submitted. In this case, the application materials did not show a Saskatchewan licensure, which the applicant obviously did not have, but he was not advised at the pre-

screening stage that his application was incomplete. The letter of rejection sent to the applicant in February 2015 stated that he had not demonstrated that he had obtained the appropriate licensure. The applicant asked, as permitted by the Guidelines, for a secondary review in March 2015 on the basis that he had not been notified that his application was incomplete and whether the first or second policy should have been applied to him at the initial assessment stage. He also argued that the SINP policies made it impossible for him or any other foreign national to be nominated because the Saskatchewan Apprenticeship and Trade Certification Commission (SATCC) had informed him that before he could be granted licensure as an industrial electrician, he would first have to acquire permanent residence status. In November 2016, the secondary reviewer dismissed the application on the grounds that the applicant had not met the criteria of having his qualifications recognized by the SATCC and was thus ineligible for nomination.
HELD: The application for judicial review was granted and the matter returned to the initial decision-maker for redetermination with the proviso that the amended policy be applied. The SATCC was ordered to determine whether the applicant was eligible for licensure based upon his education, experience and other factors relevant to his qualifications to work as an industrial electrician in the province. The court found that the first decision was unreasonable because its maker erred by applying the first policy instead of the amended policy. The first policy effectively disqualified all foreign skilled workers and frustrated the purpose of the SINP. The decision maker was required to exercise his discretion consistent with SINP's purpose and objects in effect at the time of the application. The secondary reviewer erred by applying the first policy to the application. He also relied unquestioningly upon the SATCC requirements in spite of the fact that they made no sense in the context of the SINP and failed to exercise his discretion to give effect to the purpose of it. The applicant was awarded costs of $6,000.

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Farrell Holdings Inc. v Nussbaumer Holdings Ltd., 2017 SKQB 125

Megaw, May 2, 2017 (QB17112)

Anton Piller Order
Arbitration
Civil Procedure – Costs – Solicitor/Client Costs

Civil Procedure – Originating Notice
Civil Procedure – Queen's Bench Rules, Rule 1-6

The plaintiffs, three corporations, applied without notice and on an originating application for an order allowing the Sheriff or bailiff service to take possession of all computers, tablets, and cellular phones of the two individual named respondents, D.N. and S.N. They sought injunctive relief together with an Anton Piller order. The court ordered that materials be served through the respondents' solicitor. The court ordered that D.N. and S.N. preserve their electronic devices, together with data on them, pending further order of the court. The respondent corporation and the two plaintiff holding companies were the shareholders of the plaintiff insurance corporation. The individual respondents were the shareholders of the respondent corporation. In mid-2015, there was a falling out and D.N.'s company sold its shares in the insurance company to one of the existing shareholders. D.N. entered into a Non-Competition, Non-Solicitation, and Non-Disclosure Agreement (NCA) with the insurance corporation for a consideration of $513,667. The plaintiffs learned that a competing agency had contacted at least two large customers of the insurance corporation and they believed that was because D.N. had a relationship with an individual associated with the competing agency. The plaintiffs concluded that D.N. must have breached the NCA and made an originating application. The parties were trying to arrange for deletion of any data on D.N.'s hard drives relating to the insurance corporation. However, an agreement could not be made and there was no requirement in the NCA. The applicants filed the ex parte application even though D.N. had been represented by counsel throughout and the applicants had been communicating with the counsel. The applicants argued that the respondents had reneged on an agreement to deliver up the hard drives and had disclosed confidential information. The applicants indicated that they were pursuing D.N. through the arbitration clause of the Share Purchase Agreement (SPA). The issues were as follows: 1) did the applicants fail to complete the ex parte application in an appropriate manner; 2) if so, what was the effect of such failure; 3) did the applicant's pleadings support an application for interim relief; and 4) should interim relief be granted on the evidence in the matter.
HELD: The issues were determined as follows: 1) the applicants' materials failed to include details that were known to them, such as an innocent reason why the other insurance agency was in their area. Their materials also failed to provide other information. There ought to have been notice to the respondents' solicitors of the pending ex parte application. The applicants failed to follow the correct procedure to obtain ex parte relief; 2) this was not a case that was emergent or it was not possible or

