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Subject Index

R v Ford, 2019 SKPC 26

Green, April 29, 2019 (PC19019)

Constitutional Law – Charter of Rights, Section 8, Section 9
Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking

Each of the accused was charged with possession of methamphetamine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drug and Substances Act. The defence brought a Charter application alleging that the RCMP officer who authorized their arrest did not have the requisite grounds and breached their s. 9 rights, and the search of their vehicle breached their s. 8 rights. Under s. 24(2) of the Charter, it sought to exclude from the evidence the large amount of cocaine and methamphetamine found in the van. A voir dire was held. In addition to their allegations regarding the Charter breaches, each accused claimed that the evidence obtained from searches by the police of their cell phones found in the vehicle, as well as recordings and summaries of telephone calls made by the accused , C.F., after she was arrested, should not be admitted because they were not relevant to an issue in the trial and their prejudicial value outweighed their probative value.
HELD: The Charter application was dismissed and the evidence admitted. The results of the searches of the cell phones and recordings and summaries of telephone calls made by Ford after she was arrested were also admitted because as the accused would not be tried by a jury, the court was not concerned that they might be tendered as evidence of bad character and that their prejudicial effect would exceed their probative value. The court accepted the testimony of a Crown drug expert that the that the text messages

related to communications about the drugs involved in the case regarding their sale and the price to be paid for them. The messages were relevant to the issue of whether possession of the drugs by the accused was for the purpose of trafficking. Regarding the summaries of the telephone calls, some were relevant and probative to the same material issues. Regarding the alleged Charter breaches, the court applied the test for determining reasonable grounds to arrest set out in R v Shinkewski. After reviewing the officer's testimony concerning the history of the drug investigation and the information she had obtained from three confidential informants that the accused would be driving back to Yorkton carrying drugs for sale, the court found that the officer held the requisite grounds to arrest the accused for the indictable offence under s. 5(2) of the Act. As their arrest was lawful, there was no violation of their rights under ss. 8 or 9 of the Charter.

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R v Adamko, 2019 SKPC 27

Stang, April 27, 2019 (PC19021)

Criminal Law – Firearms Offences – Careless Use of a Firearm – Sentencing

The accused pled guilty to careless use of a firearm contrary to s. 86(1) of the Criminal Code and possession of a firearm without a licence contrary to s. 92(1) of the Code. The charges were laid as a result of the death of a man whom the accused mistakenly shot while he was hunting elk. At the time, the accused was 22 years old. Prior to the incident, he had hunted in a lawful manner with his father who had the required licence to possess firearms, as permitted under s. 91(4)(a) of the Code. On the day in question, the accused decided to go hunting without his father. The Crown argued that he should receive an incarceral sentence in the range of 12 to 18 months plus a two-year period of probation and a firearm prohibition order. The defence submitted that an appropriate sentence would be a short period of incarceration to be served intermittently, combined with probation for a period of two years and a condition of which included payment of restitution to the victims who filed victim impact statements. The mitigating factors to be considered included that the accused had no prior criminal record and because he had not had any intention to cause harm to anyone, the accused demonstrated a very low level of moral blameworthiness. The accused had cooperated with the police during their investigation and pled guilty before trial. He accepted responsibility for his actions and expressed remorse to the victim's family. The accused had the support of his family, was employed and contributed to his community. He had complied with the terms of a restrictive undertaking for 16 months. The aggravating factors

were the gravity of the offence of careless use of a firearm because of the victim's death and that the accused's degree of responsibility was high because he had chosen to use the firearm without a licence. Multiple victims read their impact statements and these were considered aggravating factors as well.
HELD: The accused was sentenced to seven months in jail to be followed by two years' probation on the first charge and one month in jail to be served concurrently on the second charge. The court made an order under s. 109 of the Code prohibiting the accused from possessing any firearm for life. Due to his employability, the accused would be able to make some financial reparations to the victims.

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West v Basko, 2019 SKPC 28

Morgan, April 29, 2019 (PC19023)

Contract Law – Breach

The plaintiff and the defendant were in a relationship from 2015 to 2018. The plaintiff alleged that she loaned the defendant $17,000 during that time that he promised to repay. By the time their relationship ended, he still owed $7,744. The plaintiff submitted in evidence her bank records to support her claim. The defendant brought a counterclaim, alleging that the plaintiff owed him money because she had never returned a ring worth $6,600 that he gave her on the condition that if they parted, she would give back to him, as well as various sums she owed him for things such as car repairs he performed on her vehicle.
HELD: The plaintiff was given judgment in the amount of $7,744. The defendant's counterclaim was dismissed because he had not provided sufficient evidence.

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Banga v Sabiston, 2019 SKPC 29

Demong, May 2, 2019 (PC19022)

Contract Law – Breach – Damages
Civil Procedure – Limitation Period

The plaintiff brought an action against the defendant to recover damages arising from what he alleged to be a faulty roof installation undertaken by the defendant. He claimed that the defendant had been negligent in the provision of his services as a roof installer by failing to meet the requisite standard of care or, alternatively, that he

breached an implied contractual warranty that the work be completed in a good and workmanlike manner. The defendant denied that he was negligent and that he was in breach of such an implied condition. He argued that he did not provide a warranty, either expressly or by implication. Should he be found negligent or in breach of an implied contractual warranty, the defendant pleaded that the plaintiff was contributorily negligent and had failed to mitigate. Further, the plaintiff's action was statute-barred by The Limitations Act. The plaintiff built a house in 2011 and in an effort to reduce costs he purchased the materials necessary to shingle the roof from a local lumber yard instead of through a roofing contractor. With the help of the lumber yard's sales staff, he decided on a particular type of shingles. He bought all the necessary materials, but the staff did not advise him that the manufacturer's guide to installation of the shingles indicated that asphalt cement was required and thus he did not purchase it. After talking to a number of roofing contractors, the plaintiff selected the defendant to install the roof as he had at least 18 years of experience. The parties reached an oral agreement that did not contain much detail. The work was completed in November 2011. The defendant testified that did not apply the asphalt cement because it had not been provided by the plaintiff when he gave him the materials for the job and because the additional labour involved would increase the cost by $3,000. About four months after the completion of the work, the plaintiff noticed 40 shingles had fallen off the steepest part of the roof. He contacted the defendant who made the repairs. In January 2014 and October 2015, the same problem occurred and the plaintiff paid the defendant to replace shingles from the same area of the roof. The plaintiff testified that on each of these occasions, he was advised by the defendant that the damage had been caused by wind and he accepted this explanation without question. The defendant denied that the plaintiff had asked him about the cause. In October 2017, the plaintiff noticed that the shingles of a large section of the roof were lifting in the wind and decided that he would replace the entire roof with a steel roof that cost him $39,900 ($27,800 comprised the cost of materials). The roofer who performed the work testified that there were numerous defects in the defendant's installation. This opinion was reiterated by a home inspector called by the plaintiff as an expert. The expert noted that because the defendant had not applied the asphalt cement in accordance with the manufacturer's instructions, the defendant would have noticed the effect of that failure when he repaired the roof.

