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The appellants appealed the decision of a Queen's Bench chambers judge that dismissed their application to terminate a preservation order made pursuant to The Enforcement of Money Judgments Act (EMJA) to restrain them from disposing of shares held in a trust and to reduce the number of shares subject to that preservation order. In his judgment, the chambers judge had allowed an application by the respondent, ABank, to be added as a plaintiff in the fraudulent conveyance action brought by the other respondent, Sekerbank (see: 2017 SKQB 205). The background to the present appeal was complicated. The appellant Arslan guaranteed loans owing to Sekerbank in Turkey. Later, he transferred shares in a Canadian corporation into a trust of which the appellant, Al-Katib, was the sole trustee. The Turkish debtors defaulted on their loans and Sekerbank commenced proceedings against Arslan in Turkey. It was in reliance upon that litigation that Sekerbank obtained their first preservation order in 2013. Later in 2013, Sekerbank commenced another action in Saskatchewan alleging that the transfer of the shares into the trust had been a fraudulent conveyance under The Fraudulent Conveyances Act and obtained another preservation order in connection with the action wherein a consent order issued prohibiting the appellants from disposing of some 850,000 shares transferred by Arslan to the trust. In May 2014, the appellants brought

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their application pursuant to s. 8 of the EMJA to terminate the consent order on the basis that Sekerbank had not diligently pursued its claim in Turkey. They appealed the dismissal of that application, and while it was still under appeal, they applied in January 2016 pursuant to s. 8 of the EMJA to terminate the consent order on the ground that Sekerbank had failed to prosecute the fraudulent conveyance action without delay. Alternatively, they sought to reduce the number of shares subject to the preservation order because their value had increased since the order was made. The chambers judge accepted Sekerbank's explanation that the delay was because it had been waiting for the outcome of the Turkish proceedings as it could not succeed in the Saskatchewan claim unless it could prove that Arslan was indebted to it and obliged to pay under the relevant guarantees. The judge found that the number of shares could not be reduced because the rise in their value was not a sufficient change in the circumstances. There was no evidence regarding why share prices had increased or whether the value would be maintained. The parties had recognized when agreeing to the consent order that the share value could fluctuate. In ABank's application, it claimed that Arslan was indebted to it because he was a party to three Turkish general credit agreements as a joint debtor or joint guarantor and was liable to it because the principal debtors defaulted under those agreements. Its application rested on the alleged fraudulent transfer of shares to defeat its claim. The judge granted ABank's application to be added as a plaintiff to Sekerbank's fraudulent conveyance action under s. 20(a) of The Limitations Act (LA) on the basis that ABank's claim arose out of the same transaction as Sekerbank's.

HELD: The appeal was dismissed. The court found that the chambers judge had not erred in finding: that the appellants' conduct in the first proceedings had led Sekerbank to understand that it was appropriate to keep its second action in a holding pattern while it awaited the outcome in the former; that on the evidence, there was no reason to reduce the number of shares under the consent order; and that ABank could be added as a plaintiff under s. 20 of the LA as its claim arose from the same transaction as Sekerbank's. The fact that the judge did not first review Queen's Bench rule 3-84(1) before he turned to s. 20 of the LA had no impact on the bottom line of his decision.

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Harvard Developments Inc. v Park Manor Condominium Corp., 2018 SKCA 81

Richards Herauf Ryan-Froslie, October 22, 2018 (CA18080)

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Property Regulations

The appellants owned a condominium in a building operated by the respondent. The appellant applied, unsuccessfully, to the Court of Queen's Bench pursuant to the oppression remedy in s. 99.2 of The Condominium Property Act, 1993 and pursuant to s. 49(1)(a) of The Condominium Property Regulations, 2001 for an order prohibiting an amendment to the bylaws that changed the manner of calculating condominium fees. The appeal dealt with whether or not the chambers judge erred in his interpretation or application of the provisions. The appellants owned one of the largest units in the condominium complex. The original calculation of the expenses paid by owners was based solely on square footage. The calculation was altered in 2007 to use hybrid unit factors that reflected both square footage and an equal sharing of some of the common expenses. In 2014, the Condominium Board resolved to amend the corporation bylaws to provide a new scheme of apportionment based on unit size. The amendment passed with 75 percent of the unit owners voting in favour of it. Four unit owners, two of whom were the appellants, did not consent. One of the appellants' condominium fees increased by $179.71 per month and the others decreased by $24.64 per month. The chambers judge found that s. 49(5) allowed the appellants to bring the application and the court had broad discretion. The chambers judge concluded that the amendment had been made with the proper procedures, so it could not be interfered with unless the respondent's conduct in amending the bylaw was oppressive, unfairly prejudicial or it unfairly disregarded the interests of the appellants as set out in s. 99.2 of the Act. The chambers judge used a two-step test for oppression. The chambers judge did not find that the respondent's conduct was oppressive, or unfairly prejudicial, or that they unfairly disregarded the appellants' interests. The issues on appeal were: 1) whether the chambers judge erred in his application of s. 99.2 of the Act; and 2) whether the chambers judge applied the proper test with respect to s. 49 of the Regulations. HELD: The chambers judge did err in his application of s. 99.2, but the error did not affect the overall correctness of his decision. The appeal was dismissed. The court did not allow the appellants to make a new argument that had not been made in the chambers application. The issues were determined as follows: 1) the chambers judge did not err in his description of the test for oppression and the principles surrounding its application. The question then to be determined was whether the chambers judge correctly applied the law to the factual context before him. The onus was on the appellants to establish the basis for granting the oppression remedy. The appellants indicated that their reasonable expectation was that the unit factors or apportionment scheme would not change fundamentally. The chambers judge determined that was not a reasonable expectation because the Act and Regulations provide for amending unit factors. The appeal court found that the chambers judge incorrectly limited his analysis to the legislation when the question was whether the

appellants had a reasonable expectation that the scheme of apportionment would not change fundamentally. There was, however, not found to be any evidence to support what the appellants said was their reasonable expectation. The appellants also did not provide evidence that the new scheme was unfairly prejudicial to them; and 2) section 49 was found to provide a remedy separate and apart from s. 99.2.To be successful on a s. 99.2 application, the test for oppression must be met. To be successful on an application pursuant to s. 49, it must be shown that the apportionment scheme is not fair and equitable. An oppression remedy may qualify as a ground for objecting to a scheme of apportionment, however, a scheme of apportionment may be unfair and inequitable without meeting the test for oppression. The appeal court concluded that it did not matter whether the chambers judge approached the issue using the test for oppression or under s. 49. The appellants did not show how the unit factors had been calculated or what expenses under the new scheme were being unfairly attributed to them. Costs were assessed against the appellants in the usual way even though the respondent requested solicitor-client costs.

