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Boehmer v R, 2019 SKCA 74

Richards Leurer Tholl, August 2, 2019 (CA19073)

Constitutional Law – Charter of Rights, Section 11(b) – Appeal

The appellant appealed the decision of a Queen's Bench judge that dismissed his application for a stay of proceedings on the ground that his s. 11(b) Charter right to trial within a reasonable period had been violated (see: 2017 SKQB 328). The application was heard after the Supreme Court's decision in R v Jordan and the parties agreed that for the purpose of applying that case, the relevant period of time was 53 months. The judge found that 522 days had been expressly waived, leaving 35.5 months of delay, above the presumptive ceiling of 30 months in Jordan. The appellant had had four different counsel, three of whom had withdrawn during the time between the laying of the information in July 2012 and the closing argument in December 2016. The judge found that the withdrawal of the first lawyer due to pending suspension qualified as an exceptional circumstance within the Jordan framework and concluded that the period of delay associated with the actions of the second and third counsel could be considered defence delay or an exceptional circumstance. All of this took the calculation of time to trial well below the presumptive ceiling set by Jordan at 30 months, and therefore the s. 11(b) application was dismissed. The appellant's grounds of appeal were that the application judge: 1) had misapplied the Jordan framework by failing to find the "discrete" events (in the context of exceptional circumstances) that would justify delay above the ceiling. He failed to tie the withdrawals of the appellant's first three counsel to any specific delay in his case and treated them as a general circumstance. Jordan requires a judge

to do a mathematical calculation, identifying the specific number of delays in issue; and 2) had misapplied the framework set out in Jordan for handling transitional cases. They required the judge to undertake an analysis of the delay in this case in accordance with the principles set out in Morin.
HELD: The appeal was dismissed. The court found with respect to each ground that: 1) the judge correctly concluded that the additional delay caused by the withdrawal of the appellant's first lawyer would be enough to bring the delay well below the Jordan ceiling. His reasons showed that he had not failed to identify the need to do a mathematical calculation or to understand the need to identify the delay that flowed from each counsel's withdrawal. However, the court noted that the judge should have specifically analysed each delay and discerned what aspects were properly characterized as defence delay or reasonably unavoidable delay caused by exceptional circumstances. Regardless, no matter how the delay was categorized, the final calculation of remaining delay fell below the Jordan ceiling; and 2) the judge had not analyzed this case as a transitional one where the remaining delay as defined in Coulter (total delay minus defence delay and delay attributable to exceptional circumstances) falls below the ceiling because the defence had not met the onus of showing that the time it took his case to be tried had markedly exceeded what was reasonably required. As the delay here was below the presumptive ceiling, the Morin framework was not applicable and even it was, there was no evidence that the appellant suffered prejudice because of the time it took his case to go to trial.

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Cop v Saskatchewan Government Insurance, 2019 SKCA 75

Richards Leurer Barrington-Foote, August 2, 2019 (CA19074)

Automobile Accident Insurance Act – Income Replacement Benefits

The appellant appealed the decision of the Automobile Accident Insurance Commission regarding his claim to income replacement benefits (IRB) pursuant to The Automobile Accident Insurance Act (AAIA). The appellant was injured in a motor vehicle accident in 1999. Prior to this, he had operated a grain and cattle farm and also worked as an actor and writer. In the application he made for IRB in 2002, he stated that after the accident he suffered from pain, numbness, headaches and memory loss to the extent that his ability to farm was severely limited and he could no longer act. Saskatchewan Government Insurance (SGI) investigated his claim, including gathering medical and other records. In 2007, SGI informed the appellant's counsel that based on the information obtained, the appellant was not entitled to a claim. The appellant appealed the decision to the commission pursuant to s. 194 of the

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AAIA. At the hearing before the commission in 2017, the appellant advised that he had been unable to continue the full-time employment he previously held and claimed retroactive and prospective IRB. SGI submitted that except for a short period of time after the accident, the appellant's disabilities were caused by health conditions that had existed or would have developed independently of the accident. The commission found that the appellant had suffered a fractured sternum and a laceration to his knee, but no other injuries resulted from the accident. It accepted the opinion of SGI's medical examiner, based only upon his review of the file, that the appellant would not be able to do heavy work, such as farm labour, for a period of 90 days following the accident. It then found that he was entitled to IRB for that period. Among the grounds of appeal was that the commission erred in law by rejecting the admissibility of certain evidence of the appellant's injuries.
HELD: The appeal was allowed. The matter was remitted back to the commission for a new hearing. The court found that the commission erred in law by disregarding evidence tending to show that the appellant was unable to work for a time longer than 90 days. The commission committed this error based on the finding of fact that 91 days following the accident, the appellant was able to return to full-time employment when he had submitted medical evidence and provided testimony that he was unable to work because of his accident-related injuries as many as 300 days after the accident.

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Peterson v Peterson, 2019 SKCA 76

Kalmakoff Ottenbreit Schwann, August 7, 2019 (CA19075)

Family Law – Costs – Appeal
Family Law – Child Support – Appeal – Determination of Income
Family Law – Child Support – Appeal – Retroactive
Family Law – Custody and Access – Appeal – Best Interests of Child
Family Law – Custody and Access – Appeal – Mobility
Family Law – Custody and Access – Appeal – Shared Parenting

The parties were married in 2010 and separated in 2015. They had two children. The parties were both originally from North Dakota but lived on a farm in Saskatchewan during their marriage. The appellant and his family had a farming operation with land in both Saskatchewan and North Dakota. The respondent became employed as a pharmacy technician in North Dakota after separation. The appellant remained in Saskatchewan, about 140 kilometres from the respondent. The parties had shared parenting of the children from separation to trial. During the weeks that the respondent had the children, she would travel to Canada and stay in the rented apartment she had there. The respondent was thus limited to part-time employment in North Dakota. She did not have the necessary

qualifications to be a pharmacy technician in Saskatchewan. The respondent's new partner was also unwilling to relocate. The trial judge ordered that the children relocate to North Dakota with the parties continuing to have joint custody and be entitled to continue with the shared parenting. The trial judge found the appellant's income to be $135,300 per year and the respondent's to be $29,991. The respondent was ordered to pay $17,921.94 in retroactive child support. He also ordered that the respondent pay $15,000 in retroactive spousal support. If the children did not relocate and the respondent returned to live in Saskatchewan, the trial judge ordered that the appellant would be obligated to pay spousal support of $1,465 per month for five years. Costs were awarded against the appellant. The issues on appeal were as follows: did the trial judge err 1) in his custody and parenting decision by misapprehending the evidence regarding the parties' ability or willingness to relocate; 2) in his custody and parenting decision by failing to properly apply the "best interests of the child" test, by basing the decision regarding relocation on inappropriate or irrelevant considerations, or by failing to properly consider the impact of relocation on the children; 3) by misapprehending the evidence or otherwise erring in principle in assessing the respondent's income for child support purposes; 4) in awarding "provisional" spousal support; and 5) in awarding costs to the respondent?

