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Phillips Legal Professional Corp. v Vo, 2017 SKCA 58

Lane Ottenbreit Wilkinson, July 25, 2017 (CA17058)

Civil Procedure – Queen's Bench Rules, Rule 11-23
Civil Procedure – Costs – Solicitor-Client
Professions and Occupations – Lawyers – Fees – Assessment – Appeal

The appellant legal corporation appealed a decision of a Queen's Bench judge in chambers that dismissed its appeal of a certificate of assessment made by the assessment officer regarding the amount of legal fees due to the appellant from the respondent, a client (see: 2015 SKQB 248). The lawyer who practiced law through the corporation, Mr. Phillips, represented himself at the assessment and at the appeal of it. The assessment was conducted pursuant to ss. 67 and 72 of The Legal Professions Act (LPA) as well as Queen's Bench rule 11-23, which refers to the factors set out in the commentary to rule 2.006(1) of the Code of Professional Conduct. The officer made findings pursuant to those factors, including that the appellant's fees were excessive because the client's family law matter was not complex and that a lot of the work done on the file was unnecessary. At the appeal, Mr. Phillips made various allegations about what the officer had said and done during the hearing. Counsel for the respondent disputed Mr. Phillips's version, saying that he had misrepresented what had actually occurred. To resolve the conflict, the chambers judge determined that it was necessary for the officer to answer further questions posed by him and

provide her answers in a supplementary certificate. The supplementary certificate confirmed the respondent counsel's version. The chambers judge dismissed the appeal, confirmed the assessment and ordered the appellant to pay solicitor-client costs of the application for an assessment at $7,500 and of the assessment appeal at $7,500. Preliminary to this appeal, the appellant applied pursuant to Court of Appeal rule 59 to admit fresh evidence. He sought an order for a transcript of the audio recording of the assessment hearing. The grounds of appeal were that the chambers judge erred in the following ways: 1) in how he conducted the appeal. Among the alleged errors, he wrongly employed the supplementary certificate process; 2) in upholding the certificate. The appellant argued that the form and content of the certificate was defective for numerous reasons. In addition, the officer failed to provide procedural fairness, such as the officer had denied him an adjournment so that he could call evidence; and 3) in awarding solicitor-client costs.

HELD: The appeal was dismissed. Costs in the amount of $15,000 were awarded on a solicitor-client basis to the respondent for the appeal proper and the application to adduce fresh evidence because Mr. Phillips had frustrated the assessment process and had caused the appeal to be unnecessarily complex. The court dismissed the application to admit fresh evidence because it was not satisfied that the transcript sought would assist in its determination of the issues within the meaning of the Palmer criteria. The court reviewed the assessment process as described in the applicable legislation, Queen's Bench rule 11-23 and the commentary under the Code. The court found the following with respect to each ground of appeal: 1) the chambers judge had not erred in using the supplementary certificate process. It was not prohibited by the LPA nor The Queen's Bench Rules. It was necessary to the judge's ability to resolve the conflicts between the submissions of counsel; 2) the chambers judge had not erred in upholding the certificate. In particular, he found that the reasons given by the officer were sufficient in that they informed the parties of the basis for her determination and did so in a manner that allowed him to meaningfully review those reasons. The officer had the discretion as to how to conduct the hearing and the types of evidence that she would accept. The chambers judge reviewed the evidence that the appellant sought to call and agreed with the officer's finding that it was unnecessary and would have derailed what was intended to be an expeditious process; and 3) costs were in the discretion of the chambers judge. In this case, the award was not made arbitrarily or without regard to principle, and therefore, there was no basis for the court to interfere with the order. The award was made to censure counsel

and attempt to reimburse the client.

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D.B.B. v D.M.B., 2017 SKCA 59

Jackson Caldwell Herauf, August 1, 2017 (CA17059)

Family Law – Spousal Support – Appeal
Family Law – Child Support – Adult Child – Appeal
Family Law – Division of Family Property – Appeal

The appellant appealed the decision of a Queen's Bench judge ordering him to pay spousal and child support to the respondent and ordering the division of family property (see: 2015 SKQB 65).
HELD: The appeal was allowed in part. Regarding the grounds of appeal relating to spousal support, the court found the following: 1) the judge had not erred by imputing income to the appellant. She found on the evidence that the appellant was intentionally underemployed, had considerable skill and experience in his field, was in good health and had shown minimal effort in obtaining employment. He had voluntarily left his position that he had held pursuant to an indefinite employment contract that paid him $250,000 per annum; 2) the trial judge had not erred in the amount or duration of the award for spousal support. The evidence supported her view that the respondent was eligible for support on a compensatory basis because of the length of the marriage and the role she had played in looking after the children and the home. As a result of this entitlement, the respondent should not be expected to generate investment income from the matrimonial home she received in the division of family property. The court would not interfere with the judge's finding regarding the non-compensatory entitlement. The respondent's financial statement showed her employment income was insufficient to cover her expenses, indicating an economic hardship arising from the breakdown of the marriage. The amount of the award made by the judge was within the appropriate range and she had properly considered the respondent's strong compensatory claim, the equal division of property and the incentive for her to continue with her employment. The amount set by the judge was appropriate under the Spousal Support Advisory Guidelines (SSAG), regardless of her failure to use the "With Child Support" formula. Due to the deference owed to the trial judge, the court would not interfere with her decision to award an indefinite order and it would not substitute a review order,

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because it found there had been no issue of genuine and material uncertainty at the time of trial. The appellant would not be precluded from making an application for variation in the future if he retired and his retirement was reasonable.
Regarding the grounds of appeal relating to child support, the court found the following: 1) the trial judge correctly found on the medical evidence that the child was a child of the marriage under s. 2(1)(b) of the Divorce Act. The court dismissed the appellant's argument that the judge relied on improper opinion evidence found in the medical reports regarding the child's conditions. He should have required the authors of the reports to attend the trial for cross-examination; 2) the trial judge had not considered the issue of social assistance available to the child, as no evidence had been presented; and 3) the trial judge correctly found that the order should not be reviewable because there was no indication that any uncertainties regarding the child's health would be resolved in the future. However, the trial judge erred in failing to consider the appellant's request for regular disclosure of the child's condition. The court ordered that the respondent provide semi-annual reports.
The trial judge was correct in her findings and decisions regarding the majority of the grounds raised by the appellant respecting family property. However, the court found that the trial judge had erred in some findings regarding her valuation of certain property, accounting methodology, income tax considerations and debt. The court corrected the equalization payment owed by the appellant to the respondent.

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Northrock Resources v ExxonMobil Canada Energy, 2017 SKCA 60

Caldwell Herauf Whitmore, August 2, 2017 (CA17060)

Contract Law – Interpretation – Right of First Refusal – Appeal
Contract Law – Breach of Contract

