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A.C. v C.B., 2018 SKCA 19

Jackson Whitmore Schwann, March 15, 2018 (CA17135)

Family Law – Custody and Access – Foster Parents – Person of Sufficient Interest

A chambers judge designated foster parents as persons of sufficient interest in relation to a child whom they were fostering. The child's grandmother, who had earlier been designated a person of sufficient interest, had opposed the application. She appealed the decision. She argued that foster parents, as agents of the state, aligning themselves against a family member could result in an imbalance of power that diminished the objective of family reunification contrary to the purposes of The Child and Family Services Act. She asserted that if a designation of foster parents as persons of sufficient interest is opposed, a chambers judge should direct that the matter be determined at trial as part of the protection hearing. The Ministry and foster parents argued that persons of sufficient interest simply have party status to the proceeding.
HELD: The appeal was dismissed. The designation of someone as a person of sufficient interest can confer something more than party status only. It can have legal and practical implications, including disclosure of confidential information, full participation in pre-trial and trial, and may ultimately influence the outcome of a protection hearing. However, there is no basis in law to support the position that all applications for designation must be made to a trial judge. It is a matter of law

that such application may be made in chambers. The designation is discretionary. Thus, the appropriate standard of review is deference. The chambers judge was clearly aware of the heightened obligation on foster parents to establish that they have a sufficiently close connection to the child. He did not fail to act judicially, nor was his decision clearly wrong.

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Onion Lake Cree Nation v Stick, 2018 SKCA 20

Jackson Ottenbreit Ryan-Froslie, March 26, 2018 (CA17130)

Constitutional Law – Validity of Legislation
Civil Procedure –Stay of Proceedings – Abuse of Process

The applicant Indian nation appealed a decision of the Court of Queen's Bench wherein the court dismissed its request for a stay and granted the respondents an order for disclosure and publication of financial information pursuant to the First Nations Financial Transparency Act (FNFTA). Prior to the respondents' application to the Court of Queen's Bench for disclosure (the "QB Action"), the applicant issued a statement of claim in the Federal Court challenging the constitutionality of the FNFTA (the "Federal Court Action"). The applicant's request for a stay was primarily grounded on the argument that the QB Application raised issues that were already before the Federal Court. It based its claim for a stay on the inherent jurisdiction of the Court of Queen's Bench to prevent an abuse of its process. The chambers judge found that while it may be an abuse of process to commence two lawsuits between the same parties that effectively deal with the same subject matter, that was not the situation before him. The QB Action involved different parties and the Federal Court Action did not engage the underlying concern of parallel or duplicative proceedings because the constitutional issue at its heart was not raised in the QB Action. A decision in the Federal Court Action would not dispose of the QB Action. The respondents would be entitled to pursue the QB Action regardless of the Federal Court's jurisdiction.
HELD: The appeal was dismissed. The applicant deliberately chose not to challenge the validity of the FNFTA in the Court of Queen's Bench and a constitutional challenge cannot be incorporated by reference into another action. Thus, the applicant's reference to its pleadings in the Federal Court Action did not raise the constitutional issue in the QB Action. Further, the Court of Queen's Bench can only deal with constitutional questions if notice is provided in accordance with The

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Constitutional Questions Act. There is a legal presumption that the FNFTA is constitutionally valid. Absent a constitutional challenge, the chambers judge was obligated to interpret and apply the FNFTA. The Federal Court Action did not stay enforcement of the FNFTA. Raising a constitutional challenge to legislation in one jurisdiction does not have the effect of rendering similar challenges in other jurisdictions valid and neither the Federal Court, nor the Court of Queen's Bench, is bound by the decision of the other. Further, the circumstances giving rise to the QB Action were different from those giving rise to the Federal Court Action. There were different actors and different sections of the FNFTA were engaged. The two actions were not parallel or duplicative and the factors considered by the chambers judge were germane to the exercise of his discretion respecting the granting of a stay.

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R v Abramoff, 2018 SKCA 21

Ottenbreit Herauf Whitmore, March 27, 2018 (CA17131)

Criminal Law – Motor Vehicle Offences – Dangerous Driving

The appellant was acquitted on charges of dangerous driving. There was conflicting evidence as to whether he had more than once forced other drivers off the road by passing multiple vehicles at once while pulling a fifth wheel trailer. The trial judge had reasonable doubt as to whether he had done so and held that there was no pattern of dangerous driving. The Crown appealed the acquittal to the Court of Queen's Bench. The appeal judge reviewed the trial judge's analysis of mens reas and of subjective intent. He found there had been an error of law, set aside the acquittal, and ordered a new trial. The appellant appealed that decision.
HELD: The appeal was dismissed. The appeal judge correctly determined that the trial judge had erred. The trial judge applied the criminal standard of proof to an individual piece of evidence, namely whether one or two passing incidents occurred. She should have assessed the whole body of evidence in determining whether mens rea had been established. She applied the criminal standard of proof to what she considered a threshold issue before proceeding in her analysis. The trial judge observed that the evidence did not establish a pattern of dangerous driving behaviour immediately after concluding that she had reasonable doubt that the appellant's driving was a marked departure from the standard of a reasonable person, making it clear that the

R v J.P.

R v K.H.

R v McMahon

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absence of a pattern of dangerous driving was critical to her conclusion. The Crown was not required to prove beyond a reasonable doubt that there was a pattern of dangerous driving behaviour. These were errors of law requiring a new trial.