HELD: The plaintiff was granted judgment in the amount of $19, 250, prejudgment interest of $225, general costs calculated at five percent and out-of-pocket expenses as permitted by The Small Claims Act, 2016. The court preferred the plaintiff's evidence to that of the defendant. It found that the plaintiff's problems with his roof were caused by the defects in the installation of the shingles. The defendant's failure to give an express warranty did not negate the warranty implied into the contract by law. As a professional roofer, the defendant could not say that he did the work in a less than

adequate manner because he was not given instructions or the materials to do it otherwise. The defendant was aware of the guidelines that governed the installation of the shingles purchased by the plaintiff. His failure to follow the manufacturer's guidelines caused the loss sustained by the plaintiff and he was in breach of contract because he failed to provide his services in a good and workmanlike manner. The court was not able to conclude that the plaintiff had contributed to his loss because he was unaware of the requirement for asphalt cement. The defendant had not provided any evidence to support his claim that the plaintiff failed to mitigate his loss. The claim was not statute-barred because the plaintiff relied upon the defendant's explanation regarding the cause of the damage to his roof and, trusting him, did not suspect that there was anything wrong with the defendant's work until October 2017, when he noticed the shingles lifting in the wind. He commenced his action in July 2018 and thus his claim was not extinguished.

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Atwater Investment LP v BMO Life Assurance Co., 2019 SKQB 77

Scherman, March 15, 2019 (QB19090)

Contract Law – Interpretation
Insurance – Contract – Interpretation
Statutes – Interpretation – Saskatchewan Insurance (Licence Condition) Amendment Regulations, 2019

The applicant, an investment company, brought an originating application requesting that the court make declarations in respect of two universal life insurance contracts between it and the respondent insurance company, BMO Life Assurance (BMO). Two other proceedings brought by related entities, Ituna Investment and Mosten Investment, against other life insurance companies were heard at the same time. Judgments in those cases were rendered previously (see: 2019 SKQB 75 and 2019 SKQB 76). One of the declarations sought was to have the contracts interpreted as having distinct life insurance and investment entitlements and that the applicant would be entitled to pay premiums in any amount of its choice into the investment options available within the side account provided in the contract. Certain options included investments paying attractive interest rates. The applicant's position was based on the fact that the word "premium" was not defined in the contracts and they contained a provision that stated: "You may make additional premium payments at any time while this policy is in force". The universal life insurance policies in this case had been originally issued in 2002 by AIG Life Insurance to a numbered company and insured the lives of the sole shareholder of the company and each of his daughters, respectively. AIG was acquired

by BMO in 2009. In 2008, the applicant acquired the policies and then added another individual insured life to the beneficiaries. BMO accepted the assignment and additional beneficiary. Between 2009 and 2016, Atwater made payments totaling $1,000,000 and $1,700,000 to each policy and the payments were credited to their side accounts. In 2016, BMO advised that it would not accept disproportionately large deposits into the side account of each contract and refunded some of the applicant's recent payments. The applicant then brought this application. BMO opposed the application for the first declaration on the basis that a universal life insurance contract is made to provide life insurance and investments that are exempt from tax accrual within the exemption limits provided for such policies in the Income Tax Act. Such policies were never intended to permit insured parties to access investment opportunities as distinct investment rights unconnected to the core life insurance purpose of the contracts. BMO argued, as had the insurance companies involved in the other proceedings, that the recent coming into force of The Saskatchewan Insurance (Licence Condition) Amendment Regulations, 2019 under s. 467 of The Saskatchewan Insurance Act made the various applications by the insureds for declaratory relief moot, and they should be dismissed. Related to the substance of the first declaration and preliminary to the hearing on the merits, the applicant applied to strike major portions of BMO's affidavit evidence as inadmissible because it was not relevant to a material issue in the case, because it was opinion evidence or evidence as to the subjective intention or understanding of a contract, and on other bases. The applicant also sought a declaration that the policy never had, or had lost, its tax-exempt status with the consequence that it could pay unlimited premiums for investment within the investment account of the policy.

HELD: The applications for the two declarations were dismissed. With respect to the first application, the court found that as the contracts were standard form and for life insurance, they would be interpreted in accordance with the principles set out by the Supreme Court in Ledcor and Sabean. As a result of the finding that they were standard form contracts, the court granted the preliminary application to strike portions of the affidavit evidence because their contents were beyond the permissible factual matrix used to interpret such contracts. It ascertained the purpose of the contract by finding as relevant: its language; the legislation applicable to life insurance companies; the nature of the relationship created between the original insurer who purchased the life insurance policy; and that the life insurance industry was the market in question. The purpose of the contract was to provide life insurance and investment opportunities within the accrual tax exempt opportunities permitted by the Income Tax Act, not investment opportunities unrelated to the fundamental life insurance purpose of the contract. In this context, the word "premiums" would be understood by the ordinary insured as monies to be paid to the insurer that would not include unlimited investment opportunities

and that the purpose of the investment account was to hold excess premiums to maintain the tax-exempt status of the policy. To harmonize with the policies' use of the word "premiums', the court interpreted the provision that permitted additional payment of premiums as having the purpose of allowing insureds to make prepayments of premiums that would be due in the future. In the alternative, the court addressed the interpretation of the policy assuming the word "premium" in the contract was ambiguous, the court reviewed it in accordance with the general rules of contract construction and reached the same conclusion. In response to BMO's argument that the recent passage of the regulations made this application moot, the court determined that they were not applicable to this type of policy. Furthermore, after reviewing the regulations, the court found that they did not have retrospective reach. Regarding the second application, the court exercised its discretion under s. 11 of The Queen's Bench Act, 1998 and decided that it would decline jurisdiction to interpret and apply provisions of The Income Tax Act and the Income Tax Regulations. It deferred to the jurisdiction of the Tax Court and to its expertise.