HELD: The issues were determined as follows: 1) the appellant argued that the trial judge erroneously concluded that he would be willing to relocate to North Dakota. The appeal court found it clear that the appellant's willingness and ability to move were not determining factors in the trial judge's decision; 2) the appellant asserted that the trial judge turned the decision into one about which parent would be more easily able to relocate so that a shared parenting arrangement could be maintained. According to the appellant, the trial judge thus turned his focus away from the best interests of the children and towards the best interests of the parents. The trial judge made it clear that his focus was on where the children would reside, not where the parents would reside. He found that a shared parenting arrangement could continue if the children moved to North Dakota, but not if they remained in Saskatchewan. The appeal court concluded that the trial judge did not err; 3) the appellant argued that the trial judge erred by finding that the respondent had no income between June 1, 2016 and May 30, 2017. He further argued that it was an error to find that the respondent's ongoing income would only be $29,991, which she was currently earning, because she testified that her full-time income would be $55,000. At the time of trial, the respondent was just estimating what her full-time income could be. If her income were increased for the next year, an adjustment to child support could be made. The appeal court did find that the trial judge erred in concluding that the appellant had no income for June 1, 2016 to May 30, 2017. The retroactive child support award was reduced to $12,590.31 as a result of the appellant's income being increased; 4) the appeal court did not find that the trial judge erred by indicating

that that appellant would be entitled to spousal support if she continued to reside in Saskatchewan; and 5) the court noted that deference was required to be accorded to the trial judge's award of costs and concluded that he did not err.

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R v Badger, 2019 SKPC 43

Hinds, July 29, 2019 (PC19037)

Criminal Law – Evidence – Statement – Res Gestae – Spontaneous Utterance Exception
Criminal Law – Murder – Attempted Murder

The accused was charged with attempted murder using a firearm and breaching a condition of an undertaking, contrary to ss. 238(1)(a.1) and 145(3) of the Criminal Code respectively. The victim testified that he was too drunk to remember who shot him. The victim was drinking alcohol and smoking marijuana on the evening he was shot. He said that he heard a knock on the front door, and a woman was there. Two masked men came up and one of them put a gun in his face. The gun went off and he was wounded. The victim next recalled waking up in the hospital. The accused had been at the victim's house the night of the shooting. He left approximately 10 to 15 minutes before the knock on the door. A voir dire was held regarding the admissibility of two statements made by the victim: 1) during the victim's mother's call to 911, he told his mother who shot him and used a pseudonym used by the accused; and 2) when the victim was being loaded in the ambulance he looked at the accused and indicated twice that the accused had shot him. The 911 call was entered into evidence. The Crown argued that the two statements should be admitted into evidence as res gestae or the spontaneous utterance exception against the admission of hearsay evidence. When the accused was arrested, there was a dark red substance on his shoe. The issues were: 1) whether the statements made by the victim were contemporaneous to an unusual, overwhelming event; 2) whether the declarant, the victim, (at the time of the statements) was under pressure or emotional intensity at the time the statements were made that would give the guarantee of reliability; and 3) whether there was an absence of special features likely to result in error by the declarant, the victim, such as drunkenness.
HELD: The court admitted the two statements under the res gestae or spontaneous utterance exception to the rule against hearsay evidence. The issues were determined as follows: 1) the intrusion, shooting, and resulting injuries were unusual and overwhelming events. The victim simply reacted to the event. The statement made during the 911 call was made contemporaneously with the intrusion, shooting, and injuries. The statement made while the victim was being loaded into the ambulance was "so closely

associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event". The statement was also made contemporaneously with the intrusion, shooting, and injuries; 2) the court found that the first statement was made while the victim was under pressure and emotional intensity that provided the guarantee of reliability. The pressure and emotional intensity were found to persist for some time, including when the second statement was made; and 3) the victim testified that he was pretty drunk the night of the shooting and did not recall either statement. The court noted, however, that the victim did have the presence of mind to get his mother to call an ambulance. The victim's mother said that he was "kind of drunk". The victim's sister and girlfriend also testified as to his drinking that night. The first officer to arrive on the scene testified that the victim was very aware of his surroundings and was in a lot of pain. His actions were consistent with shock and just having being shot. The victim's alcohol level at the hospital was "47.6, Legal Driving Limit – 17.4 mmol/l". The court found that the victim's recollection of the events prior to opening the front door was not distorted. The victim was able to describe what he was drinking prior to the shooting but was unable to remember the shooter. The court did not find the descriptions of the victim's sobriety to be very helpful. The evidence of the first arriving officer was found to be helpful to the court. The court was unable to conclude that the victim was drunk or intoxicated such that it resulted in him making an error in his identification of the person who shot him.

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R v A.M., 2019 SKPC 46

Henning, August 1, 2019 (PC19039)

Constitutional Law – Full Answer and Defence – Evidence
Constitutional Law – Charter of Rights Section 7 – Notice – Complainant – Sexual Assault
Constitutional Law – Charter of Rights Section 11(d) – Notice – Complainant – Sexual Assault
constitutional Law – Validity of Legislation – Charter of Rights, Section 1 – Criminal Code, Sections 278.92(1), Section 278.92(2)(b), Section 278.94(2)
Criminal Law – Evidence – Sexual Assault – Records in Possession of the Accused

The applicant was charged with two Criminal Code offences, namely: sexual assault contrary to s. 271; and sexual touching contrary to s. 153(1)(a). The applicant applied under s. 52 of the Charter for an order that ss. 278.92(1), 278.92(2)(b), and 278.94(2) of the Criminal Code are inconsistent with the provisions of the constitution and are thereby invalid and inoperative. He further

argued that his ss. 7 and 11(d) Charter rights were violated. The new Criminal Code provisions relate to records in possession of the accused and they require that notice be given to the complainant and the complainant be a party at the hearing to determine the admissibility of the records. The applicant argued that cross-examination on records in his or her possession that must be disclosed to legal counsel and to the party being examined diminishes the efficacy of cross-examination and a fair trial process so much that it cannot be saved by s. 1 of the Charter. There has always been a limitation on cross-examination; however, until this legislation, it was within the trial judge's discretion to restrict it. The Crown argued that the new provisions continued the objectives of protecting complainants in sexual matters who must take part in trials without any impingement on the rights of the accused person. Further argument by the Crown asserted that if the legislation infringed sections 7 and 11 of the Charter, it should be upheld under s. 1 of the Charter.

