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Civil Procedure – Judgments and Orders – Consent Order
Civil Procedure – Queen's Bench Rules, Rule 13-7

The respondent plaintiff commenced an action against the appellant defendant for nonpayment of $1,100,300. After providing its own affidavit of documents (AD), it pressed the appellant for his and he promised the AD would be ready by the end of November. When he failed to provide it, the respondent applied to the Court of Queen's Bench to compel production by January 4, 2018. The respondent then granted the appellant's request for an extension of time and they negotiated an agreement that withdrew the application and gave the appellant until January 31 to serve his AD. If he did not, his statement of defence would be struck. The contract was formalized in a consent order. The appellant did not serve his AD in time and the respondent applied for an order to strike the statement of defence. On February 12, he served it and applied pursuant to Queen's Bench rule 13-7 to extend the time of service to that date nunc pro tunc. The appellant argued, both then and on this appeal, that the chambers judge had broad discretion under that rule to do so. The judge agreed, but applied Procyshyn to find that while it had the discretion to amend the consent order, it was limited to grounds that would vitiate a contract, such as common mistake, fraud, collusion, misrepresentation, duress, illegality or where there was a 'slip' in drawing up the order. The appellant argued in the alternative that the order had been vitiated by illegality, frustration or duress. The judge found that the order had not illegally ousted the court's jurisdiction to govern its own process. The appellant said

that the agreement had been frustrated because he had been unable to prepare the AD as he was in the middle of harvesting, he underestimated the time it would take to collect his documents, and his bank and lawyer had caused various delays. The judge found that these circumstances did not meet the legal test for frustration. The issues on appeal were whether the chambers judge erred in law: 1) by incorrectly identifying the law governing the exercise of discretion pursuant to Queen's Bench rules 13-7(2) and (3). The appellant submitted that the overriding consideration in applications to extend time, regardless of a consent order, is justice and fairness. He had offered cogent reasons for his failure to meet the deadline and the respondent had not suffered any prejudice by the brief delay in service; 2) in failing to find the consent order was vitiated by reason of illegality. The consent order amounted to contracting out of s. 28 of The Queen's Bench Act, 1998 and the Rules. A party cannot contract out of a statutory provision designed to protect the public interest; and 3) by disregarding material facts in failing to find the order was vitiated by frustration. He argued that the judge failed to identify the evidence relied upon to support his finding that he had not exercised diligence.
HELD: The appeal was dismissed. The court found with respect to each issue that the chambers judge: 1) had correctly identified the law of contract as limiting the exercise of his discretion, although his discretion was not limited to the specific grounds he listed. Generally speaking, however, Queen's Bench rules 13-7(2) and (3) do not alter the substantive law of contract and the judge did not have the broad discretion to grant the appellant relief on the basis of fairness or justice; 2) had not erred in failing to find illegality. The Queen's Bench Rules are not legislation of the kind that engages the contracting-out principle; and 3) had not failed to identify the evidence and it was sufficient to support his conclusion that the appellant and his counsel were not sufficiently diligent.

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Whitmore Ryan-Froslie Barrington-Foote, August 8, 2019 (CA19076)

Municipal Law – Property Taxes – Assessments
Municipal Law – Assessment Appeal
Statutes – Interpretation – Court of Appeal Act, 2000, Section 12(1)(f)
Statutes – Interpretation – Municipalities Act

The appellant appealed the decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board (committee) regarding the property tax assessments of two full-service hotels in the respondent town. The appellant disagreed with the 2016 assessment because SAMA used a capitalization rate of 11.8 percent,

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not 10.9 percent as was done in 2014 and 2015 pursuant to the committee's decisions regarding assessments in 2013. SAMA deliberately chose to ignore the committee's decisions. The Board of Revision (BOR) nonetheless dismissed the appellant's appeal because there was no appeal before it regarding limited-service hotels that were assessed with a capitalization rate of 11.8 percent. When the appellant appealed to the committee, the BOR decision was upheld. SAMA acknowledged that in 2016 it revalued all full-service hotel properties using the capitalization rate of 10.9 percent, in accordance with Martensville and Moose Jaw decisions, but it did not revalue limited-service hotels. The issue was whether the committee erred when it concluded that it had no authority or jurisdiction to address the disparity in capitalization rates between full-service and limited-service hotels because the appellant had failed to establish any error in the assessment of its full-service hotel properties. The appellant argued that its full-service hotel properties were similar to limited-service hotels for assessment purposes based on the committee's decisions in Martensville and Moose Jaw. Those decisions required that sales for both full-service and limited-service hotels be used to calculate the capitalization rate for those hotel properties. The rate was 10.9 percent. The committee said that it did not err because it did not have jurisdiction to vary the assessment of limited-service hotels as there was no appeal relating to them.
HELD: The committee was found to have erred and the appeal was allowed. The assessor was bound by s. 195(4.1) of The Municipalities Act to apply the decisions of the committee in Martensville and Moose Jaw and to use a capitalization rate of 10.9 percent for both types of hotels. The assessor instead used a capitalization rate of 10.9 percent for full-service hotels and 11.8 percent for limited-service hotels. The decision was found to be an error and it rendered the assessment of full-service hotels inequitable. Previous cases have stated that a property assessment will usually be the same for each year of the four-year valuation cycle. SAMA failed to apply the Martensville and Moose Jaw decisions, so the appeal court had to determine: 1) whether equity was achieved; and 2) what the appropriate remedy was. The appeal court determined as follows: 1) the market valuation standard was not attained with respect to the property subject to this appeal because the assessments did not reflect typical market conditions for limited-service hotels, which were treated as similar properties, and because the assessed value of the full-service hotels did not meet the quality assurance standards established by SAMA. The appeal court found that if the valuation standard was not attained, then equity was not achieved. The appeal court agreed that the BOR did not have the authority to correct the inequity; however, the committee did have the authority and jurisdiction to intervene. The committee had this power pursuant to ss. 256(b) or (c) of The Municipalities Act. The committee also had the power to direct SAMA to comply with its orders pursuant to s. 54 of The Municipal Board Act; and 2) equity could have been achieved by the committee directing the assessor to correct the assessment roll to reflect the Martensville and Moose Jaw decisions.

The appeal court disagreed with the appellant that the neighbourhood approach should be used to assess the appellant's full-service hotels at a capitalization rate of 11.8 percent. The committee had already established the appropriate capitalization rate for full-service and limited-service hotels as being 10.9 percent. The appeal court used its authority pursuant to s. 12(1)(f) of The Court of Appeal Act, 2000 to order SAMA to comply with the committee's decisions in Martensville and Moose Jaw. SAMA was ordered to pay the appellant its costs on the appeal.