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McKercher v Stantec Architecture Ltd., 2019 SKQB 100

Elson, April 10, 2019 (QB19097)

Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 7-5
Civil Procedure – Summary Judgment
Employment Law – Changed Substratum Doctrine
Employment Law – Dismissal without Just Cause – Damages
Employment Law – Dismissal without Just Cause – Reasonable Notice

The plaintiff applied for summary judgment to determine damages as a result of being dismissed, without cause, by the defendants. The plaintiff indicated that he worked for the defendants for 11 years. The defendants argued that the plaintiff did not work for one of the defendants. Further, they asserted that the plaintiff was only entitled to the damages as limited in the employment agreement signed when he was hired. The employment agreement was a letter from the defendant company SAL offering the plaintiff the employment position. The plaintiff was hired as a staff architect in 2006 with an annual salary of just more than $62,000. The letter indicated that the other defendant company (SCL) would administer the salary payments. The termination clause limited the notice period on termination without cause to three months or the minimum required by statute. The plaintiff indicated that shortly after his employment began, his employment changed from SAL to SCL. As a staff architect, the plaintiff did not have any supervisory or budgetary responsibilities. At the time of termination, the plaintiff

was the Business Centre Sector Leader in the city and was paid $134,000 in annual salary plus bonus and benefits. The plaintiff had increased responsibilities with the position. The plaintiff regularly received annual bonuses of between $12,000 and $19,000. The termination letter was on SAL letterhead but was signed by SCL's Vice President, Buildings. The letter indicated that the plaintiff would receive 11 weeks of pay in lieu of notice. He received $28,347. The plaintiff was unable to secure new employment. He was 51 years old, was married and had three children. The issues were: 1) was the action suitable for determination by summary judgment; 2) if the action was suitable for summary judgment, which company employed the plaintiff during the time in question; 3) if the action was suitable for summary judgment, did the substratum of the employment agreement change to the extent that the three-month notice limit was no longer enforceable; and 4) if the three-month notice limit was no longer enforceable, what was the period for reasonable notice?

HELD: The issues were determined as follows: 1) it was found to be both fair and proportionate for the court to decide the matter by way of summary judgment; 2) the court was satisfied that SAL was the employer. Even if the employment had changed, the employment agreement would still apply; 3) the court reviewed case law and pointed out Schmidt where the judge concluded that there was an obligation on the employer to advise an employee that it expected the terms of an earlier agreement to remain in place. There was no doubt that the plaintiff's employment had changed considerably in his 11 years with the employer. The defendants argued that the plaintiff's promotions were contemplated when he was hired in 2006. There was no clear evidence of such contemplation. Further, there was no evidence that SAL made it clear to the plaintiff that the notice of termination provisions were intended to apply to positions he was promoted to. The employer must reassert its reliance on the contractual notice period when an employee advances to higher levels of compensation and responsibility. The employer must also ensure that the employee understands and accepts the employer's position. The court found that SAL did not adequately protect the notice limit set out in the employment agreement; and 4) a reasonable range of notice was 10 to 12 months, taking into consideration the plaintiff's age, his years of service with SAL, and the level within the company he had attained. Given the evidence of the plaintiff that he was having difficulty finding similar employment, the court found the notice period should be at the higher end. Reasonable notice was determined to be 12 months. The plaintiff's estimate that his health and dental benefits provided by SAL totaled $20,800 per year was found to be reasonably accurate. The damages awarded totaled $171,467, which included pay in lieu of reasonable notice, estimated bonus, employer portion of RSP contribution, and health and dental benefits. The amount already paid was deducted. The plaintiff was also awarded costs.

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Holter v Holter, 2019 SKQB 102

Gabrielson, April 17, 2019 (QB19114)

Wills and Estates – Estate Administration

The executors of the estate of the deceased, J.H., applied to the court for approval of the sale of two parcels of land owned by the estate. The respondent, one of ten beneficiaries of the estate, opposed the sale on her own behalf and on behalf of her two children. The executors had determined that it was in the interest of the estate to sell the two parcels which consisted of a house and five acres and an adjacent parcel of 36 acres. They hired an appraiser to assess the value of the lands and he provided a written valuation that the first parcel's market value was $310,000 and the second was $275,000. None of the beneficiaries wanted to purchase either parcel so the executors signed a listing agreement to sell the properties. Shortly thereafter, the executors accepted the highest offer of $315,000 for the first parcel and $260,000 for the second, conditional on seeking approval by the estate. The respondent and her minor children refused to sign. The executors instructed the estate's lawyer to make this application. The respondent filed her affidavit explaining that why she opposed the sale. She alleged that the property was not properly marketed by the executors and their realtor and there had been collusion between the realtor and the purchaser to suppress the market value of the larger parcel. She did not submit an alternate appraisal of market value.
HELD: The application was granted. The court approved the sale. It found that it was in the estate's best interests for the sale to proceed because all the other beneficiaries had consented to it and the sale price was within 98 percent of the appraised market value.

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R v Lowdermilk, 2019 SKQB 103

Chow, April 12, 2019 (QB19098)

Criminal Law – Dangerous Driving – Failure to Stop
Criminal Law – Dangerous Driving – Mens Rea
Criminal Law – Defences – Charter of Rights, Section 7
Criminal Law – Evidence – Credibility
Criminal Law – Evidence – Loss of Evidence by Crown

The accused was charged with dangerous operation of a motor vehicle causing death, contrary to s. 249(4) of the Criminal Code. She sought a stay of proceedings at the commencement of her trial arguing that her right to make full answer and defence pursuant to s. 7 of the Charter had been violated when the Crown failed to

preserve evidence. The collision occurred at an intersection of Highways #2 and #15 at 1:00 pm. There were stop signs for motorists on Highway #15 wanting to enter or cross Highway #2. The deceased was operating a motorcycle and the accused was driving an SUV. The witness was also driving a motorcycle and was travelling with the deceased. He indicated that they were travelling north on Highway #2 at approximately 100 km/h. He was the lead motorcycle. The accused was travelling eastbound on Highway #15 and the witness testified that he did not see the SUV she was driving stop as it approached the intersection. He began applying his brakes and did so enough for the SUV to pass in front of him. He did not look behind him to see what was happening. The witness did not know if the SUV had braked at all or whether the deceased's motorcycle hit his motorcycle before colliding with the SUV. A first responder EMT also testified for the Crown. There was damage to the right front fender of the accused's SUV. The EMT indicated that he could not see into the passenger front window when he first went up to the accused's vehicle because it was obstructed by a helium balloon. An expert witness also testified for the Crown regarding collision reconstruction, speed analysis, etc. The expert indicated that there were no tire marks consistent with the accused attempting to break hard before the moment of impact. The minimum speed that the motorcycle would have been travelling was 58 km/h. According to the expert, the damage to the SUV indicated that it was travelling at less than highway speed. The accused's vehicle was equipped with an event data recorder (EDR) and the expert was able to transfer the data onto his tablet. The EDR indicated that no airbags had been deployed. When the expert attempted to transfer the files from a hard drive to an external drive the drive failed, and the evidence was lost. Some photographs taken by the expert were also lost in the file transfer process. The expert was able to locate the SUV and download the data again. Given the location of the accused's vehicle from the point of impact, the expert said it was consistent with the SUV travelling at a speed of less than 50 km/h at the point of impact. The expert indicated that the original ADR data would have been useful to have. One contributing factor to the collision, according to the expert, could have been that the accused's vehicle's A-pillar obstructed the view. The evidence was consistent both with the accused stopping at the intersection prior to the collision and with her not stopping. The accused testified on her own behalf. She denied that the balloon was on the passenger seat at the time of the accident. She said that it was in the back seat. Because it was windy, and the balloon was blowing around she said that she moved it to the passenger seat; she did not want to wake up her infant son who was in the back seat. The accused said that she stopped at the stop sign and looked both ways but did not see any motorcycles. The accused also indicated that she had crossed that intersection many times and that she takes particular care because of the rise in the intersection where she had driven too fast in the past.
The court first dealt with the Charter issues on voir dire.
HELD: The Charter application was dismissed, and the accused was