The appellant appealed from the decision of a Queen's Bench judge that dismissed its claim against the respondents. The claims arose out of a transaction under which ExxonMobil (Exxon) disposed of certain oil and gas interests, 10 percent of which were subject to rights of first refusal (ROFR) granted to the appellant. Exxon offered its interests for sale at large under either a straight-up asset sale or under a "busted-butterfly" structured transaction. The latter involved Exxon first assigning its interests to affiliates it had created and then selling the

outstanding shares in the capital stock of those affiliates to the successful bidder. Under such a transaction, Exxon knew that it would not trigger the ROFRs because they permitted the transfers of ROFR-tied interests to affiliates but did not address the subsequent sale of the shares in those affiliates to a third party. In addition, it would yield a favourable tax result for Exxon. When bidding commenced, the respondent, Crescent Point (CP), was successful. The appellant took the position that its interests had been triggered by the sale. Exxon disagreed and sold its shares in the affiliates to CP without first offering the interests to the appellant. The appellant claimed that Exxon had breached the contract and its duty of good faith. The trial judge dismissed all of the appellant's claims. He interpreted the ROFRs and found Exxon had not breached them. He found as a fact that Exxon had neither lied nor misled or structured the transaction to avoid triggering the ROFRs and consequently it had not breached its duty of good faith to the appellant. The grounds of appeal were that the trial judge erred in the following ways: 1) in his fact-finding by overlooking evidence that established the transaction was a single transaction in substance that resulted in Exxon disposing of ROFR-tied interests to the other respondent; 2) in interpreting the ROFRs. The appellant contended that they covered all dispositions of the ROFR-tied interests to a third party, no matter how structured. The judge's interpretation was flawed because it ignored the general purpose of a right of first refusal; 3) his decision created a commercially unreasonable result in that an ROFR would apply to a straight-up asset sale but not to another, such as a busted-butterfly sale; 4) in his conclusions regarding whether Exxon breached the duty of good faith. The decision disclosed an error in the application of the law to the facts. The judge focused on Exxon's motivation for the transaction rather than the purpose of a right of first refusal; and 5) in failing to interpret the transaction holistically. As a result of defining the transaction as he did, he failed to see this was a disposition of ROFR-tied interests to a third party.
HELD: The appeal was dismissed. The court noted that the standard of review for questions of law was correctness, but for all other questions in this case, it was palpable and overriding error. The court found the following with respect to each issue: 1) the record failed to establish that the trial judge overlooked material evidence. The parties had agreed at the outset as to what had occurred and it was only in the fine detail that remained to be determined by the trial judge, who was not required to refer to each and every piece of relevant evidence to support his findings; 2) the trial judge was correct in interpreting the RORFs in this case. He found the parties to the agreement were sophisticated and knowledgeable and the appellant had agreed to the terms of the contract. The terms were not only not

ambiguous but clearly revealed that the parties did not intend that every circumstance divesting itself of an interest would trigger an ROFR; 3) the trial judge had not erred in concluding that the parties had not bargained to include a provision that would trigger an ROFR in these circumstances. If the appellant considered the bargain to have disadvantaged it, that did not make it commercially unreasonable so that the courts would intervene to protect it; 4) the trial judge's reasons demonstrated that he understood the duty as it pertained to contracts and the proper approach to be taken. He found in fact that Exxon had not lied or misled the appellant and was not motivated by a desire to avoid triggering the ROFRs, based on the credibility of the testimony given by Exxon's executive who designed the transaction; and 5) the trial judge had not erred in deciding to examine the transaction first from the perspective of whether it had triggered the ROFRs and second from the perspective of whether Exon had breached its duty of good faith by structuring the transaction to purposely avoid triggering the ROFRs. The duty of good faith could not be used to circumvent the plain language of a contract.

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R v Schnurr, 2017 SKCA 61

Lane Caldwell Whitmore, August 3, 2017 (CA17061)

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

The appellant sought leave under s. 839 of the Criminal Code to appeal the dismissal of his appeal to the Court of Queen's Bench against his conviction before the Provincial Court on the charge of driving over .08 (see: 2016 SKQB 207). After stopping the appellant's vehicle, an RCMP officer suspected that the appellant had been drinking and made a breath demand under s. 254(2) of the Code. Not having an ASD with him, the officer transported the appellant to the local detachment. Another officer met them there with an ASD. The appellant failed the test and a subsequent Breathalyzer test. At trial, the appellant alleged that his s. 10(b) Charter rights had been violated because he had had a realistic opportunity to contact counsel at the detachment but was not allowed to do so. Thus, the RCMP had failed to meet the forthwith requirement of s. 254(2) of the Code. The arresting officer testified the ASD test was administered shortly after the other officer brought the device to the detachment. The defence

had not elicited what the officer meant in terms of time. Consequently, the trial judge held that there was no time frame upon which he could determine whether there was a realistic opportunity for the accused to consult counsel, and therefore, the defence had not established the forthwith requirement had not been met or the Charter breached. If wrong in so finding, the trial judge stated that he would have admitted the Breathalyzer results into evidence under s. 24(2) of the Charter. The summary conviction appeal court judge sustained the trial judge's finding that the evidence of the alleged Charter breach fell short of shifting the onus to the Crown to establish the reasonableness of the RCMP not facilitating the appellant's right to counsel and that he too would have admitted the Breathalyzer results under s. 24(2). In this proposed appeal, the appellant submitted that the appeal court judge and the trial judge had erred in their analysis of the s. 10(b) issue by focusing their analysis of the fifth criterion set out in R v Quansah in assessing whether the police met the requirement under s. 254(2).
HELD: The application for leave to appeal was denied. The appeal had not raised a question of law that was significant to the administration of justice generally. It also would require the court to take a different view from that of the trial judge of the scant evidence supporting the allegations of a Charter breach and to conclude that the appeal court judge erred in law in his assessment of the findings of fact made by the trial judge. The court found that the latter had not erred in this regard.

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Canada (Attorney General) v Merchant Law Group LLP, 2017 SKCA 62

Ottenbreit Whitmore Ryan-Froslie, August 9, 2017 (CA17062)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike – Appeal
Civil Procedure – Queen's Bench Rules, Rule 7-9(2)(a), Rule 7-9(2)(b)
Torts – Deceit

The appellant appealed the decision of a Queen's Bench judge in chambers that granted the respondent's application to strike the appellant's statement of claim on the basis that it disclosed no reasonable cause of action and was scandalous, vexatious and an abuse of process (see: 2016 SKQB 25). Between 1997 and 2005 the respondent law firm had initiated actions against Canada on behalf of Indian Residential School survivors. In 2005, Canada appointed retired Supreme Court Justice Iacobucci to act as its

agent in negotiating a settlement of those and similar claims initiated by other law firms across the country. During the negotiations with the respondent, its senior partner allegedly represented that the respondent had approximately $80 million in unbilled time and between 7,000 and 8,000 retainer agreements. Due to Mr. Iacobucci's concerns about this information, Canada and the respondent negotiated a verification agreement. The parties signed an agreement in principle (AIP) settling the Indian Residential School claims and a verification agreement regarding the respondent's legal fees in 2005. In the verification agreement, the respondent agreed to provide to the appellant its dockets, computer records of work in progress and other evidence relevant to its claims for legal fees. If the parties could not agree on the amount of fees to be paid, the matter was to be determined by arbitration, but the payment floor was $25 million and the ceiling was $40 million. The terms of the verification agreement were incorporated into the Indian Residential Schools Settlement Agreement (IRSSA) in 2006. The IRRSA was approved, including the provision regarding legal fees, in 2006 (see: Sparvier v Canada, 2006 SKQB 533). Canada appealed a portion of that judgment that found the respondent's fees to be fair and reasonable and the appeal was dismissed (see: 2007 SKCA 37). In a decision issued in 2008, a judge of the Court of Queen's Bench determined that the respondent was entitled to $25 million for fees without verification and ordered the appellant to pay that amount to the respondent (see: Fontaine v Canada, 2008 SKQB 271). Following a series of court applications in 2013, the respondent provided the appellant with the last of its billing records and retainer agreements as required by the verification process. They were found to be full of allegedly illegitimate time entries and excessive disbursements. The appellant then brought its action against the respondent claiming $25 million and other damages from the defendant, arguing that the defendant committed the torts of fraud, fraudulent misrepresentation, and deceit during the negotiation and approval of the IRSSA. The grounds of appeal were as follows: 1) did the chambers judge err in finding that the appellant's statement of claim disclosed no reasonable cause of action under Queen's Bench rule 7-9(2)(a). The judge found that in an action for deceit the appellant had failed to properly plead reliance and damages. Regarding reliance, the judge concluded that the pleadings stated that as Mr. Iacobucci did not know whether he could rely on the respondent's information. The appellant had not done so but rather followed Mr. Iacobucci's requirement that there be a process to verify the respondent's claim for fees. Thus, when the pleadings were read together with the verification agreement they were inconsistent with the allegation that Mr. Iacobucci had relied on the respondent's

senior partner's alleged misrepresentations when the fee agreement was made. The chambers judge concluded that the appellant had failed to plead sufficient facts to establish any loss as a result of its reliance on the respondent's alleged misrepresentations based on the Sparvier decision which had determined that the respondent's fees of $25 million were fair and reasonable; 2) did the chambers judge err in concluding that the claim should be struck as frivolous and vexatious pursuant to Queen's Bench rule 7-9(2)(b). The judge found that the claim was "estopped" by the Sparvier decisions and the Fontaine decision, all of which determined that the respondent was entitled to $25 million in fees regardless of the outcome of the verification process; 3) did the chambers judge err in concluding the claim should be struck as an abuse of process pursuant to Queen's Bench rule 7-9(2)(e). The doctrine applied to prevent re-litigation of issues and claims.