HELD: No previous legislation made the complainant a party to a hearing with notice of all records or questioning disclosed to the complainant. Under the law of evidence in criminal cases, cross-examination of a witness regarding prior inconsistent statements does not require disclosure in advance of examination. The Crown arguments did not adequately address the effect of disclosure on the complainant that may allow the complainant to prepare for trial with explanations for the disclosed material or possible modification of their evidence. The importance of cross-examination has been judicially recognized. The Criminal Code sections under consideration do affect the trial process in a significant and fundamental way. The court concluded that the combined effect of sections 278.92(1), 278.92(2) and 278.94(2) is to seriously limit an accused persons' ability to effectively challenge the veracity of a complainant in cases where the accused is in possession of potentially significant material that would be utilized in cross-examination to counter evidence given in court. This was found to be a serious infringement of an accused person's ability to challenge a complainant in seeking truth in a trial. The applicant's right to full answer and defence under ss. 7 and 11(d) of the Charter would be infringed. The breaches of Charter rights were not found to be permissible or justified under s. 1 of the Charter because: a) the legislative objectives are important and well-recognized in sexual assault prosecutions; b) the provisions are an extension of existing protections; c) the impairment to freedom is significant and goes to the centre of the trial process; and d) the deleterious effects of the challenged legislation were found to outweigh its benefits. The court noted that the court was able to protect a complainant along with maintaining the objectives in sexual assault provisions in the Criminal Code without adding a further provision that could fundamentally impair the right to full answer and defence of an accused person in a sexual assault trial. The challenged provisions were declared invalid and not applied in the trial.

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R v W.M., 2019 SKPC 50

Lane, August 12, 2019 (PC19041)

Criminal Law – Young Offender – Sentencing – Adult
Statutes – Interpretation – Youth Criminal Justice Act, Section 72

The accused, a young offender, pled guilty to manslaughter contrary to s. 236 of the Criminal Code, robbery contrary to s. 344(b) of the Code and wearing a mask while committing an indictable offence contrary to s. 351(2) of the Code. The Crown applied to have the accused sentenced as an adult pursuant to ss. 64 and 72 of the Youth Criminal Justice Act (YCJA) and given a sentence of between 12 and 15 years. The defence submitted that the accused should receive an Intensive Rehabilitative Custody and Supervision Order Sentence (IRCS) of three years in addition to the 25 months he had served on remand in Kilburn Hall. At the time of the offences, the accused was 17 years old. He had been homeless when he met the victim and the victim and his wife helped by providing him with accommodation, food and medical treatment from mid-2016 to April 2017 when they asked him to leave because they were worried that he was selling drugs from their house. After the accused left, he began making threats to the victim and his daughter. The accused planned to rob the victim of his expensive watch and involved his co-accused, two young men, both aged 18. The first plan failed when the victim, a restaurant owner, did not deliver a food order to them so the group went to the restaurant at 11 pm intending to steal the watch. The accused armed himself with a baseball bat, gave the others unloaded pellet guns and provided ski masks which they all wore. The accused hit the victim repeatedly with the bat. The co-accused also struck the victim, but the accused admitted that he delivered most of the blows. They took cash both from the accused and from the till, left the restaurant and ran away. The victim was found unconscious and died of his injuries two days later. The Pre-Sentence Report (PSR) described the accused as having had a very difficult childhood. He had been in foster care since he was four years old and had suffered physical, emotional and sexual abuse. The accused did not have a criminal record and had managed to attend high school while being homeless. The author of the PSR suspected that the accused might suffer from Fetal Alcohol Syndrome (FASD), but it had not been diagnosed. During his time on remand, staff testified that he had been a model prisoner, but reported that he had planned to assault a guard and then escape. He expressed no remorse about his plan to harm the guard and said that he thought of himself as a gangster. His psychologist testified that he was immature at the time of the offence and was abusing drugs and alcohol. He had been diagnosed with substance abuse disorder, conduct disorder and reactive attachment disorder. She

described him as very intelligent but manipulative. She believed he was motivated to change and advised that the accused would benefit from her counselling for the three years of an IRCS sentence but could not guarantee a successful outcome for him. An official with the program testified that the accused would be a candidate for the program but if given such a sentence, there was no guarantee that he would stay in Kilburn Hall because at ages 19 to 20, inmates are presumed to be transferred to an adult facility. It would be up to the accused to apply to stay to in the youth facility.
HELD: The Crown's application was granted and the accused was sentenced as an adult. As each of his co-accused had received a seven-year sentence, the court found the accused should receive a nine-year sentence because he was the architect of the offences. He was given credit of 38 months for time served on remand. Under s. 76 of the YCJA, the court decided that he should serve his sentence in a federal facility. The court decided that the Crown had satisfied the two-prong test required by s. 72 of the YCJA because: 1) it rebutted the presumption of diminished moral blameworthiness, as the accused was responsible for sophisticated and deliberate planning of the robbery. The suspicion that the accused suffered from FASD attracted little weight in its consideration of diagnoses of psychiatric conditions that might have a bearing on his moral culpability; and 2) a youth sentence would not be of sufficient length to hold the accused accountable for the offence because: the IRCS sentence was optional, in that the accused could leave the program and serve the rest of the two years of his sentence in jail; after being befriended by the victim, the accused made a relatively sophisticated plan and then executed it with extreme and unnecessary violence; and the risk posed by the accused once he was released from custody could not be safely managed with a youth sentence. The court noted that it would have imposed a higher sentence but it had taken into account the Gladue factors and the accused's suspected psychological and psychiatric conditions.

