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The applicant applied for leave to appeal the decision of a Queen's Bench chambers judge that dismissed her application to add a third party pursuant to The Contributory Negligence Act and to amend her statement of defence pursuant to Queen's Bench rules 3-72(1)(c)(ii) and 3-72(3) (see: 2018 SKQB 80). The applicant had been named a defendant in an action for malicious prosecution. She sought to add the plaintiff's lawyer as a third party on the basis that he had been negligent during the criminal prosecution proceedings with his client. The chambers judge relied upon Chernesky v Armadale in concluding that the applicant as an intentional tortfeasor was not permitted to pursue a claim for contribution or indemnity against the lawyer, an alleged tortfeasor accused of negligence. In addition, the chambers judge opined that the proposed third party claim and amendment to the statement of defence constituted a collateral attack regarding the criminal proceedings, which was an abuse of process. The applicant's proposed grounds of appeal were that the chambers judge erred in law: 1) because he had not given the applicant the opportunity to respond to the collateral attack and abuse of process issues because they were raised for

the first time in the chambers decision; and 2) by relying on Chernesky. If it does apply, it should be reconsidered because its interpretation of the Act is not consistent with modern principles of statutory interpretation. Further, Queen's Bench rule 3-31(c) applied regardless of Chernesky so as to broaden the scope of third party claims to permit adding the plaintiff's lawyer.
HELD: Leave to appeal was granted. The court found that the proposed grounds of appeal raised matters of sufficient merit and importance to warrant granting leave.

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Jardine v Hyggen, 2018 SKCA 38

Richards Caldwell Herauf, May 23, 2018 (CA17149)

Civil Procedure – Court of Appeal Rules, Rule13, Rule 46.1(1)(c), Rule 53(1)

The appellant applied to amend his notice of appeal and the respondent applied to quash the appeal and in the alternative, for an order for security for costs. The appellant had been charged first with assault and causing a disturbance after the respondent alleged that he had been abusive to her during a confrontation between them in the office of the local member of the Legislature where she worked. Following a second incident in which the respondent alleged that the appellant had followed her in a car, he was charged with criminal harassment. The harassment charge was stayed and the appellant was acquitted on the assault and disturbance charges. The appellant then commenced an action against a number of defendants including the respondent. In her case, he alleged that her statements to the police had been defamatory. The defendants successfully brought an application to strike the claim. Regarding the appellant's claim against the respondent, it was struck because it had been brought after the expiry of the applicable limitation period (see: 2017 SKQB 217). However, the judge also determined that in relation to the claim against the respondent there was a credibility issue to be resolved with respect to the assault and disturbance incident and ordered a viva voce hearing to assess the testimony of the relevant witnesses. The chambers judge concluded that the respondent had not been motivated by malice or other improper motive when she contacted the police and dismissed the appellant's claim of defamation against her (see: 2017 SKQB 293). The self-represented appellant appealed the decision, arguing that the chambers judge: failed to properly assess the respondent's

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credibility; had been prejudiced; and failed to consider it in the context of the respondent's criminal harassment allegation. In his application to amend his notice of appeal pursuant to Court of Appeal rule 13, the appellant sought to change the wording to say that he was appealing against the malicious prosecution and/or defamation decision. The respondent's application to quash the appeal was made pursuant to Court of Appeal rule 46.1(1)(c), arguing that it was so lacking in strength as to be manifestly without merit. Her request for security for costs made pursuant to Court of Appeal rule 53(1) was based upon the appellant's poor prospects for success in his appeal and on the ground that she would have trouble recovering any costs ultimately awarded in her favour.
HELD: The appellant's application to amend his notice of appeal was dismissed. The court found that the appellant had not advanced a malicious prosecution claim against the respondent in his statement of claim and therefore the chambers judge had not dealt with this issue in either of his judgments. It would be improper to allow the appellant to raise the claim for the first time on appeal. The respondent's application to quash the appeal was dismissed. Under Court of Appeal rule 46.1(1)(c), the court found that the appellant's first ground of appeal was not clearly destined to fail and the appeal should proceed on that basis but his other grounds did not possess merit. The court dismissed the application for security for costs because the respondent had not shown that the required special circumstances existed in this case.

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Dagenais v Farm Credit Canada, 2018 SKCA 39

Richards Caldwell Herauf, May 25, 2018 (CA17150)

Contract Law – Breach – Damages – Dismissal – Appeal
Civil Procedure – Summary Judgment – Appeal

The self-represented appellant appealed the decision of a Queen's Bench judge that granted an application for summary judgment made by the respondent, Farm Credit Canada. The appellant's daughter and son-in-law were in arrears on their mortgage obligations and the respondent was preparing to take foreclosure proceedings. The appellant paid $325,600 to the respondent in satisfaction of that mortgage debt. He then claimed in an action that he had paid the respondent on trust conditions that it would transfer to him all of its interests as mortgagee and claimed damages. At trial, the evidence

presented by the respondent convinced the judge that no trust conditions had been imposed by the appellant and granted its application for summary judgment (see: 2017 SKQB 229).
HELD: The appeal was dismissed. The trial judge did not err in granting the respondent's application for summary judgment. The appellant mistakenly believed that the respondent owned the lands in question because of the default of the mortgagors.