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Canadian Natural Resources Ltd. v Lisafeld Royalties Ltd., 2019 SKQB 201

Chicoine, August 21, 2019 (QB19195)

Real Property – Lease – Oil and Gas Lease
Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 7-5, Part 6
Contract Law – Interpretation

The plaintiff, an oil and gas company, brought an action against the defendant, the registered owner of all mines and minerals on a half section of land (the Lisafeld lands) in which it sought a declaration that it was not in breach or default under the lease between the parties and the lease remained in full force and effect. The defendant applied for summary judgment and dismissal of the plaintiff's action. The plaintiff then applied under Part 6 of The Queen's Bench Rules for a declaration that the lease remained in full force and effect resulting in resolution of the issues raised in its statement of claim. The defendant had terminated the lease on the basis that the plaintiff had breached the offset well provision regarding the Lisafeld lands. The provision stated in part: 'in the event of commercial production being obtained from any well drilled on any drilling unit laterally adjoining the said lands and not owned by the lessor, or, if owned by the lessor, not under lease to the lessee, the lessee shall commence within six months from the date of such well being placed on production, the drilling of an offset well on the drilling unit of the said lands laterally adjoining the said drilling unit on which petroleum is being so obtained…".The lease was created in 1949. The defendant was a successor to the original lessor. The plaintiff had become the lessee through an assignment from the original lessee, Imperial Oil. The plaintiff drilled a well composed of vertical and horizontal portions: the former's surface location was on the lands wherein Lisafeld held the underlying mineral rights and the latter portion of the well was in the Frobisher zone of the adjacent lands upon which Lisafeld had no interest in the mineral rights. The plaintiff drilled and obtained production of oil from the horizontal portion in October 2012. Production ceased in July 2015. The defendant notified the plaintiff in early 2016, alleging that the

drilling and production from the horizontal well on land laterally adjacent to Lisafeld's lands created an offset obligation pursuant to the clause in the lease. It then provided formal notice under a term of the lease whereby the termination would not occur if the plaintiff remedied the breach within 90 days. The plaintiff did not drill and offset well but informed the defendant that the obligation had been satisfied in 1956 when Imperial oil drilled a well into the Midale and Frobisher formations and determined at that time that no oil could be produced from it. The plaintiff also argued that lease did not contemplate horizontal wells. The defendant formally terminated the lease. Among the issues were whether: 1) it was an appropriate case for summary judgment; 2) an offset well obligation had arisen; and 3) if so, had the drilling of the 1956 well satisfied it with respect to the Frobisher formation on the adjacent land?
HELD: The plaintiff's application for the declaration that the lease remained in full force and effect was granted. The defendant's application for summary judgment was dismissed. The court found with respect to the issues that: 1) this was an appropriate case for summary judgment as it involved the interpretation of a term of a contract. It could reach a determination on the merits based upon the affidavit evidence, although the case was complex; 2) the drilling of the horizontal well triggered the offset well provision in the lease. It interpreted the provision to include horizontal wells even though the parties would not have contemplated the advent of such types of wells in 1949; 3) there had been no breach of the offset provision. The plaintiff was not obligated to drill an offset well in response to drilling the horizontal well on the adjoining drilling unit because the 1956 well satisfied the obligation to explore production in the Frobisher formation underlying all of the lands in question. In addition, as of the date that the notice of default was served upon the plaintiff, there was no commercial production on the adjoining drilling unit and as a result there was no longer any obligation to drill an offset well.

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City Centre Equities Inc. v Regina (City), 2019 SKCA 80

Ottenbreit Caldwell Whitmore, August 21, 2019 (CA19079)

Municipal Law – Appeal – Assessment Appeals Committee Decision
Statutes – Interpretation – Cities Act, Section 227

The appellant appealed the decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board (committee) relating to s. 227 of The Cities Act (Act). Section 227 allows the decision of the Board of Revision (BOR) or committee in respect of an assessment for one year to be applied to the subsequent year's assessment that was placed on the roll while such decisions were pending. The appellant appealed the respondent's original 2014

assessment of its property to the BOR arguing that the sale of a one-third interest in a property should not have been used in the income approach because it was not an arm's-length sale. The BOR allowed the appellant's appeal and required the assessor to remove the non-arm's-length sale. The appellant's 2014 assessment was amended to reflect the BOR decision. The property had the same assessed value in 2015. In 2016, the committee set aside the BOR's decision, finding that the BOR had erred in removing the property from the capitalization rate, and ordered the original 2014 assessment to be restored. The appellant obtained leave to appeal the 2014 committee decision. The respondent sent a tax notice to the appellant increasing taxes for the property for 2014 and 2015. The 2014 tax recalculation was in accordance with s. 270 of the Act and the 2015 taxes were in accordance with s. 227 of the Act. The appellant then applied to the committee under s. 227 of the Act for direction on whether that section could be used in respect of the 2015 taxes. The committee issued its decision on March 14, 2017. In June 2018, the Court of Appeal allowed the appellant's appeal of the 2014 committee decision which restored the 2014 BOR Decision that had deleted the one-third sale because it was non arm's-length from the capitalization rate calculation. The issues on this appeal were: 1) whether the committee erred in its interpretation and application of s. 227; 2) whether the committee erred when it found the assessor could apply s. 227(1) of the Act without the agreement of the parties or a ruling by the committee; and 3) whether the committee erred when it found the assessor could apply s. 227(1) on an interim basis while the committee's 2014 decision was still before the courts. HELD: The appeal was dismissed. The issues were determined as follows: 1) the appellant argued that s. 227 could not be used because the 2014 committee decision did not relate to the 2015 assessment. It further argued that involving s. 227(1) with respect to 2015 would deprive it of the right to appeal any issue it had with the 2015 assessment. The appellant also argued that applying s. 227(1) would create inequity and offend s. 165 of the Act. The purpose of enacting s. 227 was to address concerns regarding the timeliness of the assessment and appeal process. The section does not have any mandatory direction to apply appeal decisions, but it can in the proper circumstances. The appeal court found that it made sense that the assessor of the City be entitled to invoke the section in the first instance, which is consistent with the overall scheme of the Act. Section 227 applies if: a) the assessment model has not been altered; b) nothing has changed with regard to the material facts, conditions, and circumstances of the property, and c) the subsequent assessment has not itself been appealed. The requirements were found to be met. The appeal court concluded that s. 227 could be used by the respondent to apply the 2014 committee decision to the 2015 assessment and adjust the taxes accordingly. The appeal court disagreed with the appellant that it was deprived of its right of appeal by the use of s. 227. The use of the 2014 committee decision to the 2015 assessment came long after the appellant's right to appeal had expired; 2) the section does not refer to agreement. The

reference to agreement in s. 227(2) was found to have very narrow application; it does not impose prior agreement, but gives the parties something akin to a review of whether the section has been properly applied; and 3) the appeal court concluded that the provisions of the Act looked at as a whole, and particularly ss. 227 and 270, require adjustments to taxes to be made while appeals are ongoing. To conclude otherwise would be to effectively stay the decisions of a BOR or the committee while the next level of appeal is being pursued; the Act does not explicitly provide for a stay. The court also did not agree with the appellant that it was illogical for cheques and tax adjustments to go back and forth during the appeals. The respondent was awarded costs.