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Chatfield v Bell Mobility Inc., 2019 SKQB 170

Elson, July 17, 2019 (QB19168)

Class Action – Certification – Amendment
Class Action – Classes – Subclass
Statutes – Interpretation – Class Actions Act, Section 10(2)
Statutes – Interpretation – Saskatchewan Telecommunications Act
Torts – Unjust Enrichment

The class action was certified and the certification order had been amended twice. The plaintiff claimed that the defendants wrongfully collected system access fees (fees) from their subscribers. The defendants, a telecommunications company, sought further

amendment to the current certification order. They sought the creation of a new subclass and an additional common issue to apply only to the new subclass. The new issue would relate to the application of ss. 9(2) of The Saskatchewan Telecommunications Act to authorize the collection and retention of the fees by the defendant and, as a result, provide justification for the enrichment of the defendant. The sole cause of action was a claim of unjust enrichment arising from the payment of a fee by members of the class to the defendants. One class and two subclasses were defined in the certification order. The defendants all pleaded that the specific terms of their subscription contracts expressly permitted them to collect the disputed fees. The applicant defendant argued that they had an additional juristic reason for the collection of fees, namely, the schedules established pursuant to its governing statute that required persons who accessed the wireless services to pay the equivalent of the fee.

HELD: There have been instances where subclasses have not been created until after the certification hearing even though the ideal time to deal with such matters would be at the time of the certification hearing. The court determined that the definition of a subclass would be a group of persons within a class whose claims raise common issues that are shared among members of the group, but not shared by all class members. The discrete common issues often arise from the nature of the defences, rather than from the claims of the subclass members per se. A subclass will only be created if the interests of the subclass require separate representation. The court addressed the factors that should inform the court's opinions as to whether the interests of the subclass require protection. A subclass certification will be favoured if the separate interests conflict and/or raise the spectre of different outcomes between the subclass and class. The central consideration in the matter will be whether the plaintiff meets the burden of proving the absence of a juristic reason for the defendants' enrichment in the collection of the fee. The applicant defendant will likely argue the application of one of the established categories of juristic reason, namely, a valid statutory obligation. The court found that the current certification did not prevent the applicant defendant from advancing the argument. The court disagreed with the applicant defendant that a separate defence was afforded to it because of its associated statutory defence. The statutory schedules simply provide means by which a juristic reason may be presented. The applicant defendant did not show that the interests of the subclass members differed from those of the overriding class in such a substantive way that they must be protected by separate certification within the existing order. The application to create a subclass was dismissed. The matter of costs was left to the trial judge.

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Boychuk v Beutle, 2019 SKQB 174

Megaw, July 22, 2019 (QB19169)

Family Law – Custody and Access

The petitioner, the mother of two daughters aged four and six respectively, applied in January 2018 for an order giving her sole custody and primary residence of the children. The respondent's mother then successfully applied for designation as person of sufficient interest and the court ordered that she should continue to have the interim custody and primary residence of the children at her home in Moose Jaw. The background to the issue of custody between the parties was complex. The petitioner and the respondent had separated in 2015 and the petitioner brought an application shortly thereafter for joint custody and primary residence. An interim order was made directing that the children reside primarily with the respondent in Moose Jaw with specified parenting to the petitioner in the presence of a third party. In January 2016, the parties entered into a consent judgment. The order provided that the respondent would have custody and the children's primary residence would be with him. In fact, his mother was their primary caregiver. Subsequent to the order, the petitioner moved to Melville where her parents resided. In January 2018, the petitioner learned that the respondent had been charged with serious criminal offences and he was subsequently convicted and incarcerated. She then commenced this application. At trial, the petitioner testified that she had been the primary caregiver of the children before the parties separated and had never left them for even short periods of time. She said that she ended the relationship because of the respondent's drug abuse and that she had not abused drugs. She entered into the consent judgment only because her lawyer told her she would not be successful in obtaining primary residence of the children, but she had not understood the impact of the terms of the judgment upon her parental rights. Since her return to Melville, the petitioner enjoyed a close relationship with her parents and siblings. She was employed and lived in a comfortable home with her partner. The respondent's mother and the respondent both testified that during his relationship with the petitioner they had constantly partied and taken drugs. The grandmother said that the petitioner often accompanied the respondent when he was driving truck on long distance trips and that as a result, she was almost solely responsible for the children. After the separation, a meeting was held between the parties and the respondent's parents for the purpose of requesting the latter to assume parental care of the children. In cross-examination, the petitioner denied the allegations. She asserted that she agreed to the terms of the consent judgment because she was not in a financial position to raise the children and maintained that she had not understood the effect of the terms. HELD: The petitioner's application was granted. The court ordered that the primary residence of the children be with her and their grandmother would have access to them on alternate weekends. It

made no order regarding access by the respondent and it was left to the parties to make an agreement, failing which, the respondent would have to bring an application. It applied the two-step analysis set out in D.L.C. v G.E.S. in determining custodial issues between a parent and a non-parent and: 1) confirmed that the grandmother was a person of sufficient interest. She had been involved in parenting the children since their birth and had been the primary parent since the parties separated; and 2) determined that it was in the best interests of the children under s. 8 of The Children's Law Act, 1997 that the petitioner should have custody because of her biological relationship to them. With regard to the conflicts in the evidence, the court accepted the grandmother's version. It disregarded the petitioner's past misconduct, pursuant to s. 8(b) of the Act, and her prevarication at trial. The petitioner had turned her life around. Because the children were young, the status quo did not warrant refusal to change the parenting arrangement.

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"Samantha", Re, 2019 SKQB 177

Wilson, July 24, 2019 (QB19173)

Family Law – Child in Need of Protection – Long-Term Order

The Ministry of Social Services sought an order pursuant to s. 37(2) of The Child and Family Services Act permanently committing G.A.'s three daughters, aged 11, 10 and seven years old, to the Minister's care. The children had been apprehended by the Ministry a number of times because of G.A.'s long-term alcohol abuse. At the time of this application, they had been out of G.A.'s care for almost two years. The two oldest daughters lived in a therapeutic foster home and were doing well. Their foster mother testified that she was willing to continue to care for them for several more years but was not willing to adopt them because she was too old. The youngest daughter had originally lived in the same foster home but had been taken by one of the home's employees to her own home because of ill-treatment by her sisters. She testified that she and her husband wanted to adopt this sister. G.A. opposed the application because she had remained sober since 2017 after receiving treatment.
HELD: The court granted a long-term order regarding the two oldest children so that they would remain in the care of the Ministry pursuant to s. 37(3) of the Act. It granted a permanent committal to the Ministry under s. 37(2) of the Act for the youngest child. The court found that the children were still in need of protection at the time of the application, pursuant to s. 11 of the Act, because G.A.'s most recent period of sobriety was not long enough to satisfy it that she was a recovered alcoholic, given her past history. A permanent order was not appropriate for the two oldest children because it

would prevent G.A. or their maternal grandmother from having access to them and the long-term order would permit the possibility of G.A. being able to assume care of them in the future. The children could continue to reside in the same therapeutic foster home. It was in the youngest child's best interests that she be permanently committed to the Minster because her foster parents intended to adopt her.