prudent to provide notice of the application. There is also an expectation of full and frank disclosure if an application is made ex parte. The applicants did not appear to make any inquiries regarding their suspicions, nor did they provide the full information they had regarding D.N.'s activities. No explanation was provided for not including the information. The previous court order was set aside; 3) the arbitration provision had not been invoked by the applicants. If no arbitration was commenced the applicants would have to commence an action before the court. The court did not remedy the defects pursuant to rule 1-6 of The Queen's Bench Rules because there was not an irregularity, there was a complete absence; and 4) interim relief was not appropriate and the interlocutory application was dismissed. The court determined that this case was not a rare and exceptional case where solicitor/client costs ought to be granted. The court did award a higher amount of costs than it might otherwise because of the manifest errors made by the applicants. The respondents were awarded costs of $5,000 in any event of the cause.

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McLean v McLean, 2017 SKQB 127

Dufour, May 3, 2017 (QB17123)

Civil Procedure – Application to Strike Statement of Claim – No reasonable Cause of Action
Civil Procedure – Damages
Torts – Negligence
Torts – Public Misfeasance
Torts – Vicarious Liability

The defendants applied to strike the claim brought by the plaintiffs, C.M. and D.M., and their children. In 2013, a defendant, P.M., was convicted of offences relating to threats against the plaintiffs. B.M., also a defendant, was P.M.'s wife and an ex-RCMP officer. The plaintiffs alleged that the RCMP acted negligently and actively participated in the cover-up of the criminal acts of P.M. for an improper purpose, damaging the plaintiffs. The issues canvassed by the court were as follows: 1) damages suffered by the plaintiffs; 2) claims against RCMP officers; 3) claims against Canada for the actions of Victim Services employees; and 4) claims against B.M. and P.M.
HELD: The issues were discussed as follows: 1) the plaintiffs pled damages for "mental distress and anxiety" with no further facts of a recognizable psychiatric illness as required for compensable damages. The plaintiffs also sought damages for

the legal fees they incurred and continued to incur to ensure their safety and protection, but there was nothing further pled. The plaintiffs also claimed damages for the costs to order the transcripts of the criminal proceedings against P.M. The cost was not a proper head of damage, only a possible taxable disbursement. The plaintiff D.M. also claimed damages against P.M. for legal costs and losses to divide the farming operation that they previously owned jointly, which the court found may be possible. The damage claim of "distrust RCMP officers" was not compensable damage. The failure to plead damages compensable at law was enough to strike all claims except the one by D.M. against P.M.; 2) the plaintiffs claimed negligent investigation by the RCMP, but acknowledged that there was no case authority for the position that the defendant RCMP officers owed a private duty of care to the plaintiffs. The plaintiffs nevertheless argued that the claim should not be struck, positing that the court could err on the side of permitting a novel claim. The court disagreed that the claim was novel, concluding that numerous cases found that there was no private duty of care. The court also found that the claim did not support the plaintiffs' assertion of public misfeasance because they did not plead facts that could establish the RCMP officers knew that their actions were likely to cause damage to the plaintiffs. The other claims against the RCMP were also struck for lack of support in the pleadings; 3) the plaintiffs pled that the Victim Services employees breached their duty to them by not providing adequate information regarding P.M.'s charges and proceedings. The plaintiffs did not show that the relationship between the employees and the government was sufficiently close so as to make a claim for vicarious liability appropriate; and 4) the claims against B.M. related to the plaintiffs' assertion that she knew that P.M. had an unlicensed handgun in their home. All of the claims against her were struck for lack of reasonable cause of action. The court did not dismiss the plaintiffs' claim against P.M. that suggested his criminal actions caused D.M. economic disadvantage because the farming operation had to be divided. The court allowed that portion of the claim to remain even though the drafting of it was deficient. D.M. was allowed to amend the claim against P.M. in that regard. P.M. was not awarded costs, but B.M. was awarded $750 in costs.