found not guilty of the offence. The court accepted the expert's evidence that he had never before experienced a problem with the loss of data while transferring it. The court also accepted that he never looked for the accused's vehicle right away to access the EDR because his training had taught him, incorrectly he later learned, that the data would be overwritten after a small number of key cycles. The loss of the data was not found to be a deliberate attempt to frustrate the court's jurisdiction over the admission of evidence or of unacceptable negligence. The loss of the data also did not result in actual prejudice to the accused's right to make full answer and defence. The expert's opinion was consistent with the accused's testimony. The accused was found to be a generally credible witness and her evidence was free from obvious internal contradictions and was entirely consistent with the physical evidence and testimony of other witnesses, except in one regard, the location of the balloon. The only evidence that the accused may not have stopped at the stop sign came from the other motorcycle driver. The court also found him to be generally credible. His claim that the accused's vehicle was travelling at a pretty good speed was difficult for the court to reconcile with the opinion evidence of the expert. The court concluded that the evidence failed to demonstrate that the accused's view was obstructed by the helium balloon. The court was left with a reasonable doubt. The court was satisfied that the accused's manner of driving was objectively dangerous, the actus reus of the offence had been made out. The court accepted that the accused believed it was safe for her to proceed into the intersection when she did. The evidence was nothing more than a tragic but momentary lapse of attention, which falls short of proving a marked departure from the standard of care expected of a reasonable person in the same circumstances. The requisite mens rea of the offence of dangerous driving was not established.

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A.M.M. v K.D.M., 2019 SKQB 105

Goebel, April 23, 2019 (QB19101)

Family Law – Custody and Access – Children's Law Act – Person of Sufficient Interest
Family Law – Custody and Access – Divorce Act – In Loco Parentis
Family Law – Custody and Access – Interim Application

The parties met in April 2015 and were married in October 2015. The respondent's children from a previous relationship were eight years and one year old at the time. The parties' son was born in April 2016. The respondent stayed home with the children for much of the relationship, but in the months prior to separation the petitioner had some periods of unemployment and the respondent worked at a local restaurant. In January 2019, the respondent left the family

home with the children and returned to Saskatoon, where she had lived prior to her relationship with the petitioner. In February 2019, the children returned to the family home for two weeks. The parties attempted to negotiate a settlement but were unable to and the respondent decided to keep the children at the conclusion of her prearranged parenting time. The petitioner applied for relief, but before the matter was heard the respondent secured rental housing in Saskatoon and registered the two oldest children in school. The petitioner agreed to let the two oldest children stay in the school on a without prejudice basis until the end of the school year. The petitioner requested an expedited pre-trial with parenting time in the interim as follows: parenting time with the youngest child every weekend; and parenting time with the oldest two children every other weekend. The respondent did not oppose parenting time or joint custody of the youngest child, but she did oppose any custody or parenting order involving the two older children. She also indicated that she could not share driving for access because she did not have a vehicle. The respondent had been ordered to provide notice of the application to the two older children's biological fathers. She did not file any proof of service nor application to dispense with the notice. The issues were as follows: 1) did the petitioner have standing to seek relief respecting the two older children; and 2) what interim parenting arrangement was in the best interests of the children?

HELD: To avoid a further adjournment and prejudice to the petitioner, the court proceeded with the application even though notice had not been given to the biological fathers. The respondent remained responsible to comply with the earlier order of the court requiring notice to them. The issues were determined as follows: 1) the petitioner argued that he was the only father figure in the children's lives and that he had a close relationship with them. Both of the children called the petitioner "dad". The respondent indicated that the petitioner required them to call him "dad". The children were embraced as family by the petitioner's parents and extended family. The court was satisfied on a prima facie basis that the petitioner met the threshold test for standing under both The Children's Law Act, 1997 and the Divorce Act; and 2) the court found that it was in the best interests of all of the children to regularly spend time in the petitioner's care. The respondent argued that the petitioner had a bad temper and that he regularly took it out on her and one of the older children. The court found that both older children were bonded to the petitioner as a father figure and that it was appropriate to ensure continuity in the relationship until final determination of the matter. Parenting time every weekend was not found to be in the best interests of any of the children. The court was concerned about the respondent's unilateral move, her withholding contact between the children and the petitioner, and her inappropriate communications with one of the older children. The court ordered that the parties have joint legal custody of the youngest child; the petitioner's application for joint interim custody of the two two older children was dismissed as it was best left for

trial, but the respondent was to keep the petitioner informed regarding those children in the meantime; the children were to remain in the primary care of the respondent; the petitioner would have parenting time on alternating weekends, additional parenting time during school breaks, alternating holidays, and electronic access; the petitioner was responsible for pick-up and drop-off; the children were not to be exposed to any incidents of conflict; and neither party was to use corporal discipline of the children.

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Schira v Saskatchewan Government Insurance, 2019 SKQB 108

Currie, April 23, 2019 (QB19103)

Automobile Accident Insurance Act – Appeal – Income Replacement Benefits – Causation
Automobile Accident Insurance Act – Appeal – Income Replacement Benefits - Costs
Statutes – Interpretation – Automobile Accident Insurance Act