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Dearborn v Dearborn, 2019 SKQB 192

Goebel, August 13, 2019 (QB19192)

Family Law – Division of Family Property – Production of Documents

The respondent wife applied for an order compelling the production of documents from the petitioner husband and the third party, the petitioner's son, his child from a previous marriage. The petitioner petitioned for divorce only, claiming 2012 as the date of separation. The respondent filed an answer that the parties separated in 2015 and in her counter-petition sought spousal support and an unequal division of family property. She based the latter claim on the fact that during the marriage, the parties had lived in a farm home adjacent to the farm that consisting of several quarters and was operated by the petitioner. They had also purchased and resided in a home in Hawaii. In 2015, the respondent learned that the farm home, the farmland and the Hawaiian property were all registered in the petitioner's son's name. The respondent alleged that the petitioner transferred property without her knowledge or consent and at less than fair market value. After adding the son as a third party, the respondent amended her counter-petition to raise a claim against him personally relating to the property. She also sought a declaration that the transferred property be held for the benefit of the petitioner or alternatively, relief pursuant to s. 28 of The Family Property Act relating to the dissipation/transfer for insufficient consideration. The petitioner filed an answer opposing unequal division and spousal support. The third party filed an answer opposing the relief sought by the respondent including any declaration of resulting or constructive trust or relief under s. 28 of the Act. He submitted that neither the petitioner nor the respondent held any interest in the property at the relevant time. Any transfer was bona fide and completed more than two years prior to the date when the respondent applied for division. The petitioner and the third party responded to notices to disclose from the respondent but

raised a number of objections. The respondent then applied for this order and requested documents: 1) from the petitioner regarding his historical bank statements, personal income tax returns, corporate financial statements and returns, the Hawaiian property and settlement agreements with his former spouse. The petitioner stated that there were no such documents as he never had a bank account before 2013 nor filed a personal or corporate tax return since 2008. He had never owned property in Hawaii and there was no written agreement between himself and his former spouse; and 2) from the respondent and the third party predating the two-year time period prior to the date of application, such as records relating to a foreclosure proceedings that ended in 2012 with a final order. They objected to this request because the documents were outside the scope of s. 28(1)(b) of the Act and were not relevant and material. HELD: The application was granted in part. With respect to the specific requests, the court decided that: 1) it would not make an order. The matter was best left for questioning and if the respondent required further information, she could apply again for disclosure; 2) the documents should be produced by both parties. The respondent's claim was not restricted to s. 28 of the Act. Due to the unusual circumstances of this case, the court found the documents could be disclosed as relevant and material respecting the transactions regarding the transfer of property and financial arrangements between the petitioner and his son. The court limited production of the son's personal financial information, but the respondent could bring back the application after questioning.

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Fauser Energy Inc. v Skjerven, 2019 SKCA 81

Richards Jackson Caldwell, August 22, 2019 (CA19080)

Civil Procedure – Appeal
Civil Procedure – Queen's Bench Rule 3-47, Rule 7-5, Rule 7-7
Civil Procedure – Set-Off
Civil Procedure – Stay Pending Outcome of Appeal
Civil Procedure – Summary Judgment

In November 2013, the sellers (respondent's in the appeal) sold shares in the numbered company (respondent in the appeal) to the buyer (appellant). A share purchase agreement was executed, and partial payment of the purchase price was made by a promissory note. A restrictive covenant agreement (non-competition agreement) was also executed. The promissory note and non-competition agreement were schedules to the share purchase agreement. The total purchase price of the shares was $1,200,000. The promissory note was in the amount of $450,000 to be payable in equal, annual instalments plus interest at 4 percent, based on an amortization schedule beginning November 1, 2014, and continuing up to and

including November 1, 2016. The required payments were made on November 1, 2014 and November 1, 2015, but the buyer did not make the third and final payment of $155,920 that was due on November 1, 2016. The buyer did not make the payment because it believed that the sellers breached the non-competition agreement. The buyer defended the claim of the sellers for the final payment arguing an unliquidated claim for set-off arising from the alleged breaches of the non-competition agreement. The buyer counterclaimed for damages for those breaches. The sellers applied for summary judgment for the final installment, plus interest and court costs, and the dismissal of the counterclaim. The chambers judge: granted the summary judgment for the final payment; dismissed the sellers' application for dismissal of the buyer's counterclaim; and declined to grant a stay of the summary judgment pending the resolution of the counterclaim. The buyer appealed the summary judgment granting the amount owing under the promissory note as well as the decision declining the stay of the judgment. The issues were: 1) whether equitable set-off were available as between a payor and a payee as the immediate parties to a promissory note; 2) whether the chambers judge erred by granting summary judgment in this case; 3) whether the chambers judge erred by refusing to stay the enforcement of the summary judgment on the promissory note.

HELD: The appeal was dismissed. The chambers judge did err in how he stated the law, but he did not err by granting the summary judgment. There was also no basis to interfere with the decision to refuse to grant the stay. The court of appeal determined the issues as follows: 1) there is caselaw supporting and opposing the discretion not to enforce bills of exchange summarily notwithstanding a claim for unliquidated damages. The usual result was found to be that the court grants summary judgment to the note holder and then determines as a separate question whether a stay will be granted regarding the enforcement of the judgment; 2) the appeal court found the issue to be whether, as between immediate parties to a domestic promissory note, the payor can assert a partial failure of consideration based on a claim for unliquidated damages as a defence to an application for summary judgment on the note. The chambers judge concluded that equitable set-off did not apply to bills of exchange. The appeal court found that the chambers judge overstated the law. The chambers judge did, however, correctly recognize the special status of a promissory note. The appeal court found that there was discretion to refuse to grant summary judgment; however, there were no exceptional justifications to withhold summary judgment in this case. The chambers judge did not err by granting summary judgment; 3) Rule 7-7 of The Queen's Bench Rules gives Court of Queen's Bench judges discretion to stay the enforcement of judgments as they see fit. The appeal court was required to give deference to the exercise of that discretion. To set aside the refusal, the appeal court would have had to have found that the chambers judge abused his discretion, erred in principle, disregarded a material matter of fact, failed to act judicially, or

rendered a decision that was so plainly wrong as to amount to an injustice. The appeal court did not find justification to intervene with the chambers judge's decision. Costs were granted in the usual way.

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Grover v R, 2019 SKQB 190

MacMillan-Brown, August 12, 2019 (QB19188)

Municipal Law – Bylaw – Offences – Sentencing – Appeal
Municipal Law – Cities Act – Offences – Sentencing – Appeal