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Embee Diamond Technologies Inc. v Prince Albert (City), 2017 SKQB 128

Danyliuk, May 5, 2017 (QB17118)

Injunction – Interlocutory Injunction – Mandatory – Requirements
Injunction – Interlocutory Injunction – Prohibitory – Requirements
Statutes – Interpretation – Tax Enforcement Act, Section 10(3), Section 36
Statutes – Interpretation – Land Titles Act, Section 50

The plaintiff applied for both a mandatory and a prohibitory injunction against the defendant. The plaintiff occupied a commercial building that was owned by a separate but related company, MFN Holdings Inc., that had fallen into tax arrears. It alleged that the defendant, the City of Prince Albert, had acted precipitately because it took physical possession of the building and secured it by locking the doors. The plaintiff was locked out of its business premises, claimed that this was unlawful and sought the injunctions to ensure it was returned into possession of the premises. The city obtained title to the property in April 2017 following four years of tax enforcement proceedings. Although it did not provide a copy of written lease documents with MFN, the plaintiff stated that it was a tenant on a year-to-year lease. It had not made any rent payments to MFN or to the city since the latter took possession. In an affidavit, the plaintiff's principal attested that he held no formal office within MFN, but there was evidence that he was involved in both corporations and was aware of the tax proceedings since their inception. He had arranged for payment of the tax arrears but the cheques were returned due to non-sufficient funds. The city advised that the plaintiff's principal had not indicated throughout the proceedings that there was any tenancy between the plaintiff and MFN. The issues were as follows: 1) whether an application for injunction was the proper relief to seek. The plaintiff argued that s. 36 of The Tax Enforcement Act (TEA) applied because of its year-to-year lease with MFN, and as a result, the city was required to use s. 50 of The Landlord and Tenant Act (LTA) to make a formal demand for possession; 2) what the proper test for an interlocutory injunction is and whether the plaintiff was entitled to the remedy. The mandatory injunction sought by the plaintiff would require the city to give up possession of the building; and 3) whether the plaintiff had met the requirements of the tests for the injunctions.
HELD: The application was dismissed. The court found with respect to each issue that: 1) the plaintiff had sought the wrong remedy pursuant to the TEA. It was not clear that the plaintiff was a tenant under a valid lease with MFN and then the city. If there was such a lease and the city's extra-judicial action in taking possession during it, then the plaintiff should have made

an application for relief from forfeiture under s. 10(3) of the TEA. Section 50 of the LTA applies only to overholding tenants. Where a lease is in good standing as asserted by the plaintiff, the section is inapplicable; 2) the test required that the plaintiff have a strong prima facie case because the mandatory injunction was sought against the city. As a public authority, it represented the public interest and it should not be temporarily prevented from acting unless there was real merit to the claim. As well, the plaintiff must come to court with clean hands and have made full and frank disclosure. With a prohibitory injunction application, the plaintiff had to demonstrate that there was a serious issue to be tried; 3) the plaintiff had failed to establish that it had a prima facie case regarding the mandatory injunction. Its lack of disclosure regarding the lease, the corporate structures of it and MFN and its participation in the tax enforcement proceedings as well as its failure to pay rent to the city since possession had not satisfied the requirement that there was a serious issue to be tried. Regarding the prohibitory injunction application, the plaintiff had not provided evidence that a lease existed.