The plaintiff appealed decisions of the defendant insurer in relation to income replacement benefits under the no-fault system pursuant to The Automobile Accident Insurance Act. The plaintiff claimed no-fault income replacement benefits from the insurer for accidents that occurred on March 22, 2005, March 24, 2010, and March 22, 2011. On May 7, 2008, the insurer advised the plaintiff that she was not entitled to benefits for the 2005 accident. On April 17, 2015, the insurer advised her that she was not entitled to benefits for the 2010 and 2011 accidents. The plaintiff appealed pursuant to ss. 191 and 192 of the Automobile Accident Insurance Act (AAIA). The parties agreed that the standard of review was correctness. The issues were as follows: 1) whether the plaintiff could adduce new opinion evidence; 2) the insurer's standing on the appeal; 3) the evidence being considered on the appeal; 4) the test for entitlement to income replacement benefits; 5) the insurer's reasons for its decision; 6) the effect of the June 1, 2006 letter from the insurer; 7) alleged errors in the insurer's decision; 8) the reliability of "file review evidence"; 9) whether the accidents caused injuries to the plaintiff; 10) the claim relating to the 2005 accident; 11) the claim relating to the 2010 and 2011 accidents; and 12) the conclusion as to income replacement benefits.
HELD: Section 191 describes the proceedings as an appeal whereas s. 192 directs that the appeal is to be conducted in accordance with the Queen's Bench Rules respecting actions commenced by statement of claim, which are trial actions, not appeals. In Terry, the Saskatchewan Court of Appeal determined that a s. 191 appeal was a true appeal, not an originating process akin to a trial. The court determined that a claimant is entitled, as of right, to adduce new lay

evidence to put in issue the insurer's finding of facts; however, evidence of the claimant's circumstances beyond the date of the decision under review was not allowed. The issues were determined as follows: 1) the plaintiff wanted to adduce the new opinion evidence of Dr. Z. The plaintiff provided new evidence of her head position in the 2005 and 2010 accidents. The court granted the plaintiff leave to adduce Dr. Z's evidence because without it, the court could not be in a position to understand the significance of the new evidence of the plaintiff's head position; 2) The insurer was granted standing. No one else would oppose the appeal if the insurer didn't. The insurer acted in a quasi-judicial manner and would then be adversarial to the plaintiff, such factor militating against the insurer participating in the appeal. The insurer was also permitted to make submissions with limits; 3) the evidence to be considered was: the record before the insurer at the time of its decision; the new lay evidence of the plaintiff up to July 2015, and cross examination on that evidence; and Dr. Z's opinion evidence and cross-examination of it; 4) the court had to determine whether the accidents caused injury to the plaintiff and whether the injury rendered her entirely or substantially unable to perform the essential duties of her teaching employment; 5) the insurer concluded that the injuries as a result of the accidents did not result in the plaintiff being unable to continue her employment; 6) the court disagreed with the plaintiff's interpretation of the letter. The letter did not state any decision as to the plaintiff's entitlement to income replacement benefits; 7) the plaintiff argued that the insurer's decision was based on two errors. The court disagreed with the plaintiff regarding both alleged errors; 8) the plaintiff requested that the medical opinions of health care professionals who did not meet her should be rejected because they were intrinsically unreliable. The court found that there was no indication that SGI ignored other medical evidence in favour of the file review evidence. The court was also not convinced that file review evidence was intrinsically unreliable; 9) there was no dispute that the accidents caused injury to the plaintiff; 10) the 2005 accident was low-impact accident with only minimal damage to the plaintiff's vehicle. The psychologist indicated that the plaintiff's symptoms did not arise from the 2005 accident. The insurer adopted the psychologist's conclusion in its May 7, 2008 decision letter. The insurer's conclusion regarding the 2005 accident was logical and reasonable, and it accorded with the evidence. The court had to, however, also consider the new evidence of the plaintiff's head position and Dr. Z's opinion. The court found the plaintiff to be a generally credible and reliable witness. Dr. Z concluded that the plaintiff was injured in the 2005 accident to such an extent that she was unable to return to work. He noted that it was significant that the plaintiff's head was turned. The court accepted Dr. Z's opinion. The court concluded that the injuries suffered by the plaintiff as a result of the 2005 accident materially contributed to her inability to return to teaching. She was entitled to income replacement benefits as a result of the accident; 11) the 2010 and 2011 accidents effectively

became insignificant because of the court's conclusion on the 2005 accident; and 12) the plaintiff was entitled to income replacement benefits as a result of the 2005 accident. The plaintiff argued that she should be fully indemnified for her legal expense. The no-fault system was never intended to provide full indemnity to a claimant. This was not an exceptional case that justified solicitor-client costs. The plaintiff was given party and party costs on column 2. The insurer's decisions were set aside.

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Kemp v Naber, 2019 SKQB 109

Popescul, April 24, 2019 (QB19104)

Civil Procedure – Queen's Bench Rules, Rule 1-3(3)(a), Rule 4-5

Counsel for the 35 plaintiffs filed a request for case management pursuant to Queen's Bench rule 4-5. He cited as his reasons the complexity of the action and that he anticipated additional preliminary and interlocutory applications would be made. HELD The application was denied. The court found that the request was premature as the parties had not yet completed the mandatory mediation process required by The Queen's Bench Act, 1998. Further, it was incumbent upon the parties to try to manage their own litigation before resorting to the court for assistance pursuant to Queen's Bench rule 1-3(3)(a) to facilitate the quickest means of resolving the claim at the least expense.

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Mann Homes Ltd. v Arn, 2019 SKQB 110

Mitchell, April 24, 2019 (QB19100)

Builders' Lien – Procedure to Vacate
Civil Procedure – Pleadings – Application to Strike Statement of Claim
Civil Procedure – Queen's Bench Rule 1-2; 7-9(2)(b), Rule 7-9(2)(e)
Civil Procedure – Mandatory Mediation

The plaintiff claimed against the defendants B.A. and F.A., alleging that they had an oral agreement for the plaintiff to renovate their basement. The plaintiff indicated that work was completed on the basement and B.A. and F.A. failed to pay the invoice in the amount of $37,740. A builders' lien was registered against the title in August 2018. The claim alleged a breach and the plaintiff requested damages of the invoice amount as well as a declaration that the builders' lien was valid and subsisting under the Builders' Lien Act

(BLA). B.A. and F.A. denied the existence of the contract and invoice. They indicated that they had renovated their basement themselves. They further indicated that if anyone was owed money, it was a third party, P.T. B.A. and F.A. sought three orders: 1) an order striking the plaintiff's claim pursuant to Queen's Bench Rule 7-9(2)(b) or Rule 7-9(2)(e); 2) summary judgment dismissing the plaintiff's claim; and 3) an order that the matter was exempt from mediation.
HELD: F.A. and B.A.'s application was dismissed in its entirety. The court dealt with B.A. and F.A.'s application as follows: 1) the defendants had the onus. The court found that they did not satisfy the burden of showing that the alleged cause of action was such that no reasonable person could treat it as bona fide. The statement of claim had a legitimate cause of action. The disagreement between the parties was found to demonstrate that a trial was likely necessary to resolve the matter. Further, it was not appropriate to vacate a builders' lien on an application to strike a pleading. The BLA sets out its own process for vacating liens; 2) on a summary judgment application, the burden of proof shifts between the party applying for summary judgment and the party opposing it. The party requesting the summary judgment must first demonstrate, on a balance of probabilities, that the genuine issue to be tried can be determined solely on the basis of affidavit evidence. B.A. and F.A. argued that the validity of the builders' lien issue could be determined on a summary judgment proceeding. The court did not agree with the defendants. The parties did not agree on the legal issues to be decided and they did not agree on the factual circumstances. The court also required more information to assess the issues; and 3) section 42(1.2) of The Queen's Bench Act (QBA) allows a party to apply for an exemption of mandatory mediation, but is silent on factors to consider. The court found that a mediation session may be helpful given the separation of the parties. Mediation may serve to narrow the issues in dispute. An exemption was not granted. The plaintiff was awarded costs in any event of the cause.