The appellant property owner appealed the sentences for two convictions: causing or permitting a property to become untidy and unsightly contrary to Bylaw 8175 (bylaw); and failing to comply with a court order or a Justice of the Peace to remedy deficiencies on another property, contrary to The Cities Act (Act). The Justice of the Peace imposed the following fines as sentences: $15,000 fine with a victim surcharge of $6,000 on the bylaw conviction; and a $201,000 fine plus a victim surcharge of $80,400 on the conviction contrary to the Act. The total sentence was $302,400. The appellant and the City had a longstanding negative relationship marked by frequent conflict. The convictions related to two properties: the Duchess Street property and the 26th Street property. A fire investigator and a bylaw officer testified that a complaint came into the City regarding garbage and junk in the backyard of the Duchess Street property. Because this was not the first offence in relation to the property, an order was issued to the appellant to remedy the bylaw contraventions. The 26th Street property was charged with failing to comply with a Court Order that required the appellant to comply with an order issued by a municipal inspector dated March 7, 2017 (municipal order) on or before December 15, 2017. Certain deficiencies to the 26th Street property were to be remedied, such as: repairing a fence; repairing broken windows, etc. The Crown asked for a fine in the amount of $3,200 in relation to the bylaw contravention. The maximum allowable fine was $25,000 plus additional amounts for a continuing offence. The Crown requested a fine of $8,000 for the 26th Street property. The Justice of the Peace imposed a "daily rate" fine of $1,000 per day pursuant to s. 338(2)(b) of the Act on the 26th Street property. The deficiencies were rectified on June 19, 2018, a period of 201 days from December 15, 2017. HELD: The sentencing appeals were allowed because the fines imposed were disproportionate to the offences. The appellant had the onus of demonstrating that the sentence was demonstrably unfit and clearly unreasonable. The court did not find that there was a joint submission made by the Crown and the appellant that was not considered by the Justice of the Peace. The quanta suggested were quite similar but there was no joint sentencing submission. The

Justice of the Peace found that the purpose of the sentence was deterrence. The appellant clearly had not received the message prior to these sentences that it could not ignore municipal court orders. The court found that the appellant displayed a complete disregard for public safety. The Justice of the Peace was justified in concluding there was a need to impose a far more significant fine than had been imposed in the past. The fines imposed were, however, disproportionate to the offences. The court found that the surcharge did apply for two reasons: 1) the appellant did not apply to strike down the surcharge provisions in The Victims of Crime Act, 1995 pursuant to the Charter, so there was no issue before the court; and 2) legislation requires the surcharge where fines are more than $500 and no cases have struck down the application of the victim surcharge to fines for provincial, non-Criminal Code offences. The court imposed the following fines: $7,500 fine plus victim surcharge of $3,000 for the Duchess Street property; and $125 per day for the 26th Street property for a total fine of $25,125 pus a victim fine surcharge of $10,050.

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Gustafson v Future Four Agro Inc., 2019 SKCA 68

Whitmore Ryan-Froslie Barrington-Foote, July 30, 2019 (CA19067)

Civil Procedure – Judgments and Orders – Consent Order
Civil Procedure – Queen's Bench Rules, Rule 13-7

The respondent plaintiff commenced an action against the appellant defendant for nonpayment of $1,100,300. After providing its own affidavit of documents (AD), it pressed the appellant for his and he promised the AD would be ready by the end of November. When he failed to provide it, the respondent applied to the Court of Queen's Bench to compel production by January 4, 2018. The respondent then granted the appellant's request for an extension of time and they negotiated an agreement that withdrew the application and gave the appellant until January 31 to serve his AD. If he did not, his statement of defence would be struck. The contract was formalized in a consent order. The appellant did not serve his AD in time and the respondent applied for an order to strike the statement of defence. On February 12, he served it and applied pursuant to Queen's Bench rule 13-7 to extend the time of service to that date nunc pro tunc. The appellant argued, both then and on this appeal, that the chambers judge had broad discretion under that rule to do so. The judge agreed, but applied Procyshyn to find that while it had the discretion to amend the consent order, it was limited to grounds that would vitiate a contract, such as common mistake, fraud, collusion, misrepresentation, duress, illegality or where there was a 'slip' in drawing up the order. The appellant argued in the alternative that the order had been vitiated by illegality, frustration

or duress. The judge found that the order had not illegally ousted the court's jurisdiction to govern its own process. The appellant said that the agreement had been frustrated because he had been unable to prepare the AD as he was in the middle of harvesting, he underestimated the time it would take to collect his documents, and his bank and lawyer had caused various delays. The judge found that these circumstances did not meet the legal test for frustration.
The issues on appeal were whether the chambers judge erred in law: 1) by incorrectly identifying the law governing the exercise of discretion pursuant to Queen's Bench rules 13-7(2) and (3). The appellant submitted that the overriding consideration in applications to extend time, regardless of a consent order, is justice and fairness. He had offered cogent reasons for his failure to meet the deadline and the respondent had not suffered any prejudice by the brief delay in service; 2) in failing to find the consent order was vitiated by reason of illegality. The consent order amounted to contracting out of s. 28 of The Queen's Bench Act, 1998 and the Rules. A party cannot contract out of a statutory provision designed to protect the public interest; and 3) by disregarding material facts in failing to find the order was vitiated by frustration. He argued that the judge failed to identify the evidence relied upon to support his finding that he had not exercised diligence.
HELD: The appeal was dismissed. The court found with respect to each issue that the chambers judge: 1) had correctly identified the law of contract as limiting the exercise of his discretion, although his discretion was not limited to the specific grounds he listed. Generally speaking, however, Queen's Bench rules 13-7(2) and (3) do not alter the substantive law of contract and the judge did not have the broad discretion to grant the appellant relief on the basis of fairness or justice; 2) had not erred in failing to find illegality. The Queen's Bench Rules are not legislation of the kind that engages the contracting-out principle; and 3) had not failed to identify the evidence and it was sufficient to support his conclusion that the appellant and his counsel were not sufficiently diligent.

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Hodgson v R, 2019 SKCA 79

Ryan-Froslie Schwann Leurer, August 21, 2019 (CA19078)

Criminal Law – Expungement of Guilty Plea – Appeal

The self-represented appellant sought to expunge his guilty pleas to four charges related to production, possession and unlawful trafficking under the Controlled Drugs and Substances Act and to set aside all of the convictions. He had originally been charged with 16 counts of production and possession of drugs, weapons, criminal organization and conspiracy to traffic and commit robbery offences. Since being charged, the appellant was variously represented by

private or Legal Aid counsel who tried to obtain bail and work towards a global resolution of all charges with both provincial and federal Crown counsel. Legal Aid declined to act for him due to a conflict of interest and then his last private lawyer withdrew in May 2017 before a resolution could be finalized. After that, the appellant represented himself. In August 2017, he applied for court-appointed counsel (CAC) and revealed at the hearing that he had not received disclosure from the Crown on any of his charges, so the Provincial Court trial judge adjourned the application. When the parties returned to court in October, the appellant indicated to the judge that he hadn't been able to review the disclosure due its electronic format and also advised that he had had plea discussions with the provincial Crown and inquired if the Crowns' existing offer was final. The judge adjourned the application again once he had confirmed with the appellant that if he received disclosure, he might consider the offer. The judge denied the CAC application two weeks later and the case management process ensued. During it, the appellant raised with the judge whether he could appeal the CAC decision. The judge informed him it could be appealed within 30 days or the charges could be sent to the Court of Queen's Bench where the appellant could re-apply for CAC. The judge made it clear, though, that the appellant's charges would not be adjourned further and if no resolution occurred, dates would be set for the preliminary inquiry. It was up to the appellant to decide to plead guilty to some of the charges or to the four charges as arranged in the plea bargain agreement reached with Crowns that included a joint submission on sentence. At the next court date, the appellant and the Crowns advised that they were prepared to resolve all 16 charges by way of guilty pleas and the joint submission. The appellant was able to obtain further concessions from the Crowns on the basis that he would plead guilty to the four charges. The judge undertook a plea comprehension inquiry with the appellant on those charges and he confirmed that they were offered freely and voluntarily. Upon his acceptance of the guilty pleas, the judge sentenced the appellant in accordance with the joint submission. The appellant argued that the pleas were invalid because he was not informed that a guilty plea precluded an appeal from the trial judge's earlier CAC decision. He applied to adduce fresh evidence in the form of an affidavit in which he deposed that he had been overwhelmed by the prospect of defending himself and believed that the denial of his application for CAC was unfair and that he could appeal the decision. He had not understood that a guilty plea was an acknowledgment of guilt and a waiver of all procedural protections including an appeal. Had he known that, he would not have pled guilty to any counts. During the hearing of the appeal, the court learned that the appellant had contacted the Court of Queen's Bench registrar regarding an appeal of the decision before pleading guilty. The court gave him leave to file a second affidavit to explain what had transpired. He stated that based upon the information he received from officials at Queen's Bench and the Court of Appeal, he still believed that his convictions could be set aside because he had