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R v Bear, 2018 SKCA 22

Richards Caldwell Schwann, March 28, 2018 (CA17132)

Criminal Law – Appeal – Sentence - Choking
Criminal Law – Joint Submission

The appellant pled guilty to charges of assault, assault causing bodily harm, choking and various lesser offences in relation to several domestic assaults occurring over an eight-year period. His counsel and the Crown advanced a joint submission for a sentence of time served plus a conditional sentence order. The sentencing judge rejected the joint submission and imposed a global sentence of 21 months' imprisonment. The appellant appealed sentence. He argued that the sentencing judge applied the wrong legal test when deciding whether to accept the submission. In the alternative, he argued that an 18-month sentence for the choking offence was unfit.
HELD: The appeal was dismissed. The sentencing judge was clearly aware of the Supreme Court decision in R v Anthony-Cook and accurately captured the essence of that decision. It was clear that he assessed the joint submission as advancing a sentence that met the Anthony-Cook test. It was open to him to reject the joint submission. The appellant was a serial spousal abuser, his attacks on his spouse had escalated over time and he had a history of non-compliance with various release orders. It was unlikely he could comply with the terms of a conditional sentence order. Further, the sentencing judge explained his concerns about the joint submission and gave counsel an opportunity to address them. The appellant did not establish that the sentence of 18 months for the choking offence was demonstrably unfit. Choking is inherently dangerous, and parliament prescribed a maximum penalty of life in prison for such offence. There is no minimum sentence, nor did the Court of Appeal understand the sentencing judge's comments to imply that he proceeded on basis. Sentences for choking vary considerably depending on the circumstances. In this case, the appellant had previous convictions for domestic assaults and outstanding charges for assault and assault causing bodily harm to his spouse.

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Easthill v Felker, 2018 SKCA 23

Jackson, March 28, 2018 (CA17133)

Practice and Procedure – Appeal – Stay of Proceedings – Application to Lift Stay

Pursuant to an order of the Court of Queen's Bench [the "QB Order"], a husband turned a farming operation over to his ex-wife. The husband appealed the QB Order on grounds that it did not deal with income sharing and use of income to pay debts, expenses and taxes associated with the farm. Because of the appeal, the QB Order was stayed by operation of Rule 15(1) of The Court of Appeal Rules. The wife applied to lift the stay. HELD: The court lifted the stay. The court's discretion in lifting a stay is limited only by justice between the parties and appropriateness in the process directed by the court. It was possible to lift the stay and, if the appeal was ultimately allowed, equalize the interests of the parties. The court gave four reasons for lifting the stay: 1) The QB Order directed the wife to provide the husband with periodic accountings and other financial information, thereby ensuring that he had the information necessary to assess how the farming operation was being managed; 2) The Court of Queen's Bench remained seized of the matter so as to permit the parties to return to the court in the event of difficulty; 3) The Court of Appeal was entitled to take into account the highly deferential standard of review with respect to discretionary orders and the impact that the application of that standard would have on the husband's success; and 4) The husband received revenues while he was in possession of the farm and did not share any profit. It was probable that a set-off could be applied with respect to the wife's use of the property.

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R v Necroche, 2018 SKCA 24

Richards Ottenbreit Caldwell, March 29, 2018 (CA17134)

Criminal Law – Appeal – Conviction
Criminal Law – Evidence – Reviewable Errors

The appellant appealed her conviction of manslaughter. The trial

judge heard the evidence of two witnesses, which was put before the court by introducing DVD recordings of their police interviews. Their accounts were that the appellant had not been involved the fatal beating of the deceased. The trial judge did not mention or refer to that evidence in his summary of witness evidence. The appellant argued that the trial judge erred in law by overlooking this evidence or, alternatively, that his reasons for decision were legally defective because he did not explain how or why he did not accept evidence key to her defence. HELD: The conviction was set aside and a new trial ordered. The trial judge overlooked evidence in issue and did not explain how he dealt with the DVD statements. His reasons were flawed, and he committed an error of law. The trial judge referred not only to viva voce evidence in his decision, but also to several exhibits. The DVD recordings were tendered in place of viva voce testimony and much more closely resembled the evidence of the witnesses that the judge summarized than they did the other exhibits. It seemed clear that the trial judge would have referred to the DVD statements if he had taken them into account. It was not apparent why he did not refer to the DVD statements. The prosecutor never suggested the DVD statements were lacking in reliability or probative value such that the trial judge could or should ignore them. Neither was there any suggestion at trial that the DVD statements were inadmissible. Considering the structure, organization and content of the judge's reasons, there was no room to conclude he had considered and rejected the statements.

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Ottenbreit Herauf Ryan-Froslie, April 4, 2018 (CA17136)

Criminal Law – Appeal – Conviction
Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking
Criminal Procedure – Reasonable Suspicion

The appellant appealed his conviction for possession of cannabis marihuana for the purposes of trafficking. An officer checked the plates of the vehicle the appellant was driving on the highway, noting a conviction for cultivation and that the vehicle was linked to a prohibited driver. The officer pulled the vehicle over to check the status of the driver. The appellant was the sole occupant of the vehicle. The officer ran checks on the appellant and learned that he was not a prohibited driver, but had been

convicted of marihuana cultivation and arrested, though not charged, in relation to a trafficking investigation. The officer considered the appellant's nervous behaviour and observed a billfold of cash wrapped in an elastic band in the vehicle. He detained the appellant for a drug investigation and gave him his rights and standard police warning. The officer deployed the drug detection dog that was travelling with him. When the dog indicated that there were drugs in the trunk, the officer arrested the appellant for possession of a controlled substance and gave him his rights and warnings again. He then searched the vehicle and located 50 lbs of marihuana, vacuum-sealed in half-pound bags. At trial, the accused admitted to the bulk of the facts in the Crown's case but argued that the initial traffic stop and detention violated s. 9 of the Charter and that his s. 8 rights were violated because the officer lacked the reasonable suspicion required to conduct a warrantless search by way of a drug detection dog. The officer had special experience in drug investigation, including the detection of travelling criminals. At issue on appeal was whether the trial judge erred in: 1) applying the reasonable suspicion standard by failing to take in the totality of the circumstances; 2) determining that the inculpatory factors met the legal standard of reasonable suspicion; and 3) finding that the traffic stop was reasonable.
HELD: The appeal was dismissed. There was no reversible error by the trial judge. 1) There was nothing to indicate that the trial judge failed to look at the totality of the factors. He was required to analyze the totality of observable, discernible, inculpatory, exculpatory, neutral and equivocal factors, but he was not required to take into consideration factors that were not present. 2) The appellant's arguments sought to isolate certain factors and impermissibly dissect the observations of the officer at a factual level to minimize their impact. The trial judge accepted the officer's observations as valid and accurate and made no palpable and overriding error in such findings of fact. The constellation of factors could support a logical inference of drug-related criminal behaviour. 3) The appellant's argument that the pursuit of his vehicle was a ruse to support an otherwise random search for drugs was a challenge to the credibility of the officer. The trial judge addressed challenges to the officer's veracity at length and directly found that the officer was credible, and the stop was not random.