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R v Ali, 2019 SKQB 111

Chow, May 1, 2019 (QB19105)

Criminal Law – Evidence – Identification

The two accused were each charged with one count of breaking and entering a dwelling house and committing robbery therein contrary to s. 348(1)(b) of the Criminal Code. The alleged offence occurred when four men kicked in the door to a trailer. A person who was visiting there testified that after the door was opened, only the accused, I.A., entered the residence while the other three remained

outside on its deck. I.A. hit him in the face and the leg with a baseball bat. He admitted that he had been very intoxicated on drugs at the time of the attack. He identified the two accused as being the individuals involved. However, in cross-examination, the witness admitted that in a previous statement given prior to testifying, he said that the assailants had been four black people. Later he was advised that one of the accused, J.R., was Aboriginal. In re-direct examination, the witness advised that the person who entered the house was not the one who had struck him in the face. Other identification evidence provided by other witnesses was similarly unreliable.
HELD: The court found both of the accused not guilty. The evidence as a whole left the court with a reasonable doubt as to their guilt.

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R v Mahamud, 2019 SKQB 115

McCreary, May 3, 2019 (QB19115)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking
Constitutional Law – Charter of Rights, Section 8, Section 10(b)

The accused was charged with trafficking in cocaine and with four firearm offences. The charges arose as a result of the Regina Police Service's special enforcement unit receiving information that an individual was traveling from Edmonton transporting cocaine to sell in Regina. Further investigation led the officers to believe that the accused was the individual in question. They set up surveillance outside of Regina and when the accused drove into the city, the police followed him until he parked outside an apartment building. The lead investigator (LI) immediately arrested the accused at 12:30 am and advised him of his right to counsel. The accused responded by asking to call his lawyer. Shortly thereafter, the LI expressly told another officer who was taking the accused to the police station cells not to allow the accused to call his lawyer. The LI testified that he made a conscious decision to delay the accused's access to counsel at the point of arrest based upon the circumstances of the investigation. He thought that the apartment might be a stash location for drugs or occupied by other people involved in drug trafficking and decided to delay the accused's call to his lawyer until some later point for reasons of officer safety and to protect against the destruction of evidence. The police searched the accused's person incidental to the arrest and found two cell phones, a Blackberry and the keys to the apartment. The Blackberry was active when it was seized and one officer kept it active and took photographs of text messages that appeared on it. She did not keep a record of what or how many applications she searched. At 1:00 am, the lead investigator performed a preliminary search of the

accused's vehicle and discovered a bag containing a white substance. The vehicle was towed to a secure location and its was searched at 1:40. Police seized the contents, including 252 grams of cocaine and a 9 mm handgun with ammunition. The LI arrived at the police station at 1:30 and prepared documentation for a search warrant of the accused's apartment. At 3:15, he remembered that the accused had not been provided with a phone call to his lawyer, but did not proceed to the cells to make arrangements for him to do so until 4:51. He attributed the delay to being busy and because he wanted to complete the list of charges against the accused before giving him access to counsel. Before his trial, the accused brought a Charter application, claiming that after his arrest, the police violated his ss. 10(b) and 8 rights. He argued that his right to retain and instruct counsel without delay had been breached by police when he was arrested at approximately 12:30 am, conveyed to a holding cell, and then not permitted to contact counsel until approximately 5:00 am. The accused said that his s. 8 right was breached when the police searched his Blackberry incidental to arrest without compliance with the guidelines set out in Fearon. The Charter breaches should be remedied pursuant to s. 24(2) by exclusion of all evidence seized by police incidental to his arrest. A voir dire was held.

HELD: The Charter application was granted. The court excluded the evidence from the search of the vehicle and the Blackberry because it had been obtained in a manner that infringed the accused's Charter rights, the admission of which would bring the administration of justice into disrepute. It found that the accused's s. 10(b) Charter right had been breached when the LI gave instructions that he not be allowed to call his lawyer. There was nothing in the circumstances following his arrest that reasonably supported that it was necessary to deny the right to counsel in order to safeguard officers or evidence. Alternatively, any risk had been addressed by 1:30 when the police had secured the apartment and towed the accused's vehicle. The accused's s. 8 Charter right was breached because the officer failed to keep an accurate and detailed record of the methodology of her search as required by Fearon. The court performed the Grant analysis and found that the breaches were very serious, reflecting a reckless disinterest or disregard by the police of their duty to ensure that their practices met the standards required by the Charter. The impact on the accused of the delay in providing access to counsel was also serious. He was detained and not provided with any information concerning why he could not call his lawyer or when he could. Although the evidence seized was crucial to the prosecution of the accused, it was necessary to exclude it to uphold the reputation of the administration of justice.

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Nickel v Gerbrandt, 2019 SKQB 117

Keene, May 2, 2019 (QB19111)

Statutes – Interpretation – The Pension Benefits Act, 1992, Section 33(5)

The applicant sought directions from the court as to the pre-retirement death benefit held by Viterra regarding her former common law spouse, who died in 2018. The relationship ended in 1998 but before it did, the deceased named the applicant as the beneficiary of his pension plan. Under the terms of the plan, the designation could only be changed by the deceased if he gave written notice to Viterra in a prescribed form and he had not done so. The applicant argued that the benefits accrued to her under s. 33(5) of The Pension Benefits Act, 1992 because as at the time of his death, the deceased was not in a spousal relationship and had never changed the beneficiary under his pension plan. The respondent, the daughter of the deceased, applied to Viterra to receive the proceeds of the pension based upon the terms of a holograph will executed just before his death and not yet probated, giving the respondent "any money owed to me from all pension plans".
HELD: The applicant was declared to be the designated beneficiary and should receive the benefit of the deceased's pension. In the absence of any authorities to the contrary, the court concluded that the clear direction found in the Act resolved the question whether the deceased had successfully altered his beneficiary by his holograph will. Since he had not used the prescribed form and made the change in accordance with the plan, it was not an actual change to the beneficiary.