HELD: The appeal was allowed. The court found the following with respect to each ground: 1) the chambers judge erred in finding that there was no reasonable cause of action. In the circumstances, it was open to the appellant to establish that Mr. Iacobucci did rely to some extent on the representations when entering into the fee agreement. The presence of the verification agreement would not factually prevent a trial judge from finding reliance, and the question of whether it occurred and was sufficient to establish the tort should be left for determination at trial. Regarding damages, the court found that the chambers judge erred because the appellant's claim was based in tort not contract. The Sparvier decision was made in completely different contexts of the IRSSA and a class action settlement agreement regarding the $25 million. Further, the appellant claimed for other damages as well, and the chambers judge did not consider whether those claims could constitute loss suffered by the appellant as result of its reliance on the respondent's alleged misrepresentations; 2) the chambers judge erred in his application of the test for issue estoppel by finding that the appellant's action raised a question already determined in the prior proceedings. The previous proceedings did not consider the issue of fraud or its effect on the fee provisions in issue. The verification agreement was not a contract that waived the appellant's rights if fraud was later discovered; and 3) the chambers judge erred in striking the claim as an abuse of process because there was new evidence acquired through the verification process that raised the question of fraud. The previous proceedings had not and could not have addressed the appellant's allegation of fraud as the evidence was not yet available. The appellant's actions raised serious allegations that required a full hearing in the interests of justice.

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Dearborn v Saskatchewan (Financial and Consumer Affairs Authority), 2017 SKCA 63

Richards Jackson Ottenbreit, August 10, 2017 August 15, 2017 (erratum) (CA17063)

Statutes – Interpretation – Securities Act, 1988, Section 11, Section 133, Section 135.1
Civil Procedure – Appeal – Moot

The respondent (Financial and Consumer Affairs Authority) alleged that the appellant and others had breached provisions of The Securities Act, 1988. The allegations had been made after one of the investigators of the Authority had received an anonymous tip. The allegations were ultimately dismissed by a hearing panel. Although vindicated, the appellant appealed three interlocutory decisions made by the panel in the course of its proceedings under s. 11(1) of the Act. The first ground of appeal was that the panel had not dealt properly with the appellant's application for disclosure. He had encountered difficulties in obtaining disclosure of any investigative transcripts from the respondent's staff. Although the panel ordered disclosure after the appellant made an application, the staff did not comply. The appellant eventually filed another application requesting various forms of relief against the staff, for the following orders: pursuant to s. 133(1)(c) and (d) of the Act requiring disclosure; from Queen's Bench for a court order under s. 133(1)(b); that the staff pay compensation to him under s. 133(1); and under s. 135.1 requiring the staff to pay an administrative penalty for their contempt of the panel's original order. Before the panel issued its decision, the staff provided disclosure. The panel found it unnecessary to deal with the application for the orders under s. 133 because disclosure had been made and decided that s. 133(1) and s. 135.1 did not give it jurisdiction to comply with the application. The appellant argued that the staff misadvised the panel regarding disclosure because the name of the tipster had not been provided. He required the tipster's identity in order to pursue legal remedies against him. The second ground related to the panel's decision in another hearing that the tipster's identity was privileged. The hearing was ex parte and in camera. The appellant's lawyer was not permitted to make oral argument. The appellant appealed from this decision on the basis that the panel denied him procedural fairness. The appellant also appealed from the panel's decision to dismiss his application for an immediate stay of proceedings based on s. 7 of the Parliament of Canada Act. He

had argued that s. 7 had been breached by the respondent's staff because they had prepared an affidavit and exhibited to it some testimony that he had given to a Senate Committee about matters arguably relevant to the proceedings before the panel.
HELD: The appeal was dismissed. The court found that it did not have the jurisdiction on appeal to consider the appellant's desire to obtain the name of the tipster as it was not an error of law under s. 11 of the Act. As well the panel had earlier determined the identity of the tipster was privileged and the appellant could not attack that decision through this ground of appeal. It further found that the panel had not erred in refusing his applications for sanctions against the staff under s. 135.1 because neither that section nor s. 133 of the Act applied to them. The panel's failure to allow the appellant to be heard in its proceedings regarding privilege was of concern. However, the issue was moot as the proceedings against the appellant have been concluded in his favour and the identity of the tipster would not affect that result. As the matter was moot, court declined to deal with this ground. The application under s. 7 of the Parliament of Canada Act for a stay was moot and there were no reasons for the court to consider the issues in the circumstances.
ERRATUM dated August 15, 2017: Paragraphs 33 and 38 of the decision are replaced with the following:
>>>[33] The record is somewhat unclear but it appears that the hearing panel did not consider the written materials filed by Mr. Dearborn's counsel in relation to the privilege issue and that his counsel was advised that he would have no opportunity to make oral submissions to the hearing panel on the matter. However, the panel apparently did consider the June 12, 2015, Memorandum of Fact and Law prepared by the staff and an affidavit sworn by Mr. White.
>>>[38] However, the issue of mootness looms large in this appeal. As explained above, the proceedings against Mr. Dearborn have been finally concluded and, indeed, finally concluded in his favour. The merits of the decision about protecting the identity of the tipster can have no impact of any sort on the hearing panel's bottom line and, indeed, Mr. Dearborn does not want to disturb that bottom line. The underlying foundation of the contest between Mr. Dearborn and the Authority has disappeared. It follows, in my view, that this appeal is moot.

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R v Helgesen, 2017 SKPC 50

Green, July 28, 2017 (PC17064)

Criminal Law – Defences – Charter of Rights, Section 8, Section 10, Section 24(2)
Criminal Law – Driving over .08 – Approved Screening Device – Sample Forthwith – Tow Truck

The accused was charged with operating a motor vehicle while over .08. The accused alleged that the police officer did not take the Approved Screening Device (ASD) sample from him "forthwith" as required by s. 254(2) of the Criminal Code. The accused alleged that his ss. 8 and 10 Charter rights were infringed. He sought to exclude evidence of the results of the ASD test and a subsequent test taken by breath instrument, pursuant to s. 24(2) of the Charter.
HELD In total, 24 minutes had elapsed from when the accused was detained until the time he blew into the ASD. The officer acted reasonably in arranging for the towing of the vehicle, a ride for the passengers and writing his notes before he left the scene, but these tasks did not need to be done before the ASD test was conducted. The delay constituted an unreasonable or unjustified delay and the ASD sample was not taken "forthwith". The accused's rights under ss. 8 and 10 of the Charter were violated from the point he was detained. However, the admission of the evidence of the roadside ASD test and the subsequent breath test would not bring the administration of justice into disrepute having regard to the three factors set out in Grant. The officer was faced with unique exigencies as the stop was a rural stop at night and involved an unregistered vehicle with three passengers. The officer was required to take certain action before leaving the scene.