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Ryan-Froslie, May 24, 2018 (CA17151)

Civil Procedure – Court of Appeal Rules, Rule 71

The prospective appellant applied pursuant to s.9(6) of The Court of Appeal Act, 2000 and Court of Appeal rule 71 to extend the time for service of his notice of appeal from a decision of a Queen's Bench chambers judge rendered on January 10, 2018. The applicant, a PhD student at the University of Saskatchewan, issued a statement of claim against the proposed respondents as well as others claiming damages for what he alleged were wrongful acts grounded in negligence, breach of fiduciary duty and unlawful interference with his economic interests. The respondents were the applicant's supervisors in his PhD program. The appellant alleged that these respondents had variously discouraged him from patenting a discovery, failed to give him credit for a successful research proposal and published his research without giving him credit. The applicant complained to the University and it held an internal hearing, after which a report was issued that found wrongdoing. He then brought his action against the proposed respondents and others. The proposed respondents and the others brought three separate applications to strike portions of the applicant's statement of claim under Queen's Bench rule 7-9 (a) and (e), on the grounds that it disclosed no reasonable cause of action. Although the applications were all heard together, the chambers judge reserved and rendered three separate decisions on December 13, 2017, January 10, 2018 and February 1, 2018. In the January 10 decision, the chambers judge concluded that the applicant's claims against the proposed respondents were purely academic in nature and thus fell within the exclusive purview of the University. The applicant filed and served his notice of appeal of the January 10 decision after the expiry of the appeal period. In support of his application for leave to extend the time for service, the applicant filed an affidavit to which emails between himself

and his legal counsel were exhibited. The emails indicated that the applicant formed an intention to appeal long before the appeal period expired but his legal counsel advised him to wait until the chambers judge had rendered his decisions on all three applications to strike. As a result, the notice of appeal of the January 10th decision was served and filed on March 2, three weeks beyond the appeal period. The respondents argued that lawyer error did not provide a reasonable explanation for delay. HELD: The application was granted and the time for service of the notice of appeal was extended. The court found that in such applications, lawyer error may constitute a reasonable explanation for delay in filing an appeal. The circumstances surrounding the delay in this case were unique. It would have been preferable for the judge to render one judgment and the applicant's counsel erred by advising him to wait for all three judgments before launching an appeal. The evidence satisfied the court that the applicant had formed an intention to appeal before the expiry of the appeal period. The applicant had an arguable case with respect to his claims in negligence and breach of fiduciary duty because the law is unsettled whether the duties owed by a professor to a student fall solely within the jurisdiction of the University. The proposed respondent provided no evidence of actual prejudice caused by the granting of the order. The length of the delay here was relatively short.

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Goertz v The Owners Condominium Plan No. 98SA12401, 2018 SKCA 41

Ottenbreit Whitmore Schwann, May 29, 2018 (CA17152)

Statutes – Interpretation – Condominium Property Act, 1993, Section 41, Section 77

The appellant appealed from the decision of a Queen's Bench chambers judge that determined that the respondent, a condominium corporation, properly suspended the appellant's right to vote at its annual general meeting (AGM) of owners for failure to pay monies owed by him to the respondent and dismissed his application respecting oppressive conduct and other relief sought against the Board of Directors of the respondent (see: 2017 SKQB 135). The appellant owned 10 units in the condominium development and rented all but the one in which he resided. In February 2015, the board passed a resolution requiring each owner to pay a deposit of one month's rent on each unit rented by the owner pursuant to s. 77(1) of The

Condominium Property Act, 1993 (CPA). The board purported to pass the resolution in accordance with a provision of the respondent's bylaws. The deposit was assessed because the respondent had been required to pay a $4,000 insurance deductible because of damage caused to common property after the pipes in a tenant's unit had frozen and cracked. The appellant was notified in March 2015 of the obligation but refused to pay the deposit owed for units. After the respondent made repeated requests to collect the arrears, the board informed the appellant that he would not be allowed to vote at the March 2016 AGM pursuant to s. 41(8) of the CPA. At the AGM, the owners passed various amendments to the bylaw including a definition of the term "contributions". The impasse continued and in October 2016, the respondent commenced a small claims action for the deposits. The board notified the appellant that he would not be permitted to vote at the next AGM unless he paid the deposits. Before the hearing of the small claims action, the appellant commenced his unsuccessful proceeding in the Court of Queen's Bench. He had requested, among other things, a declaration that the definition of "contributions" in the bylaw was ultra vires the statutory definition in the CPA, a declaration that he was not in arrears of contributions and that he would be allowed to attend and vote at AGMs. He also requested an order under s. 99.2 of the CPA prohibiting the board from engaging in oppressive conduct to him. Among the appellant's grounds of appeal were whether the chambers judge erred: 1) by determining that the respondent properly assessed deposits; 2) in his interpretation of the term "contributions" in the CPA and the bylaw; 3) in holding that the respondent could deny the appellant the right to vote at the AGMs; and 4) in failing to find the conduct of the respondent and board was oppressive.
HELD: The appeal was dismissed. The court found with respect to each ground that the chambers judge had not erred: 1) in holding that the respondent had the authority to determine whether a deposit was necessary and to assess one under s. 77(1) of the CPA. The only condition precedent to assessment of a deposit under the legislation was the passage of a bylaw allowing a condominium corporation to do so and the respondent had complied. The court rejected the appellant's position that the board could not assess the deposit because the doctrine of laches applied thereby preventing the board from exercising its statutory rights under s. 77. It held that the equitable doctrine did not apply to the board's exercise of its statutory rights under that section because those rights are legal in nature; 2) in his interpretation of the term "contributions" in the CPA and bylaws. The term as used in s. 41 of the CPA is not restricted to monies payable for the common expenses fund or reserve but can extend to other monies payable to a