been denied CAC.
HELD: The appeal was dismissed. The court applied the two-pronged test set out in Wong: 1) whether the accused was misinformed about sufficiently serious information; and 2) whether that lack of information caused prejudice resulting in a miscarriage of justice that required the court to examine whether the appellant would have taken a meaningfully different course of action in pleading to the charges. It found that the appellant had not suffered any prejudice as there was no evidence in his affidavit that he would have opted for trial and pleaded not guilty.

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Input Capital Corp. v Gustafson, 2019 SKCA 78

Richards Caldwell Leurer, August 16, 2019 (CA19077)

Contracts – Appeal
Contracts – Breach
Contracts – Unconscionability

The appellant appealed a decision finding that the forward streaming contracts and security instruments between the appellant and respondent were unconscionable and had to be set aside in their entirety. The respondent cross-appealed seeking an order setting aside the award of costs after trial. In 2014, the appellant agreed to purchase canola from the respondent in 2014 and into the future. The parties executed a $2 million forward streaming contract for 1,790 tonnes of canola annually from 2014 to 2019. A $2 million mortgage was arranged as was a general security agreement. A second streaming contract was dated December 31, 2014 for $1 million forward streaming for an additional 700 tonnes of canola annually from 2015 to 2020. In December 2014, there was a $3 million mortgage and a general security agreement. The second streaming contract was amended on March 31, 2015, requiring the appellant to pay the respondent an additional $1.5 million in exchange for the respondent's covenant to deliver additional canola. The respondent defaulted by failing to deliver all of the required canola. The appellant commenced two actions against the respondent: one for injunctive and declaratory relief against the respondent and one for foreclosure on the mortgages and judicial sale of the mortgaged lands. The trial judge required the respondent to establish three requirements for unconscionability to be found: 1) inequality between the parties; 2) that the appellant used their position of power in an unconscionable manner to achieve a material change over the respondent; and 3) that there was substantial unfairness in the agreements themselves. The court found an inequality of bargaining power because the respondent had been experiencing financial distress while the appellant was a stable and successful company. The trial judge found that the

appellant had used an increasingly inequitable bargaining position to its advantage. The final requirement was also met. The trial judge found that there was no risk to the appellant in the streaming contracts. The appellant took issue with the trial judge's interpretation of the principle of unconscionability as it related to: 1) the relevant attributes or characteristics of the weaker party; 2) the necessary degree of inequality between the parties; 3) the requirement that the stronger party have knowledge of an inequality of bargaining position; and 4) the degree of improvidence in the bargain struck. The appellant also raised questions about the breadth of the relief granted.

HELD: The appeal was allowed, and the cross-appeal was thus moot. The appeal court analyzed the trial judge's interpretation of the principle of unconscionability regarding the four issues the appellant raised: 1) the appellant said that the trial judge failed to consider that the respondent was a well-educated, experienced farmer and businessman. The trial judge did err in principle by failing to consider evidence that was relevant and material to the questions of whether an inequality of bargaining power existed between the parties; 2) the respondent should have been required to show that the financial distress was so acute that it overcame the respondent's ability to engage in autonomous, self-interested bargaining with the appellant. The respondent failed to establish the required degree of inequality of bargaining position existed between it and the appellant in the circumstances; 3) the appellant said that the respondent presented as a successful farmer with a substantial net worth of $7,775,000 during negotiations of the agreements. The respondent did not represent that he was in a desperate financial situation or that he was unable to obtain financing elsewhere. The appellant argued that it could not have knowingly taken advantage of the respondent's weak financial position because it was unaware of same. The appeal court found it clear that the trial judge concluded that the appellant had actual knowledge of the financial circumstances of the respondent and had used that knowledge to take undue advantage of the respondent when negotiating the agreements. The trial judge did not overlook the requirement of actual knowledge; and 4) there were bonus tonne provisions in the agreements whereby the appellant could purchase additional tonnes of canola from the respondent at prices below the then market value. The appeal court found it clear that the bonus tonnes provisions played a determining role in the trial judge's analysis. The appellant argued this was in error. The trial judge indicated that the real unfairness was that there was no risk to the appellant. The trial judge erred when he found the agreements were one-sided, onerous and unconscionable. The risk to the appellant was that the respondent would not deliver the canola it promised even though the appellant had paid up front. The trial judge erred in interpreting the agreements as posing no risk to the appellant. If the matter was one of mixed law and fact, the appeal court indicated it was a palpable error that overrode the trial judge's conclusion on unconscionability. The appeal court also found that the trial judge

misapprehended the overall significance and effect of the bonus provisions. The trial judge found the steps that the appellant took to secure against the risk were untoward. The appeal court found that that interpretation to be in error for a number of reasons. The trial judge erred, and his findings were set aside. The matter was remitted to the Court of Queen's Bench for a determination of damages and for enforcement of the security interests in question. The appellant was awarded costs on the appeal.

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Jacobson v R, 2019 SKQB 207

Klatt, August 26, 2019 (QB19191)

Criminal Law – Appeal – Conviction – Release Pending Appeal
Criminal Law – Appeal – Conviction – Sexual Assault
Criminal Law – Appeal – Sentence – Sexual Assault

The appellant was convicted of sexual assault contrary to s. 271 of the Criminal Code. The trial judge found the assault to have been prolonged, with the use of repeated force that caused physical injury to the victim. The offence was found to be a major sexual assault with the imposition of a sentence of 18 months in jail with one year of probation to follow. The sentencing court noted that if the Crown had not proceeded summarily, the court would have sentenced the appellant to three years in prison. The appellant appealed his conviction and sentence. He applied for bail pending the disposition of the appeal. The appellant gave four grounds for his conviction appeal: 1) the trial judge erred by failing to give adequate reasons rejecting his evidence; 2) the trial judge erred in his treatment of the inconsistencies of the victim's evidence; 3) the trial judge erred by placing an onus on him to provide a compelling motive for the victim to fabricate her evidence; and 4) the trial judge erred by finding the witness' evidence of her observations of the victim's injuries corroborated the allegation of sexual assault. The considerations to decide whether the appellant should be released on bail pending the appeal decision were as follows: 1) whether the appeal was frivolous; 2) whether the offender would surrender himself into custody; and 3) whether detention was not necessary in the public interest.
HELD: The appellant's application for bail was dismissed. The considerations were discussed as follows: 1) the appellant only had to establish, on a balance of probabilities, that there was an arguable issue. The Crown conceded that this had been met; 2) the Crown conceded fairly that this was not an issue given the appellant's previous court attendances and lack of record for failing to attend court or breaching court orders; 3) there was a tension between the dueling objectives of enforceability and reviewability. The court must consider a number of factors to make the determination. The

trial judge gave a lengthy oral decision detailing the reasons for conviction. The record does not show that the trial judge failed to explain his reasons for conviction, as argued by the appellant. The court found that the grounds of appeal were not frivolous, but they were weak and had little chance of success on appeal. The court was mindful that any delay in the appeal process could result in the appellant serving nearly all of his sentence prior to the conclusion of the appeal. The enforceability outweighed the reviewability in this case. After considering the factors that bear on public interest, the court concluded that the appellant must remain in custody pending his appeal. The appellant's application for release was denied.