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R v McKenzie, 2018 SKPC 53

MacKenzie, September 6, 2018 (PC18053)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Controlled Drugs and Substances Act – Trafficking Cocaine
Criminal Law – Sentencing – Pre-Sentence Report
Criminal Law – Sentencing – Sentencing Principles

The accused pled guilty to one count of trafficking cocaine, contrary to s. 5(1) of the Controlled Drugs and Substances Act. Gladue factors were canvassed in the pre-sentence report. The court also ordered a supplementary report looking into rehabilitative options. At the time of the incident, the accused was addicted to cocaine. She had an arrangement with her cocaine dealer to receive one gram of cocaine for each two grams she sold for him. The accused was arrested shortly after the arrangement began. The accused sold two undercover officers a total of 3.6 grams on two occasions. The Crown sought 12 months in jail followed by two years of supervised probation. The accused wanted a 90-day intermittent jail sentence followed by one year of supervised probation. The accused was a status member of an Indian band. Her parents were caring parents who had been gainfully employed throughout her youth. They had separated before she was born. The accused was exposed to drinking and marijuana use at her mother's home; the accused's mother had a drinking problem. The accused

abstained from drugs for a short period of time following her arrest. She then began doing cocaine again until September 2017, when she attended the treatment centre. The accused abstained from the use of drugs since being released from the centre. The accused was released on conditions shortly after her arrest, which was on June 16, 2017. HELD: The court considered the accused's time on bail to be a minor mitigating factor. The court also considered the Gladue factors, specifically that the accused's mother and her mother's parents were residential school survivors. The accused attributed her mother's ongoing drinking problems partially to her residential school experience. The accused was also sexually abused by a stepbrother. The court recognized the direct connection between the residential school experience and the accused's difficulties with her mother. The offence was motivated by an addiction. The factors mentioned were found to bear directly on the accused's culpability. The accused did not have a criminal record. There were many mitigating and aggravating factors considered by the court. The court concluded that it could depart from the sentencing range of 18 months to four years for trafficking in cocaine for a number of reasons. One reason is attendance at drug treatment court, which was not available at this court location. The accused did, however, complete an inpatient course of treatment and maintained sobriety. The court determined that there were a range of possible services available to the accused in the community as compared to the correctional centre. The court was concerned that the risk to public safety and the accused's risk of relapse would be increased if the accused was sentenced to incarceration of a year or more. The court rejected a purely community-based disposition because it was essential that drug trafficking be denounced and deterred. The court imposed a sentence of 90 days in custody, served intermittently, which was found to adequately denounce the crime. The custody portion of the sentence was followed by two years of probation. The first five months of probation were on very strict conditions, such as a 24-hour curfew. A mandatory firearm prohibition was ordered. The court did not make a DNA order.

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R v Paskimin, 2018 SKPC 54

Scott, September 19, 2018 (PC18040)

Criminal Law – Assault – Assault Causing Bodily Harm
Criminal Law – Procedure – Mistrial
Constitutional Law – Charter of Rights, Section 7, Section 11

The accused was charged with committing an assault causing bodily harm contrary to s. 267(b) of the Code. The accused and the

complainant were in a spousal relationship at the time of the alleged offence. The complainant testified at trial in July 2017 and was examined and cross-examined. She said that she and the accused had been drinking and began arguing. After she informed the accused that she was going to leave him, the accused grabbed her by the throat. She ran outside and the accused pursued her, punching her in the face and biting her. He dragged her by wrists and by her hair as she tried to resist him. Another witness testified that she saw this portion of the attack and called the police. The complainant eventually escaped from the accused because her aunt arrived at the accused's apartment. The aunt testified that the complainant had bruises and bite marks on her body and she called the police. Before her testimony at trial, the complainant gave a statement to the police which was recorded and then made a written statement. The trial was adjourned to September 2017, but it did not proceed because the complainant went to the courthouse to tell the judge that she had lied when she testified in July. As she was not supposed to be at the trial at that time, she was removed from the courthouse by the police and then arrested because there were outstanding warrants against her. The court was informed that an issue had arisen with respect to the complainant and the trial was adjourned to February 2018 to allow the Crown to investigate. The accused had dismissed his first lawyer during the July portion of the trial and in November 2017, his new counsel obtained permission to withdraw. His next counsel was appointed and she and the Crown sought a further adjournment of the trial in February because the investigation had not been completed and because the defence counsel had just learned of the issue with the complainant. The court initially denied the adjournment but then granted it to May 2018 and directed the Crown to provide disclosure to the defence and to make the complainant available when the trial resumed. In May, the defence filed an application for a mistrial and a Charter notice under ss. 7, 11(b) and 11(d). The Crown had not provided disclosure until late April and the defence was not ready to proceed. The court declined to grant a mistrial, adjourned the trial to July 2018 and directed the Crown to have the complainant present to allow the defence to cross-examine her regarding her potential recantation and the reasons for it. When the trial resumed, the complainant said that she had wanted to recant because she was under pressure from the accused and his family to do so. Her fear of the proceedings was worsened because her children had been apprehended. The issues were whether: 1) the accused's Charter rights had been violated so that a stay of proceedings was warranted. The accused alleged abuse of process, lack of a fair trial and unreasonable delay; 2) a mistrial should be declared; and 3) the Crown had proven beyond a reasonable doubt that the accused had committed the offence. HELD: The accused was found guilty. The court found with respect to the issues that: 1) the accused's Charter rights had not been breached. There had not been an abuse of process. The complainant had not been arrested to intimidate her. Her cross-examination by the defence when

she was recalled in July remedied any prejudice that may have been occasioned by her attempt to recant. The length of time it took the Crown to investigate did not undermine the judicial process and its late disclosure of the complainant's attempt to recant had been remedied by the adjournments. The accused's right to a fair trial was not prejudiced because the defence was not allowed to cross-examine the complainant on all matters when she was recalled in July 2018 as she had been cross-examined by his counsel when she testified in July 2017 and there was no suggestion that his conduct of the cross-examination was incompetent. After reviewing the history of the trial in accordance with R v Jordan, the court found that the delay was below the presumptive ceiling and not unreasonable. This was not a clear case where a stay should be granted; 2) it was not appropriate to declare a mistrial. Due to the complainant's attempt to recant, the Crown had to investigate and the adjournments permitted for that investigation, as well as for disclosure to be provided and for the defence to prepare for trial; and 3) it did not believe the accused's testimony. It did not accept his explanation that he held the complainant's wrists and her hair as defensive actions and accepted the testimony of the independent witness. His denial that he had punched or bitten the complainant was refuted by the photographic evidence of the complainant's injuries and the testimony of her aunt.

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R v Zoller, 2018 SKPC 55

Baniak, October 2, 2018 (PC18044)

Criminal Law – Motor Vehicles Offences – Impaired Driving – Refusal to Provide Breath Sample
Constitutional Law – Charter of Rights, Section 8, Section 9, Section 10(b)

The accused was charged with impaired driving contrary to ss. 255(1) and 253(1)(a) of the Criminal Code and with failing to comply with a breath demand pursuant to s. 254(3)(a) of the Code and to provide samples for analysis contrary to s. 254(5) of the Code. The accused and his girlfriend were found by the police after the accused's truck had hit a tree. No one was behind the wheel of the vehicle. The accused said that he was the driver, but his girlfriend had caused the accident by grabbing the wheel. One officer asked the accused what had happened and the accused said that he wouldn't speak to him. Another officer went to look inside the truck and the accused followed him and said that he couldn't look at it. The other officer grabbed the accused and handcuffed him. As he could smell alcohol coming from the accused, he advised him he was being arrested for being intoxicated in a public

place. He read him the breath demand and his right to counsel and warnings. When asked if he understood, the accused did not respond. He refused to provide an ASD sample and then was transported to the police station to obtain a breath sample. He did not respond when asked again if he wanted to call a lawyer. The breath technician testified that the accused did not respond to her questions as to whether he understood the breath demand or whether he would provide a sample. The defence brought a Charter application alleging that the accused's ss. 7, 8 and 9 rights had been violated. He testified at the voir dire that he had had two drinks but was not affected by them. He admitted to being the driver and to telling the police not to look in his vehicle. He said that he was advised of his right to counsel but felt threatened by the police and by not answering, he was exercising his right to remain silent. The defence argued that the police did not know who was driving when they arrived, and the accused gave his statement because he believed that he was legally obliged to do so and that as statutorily-compelled statements are inadmissible, the accused's statement that he was driving was inadmissible. The police had no grounds to believe that the accused was driving so any detention or search of the accused breached his ss. 8 and 9 Charter rights. The officer did not have reasonable grounds to make a breath demand and since the demand was invalid, the accused had the right to refuse it. He was not advised of his right to counsel prior to being questioned, which violated his s. 10(b) rights.