condominium corporation with respect to the owner's unit, such as deposits; 3) in holding that the respondent could deny the appellant the right to vote at the AGMs. He correctly determined that the appellant was in arrears of payments of the deposits and therefore in arrears of payment of contributions that grounded his finding the suspension of the appellant's voting right under s. 41(8) of the CPA; and 4) in determining that the conduct of the respondent was not oppressive. The appellant's claim for oppressive conduct was largely based upon the board's interpretation of the CPA and the suspension of his right to vote and the judge's conclusions on those issues meant that he dealt with oppression remedies in a summary way. He did not consider the list of alleged oppressive conduct item-by-item, finding instead that the respondent acted properly. However, the court reviewed the appellant's list of alleged acts of oppressive conduct and found that on the evidence presented to the judge, there had been no conduct that threatened, was oppressive, unfairly prejudicial to the appellant or unfairly disregarded his interests as required by s. 99.2 of the CPA.

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R v Smith, 2018 SKCA 42

Jackson Caldwell Schwann, June 1, 2018 (CA17153)

Criminal Law – Murder – Second Degree Murder – Conviction – Appeal
Evidence – Unsavoury Witnesses – Vetrovec Warning – Charge to Jury

The appellant had been found guilty of second degree murder following a trial before a judge and jury. He appealed on the ground that the trial judge had failed to give the jury a Vetrovec warning regarding the testimony of his former common law spouse (S.S.) and a witness who had been his friend (W.D.) who was the source of the gun used in the shooting of the victim. The appellant's trial counsel had initially identified the need for the judge to issue the warning because W.D. had an interest in the outcome because there were outstanding charges against him and because there was the potential that S.S.would be charged too, she would also have an interest in the case as well. During the pre-charge conference with defence counsel and the Crown, the trial judge noted that in giving the warning to the jury he would also have to convey a summary of the Crown's confirmatory evidence. The defence counsel then withdrew his application. The victim had been a friend of the appellant.

According to S.S.'s testimony, the appellant and the victim had pre-arranged a meeting in an abandoned farmyard. The victim worked as an automated teller machine (ATM) technician and as part of his job, he travelled between ATMs carrying cash. S.S. did not see what happened between the two men but heard two gunshots and then saw the appellant and the victim point guns at each other. She saw the victim on his knees pleading with the appellant and offering money in exchange for his life. The appellant instructed her to collect the money and the victim's cellphone and place them in his truck and while she was doing so, she heard another gunshot and saw the victim lying face down and the appellant standing over him holding a gun. As she and the appellant left the scene, the appellant gave her the victim's gun. The appellant hid the other guns and the money at another farm site and then dumped the victim's cellphone and ammunition in a farm field. Apart from the handguns, none of the other items were ever recovered. The witness remained in a relationship with the appellant for another four years following the crime until November 2013. She was contacted by the police in February 2013 and denied any knowledge of the incident. At trial, S.S. testified that she was afraid of the appellant and he had warned her that as an accomplice, she was as involved as he was. When the RCMP contacted her again in May 2014, she again denied any knowledge but then told the officer what she knew because she felt safer and would receive protection from the appellant. S.S. did not have a criminal record, nor was she charged with any offence arising from this incident. The appellant testified that during the meeting in the farmyard, the victim produced two handguns and they began to test fire the weapons. The victim suggested that they stage a fake robbery. The appellant would rough up his friend and then take the cash from his truck. The victim became quite aggressive after the appellant hit him too hard and began chasing him with one of his guns. S.S. then took one of the guns and shot the victim three times. She took $23,000 in cash from his truck because she had financial problems. The testimony of W.D. was that the appellant had acquired two handguns, a Glock and a .22 calibre handgun, from him, ostensibly on behalf of another friend. Several days later, the appellant returned both handguns and reported that after his friend began to shoot at him with the .22 calibre, he had returned fired and shot him three times. On the appellant's insistence, the witness changed the barrel of the Glock handgun several months later. The police arrested W.D. and charged him with unspecified offences arising from the incident. In the appellant's version, he testified that the victim brought the guns to the meeting and assumed that he acquired them from W.D. He therefore returned them to W.D. after the incident and requested that he change the barrel on the Glock to protect W.D.