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Kapoor v Law Society of Saskatchewan, 2019 SKCA 85

Richards Leurer Barrington-Foote, August 30, 2019 (CA19084)

Professions and Occupations – Barristers and Solicitors – Discipline – Conduct Unbecoming – Appeal

The appellant appealed from the decision of the hearing committee of the respondent, the Law Society of Saskatchewan, that found him guilty of conduct unbecoming a member of the Law Society (see: 2016 SKLSS 13 (CanLII)). A complaint was laid against the appellant after he defended an accused on a charge of driving while disqualified. The trial took place before a Provincial Court judge. After the Crown concluded its case, the appellant requested a non-suit, arguing that the Crown had failed to prove that the accused was not enrolled in an alcohol ignition program, proof of which was an essential element of the offence. He referred to Gold's 2012 Annotated Code in which the author cited a Quebec Court of Appeal decision in support of that proposition. The trial judge stated that he was unaware of it but in order for him to consider it, the case would have had to have been followed in Saskatchewan. The judge said that he would read the case. After the judge asked the appellant if he had anything further to add, he cited another case that was mentioned in the textbook and supported his position. This case was a decision of the Provincial Court of Alberta. The judge advised the appellant that he would dismiss the motion unless there was authority in Saskatchewan to support the appellant's proposition but that he would, nonetheless, read the cited cases. After reviewing the pertinent provision in the appellant's textbook, the judge challenged the appellant that he had failed to draw to his attention that the author had also provided a case from the Alberta Provincial Court that was contrary to that proffered by the appellant. The appellant said he had honestly intended to refer to the case. The complaint against the appellant was that he failed to treat a judge with candour, fairness, courtesy and respect by failing to bring relevant and adverse case authority of which he was aware

to the court's attention. After conducting a hearing pursuant to the discipline process provided in The Legal Profession Act, 1990, the committee found as fact that the appellant's decision not to bring the case contra to his argument to the attention of the judge was deliberate and held that: the specific obligation to disclose binding authority on point described at s. 4.01(2)(i) of the Code of Professional Conduct does not subsume the more general duty of candour found in s. 4.01(1) of the Code and that in the circumstances of this case, the appellant's failure to bring the case to the trial judge's attention constituted conduct unbecoming. The issues were whether it was unreasonable for the committee: 1) to conclude the failure to bring relevant, adverse but non-binding case law to the attention of a court/tribunal could constitute conduct unbecoming. The appellant argued that the specific requirement in s. 4.01(2)(i) of the Code relating to the submission of legal authorities does not include cases that are non-binding. In such circumstances, a lawyer cannot be found to have committed a breach of a more general duty, such as the duty of candour found in s. 4.01(1) of the Code; 2) to conclude the failure to bring the relevant, adverse and non-binding case to the trial judge's attention was a breach of his duty of candour. The appellant argued that he was not obligated to bring the case forward because the judge had stated that he was not going to follow the Quebec case unless it had been followed in Saskatchewan; and 3) to award costs.
HELD: The appeal was dismissed. The court stated that the standard of review in this case was reasonableness. It found with respect to each issue that: 1) the committee could reasonably conclude that the appellant's failure was capable of being a breach of the duty of candour and fairness and thereby constitute conduct unbecoming. It had not acted unreasonably in rejecting the appellant's argument because the complaint was based upon conduct described in s. 4.01(1); 2) it was open to the committee to find that the appellant had the obligation to disclose the case because it had not believed his reason for failing to bring the case to the attention of the judge was innocent. It found that the appellant knew that the judge was having difficulty accepting the proposition he had advanced by the Quebec case. As the appellant went on to draw his attention to the Alberta Provincial Court case that supported it, he knew the judge would have been interested in knowing of the case contrary to it; and 3) the committee's decision to award costs was reasonable. There is no prohibition in the Act against the Law Society properly claiming costs associated with in-house counsel. The appellant had not convinced the court that that the respondent's in-house counsel's rate of $200 per hour was unreasonable, particularly in light of what the respondent might have had to pay external counsel.

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Kuderewko v Kuderewko, 2019 SKQB 206

Tochor, August 26, 2019 (QB19197)

Statutes – Interpretation – The Land Titles Act, 2000, Section 52, Section 107

The applicants, registered owners of a half section of land, applied for an order for a writ of possession of it pursuant to s. 52 of The Land Titles Act, 2000 and an order discharging interests registered by the respondent against the land pursuant to s. 107 of the Act. The respondent was the son of two of the applicants and brother of the third. From 1990 to 2002, he, his father and his brother each held a one-third interest in the land. When the father died in 2002, he bequeathed his one-third interest to his wife and from that time until 2009, she and her two sons each held a one-third interest. In 2009, the respondent transferred his interest to his mother because he was in financial difficulties. The evidence submitted by the applicant mother and the respondent in their affidavits indicated that the purchase was bona fide. Following the transfer, the respondent claimed that there was an agreement between the parties that allowed him to use the property in return for paying the annual property taxes. The applicants disputed that there was any such agreement and alleged that they had only acquiesced to the respondent's use of the land. No documentary evidence was submitted to support the respondent's claim to a right of possession. The respondent alleged that he transferred his interest to his mother, notwithstanding her purchase and the registration of her name on title, on the basis that she would hold the land in trust for his benefit. His mother deposed that the understanding between them had been that if the respondent paid off all of his debts, including $120,000 he had borrowed from her, she would sell his interest back to him, but he had not paid any of the debts.
HELD: The application for an order for a writ of possession was granted. The application to discharge the interests registered against the land was dismissed. The court found that it was appropriate in this case for it to determine the matter summarily under s. 52(2) of the Act and to order the writ because the applicants were the registered owners, the sale of the respondent's interest to his mother was bona fide and there was no evidence that the respondent had a legal right of possession. The respondent's claim for an equitable interest in the land must be determined by him bringing an action against the applicants. Similarly, the court held that the application to discharge the respondent's registered interests should be decided by action and not in a summary hearing. However, the court ordered that the interests would be discharged from the title unless the respondent commenced an action within one month of the decision.