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R v McMahon, 2018 SKCA 26

Richards Herauf Schwann, April 5, 2018 (CA17137)

Constitutional Law – Charter of Rights, Section 24(2) – Exclusion of Evidence – Search and Seizure – Search Warrant
Statutes – Interpretation – Child and Family Services Act

The accused was charged with unlawful production of marihuana and possession for the purpose of trafficking. The RCMP attended at her home at the request of Mobile Crisis, which had received an anonymous tip concerning the well-being of the children living in her residence. The accused exited her house to greet the officers and was informed of the purpose for their visit. She asked for a few moments to clean up her home, but her request was denied. Upon entering the home, the officers detected the smell of burnt marihuana and noticed a mason jar in open view that appeared to contain marihuana buds. The officers immediately placed the accused and two other adults present in the home under arrest for possession of a controlled substance and placed them in the police cruiser. With no adults left in the home, the officers concluded that the children should be temporarily taken into care. While accompanying one of the children to retrieve a pair of socks, the officer noticed a number of marihuana plants in a separate room in the basement. The officers secured the residence and prepared an ITO for a search warrant based on the information learned from Mobile Crisis and personal observations of the home. After the warrant was granted, the RCMP seized 191 marihuana plants. The accused applied pursuant to s. 8 and s. 24(2) of the Charter to have the plants excluded from evidence. The trial judge excluded the evidence. The appeal court considered whether: 1) the Child and Family Services Act authorized a warrantless search; 2) the accused consented to police entry; 3) police entry into the accused's home was authorized by the common law duty to protect the public; and 4) the trial judge erred in excluding the evidence pursuant to s. 24(2).
HELD: The appeal was dismissed. 1) Nothing in the Act expressly authorizes child protection workers or peace officers to enter a private dwelling to conduct an investigation. Section 17, which authorizes warrantless entry, is designed for emergency apprehension purposes only. Section 13 imposes a statutory obligation on peace officers to investigate child protection concerns, but there must first be reasonable grounds to believe that a child is in need of protection. An anonymous tip without corroboration may, on its own, constitute reasonable grounds in rare cases. However, absent any other indicia of reliability or corroboration, it runs the risk of giving rise to little more than a suspicion or hunch on the part of an officer, which falls short of meeting the applicable statutory threshold. On the evidence, even if the officer possessed a subjective belief that a child was in need of protection, the anonymous tip on which she based her

belief did not hold up to objective scrutiny. The officer relied exclusively on what Mobile Crisis told her and there was no evidence that she probed Mobile Crisis for particulars to assess reliability of the information. Since the police lacked reasonable grounds to believe there were children in need of protection, they were not statutorily mandated to investigate and authority to enter without a warrant had to lie elsewhere. 2) The accused did not give valid consent to police entry. For consent to be valid, it must be voluntary and informed. Jurisprudence does not support an argument that criminal protections for an accused person are less robust in child protection contexts than in criminal matters. The accused was informed about the anonymous tip and the reason for police presence, but not of the police authority under the Act, the right to refuse entry without a warrant, or the potential consequences of her choice. 3) The police actions did not amount to a justifiable use of the common law power. Entry into the home was neither necessary in the circumstances, nor the least intrusive means available. There was no evidence that the children were in distress. Even if there were, and police entry was justified, jurisprudence does not indicate further permission to search or otherwise intrude on a resident's privacy of property. 4) The trial judge was clearly alert to the appropriate legal framework for a s. 24(2) analysis and properly applied the Grant framework to the facts. His assessment under s. 24(2) was entitled to deference.

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R v J.P., 2018 SKQB 96

Elson, March 27, 2018 (QB17479)

Criminal Law – Robbery – Sentencing
Criminal Law – Break and Enter and Commit – Sentencing
Criminal Law – Gladue Report

After trial, the accused was found guilty on two counts of robbery and on arraignment for that trial pled guilty to one count of breaching an undertaking. He orchestrated both robberies by directing his 14-year-old nephew to enter stores and steal cash and cigarettes while masked and armed. The accused pled guilty in Provincial Court to two counts of possession of stolen property, one count of theft, one count of break, enter and theft in a dwelling house, one count of possession of marijuana and one count of breaching recognizance. Those pleas were transferred to the Court of Queen's Bench for a global sentence. A Gladue report indicated that the 40-year-old accused grew up

with alcoholism, violence and abuse. His stepfather taught him to steal and introduced him to alcohol and drugs. He had a lengthy criminal record. He suffered from FASD and impaired intellectual skills. The Crown sought a global sentence of 10 to 12 years' imprisonment. The defence sought to accommodate restorative justice objectives by a sentence wherein the accused would be subject to custodial restriction and judicial restraint for a total of eight years, albeit not in actual custody after reduction of three and a half years' remand credit.
HELD: A 10-year custodial sentence was a fit and proper global sentence. The sentence was comprised of: 1) seven years' imprisonment on each of the robbery counts, running concurrently; 2) two years' imprisonment on the housebreaking count, served consecutively to sentence one; 3) 12 months' imprisonment for each of one count of possession of unlawfully obtained property and two counts of stealing, running concurrent with each other, but consecutively to sentences one and two; and 4) 30 days' imprisonment for each of breach of recognizances, breach of undertaking and possession of marijuana, all served concurrently with each other and with sentence three. There were aggravating circumstances including the accused's lengthy record for property convictions, the vulnerability of the businesses robbed, pre-planning of the robberies, non-recovery of the stolen items and the accused's exploitation of his nephew in commission of offences. Moral blameworthiness for the robbery and housebreaking offences were reasonably high. The court was not convinced that the systemic and background factors presented in the Gladue report reduced the emphasis that must be placed on public protection, denunciation and deterrence, particularly in light of the accused's significant criminal record. Counsel or the Gladue writer should have provided analysis to the court of how Gladue factors may, or may not have, influenced the emphasis of sentencing objectives. The recommendations in the FASD assessment emphasized management of the accused's condition, not treatment, suggesting that more emphasis should be given to public protection and less to denunciation and deterrence.