HELD: The appeal was dismissed. The court found that the trial judge had not erred by not giving the Vetrovec warning. It was not mandatory for him to do so regardless of the position of the defence counsel. The judge was aware of the need for such a warning in the circumstances and after consulting with the Crown and the defence, he exercised his discretion to decide that he would not instruct the jury. The judge was aware that the defence counsel withdrew his application as a tactical decision to avoid having the judge repeat the Crown's confirmatory evidence to the jury. The judge's exercise of his discretion was entitled to deference.

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R v W.R.T., 2018 SKQB 129

Scherman, April 30, 2018 (QB17517)

Criminal Law - Assault – Sexual Assault
Criminal Law – Evidence – Oath-Helping

The accused was charged with committing a sexual assault contrary to s. 271 of the Criminal Code. The complainant testified that she had gone with two of her friends, who worked for the accused, to a worksite and taken a trailer in which they would sleep. They stopped at a town and met the accused and then spent the evening drinking with him in a bar. Because she was inebriated and felt unwell, the complainant testified, she went to the trailer and fell asleep. Later she was wakened by the accused who had gotten into the bed with her. Although it was dark, she knew it was him because of his size and voice and because he addressed her by a name other than her own, that only he used. The accused inserted his fingers into her vagina and her anus. She managed to escape and ran into the bar where she told her friends that she had been raped. She was sobbing and very upset. The complainant, her friends and the manager of the bar went to the trailer and found the accused lying on his bed asleep with his pants on but with his fly undone. The accused then came outside and denied everything. One of the friends made a recording of the verbal exchange between all of the parties, but faces were not filmed. The complainant could be heard sobbing and the manager's voice clearly indicated that she was impaired. The accused testified that he went to bed in the trailer before the complainant was there and slept through the night. He denied having sexually assaulted the complainant. The manager testified that she had not been drinking that night and that had seen another man in the bar, who had been flirting with

the complainant, leave before the accused. However, the other man's physical build was slight as compared to the accused's size and weight. The defence argued in a voir dire that the recording should not be admitted because the complainant knew that she was being recorded and therefore it could not be viewed as real evidence of her then emotional state or as spontaneous utterances and to admit it would be the equivalent of oath-helping. It was agreed that if it was admissible, the evidence would be adopted as evidence at trial. The issues were whether the Crown had proven: 1) that the complainant was sexually assaulted; and 2) that the accused committed the assault. ;HELD: The accused was found guilty. The court ruled on the voir dire that the evidence of the recording was admissible as real evidence of the emotional state of the complainant at the time of the alleged assault and of the condition of the bar manager. The court found with respect to each issue at trial that: 1) the complainant had been sexually assaulted based upon her spontaneous utterances made to the witnesses in the bar, her demeanour following the event, including what was recorded as well as her later statements given to the police; and 2) it believed the complainant and did not believe the accused. The manager had lied in her testimony that she had not been drinking and her testimony was not credible. Based upon the evidence, the accused lied when he denied that he had been awakened and talked to the witnesses after the assault. The evidence was sufficient to satisfy the court that it was the accused who had assaulted the complainant.

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Loraas v Loraas Disposal Services Ltd., 2018 SKQB 130

Scherman, April 30, 2018 (QB17524)

Injunction – Interlocutory Injunction – Requirements
Statutes – Interpretation – Business Corporations Act, Section 97, Section 115, Section 240

The applicant sought an order pursuant to s. 240 of The Business Corporations Act restraining the respondent from causing Loraas Disposal Services (LDS) from incurring any obligations to make any payment that was out of the ordinary course of the traditional business of LDS or that was in excess of $250,000 or to enter into any lease, sale or purchase of real property without the prior written approval of the applicant. LDS was incorporated in 1967 by the respondent to provide waste management services in Saskatoon. In 1972, LDS expanded into Regina and the plaintiff,

the brother of the respondent, moved to Regina to manage that division. At that time, he became an equal shareholder in LDS and joined his brother as one of its two directors. In 1972 the respondent said that he and the plaintiff agreed that they would each have the authority to manage LDS's business in their respective divisions and that there was no directors' resolution or other documentation of it, but the arrangement was practiced for the following 46 years. The applicant agreed that that had been the arrangement, but that there was no agreement and from time to time there were at least consultations on major matters. He argued that he was entitled to terminate the previous arrangement and had recently expressly terminated it. The plaintiff and the respondent became estranged. Each of them brought applications in the Court of Queen's Bench for an order pursuant to s. 232(1) of the Act granting leave to commence derivative actions on behalf of LDS against each other. The respondent brought an application under s. 207 for liquidation and dissolution of LDS and under s. 234 of the Act for relief of alleged oppressive conduct by the applicant. The applicant agreed that there was irreparable conflict that needed to be resolved. Each of the parties held different views of the appropriate remedy. The application for an injunction was prompted because the respondent had recently entered into a lease of real property from a corporation beneficially owned by his children and had caused LDS to spend $2,000,000 to acquire composting equipment and intended to enter to into a lease arrangement creating an obligation to pay $4,500,000 over five years for the lease of equipment to conduct its landfill operations and composting operations. The applicant had not provided evidence that the expenditures made or intended were improvident or would cause harm to LDS but argued that as a director he was entitled to know the details and to decline or approve the expenditures. The issues were whether the court had jurisdiction to grant an injunction and, if so, how it would do so.