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International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v Cornerstone Contractors Ltd., 2017 SKQB 130

Krogan, May 5, 2017 (QB17126)

Administrative Law – Judicial Review – Labour Relations Board – Common Employer Declaration
Administrative Law – Judicial Review – Standard of Review – Reasonableness
Labour Law – Judicial Review – Labour Relations Board – Common Employer Declaration

The applicant union applied for judicial review of the decision of the Saskatchewan Labour Relations Board that did not grant the declaration they sought that all the respondents were common employers. The applicant's original request to the board was prior to the proclamation of The Saskatchewan Employment Act. The applicant applied pursuant to s. 37.3 of The Trade Union Act and/or s. 18(1) of The Construction Industry Labour Relations Act, 1992. Prior to the application, the employees of one of the respondents had applied for certification to be represented by a different union. The board concluded that a common employer declaration could be made in the circumstances. The applicant argued that a correctness standard was applicable while the

respondents argued that the standard was one of reasonableness. The applicant said that the correctness standard applied because the board did not make a decision regarding the common employer issue. The board indicated that if the certification application was successful, then no common employer declaration would be made.
HELD: The court found that the board did make a final decision regarding the common employer issue because no common employer declaration would be made if the certification application was successful. The certification was successful, so the board did not make the common employer declaration. The standard of review was reasonableness. The applicant argued that the board made the common employer issue subordinate to the certification application when it had agreed to address the common employer declaration first. The court found that the board did determine the common employer issue first. The board made a determination on the issue placed before it based on the evidence and facts presented. The court found it was reasonable for the board to choose the process it did when it knew that the employees were not interested in the applicant's representation. Waiting for the results of the certification application was reasonable, especially since that application was made prior to the application for a declaration of common employer. The applicant also argued that the board applied the test unreasonably. The board used the criteria from Merick and found three of the five criteria had been met so the declaration could, but did not have to, be made. The board found that granting a common employer declaration as requested by the applicant would force them to be bargaining representatives for the employees when they knew the employees did not prefer their representation. The declaration would not have been made for a proper labour relations purpose. A compelling labour relations purpose is necessary for the declaration to be made. The certification application was not the deciding factor, as argued by the applicant, as it was but one factor considered by the board. The board's decision was reasonable. The judicial review application was dismissed.

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Edmison v Wawanesa Mutual Insurance Co., 2017 SKQB 133

Currie, May 9, 2017 (QB17127)

Insurance – Actions on Policy
Insurance – Appeal
Insurance – Contract – Interpretation

Judges and Courts – Reasonable Apprehension of Bias

The appellant appealed from the dismissal of his claim for reimbursement of loss under an insurance policy with the respondent insurance company. The appellant's wife suffered a loss of $11,000 through being defrauded. The insurance policy covered up to $5,000 for "loss caused by forgery or alteration of any cheque or negotiable instrument". The appellant's wife was given bank drafts, which turned out to be counterfeit, and told to purchase gift cards as a mystery shopper after depositing the bank drafts into her account. The wife then sent the gift cards to the company and also made Western Union money transfers to them. When the bank discovered the bank drafts were counterfeit, the money was withdrawn from the account and the wife had already sent the gift cards to the mystery shopping company. The respondent denied coverage based on an exclusion clause for "loss or damage resulting from a change in ownership of property that is agreed to, even if that change was brought about by trickery or fraud". The trial judge agreed with the respondent that the claim was excluded. The appellant appealed, saying that the trial judge erred in the following ways: 1) by finding that the trickery exclusion applied; 2) by failing to find that the respondent breached its duty of good faith; 3) by failing to find that the respondent engaged in misrepresentation; 4) by failing to recuse herself on the basis of reasonable apprehension of bias; and 5) by identifying the wrong amount of loss suffered.