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Input Capital Corp. v Berglund, 2019 SKQB 179

Currie, July 29, 2019 (QB19174)

Civil Procedure – Evidence – Credibility
Civil Procedure – Summary Judgment – Genuine Issue for Trial
Contracts – Breach
Contracts – Unconscionability

The applicant applied for summary judgment finding the personal respondent, C.B., liable to the applicant for breach of contract with the court directing a hearing or trial to determine the remedy arising from the breach of contract. C.B. signed a Streaming Canola Purchase Contract (the contract) with the applicant on February 3, 2015. The contract outlined that the applicant would purchase C.B.'s canola, paying most of the purchase price ($288,000) immediately, with additional annual payments of $12,000 provided that C.B. seeded sufficient canola to produce 200 tonnes per year, and provided he delivered that amount each year. C.B. was to deliver 200 tonnes of canola to the applicant by December 31 of each year, 2015 to 2020 inclusive. Security documents signed by C.B. included a mortgage of his farmland and a security agreement relating to other property. C.B. was paid the initial $288,000 and he delivered the required 200 tonnes of canola in October 2015. The applicant indicated that there were no more deliveries of canola, so none of the $12,000 annual payments were made to C.B. The applicant also sued on an amending agreement dated October 2015 that extended the arrangement by one year and also provided for payment of an additional $48,000 from the applicant to C.B. C.B. denied signing the amending agreement. The court had to decide whether the following could be determined without a trial: 1) whether C.B. entered into the contract and the amending agreement; and 2) whether the contract (including the amending agreement) was unconscionable and therefore unenforceable.
HELD: The court made the following determinations: 1) C.B. did sign the contract, the applicant transferred money to him, and C.B. delivered the first year's canola, all of which establish that C.B. entered into the contract and did not comply with all of its terms. The copy of the amending agreement attached to C.B.'s affidavit set out the extension and it appeared to bear C.B.'s signature. If the

matter proceeded to trial, the court found that there was no basis to believe that the trial evidence would be different from the evidence before the court on the application. The court was satisfied that the evidence was sufficient to permit a determination. The evidence was found to establish that C.B. signed the amending agreement in October 2015. There was a genuine issue for trial due to the conflict in evidence, however, the court applied its power under Rule 7-5(2)(b) to resolve the conflict. The court found that C.B. had signed the original documents in a location other than that recalled by him. The documents themselves provided the contrary location. The court also found that C.B.'s recollection of events regarding the amending agreement were not persuasive. C.B. entered into the amending agreement; 2) the court preferred the evidence of the applicant where it conflicted with C.B.'s. The court concluded that it was able to determine the question of whether the contract was unconscionable without the need for a trial. The factors that must be established in order to succeed in a claim that a contract is unconscionable were examined as follows: a) there was an inequality in bargaining position between the parties; b) C.B. relied on the Gustafson case to argue that the contract was unconscionable because many of the circumstances were the same in that case as the present. In the Gustafson case, the applicant advanced funds to the debtor after he had defaulted and when the applicant was found to know that the debtor was in dire financial straits. In this case, the applicant did not advance funds after default, nor did he sign a more onerous contract after default as was the case in Gustafson. To act in an unconscionable manner, there must be a conscious decision to take advantage of the circumstances. Here, the initial deal was negotiated in 2014 and the documents were not signed until 2015, allowing C.B. time to consider the deal. C.B. was not rushed by the applicant. The court found that the fact that one of the documents was a mortgage was plain given the bolded heading indicating it was. The court concluded that the evidence did not establish that the applicant used its position of power in an unconscionable manner to achieve an advantage over C.B.; and c) the circumstances that existed in Gustafson relating to the applicant having almost no risk in the contract did not exist in this matter. The applicant in this matter had the risk of the uncertainty of future canola prices. Further, it was found that the mortgage and security agreement were not unusual. There was no suggestion that the amount paid to C.B. was unfair. The applicant did not have a grossly unfair advantage over C.B. Neither the contract nor the amending agreement, mortgage, or security agreement were found to be unconscionable. C.B.'s defence of unenforceability was dismissed. C.B. was found to have breached the contract by failing to comply with its provisions. The court directed that a hearing be set to determine a remedy. Costs were reserved to be addressed at the hearing.

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The Creeks in Regina Land Development Ltd. v Ozem, 2019 SKQB 180

Mills, July 29, 2019 (QB19175)

Statutes – Interpretation – Land Titles Act, 2000
Real Property – Interest in Land – Caveat

The applicants, a land development company and the City of Regina, applied pursuant to ss. 106 and 109 of The Land Titles Act, 2000 to have the respondent's caveat removed from lands that they own. The lands in question were purchased in the 1960s by a company in which the respondent was a shareholder. He entered into an agreement with the company whereby it agreed to pay him royalties for all gravel gotten and sold from the land in exchange for giving up his shares. The royalty agreement provided that the respondent would have the same rights as if he had been granted a legal mortgage covering the lands and would be entitled to file and maintain a caveat against them. The lands changed ownership a number of times and in 1997, a notice to lapse the respondent's caveat was refused by the court and it ordered the registration to continue until further order or removal by consent. In 2007, the City annexed the lands and rezoned them. Gravel extraction was not permitted. The development company purchased the lands in 2013. No steps were taken until 2018 to contact the respondent for the purpose of having the caveat removed. The lands had been subsequently subdivided into residential lots and some of the lots had been sold with a closing to take place in May 2019. At the time of the hearing, there was no information as to whether the sales had proceeded. The applicants argued that there was no valid interest that allowed the creation and maintenance of a caveat and that it was no longer enforceable given the inability to develop the gravel deposits.
HELD: The application was dismissed. The court found that the caveat was based upon an interest in land as evidenced by the parties' intention in the agreement. Further, the order continuing the caveat made at the time of the agreement was never appealed. There was no authority for the position that a validly-registered caveat protecting an interest in land will expire upon the interest having no value at a particular time.