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HELD: The application was dismissed. The court used the tests set out in RJR-MacDonald to establish whether it should grant interim injunctive relief in the circumstances. The court found that it had jurisdiction to make an order under s. 240 of the Act and that s. 115(8) of the Act did not limit the remedies the court could provide to setting aside the respondent's contract with his children's corporation. In both instances the applicant had established that there was a serious issue to be tried regarding whether s. 97 of the Act had been breached and whether the respondent had a material interest in persons who were parties to the contract. However, the court found that the applicant had not demonstrated a meaningful risk of irreparable harm. The respondent's operation of his division of LDS had always been

profitable and since composting is a developing part of waste management, LDS should be developing facilities to protect its share in the market. If the respondent's transactions with his children's corporation might be found to be improper in the future, the applicant had the remedy of having the transactions set aside and claiming for damages.

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Chalupiak & Associates Accounting Services Inc. v Piapot First Nation, 2018 SKQB 131

Brown, April 30, 2018 (QB17518)

Civil Procedure – Queen's Bench Rules, Rule 7-2
Contract Law – Breach of Contract – Non-Payment

The plaintiff accounting company applied for summary judgment against the defendants for amounts invoiced by it to the three entities for accounting services provided to them from 2008 to 2013. It claimed it was owed approximately $182,500. The defendants opposed the application on the basis that a trial was necessary because they disputed various matters such as whether there was an agreement and amounts claimed and argued that the debts were statute-barred. The evidence at the hearing consisted of the affidavits provided by the individual who owned and operated the plaintiff who deposed that the invoices were rendered pursuant to an agreement signed by the Chief and two Band Council members on September 22, 2008 for the provision of accounting services and a retainer agreement signed on November 23, 2011 to provide accounting, audit and consulting services that included a provision for interest to be charged at 18 percent for unpaid invoices. The invoices sent by the applicant to the defendants were submitted. In his affidavit, the current Chief of the defendant Piapot First Nation responded with the objections noted above.
HELD: The application for summary judgment was granted in part. The plaintiff was entitled to partial summary judgment in the amount of $58,800 plus interest where appropriate. The court found that there were some issues that could be determined on the basis of the evidence before it, but other questions such as the enforceability of the debts claimed to be owing and invoices not included in this judgment, including limitation periods, would proceed to trial. After reviewing the 2008 document the court determined that it had been a proposal that was accepted by the Chief and Council and formed a binding agreement. It had not contained a provision for the payment of interest. In light of the

contents of it, the court disallowed some of the applicant's invoices because they had not involved services related to the agreement. Other invoices were disallowed because they pre-dated the agreement or were issued well beyond the timeframe recognized in it. The court found that the 2011 agreement was quite specific and disallowed some of the applicant's invoices as unrelated to its terms. As it contained an interest provision, the applicant was entitled to it for overdue amounts. With respect to the effect of the limitation period, the court held that the defendants had acknowledged the existence of the claim for payment of the debt in writing in August 2013 in accordance with s. 11 of The Limitations Act which saved debts still capable of action that were incurred after August 2011.

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Kohlman Estate, Re, 2018 SKQB 133

Dovell, May 1, 2018 (QB17525)

Wills and Estates – Will – Interpretation

The executors of the estate of their deceased father applied pursuant to Queen's Bench rule 3-31 and s. 3(1(b)(ii) of The Administration of Estates Act for direction in the interpretation of his last will and testament. The testator was a farmer. His wife had predeceased him and at the time of his death he had ten children. Within months of the testator's death, one of his surviving adult children died. The executors had not applied for letters probate because they and their siblings could not agree as to who were the beneficiaries of the estate. One clause in the will stated if a child should die before being entitled to their share in the estate, the share would form part of the residue and be distributed amongst the surviving children. Another clause in the will set out a 15-year term during which time one of the testator's children could purchase the farmland and, in the event he did not, another question arose whether the deceased son's estate or the estates of any other of the testator's children who might die before the expiry of the 15-year period would share in the farmland if sold or not.
HELD: The court interpreted the will in accordance with the known wishes of the testator because it found that the will had been sloppily and poorly drafted. It found that the testator wanted all of his children to benefit and that he wanted the family farm to continue to exist. The deceased child's estate was entitled to its share of the rent for the farmland received by the estate in 2017 and beyond until it was sold or the farmland

distributed. That estate was also entitled to a share of the proceeds of the sale of the farmland if sold and if not, it was entitled to its share of the residue of the estate. In the event of the death of any of the other beneficiaries, their estates were entitled to receive their shares.