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Earnshaw v Oudot, 2018 SKQB 97

Leurer, March 27, 2018 (QB17480)

Family Law – Custody and Access – Persons of Sufficient Interest – Grandparents

T. petitioned for access to her grandson pursuant to s. 6 of The Children's Law Act. The child's father and mother were joint custodial parents. T. asserted that her son limited her access to the child, but admitted that the child's mother did facilitate access. The parents both attested that T. had reasonable access and that they supported that access within the means of their current family life, schedule and commitments. At issue was: 1) whether T. was a person of sufficient interest, with standing to make an application; and 2) if so, whether it was in the best interests of the child that the court order access.
HELD: The application was dismissed. T. was a person of sufficient interest with standing to make the application, but court-mandated access was not in the child's best interest. 1) Grandparents are not automatically persons of sufficient interest, but may be designated as such pursuant to the Act. T. had been intimately involved in the child's life since his birth and they shared a deep and loving relationship. Both parents desired her to have a role in the child's life. 2) The issue was not whether T. should have access, but whether the court should order access or continue to allow the parents to determine the frequency and scheduling of access. It was not in the child's best interest for the court to impose terms of access.

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Figley v Figley Estate, 2018 SKQB 102

Mills, April 2, 2018 (QB17501)

Wills and Estates – Solicitor-Client Privilege Civil Procedure – Queen's Bench Rules, Rule 5-15, Rule 5-20

The plaintiff, the executor of the estate of Ray Figley, had been ordered to prove the deceased's will in solemn form in 2007. The defendants opposed the plaintiff's assertion that the will and codicil, both dated 2007, were valid testamentary documents. The proof in solemn form was to determine whether the deceased had testamentary capacity and whether he had been subject to undue influence when he executed his will and codicil. The defendant applied pursuant to Queen's Bench rule 5-20 to examine under oath the lawyer who had prepared the contested will, a non-party to the action, and for an order that he produce documents under rule 5-15. The lawyer argued that the application should be dismissed because the defendant applicant had not complied with rule 5-20 as he had failed to satisfy preconditions for questioning and solicitor-client privilege prohibited both questioning and production of documents under

rule 5-15. HELD: The application was allowed in part. With respect to the application pertaining to rule 5-20, the court found that as the plaintiff had been questioned in 2009, the defendants had had the opportunity then to question the plaintiff in his capacity as the purported executor of the estate and the person advancing the validity of the will, but had not done so. Therefore, the application failed because the defendant had not satisfied the preconditions set out in Queen's Bench rule 5-20(3)(a). The court granted the application for production of documents because of the "wills exception" to solicitor-client privilege. The documents held in the lawyer's file were not protected by privilege as they related to receiving instructions for, preparation and execution of the will, including the lawyer's observations that related to the issues to be determined at trial regarding testamentary capacity and undue influence.

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Kachur v Predy, 2018 SKQB 115

MacMillan-Brown, April 19, 2018 (QB17507)

Family Law – Custody and Access – Person of Sufficient Interest

The petitioner applied to be declared a person of sufficient interest with respect to her granddaughter and to be granted access. The petitioner's daughter, the respondent, gave birth to the child in August 2017, but did not inform the petitioner. The petitioner and the respondent have been estranged since 2015. The petitioner had never seen her granddaughter. The respondent and her husband opposed the application because the petitioner had never had a relationship with the child and it would not be in her best interests for the petitioner to have access to her. HELD: The application was dismissed. The petitioner was unable to meet the onus of establishing that she was a person of sufficient interest within the meaning of s. 6 of The Children's Law Act, 1997 because she did not have a significant relationship with the child and had not demonstrated a settled ongoing commitment to her.

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Lloyd v Lloyd, 2018 SKQB 116

Goebel, April 20, 2018 (QB17508)

Family Law – Custody and Access – Interim

The parties, the parents of a three-and-a-half-year-old child, separated in 2015. In 2016 they entered into an interspousal agreement that provided for joint custody as well as shared care of the child on a week-on/week-off basis. It contained a term that required the permission of the other parent to travel out of the province with the child. The petitioner father worked and resided in Warman and the mother lived and worked in nearby Saskatoon. The child moved between these two locations and attended different daycares. The agreement was not incorporated into the divorce judgment that issued in 2017. The shared parenting regime worked well until the respondent mother notified the petitioner that she was planning to move to Outlook, 125 kilometres from Saskatoon. She indicated that she did not believe that the current parenting arrangement would work in the long term but was prepared to continue it until summer. The petitioner advised that he would not consent to the child moving outside the vicinity of Saskatoon. The respondent took the position that his consent was not required as her relocation was akin to a move across the city. The petitioner then commenced this proceeding under The Children's Law Act, 1997 and asked the court to make an order restraining the respondent from changing the child's residence without written agreement or court order. If the respondent chose to move to Outlook, he requested that he be granted primary care of the child with the respondent having weekend access. The respondent argued that the court should defer to the agreement and dismiss the application on the basis that the petitioner had not demonstrated a material change in circumstances since it was executed. HELD: The court made an order directing that the parties should have joint interim custody and shared care on a week-on/week-off basis in order to maintain the child's stability. It did not prohibit the respondent from moving to Outlook based upon the understanding that she would continue to be employed in Saskatoon and would commute there on weekdays. If her employment should change such that it would affect the child's routine in Saskatoon or Warman, the petitioner could apply for a review of the order. The court noted that the statutory threshold requiring a material change in circumstances did not apply to agreements regarding parenting arrangements. The terms of the agreement were not binding on the court. This was a fresh application focused solely upon the best interests of the child. The respondent's anticipated move did engage a mobility analysis in the long term because the determination of the best interests of the child would be affected by where she resided and attended school in the future.