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Thievin v Thievin, 2019 SKQB 182

McCreary, July 30, 2019 (QB19177)

Family Law – Custody and Access – Interim – Variation – Relocation

The petitioner and the respondent shared joint custody of their three children, one 14-year-old and 11-year-old twins, with the respondent mother having them in her primary care. She applied to vary the order and provide an interim one permitting her to move with them from Estevan to the Moosomin area. She argued that a material change in circumstances had occurred since the last custody order was made in November 2017 and it would be in the children's best interests to move. The respondent had incurred significant personal debt using credit cards to support herself and the children and had no income except for child support, which was in arrears, limited spousal support and child tax benefits. She had been unable to secure employment and her prospects in Estevan were poor, given her skills and the local economy. She did not have a vehicle which also affected her ability to get a job. An order nisi for judicial sale of the family home had issued and she was about to be evicted and could not secure comparable housing. The respondent advised that by moving, she and the children would be able to live with her sister, free of charge, and have access to the use of her sister's vehicle. The petitioner argued that there had been no material change since 2017 when the judge declined to allow the respondent to move from Estevan with the children. He submitted that the respondent should find low-income housing in Estevan. HELD: The application was granted. The court ordered that the respondent was entitled to move with the children to the Moosomin area. The petitioner would continue to have parenting time with them every second weekend. It found that the respondent had demonstrated a material change in circumstances since the 2017 order which affected the children's needs. The pending foreclosure meant that the respondent would receive no equity from the sale of the family home and could not buy another property, nor afford to move into comparable rental housing. The move was in the children's best interests on an interim basis because they should stay with the respondent who had been their primary parent and be supported by her family while she sought employment. The move would not result in a large disruption to the petitioner's parenting time. Regardless of whether the children moved into rental housing in the current community or relocated to Moosomin, they would have to change schools.

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R v Gelowitz, 2019 SKQB 183

Danyliuk, July 31, 2019 (QB19178)

Criminal Law – Assault
Criminal Law – Defences – Protection of Persons Acting under Authority

The accused, a constable with the Saskatoon Police Service (SPS), was charged with assault, contrary to s. 266 of the Criminal Code. The charge arose after an internal SPS review had been conducted. The accused and a number of other police officers attended at the scene of an armed robbery. Unable to find the robber, two of the constables left but noticed an SUV that had been reported stolen stopped beside them at a red light. They activated their emergency lights and siren with a view to pulling over the vehicle. The driver of the vehicle did not comply, and a high-speed chase ensued through the city. The accused joined in the chase in his own vehicle as did two other officers in police vehicles. When the driver eventually stopped, all of the police vehicles surrounded the SUV and one of them parked so that the driver's door of the SUV could not open. The constables broke both of its front seat windows but neither the driver nor his passenger left the vehicle through them as commanded. The driver also disobeyed repeated commands to keeps his hands up. The accused decided to attempt to physically remove the driver from the vehicle. He first punched the driver in the head and with the help of the others, began to pull the driver out of the window. The driver kept resisting by bracing his legs against the steering wheel but as he was pulled horizontally, the accused said that he delivered a knee-strike to the driver's chest. A police vehicle video filmed at the time showed the driver struggling and then his resistance stopped after the accused's knee struck his head. At trial, the accused testified that the chase had been unusually long and dangerous, that he believed the stolen vehicle was linked to the armed robbery and that there could be numerous weapons in the vehicle. The danger was heightened by the driver failing to follow police commands and by his active resistance to being removed from the vehicle. The other constables testified that they were concerned about the danger and the risk involved for the same reasons. The driver testified that he could not recall much. He could not remember driving through red lights during the chase, that the constables yelled at him to get out of his vehicle or that he resisted them. His remembrances changed when he was cross-examined and after watching the police video. Notably, he recalled that the accused had kicked him in the face. The defence called an expert witness who testified as to the use of force by police while carrying out their duties and the training that they received in the use of force. In his opinion, the incident in this case was a high-level criminal encounter. The accused acted appropriately and within his training when he punched the driver's head and when he delivered the knee strike. The issue was whether s. 25 of the Criminal Code provided a defence to the assault charge.

HELD: The accused was found not guilty. The Crown had not disproved the applicability of s. 25 of the Code. The force used by the accused was not excessive. The court found, applying the three factors set out in Power, that: 1) the accused's subjective perception of the degree of violence or danger he was facing was on the higher end of the spectrum; 2) the accused's belief was reasonable on the basis of the situation as he perceived it. This perception was

confirmed by the testimony offered by the other officers; and 3) the accused's use of force in response to the threat was objectively reasonable, based upon: its assessment of credibility of the accused and the driver; the testimony of the other officers; and the evidence provided by the police video and the expert witness.

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Cogswell v Thompson, 2019 SKQB 184

Megaw, July 30, 2019 (QB19179)

Statutes – Interpretation – Builders' Lien Act, Section 55

The defendants applied to dismiss the lien claim made by the plaintiff and to vacate the claim registered against the property pursuant to s. 55 of The Builders' Lien Act. The plaintiff applied to extend the time to have the matter set down for trial pursuant to the same section. The plaintiff registered his claim against the property in April 2016 and the action was commenced the following August. He alleged that the defendants had failed to pay him the balance owed to him upon completion of a building project. The plaintiff's counsel permitted the defendants an extension of time to serve their pleading. After it was served, the parties attended mandatory mediation in September 2017. The plaintiff's counsel sent a letter in October asking for dates for questioning. The defendants' lawyer responded in November and requested suggested dates by the plaintiff. The plaintiff did not respond and took no further steps until his counsel contacted the defendants' lawyer in February 2019 when he renewed his request for dates for questioning.
HELD: The court ordered that the lien be dismissed pursuant to s. 55 of the BLA and that the claim of lien be vacated pursuant to s. 60. The plaintiff had not provided an explanation for the delay following the mandatory mediation session and thus it could not be determined if the delay was justifiable.