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Artistic Masonry & Stucco Ltd. v Whitley, 2018 SKQB 136

Prtichard, May 1, 2018 (QB17522)

Contract Law – Breach of Contract - Nonpayment

The plaintiff sued the defendants for the unpaid balance owing to it under a stuccoing contract with them. The defendants counterclaimed for the cost to repair the faulty workmanship. At the conclusion of the trial, the parties agreed that the sum of $36,400 remained unpaid under the total contract price. Although the plaintiff did not object to the defendants claiming some set-off against the amount owing, it disputed: the extent of the deficiencies in the work performed; the extent of the negligent damage caused by the subcontractor to other portions of the defendants' house; and the amount that the defendants should reasonably be allowed to set off against the balance owing.
HELD: The plaintiff was entitled to $36,400 subject to the proven claims of set-off made by the defendants in the amount of $33,200.

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Polsfut v Sembalerus, 2018 SKQB 137

Rothery, May 1, 2018 (QB17523)

Statutes – Interpretation – The Limitations Act, Section 5, Section 20
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

The defendant, Schroeder's, a towing and salvage company, applied pursuant to Queen's Bench rule 7-1 for an order that the action commenced against it by the plaintiff was barred by

operation of s. 5 of The Limitations Act. In response, the plaintiff applied pursuant to Queen's Bench rule 3-72, rule 3-78 and rule 3-84 to allow amendments to its initial claim against the defendant Sembalerus to add Schroeder's as a defendant and sought leave of the court pursuant to Queen's Bench rule 1-6 to cure the defect of having amended his statement of claim without prior leave of the court. The affidavit evidence filed by both the plaintiff and Schroeder's proved that the plaintiff amended its claim to add the latter as a defendant about two months after the two-year limitation period. The plaintiff sued Sembalerus for breach of contract and conversion in April 2014. They had entered into a contract in 2011 where Sembalerus sold the plaintiff various old vehicles stored on his land. Under the contract the plaintiff was allowed to bring more vehicles on the land but eventually Sembalerus imposed a deadline on the plaintiff to have the scrap metal removed. When the plaintiff missed the deadline, Sembalerus sold the metal. Sembalerus filed a defence alleging the plaintiff had repudiated the contract and counterclaimed for costs allegedly incurred to have the metal crushed and removed from his property by Schroeder's. The work it performed was completed by October 16, 2013. With the consent of Sembalerus' counsel, the plaintiff amended his claim on December 16, 2015 to add Schroeder's as a defendant, alleging that it wrongfully converted his personal property and was jointly liable with Sembalerus for the damages incurred. Schroeder's filed its defence denying conversion and filed against Sembalerus for indemnification. The issue was whether Schroeder's could be added as defendant under s. 20 of the Act. HELD: The plaintiff's application to add Schroeder's as a defendant was dismissed and it was unnecessary then for the court to decide whether the plaintiff's claim was statute-barred by s. 5. The court considered the factors required under s. 20 of the Act and found that in this case, Schroeder's could be added. However, in the exercise of its discretion, the court dismissed the application because the plaintiff had only applied for leave to amend his claim to add Schroeder's after it had applied to have the claim struck, a delay of over two years from the time the plaintiff served its amended claim on it.

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Hailink Dent Removal Inc. v Kindersley Mainline Motor Products Ltd., 2018 SKQB 138

Smith, May 3, 2018 (QB17526)

Contract Law – Breach of Contract – Nonpayment

Civil Procedure – Queen's Bench Rules, Rule 7-2

The plaintiff applied for summary judgment pursuant to Queen's Bench rules 7-2 to 7-5 against the defendant. The defendant, a car dealership, suffered hail damage to 118 vehicles in July 2016 and arranged for and contacted its insurer who in turn engaged a claim adjuster to assess the damage. The adjuster hired an automotive hail repair company to act on behalf of the insurer in preparing estimates. The plaintiff, a hail catastrophe restoration company, contacted the defendant's general manager with a proposal to repair the vehicles using its process known as paintless dent repair (PDR). The process would be faster and less expensive than conventional auto body repair. The manager authorized the plaintiff to start repairing vehicles immediately without making a written contract. After 104 vehicles had been repaired, a dispute arose because the defendant was upset about the prices that the plaintiff was charging its insurer. As a result of the dispute, the plaintiff left the site to work elsewhere. The plaintiff brought its action for payment, maintaining that there was an agreement between the parties as to price and that it was to be paid what the defendant's insurer estimated to be the cost of repair. The defendant argued that there was no agreement and the plaintiff should be paid per quantum meruit.
HELD: The plaintiff was granted summary judgment. The court found that the oral contract was enforceable. Its terms included that the plaintiff would receive payment from the insurer based upon the estimates prepared by the other repair company. The court left the matter of the amount owed to the plaintiff to be dealt with by the parties. If they could not agree, the matter could be returned to the court.