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Michel v Canada (Attorney General), 2018 SKQB 117

Smith, April 23, 2018 (QB17509)

Civil Procedure – Queen's Bench Rules, Rule 4-9

The plaintiffs, the chief and members of the Peter Ballantyne Cree Nation (PBCN), brought an action in 2004 against the three defendants for flooding portions of the Indian reserve occupied by PBCN and thus wrongfully depriving PBCN of the use of its land. The case management judge was appointed under The Queen's Bench Rules in 2012. The defendants applied to strike the claim on the basis that it was out of time under The Limitations Act and in 2014 the parties agreed that it would be appropriate for the case management judge to hear the defendants' summary judgment application. The judge found that the claims, including PBCN's claim of continued trespass, should be struck (see: 2014 SKQB 327). The plaintiffs' appeal of that decision was allowed by the Court of Appeal. Its decision confirmed there was a continuing trespass and ordered the matter to be returned to the Court of Queen's Bench to determine the merits of SaskPower's arguments relating to the consent issues. SaskPower and the Government of Saskatchewan applied to reconvene the original summary judgment application to determine whether the claim for continuing trespass must fail by reason of consent or that it was barred by promissory estoppel. The case management judge then announced that he would be assuming supernumerary status in December 2017. The plaintiffs advised that pursuant to Queen's Bench rule 4-9, they did not agree with the case management judge hearing any further summary judgment applications in the action and the defendants' arguments should proceed on that basis. In light of the judge's pending retirement, they further requested that he withdraw to permit the appointment of another judge. Counsel for SaskPower and Saskatchewan argued that the plaintiffs should not be allowed, in the middle of the process, to withdraw their consent to the case management judge hearing a summary judgment application. HELD: The case management judge found that Queen's Bench rule 4-9 did not preclude PBCN from withdrawing consent. The Court of Appeal's conclusion that a continuing trespass existed required that a new application be brought. The judge ordered the defendants to bring notices of application seeking to strike the continuing trespass claim and setting out their grounds. The case management judge would remain as appointed, but he ordered that the application should be heard by another judge.

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CIBC Mortgages Inc. v Taylor, 2018 SKQB 118

Danyliuk, April 24, 2018 (QB17510)

Mortgages – Foreclosure – Application for Judicial Sale – Order Nisi – Amendment Statutes – Interpretation – Limitation of Civil Rights Act, Section 5

The plaintiff bank applied for an extension of the time for listing of property under an Order Nisi for Sale by Real Estate Listing. The plaintiff's application for leave to commence an action for foreclosure was granted in May 2017. At that time, the plaintiff provided as an exhibit to its affidavit a home appraisal estimating the value of the property at $140,000. The appraisal was based upon sales of properties located in areas distant from the mortgaged property. The defendants were served with the statement of claim and both were noted for default in June 2017. The Order Nisi was obtained in July 2017, setting a 20-day redemption period and a floor price of $114,750. In support of its application the plaintiff had provided an affidavit with an exhibit of a comparative market analysis prepared by a realtor, estimating the value of the property at $135,000. The plaintiff did not submit the qualifications of the realtor. Under the Order, the plaintiff had leave to make an offer to purchase the subject property. The plaintiff sought and obtained an order extending the listing for a further three months in December and amending the minimum price to $106,250 because another appraisal indicated that the estimated value had decreased again. In this application, the plaintiff sought an extension of six months and a reduction of the minimum sale price to $76,600. The opinion of value was provided by another realtor who stated that the land was worth only $95,000. No evidence was provided regarding which realtor had been responsible for the sale during the second listing period. HELD: The application was dismissed. The court reviewed the factors to be considered in an application to vary an Order Nisi for Sale by extending the time for sale and varying the terms of the order including the upset price. In applying the factors to the circumstances of this case, the court expressed concern that: 1) the plaintiff had sought and obtained the provision in the order to make offers to buy the land, but had not done so and failed to explain why not. If it had made an offer for the reserve price it would have preserved its right to a deficiency judgment; 2) the evidence of the value of the property provided by the plaintiff was deficient. It had supplied six different valuations and the decrease in value from $140,000 in

February 2017 to $95,000 in April 2018 had not been explained, nor had it provided the court with information that its witnesses or deponents possessed expert credentials in accordance with the standard set by the Supreme Court in White Burgess; and 3) although the plaintiff was not guilty of inordinate delay, the passage of time had caused prejudice to the defendants regarding the amount of the deficiency judgment for which they were liable.

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PCL Construction Management Inc. v Saskatoon (City), 2018 SKQB 119

Currie, April 24, 2018 (QB17511)

Statutes – Interpretation – Builders' Lien Act, Section 5 Civil Procedure – Queen's Bench Rules, Rule 13-30

The plaintiff, PCL Construction, entered into the prime contract as a contractor with the respondent, City of Saskatoon, as the owner for the construction of two interchanges in Saskatoon. The construction of the interchanges would allow highway traffic to continue through the intersections while local traffic would pass around the highway and over it by way of bridges. A number of sub-contractors delivered written notices of liens under The Builders' Lien Act. In this application, the plaintiff requested an order striking out some affidavits filed on it. It argued that as this application was final and not interlocutory, the affidavits must be confined to the facts within the personal knowledge of the affiants in accordance with Queen's Bench rule 13-30(1). The plaintiff also sought a declaration that the Act did not apply to the prime contract between the parties or to any subcontract entered into as a result of the prime contract. HELD: The plaintiff's application did not succeed. The court found that: 1) the application was interlocutory. The dispute among the parties with respect to payment and holdbacks would continue regardless of how it decided whether the Act applied. Therefore, the affidavits sworn on information and belief were permitted pursuant to Queen's Bench rule 13-30(2). Some aspects of the affidavit evidence would be disregarded because they constituted hearsay; and 2) the Act applied. The court reviewed each of the subsections of s. 5 in light of the facts and found that the presumption that the Act applied in s. 5(1) had not been displaced.