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Genoway v D'Sena, 2017 SKPC 65

Demong, August 9, 2017 (PC17057)

Torts – Motor Vehicle Accident – Liability
Torts – Negligence
Statutes – Interpretation – Traffic Safety Act, Section 213, Section 235

The plaintiff brought an action against the defendant for damages arising from a motor vehicle accident. The plaintiff claimed that she was driving at 50 km/h through an intersection when the defendant's vehicle entered the intersection travelling westbound and struck her vehicle broadside. The defendant

counterclaimed and also sought damages. She alleged that she was stopped at the intersection and when the light turned green, proceeded to enter it. She did not notice the plaintiff's vehicle and as it drove through a red light at speed, she was unable to take any defensive action to avoid colliding with it. An SGI accident report was tendered into evidence. It analyzed the data retrieved from the defendant's airbag control module and it showed that four seconds prior to the collision, the defendant's vehicle was stationary.
HELD: The plaintiff and the defendant were each found to be negligent in the operation of their vehicles. The court accepted the defendant's evidence. The plaintiff should have complied with s. 235(3) of The Traffic Safety Act and not driven through a yellow light and then failed to stop when it turned red. The court apportioned 75 percent fault to her. The defendant negligently entered the intersection when it was not safe to do so and was 25 percent at fault. In accordance with Mallin v Clark, the defendant did not have the absolute right to enter the intersection with a green light without looking in both directions.

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Jardine v Saskatoon Police Service, 2017 SKQB 217

Barrington-Foote, July 21, 2017 (QB17210)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike
Civil Procedure – Queen's Bench Rules, Rule 7-2(b), Rule 7-5(3), Rule 7-9(2)(b)
Torts – Defamation

The self-represented plaintiff brought an action against the Saskatoon Police Service (SPS), 11 members of the SPS and other un-named members, as well as D.C. and V.H. The plaintiff had had a lengthy and complicated relationship with the SPS and claimed that the SPS and the police officers breached their statutory duties, pursuant to s. 36 of The Police Act, because they failed to investigate his reports of crimes he alleged were committed against him or negligently failed to investigate his reports. He also alleged that the SPS and individual officers negligently and maliciously investigated criminal complaints against him. The plaintiff had been charged with various sexual offences involving a child, and these charges were eventually stayed. The plaintiff's action against D.C. and V.H. arose because he had been charged with assault and causing a disturbance as a

result of an incident between him and V.H.at D.C.'s MLA office. V.H. alleged that the plaintiff had harassed her, and then she testified at trial, essentially repeating what she had said in her statement to the police. The charge was stayed. The plaintiff alleged that D.C. and V.H. had lied about what had happened, and he brought an action in defamation against them. The defendants applied for orders: 1) to amend the statement of defence to assert qualified and absolute privilege; 2) striking the plaintiff's claims pursuant to Queen's Bench subrules 7-9(b) and (e) that they were frivolous, vexatious and an abuse of process; and 3) for summary judgment pursuant to Queen's Bench rule 7-2 if the claims were not struck.
HELD: The defendants' application to amend the statement of defence was granted. The applications to strike or for summary judgment were granted in relation to all the plaintiff's claims except his claim against V.H. in defamation. The court struck the claim against SPS pursuant Queen's Bench rules 7-9(1) and 7-9(2)(a) and (b) because it was an entity that could be sued. Certain claims made by the plaintiff were struck pursuant to Queen's Bench rules 7-9(1) and 7-9(2)(b) because they were commenced after the expiration of the limitation period specified in s. 5 of The Limitations Act. The court granted summary judgment to the defendant police officers regarding the plaintiff's claims against them regarding their alleged misconduct of various investigations based on the credibility of their affidavits and the transcript of the previous court proceedings. They were protected by s. 10(3) of The Police Act as well. The court found that the plaintiff could not sue V.H. or D.C. for defamation in relation to their testimony at his criminal trial or in relation to their statements made to the police after the charges were laid. However, only qualified privilege applied to their reports to the police prior to the date that the information was sworn. Based on the evidence that D.C. told V.H. to file a police report, the court granted summary judgment in respect of the plaintiff's claim against her, as there was no evidence that she acted with malice or ill will. However, there was conflict between the plaintiff's affidavit evidence and that of V.H. with respect to his claim against her. In the absence of any other evidence, the court found that it would be appropriate for it, pursuant to Queen's Bench rule 7-5(3), to direct that the plaintiff and V.H. testify before it at a future date.

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Wolfe v Diederichs, 2017 SKQB 219

Wilson, July 17, 2017 (QB17211)

Family Law – Custody and Access – Person of Sufficient Interest

The petitioner mother applied in 2008 for custody of the two children born during her three-year relationship with the respondent. The respondent opposed the claim for custody and brought a motion in 2009 requesting an interim order for joint custody. He was granted supervised access and the order was later amended that year to give him unsupervised access. The petitioner and the children resided with her mother after their separation in 2008 and the mother assumed many of the child care responsibilities. The family continued to live there until 2011 when the petitioner began residing with her new partner. In February 2014, the petitioner was hospitalized and the two children returned to live with their grandmother. The grandmother stated that the respondent did not have contact with the children from 2011 on. In 2015, the petitioner died and her mother applied for and obtained orders providing that she be joined as a party to the proceedings and be named a person of sufficient interest regarding the children. She further requested and obtained an interim order granting her sole custody of the children and an order that the respondent have supervised access to them. Under a later consent order, the respondent's access was to be unsupervised and occur on a weekly basis. Later, yet another order was made that the parties have interim joint custody with their primary residence being with the grandmother. The matter proceeded to trial. The issues were: 1) whether the grandmother was a person of sufficient interest with respect to the children; 2) if so, what parenting arrangement would be in the best interests of the children; and 3) whether the respondent should pay child support to the grandmother if the children's primary residence remained with her.
HELD: The court found the following with respect to each issue: 1) the grandmother was a person of sufficient interest regarding the children pursuant to s. 6 of The Children's Law Act, 1997 and had standing to bring her application for custody; 2) it would be in the best interests of the children, now aged ten and nine years of age, to have their primary residence with their grandmother as she was their psychological parent. They had resided with their grandmother for most of their lives and it was important to maintain their relationships with their school and friends. The respondent would have regular weekly parenting time with the children; and 3) the evidence was inadequate to consider child support.

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Saskatchewan (Director under The Seizure of Criminal Property Act, 2009) v Hassan-Salah, 2017 SKQB 221

Pritchard, July 19, 2017 (QB17206)

Criminal Law – Forfeiture
Forfeiture – Seizure of Criminal Property

The applicant applied for an order forfeiting more than $25,000 in cash, and the proceeds realized from the sale of a vehicle. The items were seized by police following the arrest of individuals for drug trafficking offences and the execution of a search warrant. An individual was stopped in the vehicle and there were drugs and packaging to suggest drug trafficking. A search warrant of a residence was then conducted. The respondent was in the residence as was $24,000 in cash, separated into 24 individual bundles of $1,000, each wrapped in an elastic band. The remaining $1,000 was seized from another individual at the residence and $20 was seized from a jacket pocket in the living room. The charges against the respondent were withdrawn or stayed. The respondent denied that the cash had any connection to unlawful activity. The property was originally the subject of an administrative forfeiture proceeding under s. 10.3(1)(iii) of The Seizure of Criminal Property Act, 2009. The property was forfeited to the Crown in Right of Saskatchewan pursuant to s. 10.8 of the Act when no individuals receiving notice disputed the forfeiture. The respondent's notice was sent to the address listed on the police file. The respondent indicated that he learned of the forfeiture when he contacted the office of the applicant. The applicant consented to the respondent's application to set aside the forfeiture on the understanding that it did not mean that the applicant was abandoning the claim to the property. The applicant then commenced the application for forfeiture pursuant to s. 10.9(5)(a) of the Act. An expert gave his opinion that the cash seized was being derived from drug trafficking and the vehicle was being used for drug trafficking.
HELD: The court accepted the applicant's expert as an expert in various areas entitled to give expert evidence. The court was satisfied that the vehicle was used in connection with the trafficking of illicit drugs. The respondent argued an equitable interest in the vehicle because he had sold a different vehicle to the person caught in the vehicle. According to the respondent, he was never fully paid. The applicant, on the other hand, filed evidence that the respondent had sold his vehicle to another individual. The court determined that, even if the facts were as stated by the respondent, they did not give the respondent a legal or equitable interest in the vehicle. Further, even if he did have an interest in the vehicle, the court found that it was used as an instrument of unlawful activity. The respondent did not