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R v Feshasion, 2018 SKQB 139

McMurtry, May 2, 2018 (QB17527)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purposes of Trafficking - Cocaine
Constitutional Law – Charter of Rights, Section 8

The accused were each charged with possession for the purpose of trafficking, breach of undertaking for failing to abide by a condition prohibiting the possession of a cellphone, breach of undertaking for failing to abide by a condition prohibiting the possession of non-prescription drugs and breach of undertaking for failing to abide by a condition prohibiting the accused from being in a motor vehicle except with the registered owner. They

brought a Charter application alleging that their s. 8 Charter rights had been violated. A voir dire was held. An RCMP officer on patrol on the Trans-Canada Highway stopped the vehicle that the accused Feshashion was driving at 1:30 a.m. because it had exceeded the speed limit. Feshasion appeared nervous, barely opened his window to speak with the officer, and would not make eye contact. The officer informed Feshasion why he had been stopped and asked for his licence and registration. The officer suspected that the vehicle might be carrying drugs because he saw a radar detector in it and it smelled of air freshener. After running checks on police databases, he learned that Feshasion was not the owner of the vehicle and was facing a charge of possession for purpose of trafficking and that he was bound by the condition of being in a vehicle only if the registered owner was present. The officer asked Feshasion whether the registered owner was in the vehicle and he indicated his passenger, the accused Ogbaghergis. The officer obtained his licence and then checked the licence plate and discovered that Ogbaghergis was not the registered owner, was facing the same charges as Feshasion and was bound by the same conditions of release. The officer then arrested Feshasion and Ogbaghergis for breaching their undertakings. After talking with another passenger who seemed nervous, the officer arrested all three for possession for the purpose of trafficking under the Controlled Drugs and Substances Act (CDSA). He read them the police warning and their right to counsel and each of them requested to speak to a lawyer. The officer found cell phones on each of the accused. The officer then searched the vehicle incident to the arrests on the CSDA offence. He found seven cellphones and a bag of cocaine under the driver's seat.
Feshasion argued that the vehicle search was unreasonable because it followed an unlawful arrest or that the search was not truly incident to the arrest. Ogbaghergis submitted the officer's request for his name and the subsequent search of the police databases violated his s. 8 rights.
HELD: The Charter application was dismissed. The court found that the arrest was lawful. The circumstances in this case gave rise to a subjective and objective belief held on reasonable and probable grounds, not that the accused had committed an offence under the CDSA, but that they had both committed the Criminal Code offence of violating their conditions of release. The search was reasonable because it related to the accused's undertaking not to possess cellphones. The officer request for Ogbaghergis' name was to establish whether he was the registered owner of the vehicle. Because of the time of night, the remote location and the officer's safety, it was reasonable for the officer to search for information on the police databases.

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R v Feshasion, 2018 SKQB 141

McMurtry, May 3, 2018 (QB17528)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine

The accused were each charged with possession for the purpose of trafficking, breach of undertaking for failing to abide by a condition prohibiting the possession of a cellphone, breach of undertaking for failing to abide by a condition prohibiting the possession of non-prescription drugs and breach of undertaking for failing to abide by a condition prohibiting the accused from being in a motor vehicle except with the registered owner. The accused Feshasion pled guilty to count four and the accused Ogbaghergis conceded that the Crown had proved count four against him. A voir dire had been held after the accused had brought a Charter application alleging their s. 8 rights had been violated. The facts of the case were related by the judge in her decision (see: 2018 SKQB 139). Although the RCMP officer found a bag containing cocaine in the vehicle occupied by both accused, another passenger in the vehicle testified at trial that it was her cocaine and that neither Feshasion nor Ogbaghergis knew that she had cocaine on her. This witness had pled guilty to a possession for possession for the purpose of trafficking and been sentenced prior to this trial.
HELD: The accused were found not guilty of the first and third counts. The court believed that the testimony of the witness that the accused were not aware that she carried cocaine with her and therefore they could not be in possession of it. With respect to the breach of the undertaking not to possess a cellphone, the court found that each of the accused were guilty of the second count. Both accused were found guilty of count four.

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R v Ahpay, 2018 SKQB 147

Danyliuk, May 11, 2018 (QB17539)

Criminal Law – Murder – Attempted Murder – Sentencing
Criminal Law – Sentencing – Aboriginal Offender

The accused was charged with attempted murder contrary to s. 239(1) of the Criminal Code and 14 counts related to firearms