HELD: The court addressed the appellant's arguments as follows: 1) the trial judge found that the wife transferred her own property to the mystery shopping company. The appellant argued that the loss occurred when the wife received and deposited the bank drafts, but the court found that not to be the case. The wife's loss did not occur until she gave up the gift cards and made the Western Union money transfers. The application of the trickery exclusion to the circumstances was correct. The court was correct to conclude that the wife was transferring her own money to the mystery shopping company. The court did not agree with the appellant that the word "property" did not include money; 2) the appellant argued that the respondent's treatment was so intimidating that it amounted to a breach of good faith and breach of duty of honest contractual dealing. The court agreed with the trial judge that the respondent made the alleged breaches; 3) the appellant argued that the way the policy provisions were placed in the policy booklet amounted to misrepresentation. The court disagreed; it was not misrepresentation for the respondent to include coverage in one place and exclude it in another; 4) the appellant argued bias because the trial judge had practiced law with the same firm as the respondent's lawyer and the trial

judge had also represented the respondent on one occasion. The court determined that people would perceive that the trial judge had waited for the appropriate cooling off period before hearing a matter like this. There was no reasonable apprehension of bias; and 5) the trial judge correctly concluded on the amount of the loss. The appeal was dismissed.

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Goertz v Owners Condominium Plan No. 98SA12401, 2017 SKQB 135

Scherman, May 12, 2017 (QB17128)

Condominiums – Bylaw Amendment
Condominiums – Condominium Property Act, 1993
Condominiums – Contribution
Condominiums – Oppression
Condominiums – Voting Rights

The applicant was the developer and owner of 11 of 44 units in the respondent Condominium Corporation (CC). The applicant sought relief based on his argument that a bylaw amendment passed in March 2016 by the CC with 27 owners voting in favour and one opposing was ultra vires the statutory requirements and definition as provided in The Condominium Property Act, 1993. The bylaw changed the definition of contribution. The applicant was not allowed to vote for the amendment because, according to the CC, who relied on s. 41(8) of the Act, an owner does not get a vote if there are outstanding contributions for more than 30 days. The CC said that the applicant's unpaid obligations were security deposits and some repair invoices for damage caused by his tenants. The applicant disputed the payments owing and also argued that they were not contributions within the meaning of the Act. In February 2015, the board passed a resolution requiring security deposits equivalent to one month's rent be assessed on all rented units. In November 2016, the CC commenced a Small Claims Court proceeding against the applicant for payment of unpaid security deposits and invoiced amounts for damage caused by tenants. The matter was transferred to the Queen's Bench Court when the applicant commenced his action. The applicant argued that contributions were limited to common expense fund and reserve fund and that the amendment did not validly pass in any event because he owned 25 percent of the units and one other owner voted against the amendment. The applicant requested the following: 1) a declaration that the CC was not entitled to suspend his voting rights; 2) a finding that the CC was acting oppressively with

orders under s. 99.2 of the Act; and 3) that the court appoint an administrator of the CC pursuant to s. 101 of the Act.
HELD: The court did not agree with the applicant that a certified copy of the bylaws had to be filed with the court. The court also concluded that it was not oppressive of the CC to attempt to get information from the applicant on rented-out units, nor was it oppressive to assess a security deposit against each unit. Neither the Act nor the Regulations defined "contribution". The court found that s. 47 did not limit the CC's right to levy contributions for other than common expenses and reserve funds. "Contributions" was found to be used interchangeably with the concept of "arrears" with respect to the owner's unit. Contribution and arrears were not limited to a specific category of debt in the Act. The court concluded that s. 41 can extend to any contribution, assessment, or indebtedness that has a connection to the unit. Section 79.1 makes it clear that an owner has to pay for damages caused by the occupier of a unit. Sections 34(4), 77(1), and 79.1(1) demonstrate that corporations have the right and power to impose obligations other than for condominium fees and the right to collect indebtedness. The court concluded that the legislative intent was to give the condominium corporations the right to restrict an owner's entitlement to vote whenever an owner owes money to the corporation in respect of a unit. The court held that an owner is only deprived of voting rights in respect of units for which there are arrears, therefore, the applicant should have been entitled to vote for six of his 11 units at the March 2016 meeting. The 27 votes in favour of the amendment still constituted the required two-thirds for the amendment to be made. The CC did not act oppressively and no appointment of an administrator was made. The CC was awarded costs on a solicitor-client basis pursuant to bylaw 11.11.