HELD: The Charter application was dismissed. The court found that the accused could not rely on the "use immunity" defence in light of the fact that he later refused to answer any questions. He had not established on a balance of probabilities that his statement was compelled and entitled to such defence. The accused was therefore not arbitrarily detained and thus s. 9 was not breached, and consequently neither were ss. 7 or 8. The officer had reasonable grounds under s. 254(3) of the Code to make a breath demand based upon his observations that the accused was intoxicated which were objectively verifiable and would allow for the ASD demand. The accused's s. 10(b) rights were not violated because the accused was informed of his right to counsel but he would not indicate whether he understood and thus did not invoke his right to counsel.

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R v Kahnapace, 2018 SKPC 58

Hinds, October 9, 2018 (PC18054)

Criminal Law – Cross-examination on Statement
Criminal Law – Evidence – Circumstantial Evidence
Criminal Law – Evidence – Identification

Criminal Law – Evidence – Video Surveillance
Criminal Law – Identity

The accused was charged with four Criminal Code offences: 1) assault with a weapon, contrary to s. 267(a); 2) using a firearm while committing the indictable offence of assault with a weapon, contrary to s. 85(1)(a); 3) possessing ammunition while prohibited from doing so, contrary to s. 117.01(1); and 4) breach of an undertaking by failing to keep the peace and be of good behaviour, contrary to s. 145(3). The Crown argued that the accused was the person that took a shotgun out of a vehicle parked outside of a restaurant and, after pointing it at the victim, discharged it. The accused argued that the Crown did not meet the standard of proof on identity. The Crown asserted that they presented three forms of direct evidence establishing identity: 1) video surveillance recordings from the restaurant; 2) identification by the victim; and 3) identification by the accused's friend. The Crown also relied on circumstantial evidence consisting of: clothing; DNA from a sweater; a spent shotgun cartridge seized from the parking lot of the restaurant and two shotgun shells from the pant pocket of the accused; and the left thumb print of the accused lifted from the vehicle mirror. HELD: The court determined that the Crown proved the identity of the accused beyond a reasonable doubt and he was thus found guilty of all charges before the court. The leading authority on video surveillance evidence indicates that the video can be admitted at trial as an "objective silent witness" if the video is of good quality and gives a clear picture of the events and the perpetrator. The video surveillance was found to be of sufficient quality and clarity, showing the accused for a sufficient amount of time to allow the court to conclude that identification of the accused had been proven beyond a reasonable doubt. The court was cognizant of the inherent dangers in convicting on eyewitness identification alone. The victim had been drinking quite a bit, and that could have affected his observations and recollection. He also did not know the accused and had relatively short encounters with him. The court was also concerned because the accused was the only Aboriginal person in the courtroom when the victim identified him as being the perpetrator of the offences. The victim was also advised by the police that "they got the man". The eyewitness identification was found to be weak. The accused's friend's testimony had significant inconsistencies when compared to her recorded statement given to the police. The court allowed the Crown to cross-examine the accused's friend on her recorded statement. In the statement, the accused's friend admits that she was at the restaurant with the accused on the night of the offences. She also indicates that the accused and a guy had words and she saw the shotgun go off in the parking lot. The court concluded that the evidence was equivocal and not enough to establish the identity of the accused. The shoes and ball cap were exact matches with the clothing worn by the perpetrator in the video. The sweater with the accused's DNA was not found to be an exact match with the sweater worn by the perpetrator in the video. The shotgun shells appeared to be

an exact match and were connected to the accused. The court was also satisfied that the vehicle seized by police that had the accused's thumb print was the same vehicle used in the altercation at the restaurant. The cumulative effect of all the evidence as a whole was found to prove beyond a reasonable doubt that the accused was the perpetrator of the offences.

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M.R.L.P. v Canada (Attorney General), 2018 SKQB 248

Currie, September 19, 2018 (QB18242)

Civil Procedure – Affidavits – Admissibility
Civil Procedure – Class Action
Civil Procedure – Class Action – Disclosure – Pre-certification
Civil Procedure – Queen's Bench Rule, Section 6-13 – Cross-examination of Affidavits
Civil Procedure – Queen's Bench Rule, Section 13-30
Class Action – Procedure

The proposed representative plaintiffs (plaintiffs) filed affidavits in support of their class action alleging that the defendants participated in a practice of sterilizing Aboriginal women without their proper or informed consent. The affidavits were filed in anticipation of the hearing of their application for certification of the action. The defendants applied for orders permitting them to cross-examine the plaintiffs on their affidavits. The plaintiffs consented to the orders with restrictions, which were opposed by the defendants. The defendants also applied for an order requiring production of specified medical records of the plaintiffs and an order requiring the plaintiffs' counsel to disclose the name of potential class members so that medical records could be preserved. The defendants objected to the contents of one the affidavits, arguing that it breached provisions of Rule 13-30 of The Queen's Bench Rules. The issues were: 1) the objections to the affidavits; 2) the cross-examination on the affidavits with sub-issues: a) the availability of an order for cross-examination; b) the proposed protocol for the cross-examination; c) the need for a protocol; d) circumstances of the plaintiffs; and e) conclusion as to implementation of restrictions on cross-examination; 3) production of medical records; and 4) the disclosure of potential class member names.
HELD: The issues were determined as follows: 1) the court did not strike the portion of the affidavit wherein the affiant was relating her personal experience and personal reaction to that experience. Portions of the affidavit that were not properly presented as being based on information and belief were struck, as was information regarding disclosure of "without prejudice" discussions. Any portions of the affidavit found to be opinion and argument were struck; 2)a) to be

ordered, it must be established that the cross-examination will assist the court in determining whether the criteria for certification under s. 6(1) of The Class Actions Act were met. The plaintiffs have consented to the cross-examination; b) the proposed plaintiffs' counsel provided a proposed protocol for the court's consideration; c) the proposed protocol was based on the Indian Residential School Independent Assessment Process that was developed to determine entitlement and damages outside of the court process. Here, the court process already exists. The court adopted principles of cross-examination for use on an application for certification of a class action from an Ontario case. The plaintiffs' proposed protocol was not used; d) the plaintiffs argued that their proposed protocol was necessary because they are Indigenous women who were victims of forced sterilization. The court found that the established law and procedure would provide the necessary guidance and therefore, the existing framework of laws and rules would not be departed from; e) the cross-examination was ordered to be conducted in the context of the Rules, practice and any arrangements that the parties agreed on; 3) the court concluded that the certification inquiry would be assisted by the production of the information sought by the defendant; and 4) the defendants indicated that they had no way of determining which women who had tubal ligations were Aboriginal. The plaintiff's description of the proposed class also did not include a limitation in time. The plaintiffs indicated that there were approximately 50 possible class members. It was estimated that there were approximately 10,000 tubal ligations performed, so unless the possible class members were identified, the defendants would have to preserve the information for all 10,000 women. The court did not grant the order requiring identification of potential class members because of the privacy concerns of people who had not yet stepped forward to participate in the litigation.

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Peter Ballantyne First Nation v Canada (Attorney General), 2018 SKQB 250

Smith, September 19, 2018 (QB18243)

Civil Procedure – Parties – Adding Parties
Civil Procedure – Pleadings – Application to Amend
Civil Procedure – Queen's Bench Rule 3-72 – Application to Amend Pleading

The plaintiff, a Cree Nation, sued the defendant for depriving it of the use of land set aside for its people because of flooding concerns in the late 1920s and 1930s. The claim was struck by the Court of Queen's Bench due to it being statute-barred. On appeal, the Queen's Bench

decision was upheld except in relation to the tort of continuing trespass. The defendants applied to add a defendant by way of third-party claim. They also sought leave to amend their statements of defence to assert that a portion of the lands were not reserve land and to include a request for an order of possession for portions of land that were subject to flooding. One defendant also sought amendments related to riparian rights and consent to trespass. The proposed third party consented to all of the applications except to the amendment asserting that a portion of the land was not reserve land. They indicated that that amendment would be a frivolous argument.
HELD: The defendants may be issue estopped from raising the question of whether the land was set aside as reserve land, but the final determination on that matter would be made in future court proceedings. The defendants had reserved the right to raise the issue long before the application to strike the claim based on it being statute-barred. It was not plain and obvious to the court that if the pleadings were amended they would raise no reasonable defence. A defendant did provide some evidence that the lands were not reserve land at the time in question. The court concluded that it was appropriate to allow the amendment to include the argument that the land may not be reserve land so that the issue could be thoroughly canvassed by the parties and the court. The proposed amendments to the statements of defence were allowed.