provide any evidence as to why it would not be in the interests of justice to make a forfeiture order for the vehicle. The applicant was entitled to the requested forfeiture order regarding the vehicle. The respondent claimed that all of the cash except the $20 in the jacket pocket belonged to him. He said that the money was for his business venture in Ethiopia and that he had the money in his backpack until the person found driving the vehicle moved it to the safe on the day of the seizure. He said that he was told that the person would be back after going to the dentist. The respondent said that he gave the $1,000 to the other person in the residence to purchase some products required for his new business venture. No evidence or receipts were provided. The respondent did not provide any evidence of financial statements of his real estate business or his income tax returns that might reasonably show that he had a legitimate source of income that could account for the cash. The court did not believe the respondent that the cash was from a legitimate source or that the person driving the vehicle put it in the safe without him knowing. The court was satisfied with the applicant's evidence that the cash most likely represented proceeds from the unlawful activity of trafficking in illicit drugs. The cash and vehicle proceeds were forfeited to the Crown in Right of Saskatchewan.

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Hertz, Re (Bankrupt), 2017 SKQB 224

Thompson, July 21, 2017 (QB17213)

Bankruptcy and Insolvency – Discharge – Income Tax Debt

The bankrupt assigned in bankruptcy in 2015. Her application for absolute discharge was opposed by the Minister of National Revenue on the grounds that although she might be an honest debtor, she continued to enjoy a high standard of living after failing to pay taxes for nine years. The bankrupt's unsecured creditors totaled $537,000. The Canada Revenue Agency (CRA) proved a claim for unpaid personal tax of $498,900, which comprised 93 percent of her proven unsecured claims. As the tax debt exceeded $200,000 and made up more than 75 percent of the unsecured proven claims, s. 172.1 of the Bankruptcy and Insolvency Act governed the bankruptcy. The bankrupt became a real estate agent and entered the workforce for the first time in 2005 at the age of 55 in anticipation of her divorce. Her former husband declared bankruptcy and she never received her share of the family property. In 2006 the bankrupt had $60,000 in

personal debt and, as her income was minimal, she decided to file a consumer proposal to pay her creditors at the rate of $500 per month for five years and proceeded to do so. In 2006 the bankrupt failed to provide a complete income tax filing to the CRA and then failed to file returns for 2007 to 2012. She explained that she stopped filing returns because she could not pay the arrears. During the six-year period between 2007 and 2013, the CRA did not take enforcement against the bankrupt because of the consumer proposal, but annulled it in 2013. Between 2006 and 2014 there was no evidence that the bankrupt made payments towards her income tax debt but she did make three installment payments totaling $36,000 in 2015. The bankrupt's average net income for the pre-bankruptcy period between 2006 and 2014 was $122,000. However, the downturn in the economy meant that the bankrupt's ability to earn income was reduced substantially.
HELD: The court granted the bankrupt an absolute discharge upon payment of $30,000. The need for deterrence in this kind of case was affected by the age of the bankrupt. The court determined that this amount was within the range of payment conditions in relation to s. 172.1 bankruptcies concerning older bankrupts who failed to pay their income tax and had some ability to pay.

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A.M. v A.E., 2017 SKQB 225

Ball, July 21, 2017 (QB17227)

Family Law – Custody and Access – Interim

The parties cohabited for one year and separated in 2007 just after the birth of their daughter. The petitioner filed a petition claiming custody and child support and the respondent sought a shared parenting arrangement. At the time of the child's birth the petitioner, a pharmacist, was earning $84,000 and the respondent's income as a prison guard was $40,000. The court made an interim order directing that the respondent would parent for three days each week (43 percent). In 2008, the respondent waived child support in return for the petitioner's payment of s. 7 expenses under the Guidelines. In 2010 the petitioner remarried and stopped working, advising her employer that she was disabled. She received 60 percent of her previous income under a disability plan. She did not disclose any information relating to her medical issues until just before trial, and her evidence was minimal and did not indicate when

she might be able to start working again. In the period following the making of the interim court order, the parties had been involved in many mediation sessions, attempting unsuccessfully to finalize their parenting arrangement. In 2016 the petitioner applied for an order requiring the respondent to pay child support retroactively to 2012. Each party disputed what they had agreed to in the past and the amount of time that the child was with the respondent. The petitioner made it difficult for the respondent to have his parenting time. Evidence showed that the petitioner tried to reduce the respondent's time to less than 40 percent in order to claim s. 3 child support. The issues at trial were as follows: 1) what was the appropriate parenting arrangement; 2) what was the appropriate order for payment of future child support and s. 7 expenses; and 3) was the respondent obligated to pay retroactive child support.
HELD: The court held with respect to each issue: 1) it was appropriate to order a 50/50 shared parenting arrangement on a week on/week off basis; 2) the respondent had had custody of the child for not less than 40 percent of the time. The petitioner's annual income was $61,000 and the respondent's was $64,000. Under s. 3 of the Guidelines, the court calculated a small set-off amount after finding they each should pay $489 and $518 per month, respectively. The parties should share s. 7 expenses equally; and 3) the petitioner's application for retroactive s. 3 child support was dismissed. The court considered the four factors set out in the Supreme Court's decision in D.B.S. and found that the payment of a retroactive amount of child support was not warranted and would cause hardship to the respondent.

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D.D.L.C., Re, 2017 SKQB 226

Krogan, July 21, 2017 (QB17214)

Family Law – Child in Need of Protection – Permanent Order

The Minister of Social Services applied for an order that two children, aged six and five respectively, were in need of protection pursuant to s. 11 of The Child and Family Services Act (CFSA), and if found to be so, then to have the children permanently committed to the care of the Minister in accordance with s. 37(2) of the CFSA. The children's mother, K.C., admitted that she could not care for the children but requested that her mother, C.T., be given care of the children. In 2015, C.T. was designated a person of sufficient interest with respect to the children pursuant to s. 23 of the CFSA. In 2015, she applied for

custody of the children in accordance with The Children's Law Act, 1997 (CLA). The parents did not file a statement of defence and were noted for default. At this application, C.T. agreed that the children were in need of protection but sought an order at this application that would place the children in her care on a permanent basis. The father of the children, N.C., was not present during the trial. At it, the CLA and the CFSA application were consolidated. Evidence was provided regarding the parents' problems with alcohol abuse and the spousal abuse perpetrated on K.C. by N.C. and the apprehension of the children in 2013 after domestic violence had occurred. The children had been in foster care since their apprehension and both were doing well. There were families who would be a match for their adoption. The Ministry had conducted an assessment and prepared a report on C.T. after she was designated as a person of sufficient interest and recommended against approving her as a caregiver of her daughter's two children. C.T. had seven children and a number of them were living in her home, including four grandchildren, and there was no room or beds available for K.C.'s two children. C.T. had problems controlling her children and had asked the Ministry for help in the past. The Ministry advised that C.T. had substance abuse problems and family violence had occurred in her home on many occasions. In addition, she had a stormy relationship with K.C. who often resided in the house.
HELD: The Ministry's application was granted. The court found that the children were in need of protection. C.T.'s application for custody was dismissed. The court found that she did not have the space in her house or the energy to care for two more children. The court ordered that the children be placed permanently in the care of the Minister under s. 37(2) of the CFSA and agreed with the Ministry that the children's needs would best be met by placing them into the care of adoptive parents.