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O'Soup v Montana, 2019 SKQB 185

Mitchell, July 30, 2019 (QB19180)

Statutes – Interpretation – First Nations Elections Act

The applicant appealed, pursuant to s. 35 of the First Nations Elections Act (FNEA), for an order setting aside the election for the chief of the Key First Nation (KFN). The KFN held an election for chief and band councillors in June 2018. The KFN's first election under the FNEA had been held in 2016 but as a result of an appeal

by a group of electors, that election was annulled and a new election ordered. In the process of holding the June 2018 election, the applicant alleged that the respondent, Irvin Montana, in his capacity of Electoral Officer, improperly rejected his nomination as a candidate for chief and as a result the applicant's name did not appear on the ballot, contravening s. 31 of the FNEA and the First Nations Election Regulations (FNER). He requested that the court set aside the election for the chief and direct a new election for that position. Montana deposed that he had held a nomination meeting for the election on May 6, 2018 and announced the procedure for receiving nominations. It essentially required that the nominator provide the in-person nomination form after the nominator had shown photo identification or a treaty card. The member being nominated was then to present photo identification and submit a complete candidate declaration form. Once these requirements were satisfied, the candidate had to pay his or her $250 fee. The deputy electoral officer (DEO) would staple together any forms that had been provided including the receipt for payment. Montana advised those who had submitted forms that all of the requirements must be met within six days of the meeting. In the case of the applicant, he attested that after being properly nominated, he completed the candidate declaration form and paid the fee. When he asked Montana if anything further was required, he was told that he had to present his identification. As he did not have it with him, he left and retrieved it from his home. When he returned, he handed his form to the DEO and paid his fee. He approached Montana and showed him his identification papers. Montana advised him that his candidacy package was complete. On May 10, Montana called him to tell him that his name was not on the ballot because he had not received his finalized candidate declaration form. The applicant alleged that Montana must have lost his form. Montana deposed that the applicant had not returned with identification before the close of the nomination meeting. He submitted that the applicant could not have handed his candidate declaration to the DEO before Montana had reviewed his identification. The respondent remembered that the applicant was the only candidate who had not had his identification at the meeting, but he recalled that he had been properly nominated and paid his fee. He appended to his affidavit the package that had been stapled together for the applicant and the candidate declaration form was blank.
HELD: The appeal was dismissed. The court found that the applicant had not met the burden of proof on a balance of probabilities that there had been a contravention of the FNEA or s. 9 of the FNER. It accepted the respondent's evidence that the applicant had not completed his candidate declaration form. In the alternative, if there had been a contravention, the applicant had not shown it likely affected the election results. The successful candidate won the election by a considerable margin and regardless, it was impossible to determine what effect the inclusion of the applicant's name would have had on the election's result.

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B.K. v M.C., 2019 SKQB 187

MacMillan-Brown, February 6, 2019 (QB19182)

Adult Guardianship and Co-Decision-Making Act – Personal and Property Guardian
Family Law – Adult Guardianship – Variation
Family Law – Adult Guardianship – Access
Guardianship – Dependent Adult – Personal and Property Guardian – Variation
Statutes – Interpretation – Adult Guardianship and Co-decision-Making Act

The litigation concerned a 28-year-old man, R.K. The parties were his parents. In 2013, the respondent was appointed personal and property guardian of R.K. She had full authority to make decisions in relation to access to R.K. The order provided for continued sharing of R.K.'s medical information with the petitioner. After numerous unsuccessful applications by the petitioner, the court ordered that he obtain leave of the court before bringing further applications to vary the guardianship order. The application had to be accompanied by medical information indicating that R.K.'s abilities justified a change as a result of new information. In August 2015, R.K. refused to go home with the respondent when in the petitioner's care. He lived with the petitioner for a lengthy period. R.K. returned to the respondent's care in December 2016. In March 2018, the petitioner brought an application for leave to bring this application. Leave was granted and the application was heard in September 2018. The application was either for review of the guardianship order or, in the alternative, for access to R.K. The petitioner was self-represented when he made the application. At the time of hearing the application, the real issue was the petitioner's access to his son. Two assessments indicated that R.K. has a functional age of between 7 and 11 years. R.K. has a number of medical and behavioural issues as well as having Prader-Willi Syndrome. He was admitted to a hospital for six months in 2017. Upon discharge, R.K. moved to a supported living home. It appeared that R.K. had adapted well to the supported living environment. R.K. was diagnosed with avoidant/restrictive food intake disorder.
HELD: The petitioner was found to have a complete inability to live by the guardianship order. It was for that reason that the petitioner has not had access to R.K. since December 2016. According to The Adult Guardianship and Co-decision-Making Act, the best interests of R.K. are the touchstone principle to follow. The court did not find any basis upon which to grant an application for the petitioner to become R.K.'s guardian. The respondent was ordered to remain his sole personal and property guardian pursuant to the guardianship

order. The court also concluded that it was not in R.K.'s best interests for the petitioner to have access. The court found that the petitioner was consumed with R.K.'s medical conditions and potential treatment and with his communication to R.K. about those matters. The court found that R.K.'s unhealthy obsession with his weight and eating habits was exacerbated by the petitioner. The court found that the petitioner's material did not demonstrate any basis to conclude that the situation would be any different than it had been when he did have access to his son. The petitioner has had an absolute inability to accept the guardianship order. The court found that there was nothing to convince it that the petitioner would not risk harm to R.K., both medically and psychologically. The petitioner did not provide any new information. The order requiring the petitioner to obtain leave prior to another application in relation to R.K. remained in place, with leave to be sought by way of an ex parte application.

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Crescent Point Energy Corp. v DFA Transport Ltd., 2019 SKQB 189

McMurtry, August 7, 2019 (QB19184)

Statutes – Interpretation – Builders' Lien Act, Section 2, Section 22, Section 49, Section 60

The applicant, an oil and gas corporation, applied for an order discharging and vacating a lien pursuant to ss. 60, 91, 95 and 96 of The Builders' Lien Act (BLA). The lien had been registered by the respondent, a Saskatchewan transport company that supplied fluid hauling services to the applicant between 2012 and 2017. The applicant argued that these services were not "on or in respect of an improvement" within the meaning of s. 22(1) of the BLA. The parties agreed that the respondent's services to the applicant were production hauling; transporting water or oil from well sites to processing facilities or disposal sites; service hauling; transporting water, kill fluid and other liquids to well or battery sites in connection with maintenance and repairs to wells performed by third parties; and completion hauling, i.e. transporting water to well sites to fill frack storage tanks and transporting flowback liquid away from well sites.
HELD: The application was dismissed. The court found that the respondent had a lienable claim against the applicant, following the decisions in Points North and Boomer Transport, as the former delivered fluids to the latter that were "incorporated into the improvement".