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Royal Bank of Canada v Hillbom, 2018 SKQB 251

Goebel, September 20, 2018 (QB18246)

Debtor and Creditor – Priority
Family Law – Child Support – Enforcement
Land Titles Act – Interest Registration – Maintenance Order
Statutes – Interpretation – Enforcement of Money Judgments Act
Statutes – Interpretation – Enforcement of Maintenance Orders Act
Statutes – Interpretation – Land Titles Act, 2000

The defendants' recreational property was sold pursuant to an order confirming sale. After the payment of costs there was a surplus in the amount of $54,000. The order confirming the sale provided that the remaining monies be paid into court and applied as directed by the court. The defendants were in a spousal relationship but had separated prior to the sale. The defendant wife had registered an order against the title of the property in July 2016 noting the value of the interest at the time to be $46,975.13. The amount represented unpaid child and spousal support. As of March 2018, the amount owing from the husband to the wife was $96,000, so she sought payment of the surplus to her. The husband said the amount payable was inappropriate due to

a decrease in his income over the last four years. He wanted the surplus to be applied to family debt. The plaintiff bank also sought payment of the money indicating that it had two default judgments against the defendants: one for $15,783.33 against both defendants and the other for $62,596.65 against the husband. Neither judgment was registered against the property, but they were registered with the judgment registry pursuant to The Enforcement of Money Judgments Act (EMJA). In March 2018, the plaintiff served two notices of seizure on the court pursuant to the EMJA seeking to attach money payable to the husband totaling $80,596.39 and a second one totaling $15,783.33 attaching money payable to the wife. The plaintiff conceded that the maintenance order had priority over the unsecured judgment, but argued that the jointly-held judgment should be paid in priority because the wife should not receive the benefit of the funds when she had judgment outstanding against her. The issues were: 1) a determination of the legislation that applied to the distribution of the net proceeds of the judicial sale; 2) determining the competing interests, and where they stood in priority to one another; 3) the value of the maintenance order priority if it had priority over the default judgments; and 4) whether the notices of seizure attached to the remaining proceeds.

HELD: The court determined the issues as follows: 1) the three relevant pieces of legislation were The Land Titles Act, 2000 (LTA); The Enforcement of Maintenance Orders Act, 1997 (EMOA); and the EMJA; 2) the property was owned jointly so each defendant was prima facie entitled to one-half of the surplus. The maintenance order was registered pursuant to s. 45(2) of the EMOA and it was validly registered pursuant to the LTA. Pursuant to s. 45(4) of the EMOA, the maintenance order had the same priority as a registered interest based on a mortgage. The notices of seizure could only attach to any residue after the registered interest, the maintenance order, had been satisfied; 3) the husband's argument that the child and spousal maintenance were too high had no relevance. They were only relevant to the family law dispute. The plaintiff argued that pursuant to ss. 15.1(2) and 44(8) of the EMOA, the value of the wife's priority was capped at one year of maintenance arrears. The court did not accept that position. The one-year qualification did not apply to the maintenance order because it was not present in the relevant section, s. 45 of the EMOA. The section elevated the registration of the maintenance order to the same level of priority as a registered mortgage. A one-year limitation was also not consistent with the intent of the legislation. The maintenance order could attach but only to the husband's one-half share of the net proceeds. The wife was entitled to the entire share of net proceeds payable to the husband; and 4) the remaining money was the wife's one-half share. The notice of seizure was found to properly attach to the proceeds payable to the wife. The joint indebtedness in the sum of $15,783.33 plus interest was ordered to be paid to the Sheriff to be paid on the joint debt. The remainder after paying the joint debt was to be released to the wife.

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Chilly's Water and Septic Inc. v Saskatchewan (Government), 2018 SKQB 254

Chicoine, September 24, 2018 (QB18247)

Civil Procedure – Amendment to Statement of Claim
Civil Procedure – Application to Strike Statement of Claim – No Reasonable Cause of Action
Civil Procedure – Application to Strike Statement of Claim – Statutorily Barred
Civil Procedure – Queen's Bench Rule 3-72
Statutes – Interpretation – Highway Traffic Act
Statutes – Interpretation – Environmental Management and Protection Act

The plaintiff owned land that it operated its business from. Adjacent to the land was the defendant government's land, where it stored road salt, oil and asphalt material. The plaintiff alleged that the government spilled the materials, called pollutants by the plaintiff, causing them to migrate onto its land and interfering with its ability to use the land. The plaintiff alleged that it could not use or consume well water from the land. The plaintiff's original claim included claims of the tort of nuisance, breach of duty of care, and a claim that the government had a statutory duty to avoid causing environmental contamination pursuant to s. 8(1) of The Environmental Management and Protection Act (EMPA). The plaintiff claimed that allowing the pollutants to be discharged into the soil on the government and plaintiff lands was a breach of statutory duty. In its statement of defence, the government denied that the material penetrated the soil or migrated onto the plaintiff's land. The government also pleaded, pursuant to s. 52 of The Highway Traffic Act (HTA), that it was using the lands to further the duty under s. 9 of the HTA to keep public highways reasonably safe. Because their employees acted in good faith, the government said that s. 52 of the HTA was a complete bar to the plaintiff's claim. The plaintiff already amended its statement of claim once by consent to correct inconsequential errors. The government would not consent to any further amendments of the statement of claim, so the plaintiff had to obtain leave to do so. The government applied for an order to strike the statement of claim because the claim was barred by s. 52 of the HTA and also because the EMPA does not create a civil cause of action, and if it did, the breach of a statute is not a tort known to law. The plaintiff applied for leave to amend its statement of claim to introduce an element of bad faith, which was essential to avoid the repercussions of s. 52 of the HTA. Further, it wanted to plead a claim of strict liability pursuant to the rule in Rylands v. Fletcher. The issues were: 1) whether

the proposed amendments to the statement of claim were necessary to determine the real questions in issue between the parties and whether they could be allowed without injustice to the government; and 2) whether the statement of claim should be struck for either disclosing no reasonable claim or because it was statutorily barred.
HELD: The issues were determined as follows: 1) the test to establish a prima facie meritorious claim is not a strenuous one. The court also considers whether the proposed amendments would result in prejudice that cannot be compensated for by costs or by an adjournment. Courts generally allow amendments where it is necessary to determine the issues between the parties and when it can be done without injustice to the other side. The court concluded that the amendment to include a claim of strict liability was allowable because a prima facie meritorious claim was disclosed. The amendment regarding the bad faith of the Government employees was also allowable as was the amendment alleging that the activities of the Ministry or its agents or employees were reckless and careless and inconsistent with the EMPA or failed to meet the standard expected of the HTA. There was no suggestion that the proposed amendments would result in prejudice to the government that could not be compensated for by costs; and 2) the court concluded that, with the proposed amendments to the statement of claim that were allowed, it did plead sufficient material facts to engage the question of bad faith. The government's application to strike the statement of claim on the grounds that it did not disclose a reasonable claim, or it was statutorily barred, was dismissed. Costs were ordered to be in the cause.