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Porterfield v Pirot, 2017 SKQB 144

Meschishnick, May 18, 2017 (QB17136)

Real Property – Partition and Sale

The applicants (sisters) and the respondents (father and son) had inherited a property from the respondent father's mother upon her death in 1996. The parties each owned an undivided one quarter interest as tenants in common. The property included an older cottage located on a lake. The applicants applied for partition and sale of the property. The respondent father said

that neither he nor his son were in a position to purchase the applicants' interest in the property. He also claimed that he had contributed approximately $40,000 in materials and $40,000 in time to maintain and improve the property and that such contributions were over and above the contributions of the others. The applicants contested the respondent's estimates of the value of his contributions and said that they had never been provided with an accounting of the costs claimed. The issue was whether the respondent father's expenditures could result in him having established an unjust enrichment claim, or if the result in the case was governed by a valid statute, then unjust enrichment could not be employed to change the result.
HELD: The application was granted. The court ordered that the property be sold and the proceeds of sale take into account the amount necessary to protect the respondent father's claim. The Partition Act, 1868 applies in the province. It did not allow the equitable principles of unjust enrichment and constructive trust to operate to create a proprietary interest. The court found that s. 4 of the Act applied, which provides a monetary remedy so that if the respondent father could establish entitlement to some amount for his maintenance and improvement costs, he would be protected for that amount for his costs.

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GFL Environmental Inc. v Burns, 2017 SKQB 147

Gunn, May 19, 2017 (QB17139)

Contract Law – Consideration
Contract Law – Restrictive Covenant – Non-solicitation Agreement – Confidentiality Agreement

The plaintiff GFL applied for injunctive relief against the defendants from directly or indirectly dealing with confidential information, soliciting the plaintiff's customers or prospective customers, and making disparaging statements or statements reflecting badly upon the plaintiff's business. The plaintiff also sought a mandatory injunction to account for all confidential information and deliver all copies of confidential information to the plaintiff. The plaintiff sought the interim injunctive relief for a period of one year from the date the individual defendant, B., resigned from GFL. The plaintiff and the corporate defendant, Recycle West, were both in the business of waste and recycling services and were direct competitors. B. commenced employment as a truck driver picking up waste with the plaintiff in September 2013, until he began employment with the

corporate defendant in January 2017. In July 2016, the plaintiff purchased the Saskatchewan business Envirotec, which amalgamated with the plaintiff in January 2017. In August 2016, B. had signed two agreements with Envirotec entitled "Non-Solicitation Agreement" and "Confidentiality Agreement". B. argued that Envirotec and the plaintiff were separate and legal entities during the entire time he was employed by the plaintiff. B. said that he was never employed by Envirotec. The plaintiff indicated that B. had significant autonomy and trust to run the plaintiff's operations in Saskatchewan, whereas B. said that his duties were limited to truck driving. B. indicated that he did not have a Driver's Book with client information like the plaintiff said all drivers had. The plaintiff asserted that B. was visiting and picking up liquid waste products from the plaintiff's customers and was soliciting those customers on behalf of the corporate defendant. The issues were as follows: 1) preliminary matters; 2) jurisdiction; 3) what was the test for obtaining injunctive relief; 4) did the plaintiff meet the test; and 5) irreparable harm.

HELD: The issues were discussed as follows: 1) the decisions made were only an interim decision. The plaintiff sought to rely on some hearsay evidence saying it was difficult not to when referring to customers; 2) the Court of Queen's Bench had jurisdiction to deal with the application before it; 3) the parties agreed on the test and the court agreed with B. that a strong prima facie case was needed when the matter concerned the enforcement of restrictive covenants; 4) the agreements purport to prohibit the solicitation of future unknown clients. The term "business" was also very broadly defined to include any business of Envirotec. The court was not satisfied that the plaintiff had a strong prima facie case that there was an enforceable restrictive covenant. B. was not an employee of Envirotec and did not receive any consideration for signing the agreements. Also, the terms of the agreements were found to be overly broad, unreasonable, and restrictive, and therefore unenforceable. The plaintiff failed to establish a strong prima facie case that B. was a fiduciary to the plaintiff. He was not part of the managerial team even though he was the only employee in Saskatchewan. He was a truck driver that reported to others and had no one reporting to him. The court was not satisfied that B. misused information the common law would consider to be confidential, and it did not rely on the plaintiff's evidence regarding what B. allegedly said to customers because it was inherently unreliable; and 5) the court did not have to deal with the issue, but did say that in the event the plaintiff had established a strong prima facie case, it would appear that the balance of convenience would favour not granting the injunction as damages could be calculated. The application against the