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Dolter v Input Capital Corp., 2019 SKQB 118

Tochor, May 2, 2019 (QB19112)

Statutes – Interpretation – Saskatchewan Farm Security Act, Section 66

The applicants, a family farming corporation and individual family members carrying on a commercial farming operation, entered into a contract with the respondent in which they agreed to supply a certain quantity of canola in return for receiving advance payments. Pursuant to the contract, the applicants granted security interests to the respondent. In spring 2017, the applicants sought additional funding from the respondent and arrangements were made for a loan of $900,000. As part of the arrangements, the farming corporation and A.D. had to execute waivers pursuant to s. 68(3)(a) of The Saskatchewan Farm Security Act that permitted seizure of farm assets that would otherwise have been exempt under the Act. The applicants defaulted under the initial contract and the loan agreement and the respondent commenced steps to recover

$1,450,200. It filed notices of intention to each of the five applicants to take possession of the implements held as collateral under the security agreement pursuant to s. 48 of the Act. The applicant filed an application for hearing pursuant to s. 50 of the Act and a hearing date was set down. In March 2019, the court granted a consent order allowing the respondent to take possession of 66 pieces of list machinery and equipment followed by another consent order allowing it to take possession of another six pieces of equipment. Only seven items remained in dispute. Under s. 66(d) of the Act, A.D. sought an exemption of certain implements in order to continue his farming operation for the next 12 months. In her affidavit, B.D. claimed ownership of seven implements.
HELD: The court ordered that the parties proceed to a pre-trial conference and, if necessary, a trial, so that the applicants could establish their entitlement to an exemption under the Act. The court could not determine on the evidence presented if some or all of the disputed implements were required for the farming operation and whether it was appropriate to grant B.D.'s request for exemption resting on her claim of ownership.

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Sekerbank T.A.S. v Arslan, 2019 SKQB 119

Barrington-Foote (ex officio), May 3, 2019 (QB19113)

Debtor and Creditor – Preservation Order – Application to Terminate
Statutes – Interpretation – Enforcement of Money Judgments Act, Section 5(5), Section 8

The defendants applied for the fourth time to terminate a consent preservation order granted pursuant to s. 8 of The Enforcement of Money Judgments Act (EMJA). The defendants argued that the plaintiff failed to prosecute the action without delay and no longer met the condition specified in s. 5(5)(c) of the EMJA. The plaintiff brought an action in Turkey in 2013 alleging that the defendant Arslan had defaulted in his obligation to pay it $13,800,5000 pursuant to a certain guarantee and Arslan denied that the guarantees were binding or enforceable. As the plaintiff was concerned that it would be unable to realize on any judgment it might obtain in Turkey, it brought this action in Saskatchewan to ensure that it would be able to enforce a Turkish judgment against certain shares that Arslan transferred to the other defendant, Al-Katib, in trust, alleging the transfer was a fraudulent preference or conveyance. It obtained the preservation order after satisfying the court that both the Turkish and Saskatchewan actions would be prosecuted without delay. In this application, the defendants submitted that the plaintiff had not taken the steps it was obliged to take in this action as soon as reasonably possible during the period

of March 2016 to February 2018. They pointed to the fact that the statement of defence was filed in January 2014 and the plaintiff was obliged by the Queen's Bench Rules to serve its affidavit of documents by February 2014. The plaintiff had only delivered its affidavit of documents in February 2018. The continuation of the order was causing prejudice to the defendant Al-Katib because he had to annually disclose to securities regulators that he is the subject of a fraud claim.
HELD: The application was dismissed. The court found that during the period in question (March 2016 to February 2018), the plaintiff complied with its obligation to prosecute this action without delay within the meaning of the case law. Regardless, a failure to prosecute without delay in the past does not mean a preservation order must be terminated. In this case the applicants had also failed to discharge the onus to satisfy the court that the plaintiff would not prosecute its action without delay in the future.

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Busch-Vishniac v Wall, 2019 SKQB 120

Popescul, May 7, 2019 (QB19120)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike
Civil Procedure – Security for Costs

The plaintiff, a past President of the University of Saskatchewan, commenced an action in 2015 against the University, the former Premier of Saskatchewan, a former cabinet minister and each member of the board of governors. The plaintiff had entered into a five-year employment contract with the university in July 2012 to perform the duties of President and Vice-Chancellor. In May 2014, the board informed her by letter that her appointment was terminated without cause, effective immediately. The plaintiff claimed damages against the defendants Wall and Norris, alleging a variety of causes of action, including improper political interference. She also claimed damages against each board member in their personal capacity alleging, among other things, that they acted in bad faith and outside of the scope of their authority and made defamatory statements about her. The individual board member defendants applied for an order striking the entire claim against them as disclosing no reasonable cause of action, pursuant to Queen's Bench rule 7-9. In the alternative, they sought an order requiring the plaintiff to post security for costs as she was no longer resident in Saskatchewan, nor did she have any assets in the province other than her pension. The defendants, Wall and Norris, filed a joint application that also sought security for costs. In response to the applications for security, the plaintiff offered to pledge both her pension and her husband's as security.

HELD: The application to strike the claim was dismissed. The application for security for costs was granted and the plaintiff was ordered to pay $150,000 into court as a just and reasonable amount. It was to be paid in two installments of $75,000 within 60 days of the order and within 30 days after the matter had been set down for pre-trial conference. The court found that that the plaintiff's proposed causes of action in her statement of claim was supported by enough factual allegations to permit the action to proceed against the individual board members. Regarding the application for security for costs, the court found that the multi-party $8.5 million lawsuit would be a costly venture for all parties. If the plaintiff were successful, she would be able to recover her damages and costs but if she were unsuccessful, it was less certain that the defendants would be able to recover their costs. It noted that the plaintiff's pension and her husband's pensions were not exigible under s. 63 of The Pension Benefits Act, 1992 and might be subject to exemptions under ss. 94 to 96 of The Enforcement of Money Judgments Act.