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Meyers v Meyers, 2018 SKQB 255

Popescul, September 24, 2018 (QB18248)

Family Law – Division of Property – Vesting Order
Real Property – Land Titles Act

The applicant applied to have a number of parcels of farmland currently registered in the name of F. vest in the name of D. F. is D.'s father and the applicant and D. were spouses, but then divorced. D. purchased the land pursuant to an agreement for sale and all payments had been made, but the title had not been transferred to his name. The divorce judgment of the applicant and D. had a term requiring the farmland be transferred to D. and then listed for sale. Another term included in the divorce judgment indicated that the applicant or D. could apply for an order vesting titles of the farmland to D. if the vendor did not sign the transfer authorization within 30 days.
HELD: The court canvassed the criteria for exercising its discretionary

authority and granted the vesting order. The criteria were discussed as follows: 1) the facts were not in dispute; 2) there was no question that the applicant had a right to the vesting order; and 3) F. was not executing the transfer authorization, so there was no other available or reasonably convenient remedy or procedure for granting the applicant the sought relief.

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R v Aw Dahir, 2018 SKQB 256

MacMillan-Brown, September 25, 2018 (QB18249)

Criminal Law – Bail – Bail Review
Criminal Law – Cash Bail – Application to Estreat
Criminal Law – Forfeiture
Criminal Law – Release of Accused – Sureties

The Crown applied pursuant to ss. 770 and 771 for an order estreating the $10,000 bail deposited on the accused's behalf by his parents. The Crown argued that the bail should be estreated because the accused breached the terms of his release. The accused was charged with offences on two informations, all alleged to have occurred on June 4, 2016. The first information charged the accused with sexual assault and 15 weapons-related offences and the second information charged the accused with two drug offences. The accused's release was denied at the show cause hearing in Provincial Court. A court review of the bail denial concluded that the accused could be released pending trial subject to compliance with certain conditions, including the deposit of the cash bail. The accused's parents also signed an Undertaking to report the accused to the Bail Supervisor if they observed him doing certain things. When the cash bail was deposited with the court by the accused's mother he assigned the cash bail back to his parents. The accused was released on a Recognizance. The accused absconded from Saskatchewan and was stopped by police in Alberta. He was charged with failing to comply with the electronic monitoring provisions of the Recognizance, obstructing a peace officer, failing to comply with a breath demand, failing to comply with the conditions of the Recognizance, and possession of cocaine. He pled guilty to the obstruction charge, the failing to comply charge, and the possession of cocaine charge. With respect to the Saskatchewan charges, the accused was convicted of possession of methamphetamine for the purpose of trafficking and other charges. He received a global sentence of seven years' incarceration minus remand credit. He also pled guilty to failing to comply with the electronic monitoring condition of his Recognizance and was sentenced to one month of incarceration, which formed part of the global sentence. The Provincial Court Judge certified that the

accused had not complied with the conditions of his release pursuant to a certificate of default. The names and addresses of the principal and sureties were left blank in the certificate. The issues were: 1) whether the accused's parents were sureties; 2) if the accused's parents were sureties, was the fact that they were not named on the certificate of default fatal to the Crown's application; and 3) if the Crown's application was not a nullity, how much of the cash bail should be forfeited to the Crown?
HELD: The court ordered that $8,500 be forfeited to the Crown and the remaining $1,500 be paid to the accused's parents. The court determined the issues as follows: 1) the Crown argued that the only time that a court will order both a surety and a deposit of money is if the accused is not ordinarily resident in the province in which he is in custody or he does not live within 200 kilometres of the place that he is in custody. The court concluded that the accused's parents were not sureties from a statutory perspective as well as from a factual point of view. The court found that the fact that the accused assigned the cash deposit suggested that the money was a cash deposit made by the accused's parents as opposed to being made by the parents in the role of surety; 2) even if the parents were sureties, the failure to have them named in the certificate would not have been fatal to the Crown's application. The reason for naming sureties on the certificate is so that they have notice of the default. The parents were served with the Crown's application; therefore, even if they were sureties, they were aware of the application and had the opportunity to attend and make submissions; 3) the onus was on the accused to persuade the court that the cash bail should not be forfeited. The accused's parents' conduct in ensuring the accused's compliance was not a factor for the court because they were not sureties. The conduct of the accused had to be considered to determine whether any of the cash bail should be forfeited. The court found that the accused's breach was deliberate and serious.

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Sherwood (Rural Municipality No. 159) v Delarue, 2018 SKQB 257

Leurer, September 25, 2018 (QB18244)

Expropriation – Valuation
Municipal Law – Expropriation – Compensation
Real Property – Expropriation

The plaintiff, a Rural Municipality (RM), deposited a plan pursuant to s. 4 of The Municipal Expropriation Act (MEA) to take 4.13 acres from the defendant. The expropriated land was necessary for the RM to construct a new road bridge over a creek on the land. The RM argued

that the land should be valued at $3,300 per acre based on its agricultural use, whereas the defendant argued it was worth $56,000 because, based on its location, it could be developed into a rural residential acreage. Both parties obtained their figures with the assistance of expert appraisers. The land was located approximately three miles west of Regina city limits and it had access to gas, power, and community water. It had a creek running through it. The land was zoned as AG-1 (Agricultural District), which allowed a maximum of two residences per quarter section. The land would have to be rezoned to AG-2 to develop more than two residences on the quarter section. The land was in an Environmentally Sensitive Area (ESA), which could require additional information before the RM would allow development on the land. A 2014 official community plan (OCP) of the RM suggested it would support expanding residential development within the RM.

HELD: The court agreed that the defendant should be compensated on the basis that the highest and best use of the land was as a residential acreage. It was not only foreseeable, but almost certain that if the expropriated land was not taken by the RM, rezoning would have occurred. The expropriated land was the most desirable portion of the quarter section. The OCP was not binding on the RM: no development could be carried out contrary to a zoning bylaw. The court concluded that the future possible use of the land could be considered. The court indicated that the defendant could still create the same number of residential acreages from his land as before the expropriation. Also, moving the road provided some previously landlocked land with access to the road. The total frontage along the road did not decrease, but there was slightly more frontage. The formula outlined in s. 9 of the MEA requires the court to determine the value of the land and improvements taken and add the value of any damage to the remaining land. Any increased value of remaining land was to be deducted from the first figure. The value of the expropriated land was found to be $230,000 and there was no damage to remaining land. The value of the remaining land was found to have increased by $180,000 due to the relocation of the road. The RM must pay the difference of $50,000 plus interest. The RM was ordered to pay the defendant's taxable costs, including the fees of the appraiser for the report and testimony.

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Farnell v Brendle, 2018 SKQB 258

Currie, September 25, 2018 (QB18245)

Civil Procedure – Application to Strike – Want of Prosecution
Family Law – Division of Family Property
Real Property – Certificate of Pending Litigation

The defendant applied for an order striking or staying the action for want of prosecution, or in the alternative, for an order that the petitioner be directed to take steps to move the proceedings along. The petitioner registered a homestead caveat against the respondent's farm land in May 2012 and the petition was issued in March 2013. From March 2013 to June 2018 when this application was served, the respondent remarried, a homestead caveat was discharged, registered again, discharged again, and a certificate of pending litigation was registered against the respondent's land, including land that he owned jointly with his mother after his father's death. The last step in the litigation was in July 2014 when the respondent served a notice to disclose. The last step taken by the petitioner was in May 2013 when she served her property statement.