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Bourelle v Saskatchewan Government Insurance, 2018 SKQB 120

Smith, April 24, 2018 (QB17512)

Automobile Accident Insurance Act – Income Replacement Benefits Statutes – Interpretation – Automobile Accident Insurance Act, Section 129

The applicant had been injured in three separate motor vehicle accidents (MVAs) that occurred between 1996 and 1998. She began receiving income replacement benefits (IRB) under Part VIII, Division 4 of The Automobile Accident Insurance Act (AAIA) in April 1996. The respondent, Saskatchewan Government Insurance (SGI), terminated the IRB on March 15, 2000, effective March 15, 2001 because in its opinion, the applicant was able to return to the employment she had held at the time of her first accident pursuant to s. 129(1)(a) of the AAIA. The applicant applied for a review of the decision, but SGI did not change its position. She then exercised her right to a hearing under the AAIA and issued a statement of claim. She submitted that SGI was incorrect in determining that she was able to return to her regular employment in March 2002 and that in fact, she did not recover to that state until December 2008. At the time of the first accident, the applicant was working 25 hours per week for her husband's carpet-laying business. She maintained that she performed clerical/accounting duties as well as having to help physically with carrying heavy equipment and carpet. SGI said the evidentiary record showed that her duties were clerical/accounting in nature. The applicant had suffered from medical problems prior to the accident and SGI argued that the health issues that the applicant claimed were ongoing were not causally related to the MVAs. Both parties called expert witnesses. The applicant underwent independent medical exams conducted by a physician retained by her and by a physician selected by SGI. The opinions of the medical experts conflicted as to whether the applicant's health problems were attributable to the MVAs. HELD: The court found that SGI was not correct in terminating the applicant's IRB in 2001 and they should not have done so until August 2004. The parties were left to determine what damages were payable to the applicant. The court determined that the applicant returned to work out of financial necessity, but was not physically able to do so until 2004. The court held that her inability to work was caused by a combination of the injuries suffered in the MVAs and her other health issues.

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Saskatchewan (Director under The Seizure of Criminal Property Act, 2009) v Harris, 2018 SKQB 121

Layh, April 25, 2018 (QB17502)

Statutes – Interpretation – Seizure of Criminal Property Act, 2009, Section 2, Section 8, Section 10 Criminal Law – Drug Offences - Forfeiture

The Director under The Seizure of Criminal Property Act, 2009 brought an application seeking forfeiture of a truck seized by the Regina Police Service from the defendant (Harris Jr.). The Director brought administrative proceedings under Part II.I of the Act, but the defendant sent a notice disputing the forfeiture, saying that that the truck was owned by his father. Their names were identical but for their middle initials. The Director then pursued forfeiture under Part II of the Act, naming both the defendant and his father. The truck had been seized after the police had stopped Harris Jr. in the vehicle and searched him and the truck. They arrested Harris Jr. for possession of cocaine for the purposes of trafficking and after searching his residence under warrant, found more drugs and firearms. Harris Jr. and Harris Sr. filed affidavits that asserted that the latter owned the vehicle. However, there was nothing in either affidavit that disputed that the truck was an instrument of unlawful activity. The defendants relied upon s. 10(2) of the Act and Harris Sr. provided a bill of sale showing that the truck had been sold to Harris Sr. and his wife in 2010. The defendants shared the use of the truck to drive to the oil rig where both of them worked. The truck had been registered in the name of Harris Jr. for 10 years. HELD: The application was granted and the order for forfeiture was issued. The court found that the truck was an instrument of unlawful activity as defined in s. 2(i) and s. 2(u) of the Act and that neither s. 8 nor s. 10 of the Act applied because Harris Sr. neither owned nor had an interest in the truck. It was not satisfied that the bill of sale was sufficient to prove ownership as the truck may have been purchased by Harris Sr. and his wife and given as a gift to Harris Jr. The registration of the truck for 10 years in the name of Harris Jr. determined that he owned the truck.

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McNally Enterprises Ltd. v Government of Saskatchewan, 2018 SKQB 122

Layh, April 25, 2018 (QB17503)

Civil Procedure – Queen's Bench Rules, Rule 7-5 Civil Procedure – Limitation Period Statutes – Limitation Period – Expropriation Procedure Act

The plaintiff commenced an action in 2016 against the defendant, the Government of Saskatchewan, alleging that it had misrepresented the value of two parcels of land that the plaintiffs sold to it in 2010 and 2011, land that Saskatchewan had the statutory right to expropriate. The plaintiff alleged misfeasance in office by the Ministry of Highways and Infrastructure and misrepresentation of the value of the land that resulted in Saskatchewan grossly underpaying it. Saskatchewan brought an application seeking summary judgment pursuant to Queen's Bench rule 7-5 to have the action dismissed on the grounds that the limitation period expired before the claim was issued because the plaintiff knowingly recognized and chose to forfeit a statutorily-created claim in 2010 and 2011 under The Expropriation Procedure Act and, alternatively, the plaintiff had discovered the alleged claim in 2010 and 2011 and thus the limitation period under The Limitations Act had expired. Saskatchewan also argued that the plaintiff had its own opinion of value when it sold its land and by its own admission made during oral questioning, had not relied upon Saskatchewan's valuation. In response, the plaintiff brought an application seeking better production of Saskatchewan's documents, arguing that its action was not based upon what it knew at the time of the land transaction in 2010 and 2011 but upon information it acquired in 2016 from the 2016 Provincial Auditor's report and reporting from the CBC regarding Saskatchewan's land acquisition for the Global Transportation Hub during that period. Saskatchewan submitted that its application should be determined first and the plaintiff requested that the court determine the merits of its application, saying that only upon production of further documents and answers to further questions would the court be able to determine the date the cause of action arose or whether there was a genuine issue for determination at trial. HELD: The application for summary judgment was granted and the plaintiff's action was dismissed. The plaintiff's application was dismissed because in a summary judgment application, the parties must rely upon on the materials before the court. The court decided that the claim could not succeed and thus the application for compelling further document production failed as well. The court determined that pursuant to Queen's Bench rule 7-5, this was an appropriate case to resolve the action without a need for trial. The plaintiff's claim was dismissed because it was statute-barred. The court acknowledged that the statutory right under s. 24 of the Act did

not squarely apply here because the land was voluntarily sold. Regardless, the plaintiff had forfeited its statutory right to dispute the valuation of the land because the two-year statutory period under the Act had expired before it commenced its action. Similarly, the limitation period under The Limitations Act had expired. The court found that regardless of the date when the plaintiff alleged negligent misrepresentation had occurred, the ensuing two-year periods expired before the claim was issued. Further, there was no genuine issue for trial respecting negligent misrepresentation because the plaintiff had admitted that it had not relied upon Saskatchewan's position regarding the land's value.