defendants was dismissed.

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Hrenyk v Domm, 2017 SKQB 151

McMurtry, May 25, 2017 (QB17137)

Wills and Estates – Capacity/Undue Influence
Wills and Estates – Proof of Will in Solemn Form

The applicant and the respondent were nieces of the deceased testator. Pursuant to a will made in July 23, 2015, the respondent was named executor and sole beneficiary of the testator. Letters Probate were issued in October 2015. In November 2015, the applicant's counsel wrote to the estate's lawyer and requested a copy of the will and notified him of the applicant's intention to contest the validity of it. Shortly thereafter, the respondent distributed over 80 percent of the estate's assets to herself. The applicant sought an order revoking Letters Probate and an order requiring the respondent to prove the 2015 will in solemn form. Before this hearing, the application had been adjourned by another judge who ordered that the solicitor-client privilege be waived between the deceased and the lawyer who had prepared earlier versions of his will. The lawyer was to provide information relating to the capacity of the testator and/or undue influence or coercion upon him. The respondent was ordered to file an accounting and refrain from dealing with the assets of the estate without leave of the court. The applicant deposed that the deceased told her before his death in October 2015 that he felt pressured by the respondent into giving her approximately $100,000. In 2010, the deceased's will left his estate to the applicant, the respondent and another relative in equal shares. He named the applicant and the respondent as his powers of attorney. Between the making of 2010 and the 2015 will, the deceased changed his will, added codicils and changed his powers of attorney a number of times. The applicant provided evidence that the deceased's mental and physical health deteriorated markedly before he executed the 2015 will. She asked the deceased about the new power of attorney and will, and he told her he had no recollection of seeing a lawyer or signing any documents. A nephew of the deceased deposed that the deceased appeared confused when he visited him in 2014 and 2015. In accordance with the court order, the lawyer who had prepared the deceased's will in 2010 and a later codicil in 2013, deposed that the deceased said that he was concerned when the respondent told him that she could take all his money

because she had power of attorney. In July 2015, the deceased and the respondent came to the lawyer's office to discuss changes to the 2010 will and the deceased appeared agitated, confused and nervous. The lawyer advised that he would not take instructions without a medical certificate and a letter from his physicians confirming his capacity to provide legal instructions. The 2015 will was prepared by another lawyer who deposed that the deceased appeared to have capacity because he was able to describe his assets and his relationship with the respondent and the applicant. The respondent denied that she had pressured the deceased into executing his 2015 will or power of attorney, nor had she asked him for money, although he had given her funds for a vehicle and her schooling. The respondent requested that the court dismiss the application for undue delay or laches. The applicant responded that the delay in bringing her application 11 months after the deceased's death was spent marshaling her evidence from the people who had dealt with the deceased before he executed the 2015 will. She filed her caveat in October 2015 and then advised the respondent's lawyer that she was bringing the application.
HELD: The application was granted. The court directed that the will be proven in solemn form, and secondly, that the question of whether the respondent had exercised undue influence on the deceased be dealt with at trial. The respondent had not provided unconditional and uncontroverted evidence that the deceased had the necessary capacity and/or was not unduly influenced. The court denied the respondent's request to dismiss the application because it found that the applicant took timely steps in preparing her case and did not acquiesce in the respondent relying upon the 2015 will. Laches was unavailable to the respondent.

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