offences contrary to ss. 95(1)(a) and (b), 109 and 117.01(1), 88, 86 and 90 of the Code. The accused was found guilty of all counts but for two of the firearms charges and one of the remaining firearm charges was stayed (see: 2017 SKQB 352). The accused, a drug addict, a drug dealer and a member of a gang, had taken a loaded sawed-off 12 gauge shotgun with him on the day in question as he intended to sell drugs. As he walked by a house on Saskatoon's west side, he showed off his gun to some men gathered outside a house. These men may have been members of a rival street gang and they pursued the accused and began shooting at him. He returned fire and hit the victim twice. The other men ran off and the accused pursued the victim who abandoned his sawed-off rifle and sought shelter in the backyard of a residence. The accused followed him and shot him at close range in the face. The victim was badly injured but survived. The accused fled the scene, pausing to grab the victim's rifle. He was later found by the police and arrested. The accused was 30 years old at the time he committed the offences. His background was provided by a report prepared by an adjudicator of the accused's compensation claim for having attended a residential school. As a small child, he lived with his parents, both of whom had problems with substance abuse. His father physically abused him. At either age five or seven he was sent to residential school and while there, he was sexually abused by an employee. The accused said the sexual abuse and violation of trust fundamentally altered his existence. He no longer trusted people in authority, didn't pay attention to teachers and was unable to learn right from wrong. The adjudicator accepted that as a result of the sexual abuse, the accused suffered from insomnia, anxiety, fear of being alone, lack of trust, problems with authority figures, difficulty with interpersonal relationships, anger, aggressiveness and significant substance abuse problems. The accused began drinking and using marijuana while in residential school. The author of the Pre-Sentence Report (PSR) noted that the accused said he had experienced racism every day. His employment history was minimal and he estimated that he was fired from the majority of his jobs for substance abuse and resistance to authority. The accused became involved in criminal activities as a youth and committed many offences, most of them involving theft under $5,000 and failures to appear or to comply with court orders. His criminal record as an adult was lengthy. Although robbery and failure to comply with orders remained his common offences, the accused's record showed an increase in more serious and violent crimes. The PSR indicted that the accused was in the 98th percentile of risk to re-offend and posed a high risk to the public. The accused had been in custody since his arrest and his conduct had been exemplary. He had had problems with other inmates that were ascribed to the accused's

efforts to remove himself from gang membership. The Crown took the position that an appropriate sentence before applying the totality principle was 23.5 years, composed of 17 years for the attempted murder and another five and one half years for concurrent sentences for four of the firearms charges. The defence argued that a global sentence would be 15 years, regardless of how the sentence was constructed.
HELD: The accused was sentenced to 17 years' imprisonment in a federal penitentiary reduced to 12 years and nine months when credit at the rate of 1.5 was given for the accused's time on remand of 34 months. The accused's sentence was comprised of: 14 years for attempted murder; two years consecutive for possession of a loaded prohibited firearm; and one year consecutive for possession of a firearm while prohibited. All of the other sentences for firearm offences were assessed as concurrent to all other counts. The court considered the mitigating factors to consist of the accused's: age and upbringing under the Gladue factors; youth, as there was hope that he would turn his life around; remorse that he had expressed for the crimes; and acceptance of responsibility and willingness to accept the consequences and conduct while on remand. The court considered the Gladue factors in deciding that because of the accused's background, his moral blameworthiness was reduced or mitigated. The aggravating factors were the accused's: criminal record and pattern of showing disrespect for the law; use of a firearm while prohibited, especially in a residential neighbourhood; instigation of the incident, his pursuit of the victim and attempt to execute him; gang membership; and being unemployed or not contributing in any way to society. The court denied the Crown's request to make an order under s. 743.6 of the Code regarding the accused's eligibility for parole because it had not been convinced by the Crown that denunciation and deterrence had not been met by the sentence imposed upon the accused.

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Ituna Investments LP v Industrial Alliance Insurance and Financial Services Inc., 2018 SKQB 162

Scherman, May 24, 2018 (QB17549)

Civil Procedure – Queen's Bench Rules, Rule 3-49
Civil Procedure – Pleadings – Originating Application
Contract Law – Interpretation

The three applicant investment companies respectively

commenced proceedings by originating application under Queen's Bench rule 3-49 (1)(d), against the three respondent insurance companies in relation to certain "universal life" insurance policies. The applicants sought declarations that the policy language required the respective insurers to accept "premium" contributions to and withdrawals from policy side accounts where those excess contributions would earn specified and attractive rates of interest. The respondents filed 11 affidavits of more than 5,500 pages of sworn statement and exhibits. The applicants then brought applications to strike out much or all of the affidavits because as the central issue in their originating application was the proper interpretation of the contracts, the evidence proffered in the affidavits was inadmissible. The language of the contracts was unambiguous and therefore extrinsic evidence regarding the purpose and intent of the policies should not be admitted when interpreting the contracts. In addition, the affidavits contained matters beyond the personal knowledge of the affiants, opinion evidence, extrinsic evidence and irrelevant evidence generally. The respondents then applied requesting that the applications to strike be adjourned to the hearing on the merits of the applications. They contended that as well as the affidavit evidence being relevant and admissible, it was also efficient to deal with the applicants' evidentiary objections in conjunction with the hearing on the merits. Amongst their arguments in favour of this position was that there was latent ambiguity in the contracts and an understanding of the factual matrix involved in their making was necessary to their proper interpretation. The judge hearing the merits would be in the best position to know what the operative issues were and would then be able to make relevance and admissibility determinations as a result.
HELD: The respondents' application to adjourn the application to strike evidence filed by them until the hearing on the merits was granted. The court found that the originating application process was appropriate because of the remedy sought. As it did not have the comprehensive understanding of the facts and issues to make proper decisions on what evidence was relevant or not, it would deal with the evidentiary issues during the course of the substantive applications.

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