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R v Dejarlais, 2017 SKQB 227

Barrington-Foote, July 24, 2017 (QB17215)

Criminal Law – Assault – Aggravated Sexual Assault – Sentencing

The accused pled guilty to committing the offence of aggravated sexual assault, contrary to s. 273 of the Criminal Code. The victim was choked until she became unconscious. She suffered

from depression and was unable to lead her life as she had in the past because of her fear. As the accused was HIV positive, the victim had to wait for months to find out whether she had been infected. The accused, a 26-year-old member of the Piapot First Nation, had been raised by his grandparents until he was 12. Both his grandfather and father had attended residential schools. He suffered physical abuse from his grandfather. He was expelled from school in grade seven and went to live with his mother. She was a drug user who introduced the accused to a criminal lifestyle. He began stealing cars at 14 and spent the remainder of his youth in and out of correctional facilities. He had never worked steadily. At 19, the accused became a morphine user, and his criminal record showed that he supported himself and his addiction through crime. He had been convicted of 60 offences, the majority of which were property crimes or failures to comply with court orders, although he had youth and adult convictions for assault. The pre-sentencing report indicated that he was at high risk to re-offend and scored at the top 5 to 10 percent of sex offenders for risk of recidivism. HELD: The accused was sentenced to nine years' imprisonment. Remand credit at the rate of 1.5 days was given for 223 days spent in custody. The court considered the aggravating factors to include the following: the accused had committed a deliberate attack on a random victim; he choked his victim and endangered her life; he had HIV; hehad a lengthy criminal record; and he was at high risk to reoffend. The victim had suffered serious psychological damage and had lived in fear of infection. The mitigating factors were that the accused pled guilty and expressed remorse. His culpability was reduced by Gladue factors. His family background and upbringing provided context to his decisions to take drugs and engage in sexual violence.

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Affinity Credit Union 2013 v Vortex Drilling Ltd., 2017 SKQB 228

Scherman, July 24, 2017 (QB17216)

Bankruptcy and Insolvency – Receiver – Application to Appoint
Debtors and Creditors – Application under Companies' Creditors Arrangement Act
Civil Procedure – Queen's Bench Rules, Rule 13-30

The plaintiff Credit Union applied for the appointment of a receiver of all of the assets and properties of the defendant, an oil and gas drilling company, under s. 243 of the Bankruptcy and Insolvency Act (BIA) and s. 64 of The Personal Property Security

Act, 1993. The defendant applied under s. 11.02(a) of the Companies' Creditors Arrangement Act (CCAA) for an initial order granting a stay of all proceedings against it for a period of time to permit it to pursue a successful arrangement. The defendant had been in default under various terms of the credit agreement with the plaintiff since the collapse of oil prices. It argued that putting it into receivership would result in the loss of many people's employment and the other economic activity it generated in the community. In affidavits filed by its administrator, she deposed that the oil industry's situation was improving, that the defendant expected a substantial improvement in its cash flow and that it was actively pursuing promising refinancing opportunities. She also deposed that the security held by the plaintiff was greater than the debt owed and thus there would no prejudice to the plaintiff by granting an initial order and stay. The plaintiff said that the defendant was insolvent and that for two years it had provided it with significant accommodations. The defendant had failed to honour contractual commitments made to the plaintiff in return for the deferrals granted, and the evidence showed the defendant had not acted in good faith. The defendant's application did not contain a reorganization plan and relied on unverified refinancing possibilities. Allowing the rigs to continue to operate without generating sufficient revenue to cover the fixed costs meant that the rigs would continue to depreciate, thus eroding the plaintiff's security position.

HELD: The plaintiff's application in bankruptcy was granted and a receiver was appointed. The defendant's application was dismissed. Regarding the application under the CCAA, the court found that the defendant had not satisfied it that circumstances existed that would make the order sought appropriate. It took issue with the defendant's evidence and examined the affidavit evidence that was sworn by the employee. The affiant's position in the company was not described nor how it would have given her the personal knowledge she claimed to have. Much of her evidence was based on information and belief such as the defendant's business was growing because of the improvement in the oil and gas climate. She also deposed that an appraisal of the defendant's equipment valued it at an amount exceeding the secured debt but the defendant had not filed the appraisal itself. The court found that the defendant's application was not interlocutory, and therefore, under Queen's Bench rule 13-30, the affidavit had to be confined to facts within the personal knowledge of the affiant. There was evidence acquired through the investigation of the interim receiver that the defendant had not acted in good faith.

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Dagenais v Farm Credit Canada, 2017 SKQB 229

Labach, July 24, 2017 (QB17217)

Contract Law – Breach – Damages

The self-represented plaintiff brought an action in damages against the defendant, Farm Credit Corporation (FCC). He alleged that he paid the FCC the amount of $324,000 in 1997 to pay out mortgages that they held on four parcels of land owned by his daughter and son-in-law. They had defaulted on various terms of their mortgage agreements, but FCC had not yet commenced a foreclosure action to collect on the mortgages. The plaintiff submitted that his payment was made on trust conditions that FCC would transfer their interest as mortgagee in the parcels to him. He contacted FCC numerous times between 2004 and 2006 to ask it why it had not transferred title of the parcels to him. FCC repeatedly advised him that as they were never the registered owners of the lands, they never had the ability to convey title. The plaintiff's statement of claim was issued in 2015 alleging that there was a trust condition attached to his payment such that FCC was supposed to transfer to him all its interest as mortgagee. He did not plead that FCC was under a trust condition to provide him title to the properties. In his affidavit, the plaintiff deposed that in 1990 he had purchase land from FCC, who had foreclosed on the prior owner. He gave FCC a cheque to purchase the land with the understanding that according to law, the previous owner would have one month to match his offer. As that did not occur, FCC sent him the title to the property. Based on that experience, the plaintiff expected that his daughter and son-in-law would have one month to match his payment or FCC would transfer title to the property secured by the mortgages to him. The affidavit did not claim that FCC would transfer their interest in the mortgages to him, but the title. FCC's statement of defence rested on the point that it had never had title to the lands. In an affidavit sworn by an employee of FCC who had met with the plaintiff when he made the payment, the employee deposed that he told him that FCC had no title to convey to him. He advised the plaintiff that he would have to make arrangements with the registered owners if he wanted to receive an interest in the lands. He attested that the plaintiff did not refer to conditions or trust conditions attached to his payment or that he expected FCC to transfer their interest in the mortgages or title to lands to him and there was no oral or written agreement between them. FCC applied for summary judgment dismissing the plaintiff's claim on the basis that there was no genuine issue requiring a trial pursuant to Queen's

Bench rule 7-5(1)(a).
HELD: The application for summary judgment was granted and the plaintiff's claim was dismissed. FCC had provided evidence, which the court accepted, that the plaintiff had not made an agreement with it that his payment was made on trust conditions. The plaintiff had not produced evidence to counter FCC's evidence. The plaintiff had not specifically pled that he expected that this transaction would be the same as the one he had had with FCC in 1990 and could not now say that was what he meant to do. Even if the court gave a generous interpretation to the plaintiff's pleadings that he had imposed a trust condition on FCC, the court was not satisfied that there was a genuine issue for trial. The defendant never had title to the lands in question and had not foreclosed as it had in the 1990 transaction.