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LaSwisse, Re (Bankrupt), 2018 SKQB 123

Thompson, April 26, 2018 (QB17513)

Bankruptcy and Insolvency – Conditional Discharge

The bankrupt's application for discharge was opposed by Saskatchewan Government Insurance (SGI). The majority of the bankrupt's debt to SGI arose out of two motor vehicle accidents that occurred in 2011 and 2014. The bankrupt's driver's licence had been suspended at the time of the accidents. SGI paid out $2,700 in regard to the 2011 accident and $9,800 in regard to the second. SGI alleged that two s. 173 facts existed in relation to the bankruptcy: 1) the bankrupt chose to assign in bankruptcy even though he had the resources to make a viable proposal. The trustee reported that the bankrupt could not have made a viable proposal because at the time of his bankruptcy, the bankrupt declared $67,700 in unsecured liabilities and his assets were valued at $3,250. According to his income and expense statement, he had no surplus income; and 2) the bankrupt could not justly be held responsible for the fact that his assets were not equal to 50 cents on the dollar of his unsecured liabilities. The bankrupt caused two accidents at times when he knew his licence was suspended. The bankrupt testified, however, that he should not be held accountable for the debt of $2,700 because he was not aware that his licence was suspended in 2011. HELD: The court granted a conditional discharge. The bankrupt was ordered to satisfy the conditions that: he report to the trustee annually for the next two years and make all payments to the requirements of the Superintendent's Standards in the amount that a bankrupt would be required to pay during a regular bankruptcy term; and he pay the trustee $4,330. That amount

was 50 percent of the amount proven by SGI in relation to the accident that occurred when the bankrupt knew that he was driving without a licence. It was levied to deter the bankrupt from continuing to act recklessly financially, but would not create undue hardship for him and his children. With respect to SGI's objections, the court accepted: 1) the trustee's report that the bankrupt could not have made a viable proposal; and 2) the bankrupt's testimony that he did not know that his licence had been suspended at the time of the first accident. The court was satisfied that the bankrupt did not have the ability to pay at this time. The court distinguished the decision in Kozack from this case because the bankrupt was not a judgment debtor and he had not acted willfully and wantonly.

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L.R.S., Re, 2018 SKQB 124

Elson, April 25, 2018 (QB17504)

Family Law – Adoption Statutes – Interpretation – Adoption Act, 1998, Section 16, Section 23

The applicant applied to adopt his spouse's child, born in 2008. The birth father refused to consent to the adoption, despite the fact that he admitted that he had had no direct contact with the child since 2009. The applicant provided affidavit evidence supporting his application. The birth father appeared in chambers and stated his position. HELD: The application for adoption was granted. After reviewing The Adoption Act, 1998, the court noted that s. 23(15) incorporates the application of certain subsections contained in s. 16 of the Act. In the circumstances of this case where the birth parent refused to consent to the proposed step-parent adoption, the court found that it was not constrained to follow the process set out in s. 23(10)(a) and (b). Under the overarching consideration of the "best interests of the child" expressed in s. 16(1), the court was satisfied that in this case, the child's best interests were served by granting the requested order. The birth father had had no meaningful relationship with the child for nine years and the evidence showed that the applicant and the child had developed a full and nurturing parent-child relationship.

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R v K.H., 2018 SKQB 126

Tholl, April 30, 2018 (QB17515)

Criminal Law – Assault – Sexual Assault - Consent

The accused was charged with sexual assault contrary to s. 271 of the Criminal Code. The accused conceded that he was guilty of sexual assault regarding a portion of his actions in that he had touched the complainant's breasts while she was sleeping, but claimed that the sexual intercourse that followed had occurred with the consent of the complainant. In the alternative, the accused submitted that he had an honest but mistaken belief that the complainant consented. The alleged offence occurred after the complainant had gone to bed. She testified that she had had too much to drink and left the accused, his wife (the complainant's sister) and her husband in the backyard and, probably due to her intoxication, she had not wakened when the accused touched her nor when intercourse occurred. She was wakened by her husband after he had seen the accused leave the bedroom. The accused testified that he had gone into the complainant's bedroom with the intention of touching her breasts. He did not speak to her and made no attempt to identify himself to her in the dark but felt that the complainant's response to the fondling indicated that she consented to intercourse, as she took her pants off and moved toward him. HELD: The accused was found guilty of sexual assault. The court held that the Crown had proven beyond a reasonable doubt that the complainant had not consented to the sexual intercourse. It accepted the evidence of the complainant and found that the accused's testimony was inconsistent and lacked credibility. There was no air of reality to the defence of honest but mistaken belief. There had been no prior relationship between the parties and no communication of any kind prior to the offence that the complainant was sexually interested in the accused. Even if the court had found that there was an air of reality, the Crown had proven beyond a reasonable doubt the accused had not taken reasonable steps in the circumstances known to him at the time to ascertain consent.

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P.R. Investments Inc. v Amos, 2018 SKQB 127

Leurer, April 27, 2018 (QB17505)

Landlord and Tenant – Residential Tenancies Act, 2006 – Hearing - Appeal Statutes – Interpretation – Residential