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Mauri Gwyn Developments Ltd. v Larson Manufacturing Co. of South Dakota, Inc., 2019 SKQB 200

McMurtry, August 21, 2019 (QB19194)

Civil Procedure – Queen's Bench Rules, Rule 7-5

The defendant, Larson Manufacturing, applied for summary determination of questions of law and summary judgment under Queen's Bench rules 7-2 and 7-5 requesting an order dismissing the plaintiff's claim against it. The plaintiff commenced an action against Larson and the other defendant, American Modular Housing Group Inc. (AMHG) in which it sought compensation from the defendants for the transfer of certain condominium titles from AMHG to Larson in 2017. The title to the lands on which the condominiums were built was registered to AMHG. It, Larson and the plaintiff were engaged in a construction project. The plaintiff alleged that it transferred the lands to AMHG to facilitate obtaining a bond for the project and the transfer was subject to AMHG's obligation to pay it $30,000 per unit sold. When AMG transferred title to Larson, the latter became a constructive trustee to that obligation. In this application, Larson argued that the determination of two questions of law would resolve the plaintiff's claim: i) it had no specific knowledge of an agreement between the other parties and was not a constructive trustee of the condominium units for the plaintiff's benefit; and any agreement between the plaintiff and AMHG regarding the lands was void or unenforceable because of ss. 4 and 7 of the Statute of Frauds. The plaintiff asserted that summary judgment was inappropriate in the circumstances of conflicting and complex evidence. The construction project involved many transactions and had resulted in seven related court actions, four of which had been commenced by Larson. Establishing the facts necessary to resolve this action could not be accomplished without making credibility determinations, necessitating a trial. HELD: The application was dismissed. The court could not reach a fair and just determination on the merits on the basis of the affidavit evidence. The plaintiff's allegation of breach of trust and that the breach amounted to fraud within the meaning of s. 15 of The Land Titles Act, 2000 raised a genuine issue requiring trial.

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R v Pastuch, 2019 SKQB 196

Elson, August 16, 2019 (QB19190)

Criminal Law – Fraud – Investors
Criminal Law – Sentencing – Fraud – Restitution
Criminal Law – Sentencing – Sentencing Principles

The offender was found guilty of one count of fraud exceeding $5,000, contrary to s. 380(1) of the Criminal Code. The Crown submitted that a term of imprisonment of 10 years was an appropriate sentence for the offence. The Crown also sought full restitution and a fine in lieu of forfeiture in an amount equal to the lost funds. The offender submitted that a fit sentence would be six months imprisonment. The fraud consisted of the offender convincing more than 80 people to invest $5.5 million in two projects.

HELD: The court considered the following aggravating factors: a) the magnitude of the fraud. Over $3 million of the funds was spent on purposes unrelated to the intended investments. The diversion of funds fell within the category of "other fraudulent means" as set out in s. 380(1) of the Criminal Code. Further, the investments would not have been made if the offender had not been deceitful; b) the offender was the sole force responsible for the deceit of the investors. Greed played a significant role; c) the duration of the fraud was between three and three and a half years; d) the degree of planning was not particularly sophisticated. It was to persuade people to invest in projects that did not exist. It did, however, involve the operation of six companies and 27 bank and credit card accounts. The court found that the offender's presentations were sufficiently complex and detailed that they gave the false appearance of an active business expected to generate a lucrative return on investment; and e) most of the victims were not sophisticated investors. Many of the seniors had invested funds intended for their retirement. Many also had an interest in developing the child protection software that they thought they were investing in. Further, many of the investors were extended family members of the offender. The only arguable mitigating circumstance was that the offender did not have a criminal record, which was found to have minimal significance against the backdrop of the offender's behaviour. The court did note the absence of any meaningful remorse on the offender's part. The court was satisfied that the moral blameworthiness of the offender was high. The court considered previous sentences for similar offences. In cases of deliberate and planned fraud, involving more than $1 million, the court must primarily regard the sentencing objectives of denunciation and deterrence. The appropriate range of sentences for the offender was six years to eight and half years. The offender was sentenced to seven years and three months' imprisonment with three months' remand credit. The court recommended that a portion of the sentence be served at the Regional Psychiatric Centre due to the offender's mental and physical health challenges. A restitution order in the amount of $5,523,507 was made. A fine in lieu of forfeiture was also ordered in the amount of $5,523,507, less any amounts paid in satisfaction of the restitution order. The offender was given twelve years following her release from prison to pay the amounts. The default time for the fine was a further five-year term of imprisonment consecutive to any other term of imprisonment.

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Richer v R, 2019 SKQB 193

Zuk, August 14, 2019 (QB19189)

Criminal Law – Release – Habeas Corpus
Criminal Law – Parole – Appeal
Statutes – Interpretation – Corrections and Conditional Release Regulations, Section 157(2)

The applicant was serving a life sentence without eligibility for parole for 25 years. He applied for a writ of habeas corpus ad subjiciendum seeking his unconditional release from incarceration. All of his parole eligibility dates had been surpassed and he argued that his parole officer's inadvertent failure to submit his parole application to the Parole Board of Canada (Parole Board) for over three months had led to a delay in scheduling his day parole hearing. The applicant completed his application for parole in February 2019 and gave it to his parole officer to deliver to the Parole Board. There was no disagreement that the parole officer had inadvertently failed to submit the application to the Parole Board until May 23, 2019. He argued that his liberty was deprived further when the Parole Board did not conduct a hearing within 6 months of receiving the application pursuant to s. 157(2) of the Corrections and Conditional Release Regulations (CCRR). The court had to determine when the Parole Board received the applicant's application and, if it was outside of the six-month period, what was the appropriate remedy. The respondent indicated that the Parole Board received the application in May 2019 and had a paper review scheduled for October 2019, which was within the six months. They also argued that there was no decision to be challenged because the Parole Board had not denied the applicant's request for a hearing. The applicant also did not suffer any deprivation of liberty, according to the respondent, because he was a minimum-security inmate. Lastly, the respondent argued that a request for unconditional release is not an available remedy in habeas corpus. It is expected that the application will be heard within six months of the Parole Board receiving the application. The issues were: 1) whether the applicant's delivery of his parole application to his parole officer constituted delivery of the application to the Parole Board; 2) if the hearing is outside the legislated six-month time frame, is a writ of habeas corpus available to the applicant as a remedy for the Parole Board's failure to conduct a hearing within six months; and 3) if there was a breach of the applicant's rights, was habeas corpus the appropriate remedy?
HELD: The issues were determined as follows: 1) the applicant did not establish that providing the application to the parole officer constituted submission of the application to the Parole Board. There was no legal authority for the proposition that the parole officer had

to submit the application to the Parole Board without delay. The Parole Board received the application on May 23, 2019. The application for a writ of habeas corpus was dismissed because the applicant did not establish any breach of s. 157(2) of the CCRR; 2) the court continued with the second issue in the event that it erred in the first issue. The applicant argued that his initially valid deprivation of liberty became unlawful by the delay in setting his parole hearing. The continued detention of an inmate will only become unlawful if he or she has acquired the status of a parolee. The applicant did not attain the status of parolee. The offenders in both of the cases relied upon by the applicant were on parole and had their parole revoked. In this matter, the applicant was validly incarcerated at the date his rights were breached. He did not suffer the deprivation of liberty that the offenders in the previous cases did; and 3) the court still would not have granted the applicant a writ of habeas corpus if the court was in error on a writ of habeas not being available to the applicant. The remedy is a discretionary one. The court found that an order directing the applicant's unconditional release, or a release on conditions, would not be appropriate. The Parole Board has the expertise to determine whether the applicant was a good candidate for day parole, not the court. The court did not award costs to the respondent in the amount of $300 as requested.