HELD: The test for striking an action for want of prosecution requires the applicant to show that: there was inordinate delay; the delay was inexcusable; and it is not in the interests of justice for the claim to proceed to trial. The delay of five years, from the petitioner's last step in the proceedings, or four years, from the respondent's last step, was inordinate. With respect to whether the delay was inexcusable, the court noted that the matter was a typical family law matter and the petitioner had not been diligent in moving the matter along. The petitioner did not offer a reason for the delay and the respondent did not indicate to the petitioner that he was content to leave the action dormant. The court concluded that the delay was inexcusable. The court considered the last factor, the interests of justice. The only potential prejudice to the respondent was the risk of some minor memory failure. The delay of four to five years was not found to be extreme and there had been an exchange of extensive financial and property information. The action appeared to be ready for a pre-trial conference. The respondent indicated that the action and certificate of pending litigation had been disastrous for his business. The court was not sure how the action impacted the respondent as he claimed because there was no mention that he planned to transfer or refinance any of the land. The impact of the delay on the respondent was found to be the normal complication and uncertainty that arises from such an action and it did not militate against the action continuing. The petitioner did not offer an explanation for the delay, and that factor militated against the action continuing. There was no suggestion that counsel played a part in the delay. The matter involved the breakdown of a common law relationship with children so if the matter was struck it would leave matters unresolved. The court found that there was a strong public interest in seeing that the many consequences of marriage breakdown be dealt with in the courts. The issue was one of genuine public importance with implications beyond the litigants themselves. In the interests of justice, the action must be permitted to continue. The application for an order that the action be dismissed or stayed was dismissed. A case conference call was to be scheduled to determine, by agreement or order, the steps to be taken to move the action forward.

The petitioner was ordered to pay the respondent $1,000 in costs.

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Primewest Mortgage Investment Corp. v Antonenko, 2018 SKQB 259

Elson, September 26, 2018 (QB18250)

Civil Procedure – Queen's Bench Rules, Rule 7-2
Civil Procedure – Summary Judgment
Contracts – Non Est Factum
Contracts – Unconscionability
Foreclosure – Order Nisi

The plaintiff mortgage corporation applied for an order nisi for sale by real estate listing on two residential properties. One property was the residence of two defendants, T. and G., and the other property was the residence of another defendant, L., who was T.'s mother. The defendants were the mortgagors of their properties. T. and G. sought to renew the mortgage on their home and add an additional $40,000 to the mortgage. The plaintiff did not approve the application, so L. also applied and offered to mortgage her property for T. and G. The mortgage as initially prepared was not pursued, but a new arrangement was agreed upon. A new cost of borrowing disclosure statement was sent to each of the three mortgagors. The mortgage document was signed by all three mortgagors and the word "Mortgage" was on the front of the document in bold print. The mortgage term was one year. After expiration, the mortgagors sought renewal as well as an increase to the loan. An additional $45,000 was provided in return for a promissory note. All three mortgagors signed an offer of financing letter, cost of borrowing disclosure statement, and a promissory note for the $45,000. L. denied that she had any knowledge of a mortgage being registered on her property. When the mortgage matured on October 1, 2016 it was in arrears in the amount of $10,160. Leave was granted to the plaintiff to commence the action for foreclosure on May 17, 2017. The mortgagors' defences to the application for summary judgment were: 1) non est factum, with respect to the mortgage on L.'s property. The mortgagors argued that L. only agreed to guarantee or co-sign the debt of T. and G., such understanding never being corrected by the solicitor representing them; and 2) the loan transaction was unconscionable.
HELD: The court was satisfied that the plaintiff's application must succeed because there was no genuine issue for trial. The mortgagors must deal with any issues they had with their mortgage broker and/or solicitor directly with them. A number of affidavits were filed, but there were really no facts in dispute between the mortgagors and the plaintiff. The respondent to an application for summary judgment must

provide their case, they cannot simply assert that their argument will be provided in full at trial. The court considered the non est factum argument of the mortgagors and concluded that there was no evidence to suggest the application of non est factum presented a genuine issue for trial. The court did not accept the argument that L. was not aware that she had granted a mortgage on her home. The mortgagors needed to explain something more than reliance on their mortgage broker. The mortgagors provided evidence that the mortgage broker had been disciplined for past conduct, but they did not assert that the discipline had anything to do with their financing. The court found that the mortgagors' evidence did not meet the onus of establishing an absence of carelessness. Next, the court considered the unconscionability argument. The Unconscionable Transactions Relief Act (UTRA) and the common law or equitable concepts of unconscionability applied to the transaction. Section 3 of the UTRA requires the application of an objective test of the risk associated with a loan and all the attendant circumstances to that risk. Non-exclusive factors have been established in the case law to assist in determining the risk to the lender. The greater the risk, the greater justification for increased costs imposed by the lender. The court recognized that there was an inequality of bargaining power between the mortgagors and the plaintiff. However, there needed to be something to show that the mortgagors' ability to bargain was impaired to the extent that they were not in a position to protect themselves. There must be something to suggest that the plaintiff took advantage of the mortgagors or used its power to gain a grossly unfair advantage. The annual percentage rates of the loans were 23.3 percent in 2014 and 17.9 percent in 2015. The court concluded that the costs were not excessive after considering the factors. The same conclusion was made with respect to the principle of common law and/or equity. The court granted the order nisi for sale by real estate listing.

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R v Sutherland-Kayseas, 2018 SKQB 260

Smith, September 28, 2018 (QB18251)

Criminal Law – Criminal Code, Section 231(6.1) – Criminal Organization
Criminal Law – First Degree Murder
Criminal Law – Second Degree Murder

The accused was charged with four Criminal Code offences: 1) first degree murder, contrary to s. 235(1); 2) two counts of assault using a weapon, contrary to s. 267(a); and 3) committing murder for the benefit of, or in association with, a criminal organization, contrary to s. 467.12(1). Two other people were with the accused during the time of

the offences. They both pled guilty to manslaughter. The Crown conceded that the murder was not deliberate and planned. The Crown argued that the accused and associates attempted an armed robbery and it went wrong, resulting in the victim's death. The Crown relied on s. 231(6.1) of the Criminal Code to elevate the killing of the victim to first degree murder where the death is caused for the benefit of, at the direction of, or in association with a criminal organization. The Crown argued the killing was for the benefit or at the direction of, or in association with, the gang of which the accused was a member. A friend of the accused's was in her presence when she was bragging about killing someone. The friend mentioned this later to some other people. The clothes used in the murder had been in the trunk of the accused's car, so considerable DNA evidence was located. During police interrogation, the accused admitted to shooting the victim. The parents of the victim witnessed the shooting and testified. The accused also testified. The accused's phone calls during her remand were recorded and the Crown argued that they showed the accused was acting on behalf of the gang or on a gang assignment. They argued that the victim was selling drugs from his parents' home, so the accused was sent by the gang to steal drugs and cash from the victim as punishment for selling drugs without the sanction of the gang.
HELD: The court questioned the accused's credibility. Her version of the incident was not consistent with the facts elicited during the trial. The accused testified that she was high on methamphetamine at the time of the incident and that the gun went off by accident when the victim lunged at her. The court found that the accused was not high at the time. The court concluded that the accused did not intend to kill the victim, but that she did kill the victim. The recorded telephone calls were not found to be enough to determine the s. 231(6.1) issue; they did not clearly confirm that the shooting was a mission for or on behalf of or to advance the interest of the gang. The Crown attempted to use the principle of adoptive admission, arguing that the accused made an adoptive admission that she was on a "mission" in a telephone exchange between herself and her sister. The necessary prerequisites for second degree murder were proven beyond a reasonable doubt by the Crown. The Crown also proved beyond a reasonable doubt that the accused intentionally shot the accused in the course of an attempt to rob him. The court had a reasonable doubt regarding the elements of s. 231(6.1). The accused was therefore convicted of second-degree murder. She was also convicted of both assaults as parties to those offences. The accused was found not guilty of the offence contrary to s. 467.12(1).