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Templeman v Water Security Agency, 2017 SKQB 230

Rothery, July 27, 2017 (QB17218)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike

The plaintiffs brought an action against the Water Security Agency (WSA) and the Saskatchewan Ministry of Parks, Culture and Sport (Parks) for negligence, nuisance, trespass and strict liability and sought damages from the defendants jointly and severally. The plaintiffs owned a cottage on a lake whose level was controlled by a stoplog dam. A rise in water levels in 2014 and 2015 damaged the plaintiffs' property. Parks admitted that it constructed the dam but denied any liability to the plaintiffs. The WSA defended the action on the basis that it did not owe a common law or statutory duty of care to the plaintiffs and the action did not give rise to a viable claim at law. WSA brought an application pursuant to Queen's Bench rule 7-9(2)(a) to strike the claims for failing to disclose a reasonable cause of action. The WSA argued that it is a regulatory body created by statute and has only a public duty of care. Therefore it cannot be sued by the plaintiffs for negligence. It could not be sued in nuisance, trespass or strict liability either because it did not operate the dam that allegedly caused the flooding.
HELD: The application was granted. The plaintiffs' claim against WSA was struck in its entirety. The court found that the plaintiffs' allegation the WSA operated the dam was a fact that could not be proven as the plaintiffs' own expert report identified Parks as the operator. Regarding the issue of duty of

care, the court found that the WSA was a statutory body owing only a public duty of care. A duty of care had not previously been recognized in this type of case. As the purpose of the WSA under The Water Security Agency Act was to regulate and control the flow of water owned by the Crown, there was no duty of care imposed on the WSA to the plaintiffs specifically. Therefore, the plaintiffs' claim failed on the first branch of the Anns test and it was unnecessary to proceed to the second branch because the plaintiffs failed to plead any facts giving rise to any specific interactions between them and the WSA that might have given rise to a duty of care separate and apart from the Act. The court dismissed the plaintiffs' argument that, following the Supreme Court's decision in Kamloops, the WSA was bound by an operational duty of care to monitor lake level to ensure that Parks was complying with its water rights licence and it had failed in this duty. The Act did not impose a duty on the WSA for Park's operation of the dam and it had not delegated any operation of it to Parks such that it might be liable if Parks operated the dam negligently. The plaintiffs' other claims were struck as well because Parks operated the dam and any damages caused by flooding related only to Parks.

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McCorriston v McCorriston, 2017 SKQB 231

Brown, July 27, 2017 (QB17219)

Civil Procedure – Parties – Adding Parties
Civil Procedure – Queen's Bench Rules, Rule 3-84

In a family law proceeding, the petitioner applied for an order that the respondent's mother be joined as a party to it pursuant to Queen's Bench rule 3-84. The petitioner alleged that the parties and the proposed third party made an arrangement whereby the mother purchased a house and obtained a mortgage. The parties agreed to pay the mortgage payments in order to acquire an interest in the property from her. The payments or some portion thereof would constitute family property and therefore should be divided between the parties. The evidence supporting this contention was the cancelled cheques written by the respondent to pay into the bank account set up for the mortgage that included a notation on the memo line indicating: principal, interest and mortgage. The applicant argued that if payments were found to be part of the family property, she would not be able to enforce a remedy unless the mother was joined as a party. The mother responded that the

applicant's allegations regarding the property were so weak and speculative that they would not pass the low threshold as set by law as in the case of Shatula v Shatula Estate.
HELD: The application was granted. The court found that the claim had a justiciable element in that it was reasonable and it was connected to the family property.

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R v Letch, 2017 SKQB 233

Chicoine, August 8, 2017 (QB17220)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Conviction – Appeal

The appellant was convicted of operating a vehicle while impaired by alcohol under s. 253(1)(a) of the Criminal Code. The charge arose after the appellant and his passenger were injured after their vehicle left the highway and the vehicle rolled over. An RCMP officer arrived at the scene and found the appellant and another man outside the vehicle but the passenger was still strapped inside it. He testified at trial that he smelled alcohol coming from the appellant's breath, and when an ambulance arrived he observed that the appellant was unsteady on his feet when he walked to it. He said that he formed the opinion that the appellant was impaired at that time. After the appellant and the passenger were taken to the hospital for treatment, the officer followed them there and eventually was able to question the appellant. His inability to recall his address or phone number reinforced the officer's opinion, although he admitted that he had been told by a doctor that the appellant had been heavily sedated. The officer described the accident scene, testifying that the highway was near level and fairly straight. The road was wet but otherwise clear. He noticed some skid marks on the road, which led him to believe that the vehicle was heading westbound and then suddenly turned south and entered the ditch on that side of the road. The Crown also placed into evidence the report of the accident that the appellant had prepared for his employer after the accident and a warned statement given by him to the RCMP about the cause of the rollover. The statements indicated that the appellant and his co-worker had left work and had stopped to buy food. While they waited, they consumed a couple of drinks. After they resumed their trip, they encountered large puddles of water on the road after heavy rains. The standing water caused the vehicle to move into the mud of the ditch and the appellant tried to get back onto

the highway but when the tires caught in the mud, the vehicle flipped. The trial judge found that the appellant had been the driver of the vehicle because he was satisfied that there were only two occupants when it rolled as the appellant's statements had not referred to anyone else being in it. He found that the Crown had proven the charge of impaired driving. He based the latter finding on his conclusion that the appellant's report to his employer was self-serving and unreliable. He did not accept the evidence provided therein of the weather, the road conditions and the manner in which the accident occurred. The trial judge preferred the evidence of the RCMP officer regarding the conditions and his opinion that the appellant was impaired. The grounds of appeal were whether the trial judge erred in finding that the appellant was the driver and in holding that the Crown had proven the appellant's ability to drive was impaired by alcohol.
HELD: The appeal was allowed and the conviction of impaired driving was quashed. The court found that the trial judge had not erred and the evidence supported his finding. Although the officer said there were two people outside the vehicle when he arrived, the appellant's statements ruled out the possibility of a third person being in the vehicle at the time of the accident. The court also found the trial judge had erred in finding the appellant was impaired by alcohol. The smell of alcohol on a person's breath does not indicate any particular level of impairment. The judge placed too much emphasis on apparent contradictions between the officer and the appellant's descriptions of the road conditions. Finally, the officer's evidence of impairment should not have been given much if any weight considering that in the circumstances there were other explanations for his observations other than impairment.

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Andros Enterprises Ltd. v Fiesta Barbeques Ltd., 2017 SKQB 234

Chicoine, August 11, 2017 (QB17228)

Civil Procedure – Pleadings – Statement of Claim – Application to Amend
Civil Procedure – Pleadings – Statement of Claim – Adding Defendant
Civil Procedure – Queen's Bench Rules, Rule 3-72, Rule 3-84
Statutes – Interpretation – Limitations Act, Section 5, Section 20

The plaintiffs applied for an order that they be granted leave to amend their claim to add the proposed defendant (Vomar) to the action and to amend their statement of claim pursuant to

Queen's Bench rules 3-72 and 3-84. The defendant Bennett was using a barbeque on his apartment balcony in July 2012 when a fire erupted as he attempted to shut off the valve to the propane cylinder. The fire damaged the building, which was owned by the plaintiffs. The barbeque was designed, manufactured and distributed by the defendant Fiesta Barbeques (Fiesta). The plaintiffs commenced an action against Fiesta in July 2014, just short of two years after the fire, claiming damages in negligence, alleging that Fiesta had created a risk of fire in the design, manufacture or assembling of the barbeque. A risk of fire was posed due to the location of the gas hose. They alleged negligence against the plaintiff Bennett for using the barbeque in an unsafe manner and assembling it improperly so that the gas propane hose was able to come into contact with hot surfaces. All of the defendants filed their statements of defence denying negligence. In this application counsel for the plaintiffs deposed that in January 2015 he read an investigator's report from the Regina Fire Department. The writer indicated that the cause of the fire was a mechanical failure of the propane cylinder connected to the barbeque that caused a leak below the shut-off valve on the head of the cylinder. At mandatory mediation in May 2015, the plaintiffs informed Bennett's counsel that they would take the position the fire was caused by the defective valve and his lawyer confirmed that was his position as well. The plaintiffs were advised that Vomar had requalified the propane cylinder at some point before the fire. The plaintiffs then informed Vomar of their intention to add them as a defendant and they filed the application for leave in October 2015. The proposed amendments alleged that Vomar operated a cylinder exchange program through retail outlets and it was its responsibility to assess the safety of the cylinder and in particular when it was used with a Fiesta barbeque, but that it had failed to properly refurbish the valve of Bennett's cylinder. Vomar filed an affidavit saying that cylinders must be requalified or replaced every 10 years by Transport Canada. In this case, Vomar had requalified and refilled the cylinder in question in July 2007. Vomar argued the following: 1) any issues related to the design, manufacture and manner of use of the barbeque were independent of issues related to its alleged refurbishment of the cylinder and would not facilitate the resolution of the issues in the original claim but would add a second independent cause of action. It also argued that the proposed amendments could be struck under Queen's Bench rule 7-9(2)(a) for failing to disclose a reasonable claim as they failed to plead the essential elements of an action in negligence; and 2) that the limitation period under s. 5 of The Limitations Act had expired; and 3) if the limitation period had expired, the amendment to the pleadings should not be allowed pursuant to