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Alie-Kirkpatrick v Saskatoon (City), 2019 SKQB 121

Currie, May 7, 2019 (QB19116)

Landlord and Tenant – Residential Tenancies Act, 2006 – Order for Possession – Appeal
Statutes – Interpretation – Tax Enforcement Act, Section 36

The appellant appealed from the decision of a hearing officer of The Office of Residential Tenancies (ORT) that granted an order for possession of the house occupied by the appellant to the respondent, the City of Saskatoon. The respondent acquired title to the house on June 28, 2018 under proceedings it took pursuant to The Tax Enforcement Act (TEA) and the consent of the Provincial Mediation Board as a result of the appellant's tax arrears. The consent of the board to the transfer of title included the condition that the respondent would offer the house for sale within one year of the transfer date and if the sale occurred within that period, the respondent would pay the appellant any equity remaining after the sale. After ownership had transferred, the appellant remained in the house and under s. 36 of the TEA, she was deemed to be the respondent's tenant so that it could give her appropriate notice to vacate. The respondent applied for an order for possession under The Residential Tenancies Act, 2006 (RTA). In its notice to vacate, the respondent claimed the right to possession of the house because it had taken title to it pursuant to the TEA and it needed vacant possession in order to offer the house for sale, particularly within the one-year period. The hearing commenced but was adjourned by agreement to discuss a possible settlement because the appellant advised that she might be able to obtain funds to pay the

outstanding taxes in exchange for a transfer back of the title. The discussion was unsuccessful, and the appellant then applied to the Court of Queen's Bench for judicial review of the respondent's conduct and the hearing was adjourned by consent. The court dismissed the appellant's judicial review application (see: 2019 SKQB 13) and the hearing resumed. The officer found that the respondent had proven to the required standard of balance of probabilities that it had reasonable grounds for ending the tenancy and granted the order for possession on the basis that it was just and equitable to do so under ss. 58(1)(n) and s. 67(3) of the RTA so that the respondent could sell the property within one year and vacant possession would allow it to maximize its value. In light of the appellant's circumstances, the officer deferred operation of the order. At the hearing, both parties were represented by counsel. In her appeal of the hearing officer's decision under s. 72(1) of the RTA, the appellant argued that he erred in law: 1) in procedural fairness in relation to the evidence. She argued that he was wrong to accept submissions from the respondent's counsel that she had not paid rent since it became owner, that the tax arrears might amount to $50,000 and that it had paid for a water heater and for insurance on the house when he had not accepted the statement of her counsel that she had access to funds to pay the tax arrears; and 2) in finding that it was just and equitable to grant an order for possession. He should have considered the option that they parties might settle. Alternatively, if the order was just, he should have deferred operation of the order until the Court of Appeal addressed her appeal from the dismissal of her judicial review application.
HELD: The appeal was dismissed. The writ of possession was ordered in effect as at the date of judgment and set to expire within 30 days of it. The court determined that the standard of review pertaining to procedural fairness was correctness and, with respect to the officer's decision to grant the order, it was reasonableness. Respecting each ground of appeal, it found that: 1) the hearing officer had not erred in accepting the respondent's submissions as non-evidentiary statements of fact because they were non-contentious and were not controverted before the officer, and he was justified in his treatment of them, whereas the appellant's statements were contentious; and 2) the officer took into account all the relevant factors and in the context of a routine application for an order for possession under the RTA, his decision was reasonable and his reasons transparent and intelligible. The court noted that this was not a routine application under the RTA, but rather the creation of a notional tenancy under the TEA. When the application for an order for possession under the RTA originates in tax enforcement proceedings under the TEA, extraordinary measures are required to justify denial or deferral of the order, and they did not exist in this case.

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Bank of Nova Scotia v Moore, 2019 SKQB 122

Pritchard, May 7, 2019 (QB19117)

Mortgages – Judicial Sale – Deficiency Judgment

The plaintiff bank sought an order for disbursement of $47,400 that was paid into court pursuant to an order confirming sale (OCS) granted to it in May 2018. At that time, the sum of $150,225, representing principal and interest to January 2015 owing to it under a mortgage security granted to it by the defendant, was paid to the plaintiff from the proceeds of the sale of the mortgaged property. The plaintiff claimed that after crediting the amount paid under the OCS, the defendant still owed it $75,900 for interest and legal fees ($39,100), property management costs, taxes, etc. ($40,550) and legal fees incurred by the court-appointed selling officer ($4,160). The background to this application was that the defendant had given a non-purchase money mortgage to the plaintiff against his residential property. The mortgage secured two loan accounts. At the commencement of the proceedings in October 2012, the plaintiff filed an affidavit of default showing that the amount owing under this account was $135,600 with interest accruing at 4 percent annually. The outstanding amount of the second loan was $450 with 21 percent interest. The plaintiff was granted leave to commence foreclosure proceedings the following month. Delays occurred following the application because the plaintiff had to obtain an order for substitutional service on the defendant and once he received notice, he requested a number of adjournments. In June 2013, the plaintiff was granted leave to commence on the condition that the claim not be issued for 60 days. The plaintiff issued its claim in October 2013, showing principal and interest owing of $139,200 plus $3,880 owing for taxes that it had paid. It took the plaintiff another 11 months to file an application without notice in which it sought an order nisi (ON) for sale by listing. The application was denied and the plaintiff required to provide notice to the defendant. The defendant appeared at the chambers date in January 2015. The ON issued with a 90-day redemption period and was served on defendant in February 2015. The terms indicated that the listing would be for 90 days at $295,000 and no offer less than $250,750 would be accepted. Both the plaintiff and the defendant were given leave to submit offers to purchase the mortgaged land. If no sale occurred, the plaintiff was to apply to the court for further direction or apply for foreclosure absolute. In November 2017, 34 months later, the plaintiff applied for an order amending the original ON to change the minimum selling price to between $244,000 and $247,500 despite the fact that its realtor recommended reducing the price to $215,000. Evidence filed by the plaintiff included that it had obtained a writ of possession in June 2015 and evicted the defendant. Due to the furniture and clutter left by him, the plaintiff had to empty and clean the property before listing it in April 2017 at $295,000. When no acceptable offers were received within 90 days in late July 2017, the listing was extended to the end of August 2017,

but no sale occurred. The plaintiff waited until November 2017 before making its application to amend the ON. At the hearing the court required the plaintiff to serve and file an appraisal. In January 2018, the appraisal estimated the value of the property to be between $201,000 and $225,000. The plaintiff gave no indication then that it would be adding $76,000 in interest, fees and expenses to the mortgage indebtedness. After the amended order was granted, a sale proceeded and the OCS was granted as described above.
HELD: The court found that the plaintiff was entitled to receive $21,890 of the sale proceeds remaining in court. The remaining funds in court would be paid to the defendant. It found that the plaintiff had provided no reason, other than its own delay, why the initial judicial sale was not successfully completed in accordance with the original ON. Therefore, all interest, costs, fees and other expenses accruing during the delay caused by the plaintiff should not be added to the mortgage indebtedness. It took three times longer than was reasonable to obtain the order confirming sale and during the delay, the value of the mortgaged property declined substantially and significant charges to the mortgage indebtedness continued to accrue. Therefore the court calculated that the plaintiff was entitled to reimbursement of one-third of its legal fees and other expenses it claimed. As it had already received interest to January 15, 2015, no further interest would be payable from the funds paid into court as the plaintiff should have completed its realization on its security by December 2014.

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