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Podruchny v Evans, 2018 SKQB 262

Megaw, September 28, 2018 (QB18253)

Family Law – Child Custody and Access – Variation – Interim Order
Family Law – Child Support – Determination of Income
Family Law – Child Support – Imputing Income
Family Law – Child Support – Interim – Retroactive
Family Law – Child Support – Section 7 Expenses

The parties had four children. They separated over seven years ago and resolved their financial issues pursuant to a separation agreement five years ago. The petitioner applied for an order setting the current and retroactive child support for both ss. 3 and 7 Federal Child Support Guideline child support. She wanted the s. 7 amount to be set as a monthly amount so that she could seek the assistance of enforcement from the Maintenance Enforcement Office. The respondent applied for a change to the parenting arrangement. He also sought to have income imputed to the petitioner for the purpose of calculating s. 7 child support. He also requested a s. 3 child support adjustment with credit for overpayments. The separation agreement provided that the petitioner have sole custody of the children and the respondent was to have reasonable access. The parties' income was specified, and they agreed to share in section 7 expenses. After the separation, the petitioner quit working as a teacher and began working as an optician for her mother's optical company. She indicated that she changed employment to be more flexible for the children and also because she could not afford to pay the childcare costs. The respondent was a travelling salesman of optical frames. He traveled extensively for work. He had a personal corporation and paid himself dividends as an income. A mileage rate of $41,948 and a meal allowance of $5,916 were deducted by the corporation in 2017. The issues were: 1) the parenting of the children; 2) the petitioner's income; 3) the respondent's income; 4) payment of s. 7 expenses; and 5) retroactive adjustment of support, both ss. 3 and 7.
HELD: The issues were determined as follows: 1) the respondent wanted joint custody with set parenting time. The court did not find that the material revealed a history of the respondent seeking specific parenting time that was denied. Nor did it disclose a history of the respondent missing time and complaining to the petitioner about that missed time. The court was unable to determine on an interim basis whether it was in the best interests of the children for the custodial arrangement to change or for there to be an order of specified access; 2) the respondent wanted the income of the petitioner to be imputed to that of a teacher's income. It was not clear when the petitioner quit teaching. The court found that it appeared that the first time the respondent raised the concern with the petitioner's income was when the petitioner brought her application. The respondent did not dispute the petitioner's reasons for changing employment. The court concluded that the lower income was necessitated by the needs of the children, as outlined in s. 19(1)(a) of the Guidelines. The court declined to impute income to the petitioner at this stage of the proceedings; 3) the

respondent declared dividends of $94,304 in 2017. The taxable amount of those dividends was $110,335.68. The court did not decide whether or not the grossed-up amount of the dividends should be used. The court did add back some of the respondent's expenses to his income. The only explanation that the respondent provided for deducting mileage at the rate of $.65 per kilometer was because his accountant told him to. One-third of the mileage expense ($13,983.00) was added back to the respondent's income. One-half of the meal allowance ($2,958.00) was added back to the respondent's income. The respondent's income was found to be $111,245.00. The respondent's monthly s. 3 child support obligation was $2,398.85; 4) the petitioner's income was found to be $32,780.00. The petitioner was ordered to pay 77 percent of the s. 7 expenses. The current extracurricular activities of the children were to be paid for in proportionate shares. Any additional expenses were only to be incurred with agreement of the parties. The court did not order payment of a monthly amount; and 5) the court was unable to determine that the facts and the law were not in dispute with respect to the claims for retroactivity for both parties. The claims for retroactive support were not determined. The matter was ordered to proceed to a pre-trial conference and, if necessary, a trial.

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Elder v Elder, 2018 SKQB 263

Tochor, October 1, 2018 (QB18254)

Family Law – Spousal Support – Interim – Variation
Civil Procedure – Queen's Bench Rules, Rule 7-2

The parties separated in 2015. In 2016, a Queen's Bench judge ordered the respondent to pay interim spousal support of $3,500 per month to the petitioner and interim spousal support of $800 per month for the one child still living with the petitioner. The respondent applied for summary judgment pursuant to Queen's Bench rule 7-2 and s. 15.2 of the Divorce Act to terminate his obligation to pay spousal support effective July 2018 or to reduce support to $1,250 per month to the end of June 2020 as well as an order eliminating the arrears of spousal support arising from the 2016 order. The respondent argued that his spousal support obligation should be ended or reduced because his income had decreased substantially since the order was made when it was $200,000. The petitioner opposed the application on the ground that the respondent had not provided adequate disclosure, including his 2016 and 2017 personal tax returns and his 2016 corporate tax return. The respondent said that he had not filed his personal returns because he could not afford to pay his accountant to prepare his corporate return.

HELD: The application was dismissed. The court could not determine child or spousal support under the Act without adequate information regarding the parties' incomes and the defendant had failed to provide such information and he was obliged to do so regardless of whether he believed he could not afford to pay his accountant. Without the necessary evidence, the court could not fairly resolve the issue on a summary judgment application under the Queen's Bench rules.

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Barbagianis v Richmond Nychuk, 2018 SKQB 266

Brown, October 3, 2018 (QB18257)

Civil Procedure – Non-suit Application
Civil Procedure – Queen's Bench Rules, Rule 9-26
Professions and Occupations – Lawyers – Negligence – Standard of Care
Statutes – Interpretation – Limitations Act
Statutes – Interpretation – Police Act
Statutes – Interpretation – Public Officers Protection Act
Torts – Bad Faith
Torts – Negligence – Standard of Care

the plaintiffs claimed against the defendants, his lawyers, alleging that they were negligent in representing him with respect to claims he had against the RCMP. The plaintiff was stopped by the RCMP on three separate occasions when he was travelling back and forth from British Columbia to Manitoba. The stops were made in January 2003, September 2004, and October 2004. The plaintiff asserted that the RCMP's actions were wrong and illegal on all the stops. Charges were not laid against the plaintiff as a result of any of the stops. The RCMP seized $80,000 cash from the plaintiff during the first stop. He arranged for a lawyer to assist him in having the money returned to him shortly after the seizure. In 2005, the plaintiff made three formal complaints against the RCMP to the Complaints Commission. All three of the complaints were dismissed and the plaintiff then asked for a review of them. In March 2007, the plaintiff contacted lawyers, the defendants. He said that the lawyers told him there would not be a limitation problem if there was bad faith involved. Further, he testified that the lawyer told him if the police acted maliciously or in bad faith, it gave him six years to sue. The statement of claim did contain Charter relief, but it did not contain an allegation that the RCMP acted in bad faith. The plaintiff's first claim was struck in 2008 due to its being statute-barred. A new claim with bad faith was issued. The second claim was also struck. The plaintiff then claimed against the defendants in negligence. The defendants made a non-suit application. The issues were: 1) whether a non-suit application was available; 2) whether the application should

succeed: a) based on there being no expert evidence of the standard of care to be applied; b) based on there not being a possibility of the plaintiff establishing bad faith, which was essential to his action; and c) based on the limitation periods already barring his action by the time the lawyer was retained; and 3) the appropriate order of costs.
HELD: The defendants argued that the plaintiff had an onus to show what fell below a reasonably competent legal counsel's standard of care. The plaintiff did not tender any expert evidence on the standard. It was determined that only the clearest of cases did not require expert evidence. The court held that an expert was required to address the standard of care in all but one respect. The only area that the court found an expert was not necessary was with respect to the bad faith claim. The lack of a pleading of bad faith was the reason for the first statement of claim to be struck. The plaintiff was aware of all of the necessary facts to bring an action against the RCMP at the conclusion of each stop. His not knowing the names of some of the officers would not have extended the limitation periods. Therefore, the plaintiff was reasonably expected to commence his action within the relevant time periods established by the then-current law. The court next considered whether the action would have failed in any event if bad faith had been pleaded, which was argued by the defendants. Bad faith is not a stand-alone tort. The defendants' position was that the plaintiff had to show evidence of the subjective intent of the police officers, whereas the plaintiff argued that an inference of bad faith was available at law. The court agreed there were categories of bad faith that could be proved through drawing inferences based on the actions of defendants. The court noted that to hold otherwise would require a plaintiff to have independent evidence of the state of mind of the defendant or would require them to call the defendant as their own witness. After reviewing the plaintiff's evidence of bad faith, the court concluded that he had not proven any specific intent to harm nor specific malice on behalf of the RCMP. Therefore, the plaintiff had to rely on proof leading to an inference of bad faith. The conduct of the RCMP with respect to the initial traffic stops was not found to cross the line into bad faith activities. There was no evidence from the police officers. The court had to determine whether, based on the plaintiff's evidence, the RCMP's conduct met the criteria of showing bad faith in some of their actions. The court found that, if left unanswered, there were matters that would fit the criteria of bad faith. If no additional evidence was provided, it could be found that bad faith did occur after the initial stops. Therefore, the non-suit application did not succeed on the basis of the defendants' bad faith argument. The plaintiff had all of the required information to make his claim on the days of the stops. The 12-month limitation period established by The Public Officers' Protection Act (POPA) expired one year after each stop: January 11, 2004; September 24, 2005; and October 15, 2005. The first stop's 12 months expired prior to May 8, 2005, when The Limitations Act (LA) was proclaimed in force. The action was barred because the 12 months expired prior to the LA coming into force