s. 20 of the Act.
HELD: The application was dismissed. The court found the following with respect to each issue: 1) under Queen's Bench rules 3-72 and 3-84, the addition of Vomar as a defendant was not required to determine whether Fiesta and Bennett owed a duty of care to the plaintiffs. The allegations concerning Vomar in the proposed amendments created a second independent cause of action. The addition of Vomar would cause prejudice to it because it would lose its ability to rely on the limitation period. The court declined to find that the plaintiff's proposed amendments disclosed a reasonable cause of action; 2) the plaintiff could have discovered the investigator's report within a few months of the fire. The limitation period to commence an action against Vomar had expired, at the latest, two years after the report was completed; and 3) it was not an appropriate case to allow amendment to pleadings under s. 20 of the Act because the allegations had not arisen out of the same transaction or occurrence in the original claim.

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Toronto-Dominion Bank v Forsyth, 2017 SKQB 235

Mills, August 11, 2017 (QB17222)

Mortgages – Foreclosure – Application for Judicial Sale – Order Nisi – Amendment

The plaintiff bank brought an application without notice for an amended order nisi for sale by real estate listing under a residential mortgage. The original order nisi for sale granted permission to the plaintiff to amend its terms or apply for foreclosure absolute. It was silent as to the right of the lender to purchase. The plaintiff was granted leave to commence the foreclosure action in December 2015, and the statement of claim was then issued. The Wuthrich defendants were served and noted for default of defence in January 2016. They filed a demand for notice. The defendant Forsyth was served in May 2016 and noted for default in June 2016. An order allowing substitutional service on the defendant Sanford and the claim was served in March 2016. There was no explanation why the delay in serving Forsyth and Sanford occurred. The plaintiff then made a notice of application returnable in January 2017 for an order nisi for sale by real estate agent. Again, there was no explanation of the delay between the noting for default and the judicial sale application. No one appeared on the return date of this application for order nisi for sale. The plaintiff provided a

statement as to the amount outstanding, identified the selling officer, a realtor, and the draft order nisi. The proposed upset price was $68,000. The order was granted on the terms requested by the plaintiff and taken out in January 2017. The Wuttrich defendants were served in February, Forsyth in March and Sandford at the end of April 2017 and there was no explanation for the delay. This application was filed in July 2017. It acknowledged that the period of redemption expired in April 2017. The affidavit in support indicated that a request was made to the selling officer to list the property in May 2017 but that he had refused to do so. In June, the plaintiff directed its lawyer to use a different realtor.
HELD: The application was denied. The delays on the file with respect to the foreclosure were the fault of the plaintiff and it was not the type of delay contemplated by the court in its grant of the order nisi for sale by real estate listing. The court has the discretion to order a judicial sale, whether a first or second one, based on the equities of the situation. In the circumstances, the court was not prepared to grant the second judicial sale.

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101073294 Saskatchewan Ltd. V Condominium Corp. No. 101159043, 2017 SKQB 236

McMurtry, August 14, 2017 (QB17221)

Civil Procedure – Queen's Bench Rules, Rule 7-5
Statutes – Interpretation – Condominium Property Act, 1993, Section 16, Section 17, Section 19, Section 20

The defendants applied for summary judgment dismissing the plaintiff's statement of claim. The plaintiff developed a condominium complex in 2010 and in the same year sold the property to the defendants. In 2014 the plaintiff sought to construct a second building on the property and the defendants opposed it. The plaintiff deposed that it had provided purchasers of the original condominiums with a site plan illustrating the building design for two phases. Thus it claimed that it sold the property as the first phase of a planned development and the defendants knew of its plan to erect a second building on the remaining half of the property. However, when it took steps to begin construction of the second phase, it learned that its solicitors had failed to register a developer's reservation against the title pursuant to s. 16 of The Condominium Property Act, 1993 (CPA, 1993). It then sought the defendants' consent to rectify the omission, but they refused and

the plaintiff commenced the action. The defendants sought dismissal of the claim on the ground that the plaintiff never advised them of the planned second phase and it was now too late for it to rectify its failure to register the appropriate reservation.
HELD: The application was granted and the plaintiff's claim was dismissed. The court found that there was no genuine issue for trial under Queen's Bench rule 7-5(1)(a). The plaintiff first failed to register its developer's reservation under s. 16(1)(a) and secondly failed to act on any reservation within the time frame established by s. 17 of the CPA, 1993. It then failed to obtain the extensions permitted under s. 19 and s. 20 to obtain issuance of titles under phase 2 of the development before the expiration of the prescribed period. Under s. 17(2), the plaintiff then lost all rights reserved to it under the developer's reservation. The court added that if it was wrong in this finding, it found that although the plaintiff's claim would be statute-barred by s. 5 of The Limitations Act, there was a justiciable issue regarding when it had discovered the failure to register a developer's reservation under s. 6 of the Act. However, the expiry of the time limitations of the CPA, 1993 prevented the plaintiff from establishing that there was genuine issue for trial.

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R v Mullen, 2017 SKQB 237

McMurtry, August 15, 2017 (QB17223)

Criminal Law – Manslaughter – Sentencing

The accused pled guilty to manslaughter of his spouse. He committed the offence in April 2014. At the time, the parties were in the process of separating. The accused alleged that the victim had hit him and belittled him during the course of their relationship. On the day in question, they argued and the accused alleged that his spouse kicked him in the head. When he revived, he found that she was dead and called the police. The coroner's report indicated that the victim had died from compression of the neck. The accused's criminal record consisted of two convictions for theft and mischief in 2008 and 2010 for which he had received a conditional discharges and probation on conditions of anger management counselling. In the pre-sentence report, the author indicated that despite completing the programs, the accused had shown in this offence that he was unable to manage his behaviours. She found him at medium risk to re-offend and expressed concern that he rationalized the

offence by claiming that the victim's conduct had pushed his buttons. The Crown argued that an appropriate sentence was 10 years. The defence argued that as the accused acted out of character and on impulse, he should receive a shorter sentence. It submitted that it should be limited to time served since his credit for time on remand (40 months) should be doubled because while in custody, another inmate slashed his neck in the Provincial Correctional Centre.
HELD: The accused was sentenced to eight years. The accused was given double credit for time on remand of 80 months because of the incident, leaving him to serve three additional years.

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Schroeder v Jackson, 2017 SKQB 238

Zarzeczny, August 15, 2017 (QB17224)

Real Property – Easements – Registration

The plaintiff applied for summary judgment with the consent of the defendants regarding the plaintiff's claim for an easement and right-of-way over the defendants' property. The parties were neighbours in a residential area that had been developed in the 1920s. The original owner purchased four lots and later severed a portion of them creating a fifth lot. In 1928 the owner transferred title to lot 3 and specifically created an easement described in the transfer and given a registration number. The transfer was registered and described the easement as governing lots 1 and 2 as well. In 2004, the plaintiff purchased lot 4. At the time, no easement was registered on its title. The easement originally granted by the instrument and registered on lots 1 to 3 left the rear of the plaintiff's property inaccessible. The issue was whether the plaintiff was entitled to the benefits and burdens of the easement created by the land titles instrument.
HELD: The plaintiff's claim was dismissed. The registration of the notice of the easement on all subsequent titles issued for lots 1, 2 and 3, and the non-registration of any notice of the easement on any subsequent title issued for lot 4 was conclusive. It was not intended to be included in the scope of the benefits conveyed by the grant of the easement.

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