Tenancies Act, 2006, Section 8, Section 72

The appellant landlord appealed the decision of a hearing officer appointed under The Residential Tenancies Act, 2006 dismissing the landlord's claim for damages against its tenants, the respondents. The appellant had earlier appealed from a previous dismissal of its claim by the hearing officer and the appeal judge had referred the claim back for reconsideration by the officer (see: 2017 SKQB 342). The officer reconsidered the matter and again dismissed the landlord's claim. The facts underlying the two appeals were that the appellant had served notice on the respondents that it was immediately terminating the tenancy pursuant to s. 58(1)(e) of the Act because they had had a domestic dispute that led to a physical assault on the landlord's property manager and damage to the residential premises. The tenants complied coincidentally with the landlord's demand for immediate possession only after it had obtained an order of possession pursuant to s. 68 and s. 70 of the Act, as they vacated the premises on February 27 and the order was granted on February 28. The landlord then applied pursuant to s. 32 and s. 70 to claim the tenants' security deposit and damages because of the condition in which they had left the premises and for a sum for rent loss pursuant to s. 8 of the Act. The hearing officer allowed the claim for cleaning and repairs but rejected the claim for loss of rent, based upon the decisions in Danis and Weeseekase. The officer's decision was overturned by the appeal judge because Danis was decided prior to amendments that introduced the current version of s. 8 and because she misapplied Weeseekase. He referred the matter back to hearing officer to determine whether the landlord's loss of March rent was the result of the tenants' apparent non-compliance with the Act, the regulations or the tenancy agreement. The hearing officer found that the situation did not warrant an award of damages for lost income because the landlord had not provided sufficient evidence to prove the claim. The landlord's grounds for appeal of the second decision was that the hearing officer had erred in law: 1) by breaching the duty of procedural fairness by not reconvening the hearing to receive evidence on points that she had been asked to reconsider; and 2) by not properly applying the law in respect of the landlord's ability to re-let the premises, not properly considering the facts and misapplying the facts to the law. The landlord argued that by considering only the time taken to clean and repair the rental premises, the hearing officer missed the essential point that the loss of rental income flowed not simply from the time needed to clean and repair the premises, but more seminally from the fact that the landlord was unable to go to market to attempt to rent the premises until it was aware it would have access to the premises at the end of February when the tenants gave up possession on

February 27, 2017 and the nearly coincidental grant of the order of February 28, 2017. HELD: The appeal was dismissed. The court found held that pursuant to s. 72 of the Act, it could only hear appeals that raised questions of law or jurisdiction and if the appeal qualified, the court must then determine the standard of review. The court found: 1) respecting the first ground of appeal, that it raised an issue of law and that it would apply the correctness standard. The appeal judge directed the hearing officer to reconsider the matter on the basis of the evidence already before her and the hearing officer therefore adopted the correct procedure. The appellant should have sought leave to appeal the decision of the appeal judge pursuant to s. 72(2) of the Act if it was dissatisfied with his direction; and 2) the second ground did not raise a question of law. The hearing officer asked and answered the questions that were referred back to her for determination. Her decision was based on the evidence before her and there was nothing to indicate that she proceeded on the basis of no or irrelevant evidence that would have given rise to an error of law on her part. The court noted that it was not deciding whether landlords who are compelled to terminate tenancies without notice because of a tenant's breach of the tenancy agreement are not allowed to claim rent loss for a period of time equivalent to the period of notice that the tenant should have given if they had terminated the tenancy.

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Gerow v Dobko, 2018 SKQB 128

Dufour, April 27, 2018 (QB17516)

Barristers and Solicitors – Confidentiality – Conflict of Interest – Application for Removal

The respondent applied to disqualify a lawyer and the lawyers at his law firm from acting for the petitioner in their family law action. The parties were married in 2002 and executed a pre-nuptial agreement. The respondent retained her own counsel regarding the agreement. In it, the respondent waived her rights relating to the division of property. The parties separated in 2014 and the petitioner issued a petition for divorce wherein he claimed exemptions based on the agreement. The respondent disputed its validity and sought an equal division of family property. The respondent argued that the disqualification was warranted because: 1) the lawyer in question and the members of his firm had a conflict of interest arising from their dealings with her in the past; and 2) members of the firm would be

witnesses at trial. HELD: The application was dismissed. The court found with respect to each of the grounds that: 1) the respondent failed to discharge her onus to establish that the lawyer or the firm received confidential information attributable to a solicitor-and-client relationship that was sufficiently related to this action. Where the lawyer or members of the firm had dealt with matters related to the action, they had represented the petitioner, not the respondent; and 2) after considering the factors set out in the Supreme Court's decision in Essa that were relevant to this case, the court noted that the application was brought very late in the proceedings and that it would be prejudicial to the petitioner if his counsel were removed at this stage. The respondent may not be exhibiting bad faith in making the application, but as she had practised law, she would have been aware of what she would have to prove and from where the evidence would have to come. However, she was very late to indicate that she would be calling the lawyer or members of his firm to testify at trial. Finally and most importantly, even if the lawyer or members of his firm were called as witnesses, they would not be able to divulge what the petitioner told them or what advice they had given because of solicitor-client privilege. The respondent had not shown that the petitioner's counsel were likely to testify because he had not waived privilege.

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Kyrylchuk Estate, Re, 2018 SKQB 132

Leurer, May 1, 2018 (QB17519)

Civil Procedure – Queen's Bench Rules, Rule 7-9(2)(e), Rule 16-46, Rule 16-47

The defendants, the executors of the estate of Michal Kyrylchuk, applied to have the plaintiff's action struck out and dismissed on the ground it is an abuse of process, contrary to Queen's Bench rule 7-9(2)(e). After the death of the testator, letters probate were issued and the plaintiff commenced his action, which challenged the validity of the will and also claimed relief premised on the existence of causes of actions directly against the estate. The plaintiff then determined that the questions regarding the validity of the will could not be determined in the context of the action and brought an application in separate proceedings that sought orders against the defendants that they should show cause why the grant should not be revoked and the will proved in solemn form. The application was dismissed (see: 2017 SKQB 353). The defendants argued that the plaintiff was trying to

relitigate issues already decided against him. The plaintiff agreed that the validity of the will had been established but alleged that there were other issues and relief claimed that were not determined in his earlier application. The plaintiff alleged that he had been promised by the testator that he would leave him his house, home quarter and other land and property upon his death. They had farmed together from 1989 until 2013. HELD: The application was dismissed. The court found that the existence of the second claim would not offend the doctrine of abuse of process by re-litigation because issues raised by the plaintiff were not and could not have been determined in the prior proceeding. The application regarding the validity of the will was made pursuant to Queen's Bench rules 16-46 and rule 16-47, under which the litigant has no right to define the issues tried by the court. The judge hearing the previous application could not have considered any issues relating to other claims the plaintiff made against the estate. The court then struck portions of the statement of claim that related solely to the challenge to the will but, otherwise, the plaintiff was entitled to pursue the claim.

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