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Roy v Roy, 2019 SKPC 45

Demong, August 8, 2019 (PC19038)

Small Claims – Costs
Small Claims – Evidence – Credibility
Trusts and Trustees – Resulting Trust – Family Transactions

The plaintiff was the son of the defendant. The plaintiff claimed the return of a vehicle whose ownership he had transferred to the defendant, or alternatively, payment of the sum of $5,000 plus prejudgment interest and costs. The defendant argued that the vehicle was gifted to him. He counterclaimed for $2,000 due to the sadness, anxiety, and distress that the court proceedings had caused him. The defendant also sought an additional $1,000 for the time and expense that he had to devote to defend the plaintiff's claim. The court had to determine whether the transfer of the vehicle was an outright sale, a conditional sale, a loan or a gift. The plaintiff testified that his father called him out of the blue after not having talked to him for two to three years. He said that his father told him he had lost his job so could no longer use the work vehicle. The plaintiff said that the defendant told him he needed a vehicle for a month or two. The plaintiff bought and sold vehicles, so he had three or four vehicles at the time. The plaintiff said that he was

originally just going to give the vehicle to his father, but the respondent insisted on either paying $100 per month or agreeing to give it back whenever the plaintiff asked for it back. There was no indication as to why $5,000 was inserted as the value on the transfer document considering that the plaintiff paid considerably less for the vehicle. A couple of months later, the plaintiff took the vehicle to make approximately $4,000 in upgrades and repairs. No invoices were provided to the court and the vehicle was returned to the defendant after a couple of weeks. The defendant argued that the plaintiff's recollection of events was faulty due to long-term cannabis use. For example, the plaintiff agreed that he may have been wrong on the date of the transfer. The transfer occurred in 2014, not 2016 as alleged by the plaintiff. The defendant said that the plaintiff called him and offered to gift him the vehicle. He said that the transfer indicated $5,000 so that the plaintiff would have a receipt for his business. The plaintiff conceded that he never asked for additional money for the additional upgrades to the vehicle. The defendant and a brother of the plaintiff both indicated that the plaintiff would often gift things to them in an attempt to ingratiate himself into the family. The defendant and plaintiff had an estranged relationship. The defendant tendered text messages between him and the plaintiff wherein it appeared the plaintiff would not accept money for the additional repairs to the vehicle and wherein he also indicated that he gifted the defendant the vehicle. HELD: The court preferred the evidence of the defendant and the plaintiff's brother where it conflicted with the plaintiff's. The court was convinced that, more likely than not, the plaintiff sought and intended to gift the vehicle to his father. The defendant was found to have rebutted the legal presumption of resulting trust and concluded that the transfer of the vehicle was a gift. The court found that there was no compelling reason to conclude that the transaction was an outright sale transaction. No money ever changed hands. Further, more than two years had transpired since the transfer and the claim would have been statute-barred pursuant to The Limitations Act. The plaintiff's claim did not meet the standard required for a claim to be a malicious civil claim, nor did the court conclude that the plaintiff's intention in bringing the claim was to cause his father mental distress. The defendant was awarded the full amount of costs that can be recovered under The Small Claims Act, 2016, which was $500.

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Vogel v Saskatchewan Power Corp., 2019 SKPC 49

Demong, August 21, 2019 (PC19040)

Small Claims – Breach of Contract
Small Claims – Costs
Small Claims – Torts Negligence

The defendant provided electrical services to the plaintiffs' two residential duplex homes. The plaintiffs alleged that the defendant negligently, or in the alternative, in breach of contract, discontinued electrical service to the properties during cold weather conditions, and that water pipes froze as a result, causing a water leak that damaged the walls, gyproc, insulation, ceilings and flooring of one of the duplexes. According to the plaintiffs, the damages totaled $32,240.89, they lost income from the inability to rent the property due to the damage, they suffered loss because of the property's reduced market value and because they had to carry certain costs in the ongoing maintenance and management of the property in its damaged condition. The plaintiffs limited their claim to $30,000. The defendant argued that it had the authority to cut off electrical supply because the plaintiffs failed to pay the full amount of an invoice. The defendant was a Crown Corporation governed by The Power Corporation Act (Act). The defendant agreed that the loss portion analysis of the claim was not in issue: the plaintiffs' loss was equal to the maximum monetary jurisdiction of the court due to losses that were a direct result of the defendant's decision to cut electrical power.

HELD: The terms and conditions of the Act were on the defendant's website and could be obtained upon request. There was no evidence that the plaintiffs were unaware of the terms and conditions. The plaintiffs were customers as defined in the terms and conditions of service. Sections 7.11 and 7.13 imposed a responsibility on the customer to pay the full amount of a bill by the due date on the bill. The consequences of failure to pay the bill were also outlined. The plaintiffs' evidence indicated that: they had not been made aware that the defendant cut off the electrical service; they never received notice that the service might eventually be cut off; and the decision to cut off the service was unfair and caused catastrophic loss. The defendant provided evidence of its protocols prior to terminating electrical service as well as evidence that the protocols were followed. Two bills were sent to the plaintiffs indicating the arrears and a notice that service might be terminated if the amount owing were not paid. The plaintiffs indicated that the bills were not received because the address they were sent to may have been the property manager's. The court found that it would be highly unlikely that the personal plaintiff did not know that he had to pay his monthly power bills or understand the consequences of not paying them. The court was satisfied that the personal plaintiff received a phone call from the defendant in July 2018 due to nonpayment of the amounts owing. The court preferred the business records of the defendants where the plaintiffs indicated they could not recall matters. Another call was made on August 15, 2018 wherein a message was left for the plaintiffs advising that service would be disconnected if payment was not made within 48 hours. The personal plaintiff replied to the message on August 24 and a note was made that the bills were not being paid because of a dispute between the plaintiffs and their property manager. Payment was made on one account but not the other. The electrical service

relating to the delinquent account was terminated on October 23, 2018 without further notice to the plaintiffs. The court could not find a justification for the plaintiffs not knowing the power had been terminated when they indicated that someone was at the property approximately every second day. The court found that the plaintiffs knew that their account was in arrears and had been in arrears for some time. The court was also satisfied that they knew or ought to have known that a failure to keep that account current might result in termination of service. The defendant had an established protocol that was followed. The standard of care afforded to the plaintiffs was not unreasonable. There was no breach of contract, nor did the defendant act negligently. The court could also not exercise jurisdiction to award damages because the plaintiffs felt the situation was unfair. The defendants only sought five percent of the damages as costs, or $1,500. The court awarded the sum of $1,000 plus $50.00 for the reply to the defendants because the matters in issue were straightforward.

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