(section 31(3)). Subsection 31(5)(b) of the LA applied to the second and third stops. The POPA applied because the claims were discovered prior to May 2005. Therefore, the plaintiff's action was barred prior to March of 2007 unless bad faith was properly alleged, or an extension was properly obtained. If bad faith had been pleaded in the initial claim, the POPA would not have been the applicable statute. The court concluded that because ss. 31(5)(b) of LA indicates that, where the claim was discovered before May 2005, the former limitation period applies. The applicable limitation was contained in the Limitations of Actions Act (LAA). After reviewing the applicable sections, the court concluded that the only actions that could still be brought by March of 2007 were those based on bad faith that related to property, including property-based Charter breaches. All other causes of actions were statute-barred unless the plaintiff could rely on POPA to extend the period. There are three requirements for extension to be available: a) a prima facie case; b) an adequate explanation for the delay; and c) no prejudice to the defendants. The court concluded that the plaintiff did not have an adequate explanation for the delay; therefore, an extension of time was not available. In conclusion, the court found that expert evidence was not required for the standard of care as it related to whether bad faith should have been pleaded in the initial statement of claim. There were certain actions of the RCMP that resulted in an inference of bad faith being properly drawn. The claims, however, were statute-barred other than those with respect to bad faith conduct that were related to the plaintiff's property. The court granted the non-suit application with respect to all other causes of action, so they were dismissed. An extension to the other limitation periods would not have been granted because the plaintiff did not have a reasonable explanation for the delay in issuing the claim. The court did not make an order of costs; the matter was reserved to be dealt with when the outcome of the remaining matters had been concluded.

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Aero Mortgages & Investments Ltd. v Wilderness Roofing Ltd., 2018 SKQB 268

MacMillan-Brown, October 4, 2018 (QB18260)

Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 7-3, Rule 7-5
Civil Procedure – Summary Judgment

The defendant, plaintiff by counterclaim, applied for summary judgment against the plaintiff, defendant by counterclaim, in the amount of $45,680 plus interest and costs. The amount represented an invoice from the defendant to the plaintiff for repair and replacement to a roof on an apartment building owned by the plaintiff. The plaintiff

argued that the invoice was not paid because the work done by the defendant was not done in a reasonable and workmanlike manner. The plaintiff sought damages to be determined at trial. According to the defendant, it was recommended to the plaintiff that the roof be entirely replaced due to its poor condition. The defendant asserted that the plaintiff instead engaged them to repair the roof, which they say they did not guarantee the success of. The plaintiff indicated that the defendant told them that the roof could either be replaced or repaired and that the repair would only be warrantied for two years. The plaintiff chose the roof-patching option, it was completed in 2015 and the defendant was paid for the work. The plaintiff contacted the defendant a year later and apparently wanted to then proceed with the replacement of the roof. The replacement was completed in August 2016 and the balance owing of $45,680.35 was not paid by the plaintiff. The plaintiff indicated that the roof continued to leak after the repair in 2015. The plaintiff subsequently sold the property subject to a satisfactory roof inspection. The inspection company said that there were deficiencies with the roof and indicated that the replacement of the roof would be necessary. The purchase price was decreased by $100,000 due to the roof inspection. The defendants indicated that they had evidence from the new owner that no work had been done on the roof since the replacement in 2016.
HELD: The claim and counterclaim could not be considered in isolation. It was not an appropriate case for summary judgment even though the defendant's claim was small and seemed simple. The concept of proportionality must guide the court when determining whether to grant a summary judgment. The court has to balance the necessity of a fair and just adjudication of a dispute with the goal of providing a timely and affordable process. The question of whether the defendant's work was deficient was a live issue. Rules 7-5(6) and (7) allow a court to grant summary judgment in relation to a part of an action and leave the remainder to be determined at trial. The provisions have been relied upon in cases where the summary judgment allows the scope of the litigation to be narrowed for trial. In this matter, the court concluded that the summary judgment would not narrow the litigation, and the trial would nonetheless have to proceed on whether the work that was completed was done in a good and workmanlike manner. The defendant's debt claim was intertwined with the plaintiff's claim for set-off against the damages it alleges it suffered.

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Canadian National Railway Co. v SSAB Alabama Inc., 2018 SKQB 272

Leurer (ex officio), October 9, 2018 (QB18261)

Statutes – Interpretation – Court Jurisdiction and Proceedings Transfer

Act, Section 9, Section 10

The plaintiff brought an action against the defendants claiming damages for losses it suffered when one of its trains derailed in Saskatchewan. The plaintiff said that the defendants (SSAB) were at fault because a rail car, carrying steel manufactured by SSAB in Alabama to Alberta, was improperly loaded, causing the derailment. Before the defendants issued their statement of defence, an application was made pursuant to The Court Jurisdiction and Proceedings Transfer Act (CJPTA) to determine whether the plaintiff's claim should proceed in Saskatchewan or in Alabama. SSAB received an order from an Alberta company to deliver steel to that province to be delivered by rail. It was loaded on a flatbed rail car by employees and contractors working for SSAB under statutory, regulatory and industry rules and standards in loading and securing the steel. The plaintiff alleged that the Norfolk Southern Railway (NSR) and it had entered into a "through rate contract" for the transportation of the steel from Alabama to Alberta because the NSR's rail network did not extend to Alberta. It alleged that the contract between NSR and SSAB contemplated that the steel would be moved by it as a connecting railroad and that SSAB knew that the steel would be carried through Saskatchewan. It claimed the benefit of the contract between NSR and SSAB relying on a "Himalaya clause". The defendant argued that it was a confidential transportation contract that did not allow the court to determine what terms of contract existed for the movement of the steel and that the contract provided that the laws of Alabama applied to it. The plaintiff noted that the evidence failed to show that the confidential contract applied to the movement of the steel in this case but also that it was inapplicable. The plaintiff said that there was a presumptive connection to Saskatchewan under s. 9(e), (g) and (h) of CJPTA, relying primarily on s. 9(e)(i), as the contractual obligations were to be performed in Saskatchewan as part of its obligation to move the steel to Alberta. SSAB argued that the court should determine where performance of the obligations were allegedly breached and that its contractual obligations were completely fulfilled in Alabama.

HELD: The plaintiff's claim was permitted to proceed in Saskatchewan. The court found that it had territorial competence under s. 9(e)(i) or s. 9(g) of CJPTA and that, under s. 10, Alabama was not a more appropriate forum in which to try the proceeding. It found that SSAB had not established a sufficient basis to displace the facts as pleaded by the plaintiff as to what contract existed for the shipment. It then determined that pursuant to s. 4 of the CJPTA, it had territorial competence because there was a real and substantial connection with Saskatchewan based on its interpretation of s. 9(e)(i). The court also found that under s. 9(g), Saskatchewan was the most obviously affected by the alleged negligence and concluded that the tort, if any, occurred in the province. The court reviewed a number of factors under s. 10 of CJPTA to decide that Saskatchewan was the more appropriate forum.

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