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Miroshnichenko v SEIU – West, 2019 SKQB 194

Tochor, August 15, 2019 (QB19185)

Administrative Law – Judicial Review
Labour Law – Judicial Review – Labour Relations Board

The applicant applied for judicial review of an order made by the Saskatchewan Labour Relations Board (SLRB) that dismissed her application for an order pursuant to s. 6-59 of The Saskatchewan Employment Act (SEA). She had sought a declaration that the respondent union had breached its duty to provide her with fair representation. The applicant was a member of the Service Employees International Union (SEIU) while employed by the YWCA. After receiving a written reprimand and a one-day suspension from the YWCA for the applicant's refusal to participate in performance coaching designed to resolve an interpersonal conflict between her and a co-worker, the respondent filed grievances on her behalf under the collective agreement. The grievances were held in abeyance while the employer and the respondent tried to resolve the underlying disputes, but the applicant repeatedly refused to participate in remedial efforts. After receipt of a caution from her employer that her employment would be terminated, the applicant persisted in conduct deemed inappropriate and was dismissed. The respondent filed another grievance and sought her reinstatement. The respondent and the employer agreed to proceed directly to arbitration on that grievance, but also had its Grievance Committee and its counsel review both it and the earlier grievances. It concluded that all the grievances should be withdrawn and the respondent accepted its recommendation. The applicant appealed this decision to the respondent's Executive Board which upheld it, noting that her employer's requirement that she attend coaching sessions was not harassment as she had alleged. She then appealed unsuccessfully to the SEIU International Vice-President and then applied to the SLRB, arguing that the respondent had not fairly represented her. It decided that the respondent had met its statutory obligations under s. 6-59 of the SEA. In this appeal, the applicant alleged that the SLRB chairperson: 1) erred in his ruling by accepting the evidence submitted by the respondent; and 2) failed to be a neutral adjudicator.
HELD: The application was dismissed. The court found with respect to each issue that: 1) the standard of review regarding findings of fact made by a trier of fact was reasonableness. Based on the record, the chairperson's findings that the respondent had taken proper steps to investigate the applicant's claims and had represented her appropriately were within a reasonable range of options open to him; and 2) the standard of review was correctness regarding the neutrality of the chairperson. Complaints regarding neutrality raise considerations of procedural fairness and are questions of law. The

applicant failed to present any evidence establishing that the chairperson displayed a lack of neutrality.

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Hired Resources Ltd. v Lomond, 2019 SKQB 195

Layh, August 15, 2019 (QB19186)

Injunction – Restrictive Covenant
Employment Law – Restrictive Covenant – Non-Solicitation Clause

The applicant, a labour leasing company, applied for injunctive relief to restrain the defendants, its former employee, Lomond, and his current employer, Handshake Services, from soliciting the applicant's clients, prospective clients and employees. The applicant was hired under an employment agreement that contained his job title as operations manager-industrial division and his duties to grow the industrial division and a non-solicitation clause that prohibited Lomond from such things as contracting, soliciting or accepting the patronage of any customer, prospective customer for the purpose of engaging accepting or providing services to induce them to change their relationship with the applicant or employ or entice away any of the applicant's employees. The respondent's evidence was that he possessed very little authority in his position. Lomond left his employment with the applicant and it argued that he immediately started working for Handshake Services, a competitor labour leasing company, and started soliciting and providing those services to the applicant's clients and prospective clients and facilitated the hiring away of several of its employees to his new employer. The issues were whether the applicant had satisfied the conditions for granting injunctive relief and established: 1) a strong prima facie case based on either: a) a breach of a fiduciary duty; or b) a breach of the non-solicitation clause; 2) that it would suffer irreparable harm if the injunctive order was not granted; and 3) that the balance of convenience favoured it.
HELD: The application was dismissed. The court found with respect to each issue that the applicant had failed: 1) to establish a strong prima facie case on the basis of: a) a breach of fiduciary duty. The evidence had not met the requirement that Lomond had to be part of its top management or a key employee; and b) any breach of the non-solicitation clause. The clause in the agreement was invalid because it failed the test of reasonableness by being ambiguous and overly broad; 2) to show that it would suffer irreparable harm, because it had not provided evidence regarding the magnitude of the loss it claimed it might experience; and 3) to show that the balance of convenience was in its favour. Because of the urgency and importance of injunction applications, the court awarded costs to the defendants on column 2 of the Tariff of Costs, with two thirds being awarded to Lomond.

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Globe-Elite Electrical Contractors Ltd. v Centre Square Developments GP Inc., 2019 SKQB 197

Robertson, August 16, 2019 (QB19187)

Civil Procedure – Queen's Bench Rules, Rule 5-32

The plaintiff applied for an order requiring the defendants to answer written questions. The defendants applied for an order striking the written questions pursuant to Queen's Bench rule 5-32(6). The plaintiff had been given judgment for over $100,000 against the defendant, Centre Square Developments, but as it was unable to collect on the judgment, looked to the other defendants who owned or were involved in the defaulting company, claiming that they improperly benefitted through fraudulent conveyancing of company property. In the ensuing proceedings, the parties had agreed to conduct questioning, but before it occurred, the plaintiff served written questions on the individual defendants. Their counsel objected. The four written questions asked by the plaintiffs were relevant to whether, when and how the defendants had received funds from Centre Square. The defendants' application to strike the questions or in the alternative, to defer answering until after the conclusion of oral questioning was made because the questions did not further the purpose or intention of the foundational rules, specifically Queen's Bench rule 1-3, in light of the scheduled date for oral questioning. The questions were not narrowly crafted, the time it would take to answer them was not proportional to their value and the answers could be obtained during questioning. The plaintiff argued that the questions were a proper use of the Queen's Bench Rules because written answers would provide a foundation for cross-examination at the questioning. Because there were multiple defendants, it would reduce the time needed for questioning and the potential for inconsistences.
HELD: The defendants' application was granted and the plaintiff's application dismissed. The court used it powers pursuant to Queen's Bench rule 1-4, reframed the plaintiff's questions and ordered that the defendants provide answers to them. In its analysis of the plaintiff's four questions, the court applied the eight criteria set out in Tse-Ching and found that only two qualified as appropriate. The time and cost of answering the questions would be disproportional to the value, having regard to the scheduled oral questioning.

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